

AN EQUITABLE APPROACH TO MITIGATION IN CONTRACT

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ABSTRACT

This dissertation considers the scope and content of the doctrine of mitigation (“Mitigation”) as it applies to damages for breach of contract, and aims to accomplish two overarching goals. The first goal is to confront and dispel a number of misunderstandings about Mitigation that appear frequently in jurisprudence on the topic, and academic commentary on the subject. The second goal is to establish a new model for understanding Mitigation that establishes what the doctrine is in substance, and how, why, and when it will or will not (or should/should not) apply to any given claim for contract damages. The author accomplishes the first objective by examining each of these prominent misunderstandings and unpacking the inaccuracy or incoherence in each of them. The author obtains the second objective by setting out answers to each of the four key concerns or questions identified (i.e., what, how, why and when). The answers provided to these key questions are derived from a survey of the leading decisions on Mitigation generally accepted as being authoritative in Canada, the United Kingdom, New Zealand, and Australia. The answers provided to “what” and “why” are the most jurisprudentially novel of the four, and arguably the most important. The author’s explanation of “what” Mitigation is posits that it is effectively an equitable doctrine, and ought to be understood in these terms. The author’s explanation as to “why” the doctrine applies follows from this classification, and asserts that Mitigation exists to promote or ensure the realization of contract’s overarching purpose when damages are assessed for breach. These two answers are supported by the leading case law surveyed by the author, and they are also further buttressed by an analysis of the underpinnings of contract and its purpose in Chapter I, and an historical theoretical account of the role of equity as a necessary supplement to the common law in Chapter II.

LAY SUMMARY

This dissertation explains a key aspect of the law that regulates how courts award damages for breach of contract. This aspect is called the doctrine of mitigation (“Mitigation”), and it is important because it can lead to the court reducing the award to nil in certain circumstances, or substantially increasing the award in other circumstances. This dissertation explains how Mitigation works and when it will increase or decrease an award of damages by examining leading court decisions that provide guidance on what courts actually do when applying Mitigation. What courts actually do when applying the doctrine often differs from what they say they are doing. The dissertation aims to explain this difference, and to provide a superior explanation for the behaviour of courts when they apply this doctrine in practice.

PREFACE

This dissertation is the original, unpublished, independent work of the sole author, Krishneel Maharaj.

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DEDICATION

For the many friends, family, and mentors without whom I could not have come so far nor done so much.

INTRODUCTION

Mitigation has been with us since at least *Staniforth v. Lyall* decided in 1830, which makes it almost a quarter century older than remoteness as handed down in *Hadley*. Despite the doctrine's age and endurance though, the mitigation doctrine (hereafter "Mitigation") appears to have attracted much less attention than its younger peer. This has led to a degree of confusion and inconsistency in the jurisprudence on the topic as courts across the Commonwealth have been largely left to muddle through. The goal of this dissertation is to remedy this situation by establishing a new framework for understanding Mitigation as it applies in contract. The proposed framework starts from the premise that Mitigation is an equitable doctrine that intervenes in the assessment of damages for breach of contract to promote the realization of contract's underlying purpose. The dissertation builds to this conclusion over the course of four chapters. An explanation as to how each chapter supports this ultimate end is as follows.

The first chapter considers contract's underlying purpose and the arguments for and against the three most prominent theories of "promissory liability" that purport to explain the underlying rationale of contract and contract enforcement. These theories are the will/promise theory, the reliance theory, and the economic efficiency theory. The three are held up against the accepted rules of contract enforcement and more recent and controversial developments in contractual "good faith". A single theory is then selected on the basis of best fit with these developments and compatibility with the apparent long-term philosophical direction of contract. The theory I have selected on this basis is economic efficiency. The purpose of this exercise is to establish the underlying rationale for contract as an institution. I acknowledge that this may appear to be an odd tangent at first, but a teleological approach to explaining Mitigation's interaction with contract could not work without it. In short, one cannot explain the end that equity is attempting to fulfill by intervening in the ordinary operation of common law rules without having some sense as to what the end sought by the common law in the particular jurisprudential context is supposed to be.

The second chapter engages with equity and makes the case for understanding equity as a necessary response to the challenges created by a rules-based order, such as the common law, and as distinct from the common law in its methods and operation. The intention behind this chapter is twofold. The first is to lay the groundwork for the analysis in the final chapter that explains why Mitigation is effectively equitable despite its common law pedigree. And the second is to reaffirm that the characterization of any doctrine as equitable as opposed to common law is a distinction with a difference. Canadian equity jurisprudence and scholarship have been allowed to grow moribund in many respects. As such, even though it may go without saying elsewhere in the Commonwealth, it is necessary to establish that equity is an essential and distinct aspect of Anglo-Canadian law if I am to achieve my overarching objective.

The third chapter reaches the subject of Mitigation itself and aims to raze the ramshackle structure of received wisdom on Mitigation in order to clear the way for the new framework put forward in the following chapter. To achieve this end, a series of notions about the doctrine's operation are unpacked and exposed as specious or incorrect. These notions include the generally accepted definition of the doctrine from *British Westinghouse v. London Underground Electric Railway*, and the logical foundations of the doctrine, which have been explained varyingly in terms of either causation or remoteness.

The final chapter brings matters to a head and sets out in four broad sections my explanation as to what Mitigation is, why it applies, how it applies, and most importantly when it applies. Of these questions it is the last that is most important for understanding Mitigation in practice. It is also the longest section because Mitigation's application varies according to the circumstances, and the equities of the case. The answers provided to these and other questions in this chapter are derived from a survey of the leading cases. I obviously do not necessarily agree with the reasons provided by the courts in question. But, one must remember that a case's *ratio* and a court's reasons are not necessarily one and the same. A *ratio* is a bridge between the facts and the result, and oftentimes the best candidate will be the reasons provided by the court itself. It is not always thus, however, and in putting

forward my own explanation I only intend to lay bare the intuitions that underpin the result, even if these conflict with the court's own articulate major premise.

CHAPTER I

CONTRACT THEORY

I. Introduction

I take a teleological approach¹ to answer the what, how, why, and when of Mitigation's application in the law of contract, which is the ultimate end of this dissertation. My intention is to explain Mitigation as an equitable doctrine/defence that intervenes at the point of intersection between the law of contract and the law of damages, or the point of translation from primary rights into secondary rights in contract — not to interfere, but instead, as with all else in equity, to fulfill. However, in order to establish that Mitigation acts to further or promote the purposes of contract, one must *a priori* establish the identity of that particular purpose. In other words, one must establish the “why” of contract before one can in turn establish the what, how, why and when of Mitigation, or at least that is so if one is seeking to establish positive or normative consistency with the larger institution. Thus, in this chapter I consider the three leading theories that contend for supremacy in contract theory, and make the case for accepting the theory of economic efficiency, or wealth maximization, as the most apt for understanding contract today and thus the most apt for defining the parameters of Mitigation.

¹ An approach that attempts to support and conform to an overarching objective or purpose. In this case, and approach that attempts answer these essential questions in a manner that is consistent with ultimate objective of contract as an institution; See *teleological, adj.* (Oxford University Press) (“Relating to a goal, end, or final cause; dealing with or invoking the concepts of purpose or design, esp. in relation to the natural or physical world; of, relating to, characterized by, or involving teleology.”).

II. What are the theories anyway?

Though others exist, the three theories that garner the most support and most viably vie to be accepted as *the* theory of promissory liability in the common law of contract are as follows:²

- A. The will or promise theory of contract (hereafter the “Will Theory”);
- B. The detrimental reliance theory of contract (hereafter the “Reliance Theory”); and
- C. The theory of wealth maximization or economic analysis of contract (hereafter the “Efficiency Theory”).

Each of the above theories has both its proponents and its detractors, as well as strengths and weaknesses in their respective claims to providing an apt positive and normative account of what contract is and what it should be. This has led to the literature being caught in something of a three-way tie. That this is unsatisfactory in theoretical terms is likely obvious. That it makes a task such as mine to explain Mitigation in teleological terms and to divine a direction for its development in practice difficult if not impossible, is perhaps less so. This will however become clear in section III below, where I will demonstrate the practical significance of theoretical difference and make the case for accepting the Efficiency Theory as best for Mitigation, and the most accurate explanation for contract overall. Of course, I must first outline each of the three before any critique or comparison is possible, which I will proceed to do below.

A. What is the Will Theory of contract?

What the Will Theory of contract is, or what it means, to some extent depends upon who is asked, or to which source one goes, and this in part accounts for the different monikers by which the school of thought is known. By this I am referring to the differing

² Stephen A Smith, *Contract theory* (Oxford: Oxford University Press, 2004) at 43–46, 103–164, 387–431 (when introducing contract theory generally Smith's division is (1) promissory theories (2) reliance theories, and (3) transfer theories. Smith himself admits that the last is not well known, and in subsequent chapters, including chapter 4 (normative justifications for contract) and chapter 11 (remedies) it is efficiency theories that are discussed most heavily along with (1) and (2). As such, it appears that efficiency is the more appropriate choice to round out the third spot).

use of the terms “promise” or “will” as the key descriptors.³ My obvious preference is “will”, as it is the older designation going back to Von Savigny and Pothier,⁴ but irrespective of the particular nomenclature used, it is apparent that the school of thought as it has developed in the common law world across time and place is for all its differences nonetheless uniform in its prescription that a contractual promise is to be enforced as an end in and of itself.⁵ That is to say that the contractual promise is not to be enforced as a mere means to an end, and thus not *only* to the extent necessary to obtain whatever other end may be in view.⁶ Where accounts of the theory may differ is in their explanation for the underlying reason for such strict adherence to absolute enforcement according to the letter of the promise. I will explain each perspective below, but note at the outset that the implications of either understanding are ultimately indistinguishable, or at least it appears to be so for our purposes.

1. Putting the “I” in Will

According to those within the school who emphasize the importance of the “will” of the parties involved, contractual promises are and ought to be enforced because they must be *if* we are to give effect and due respect to the will of the persons contracting.⁷ What is more, *if* contractual promises are enforced to give effect to the will of a party promising, then the effect a contractual promise is given must reflect the capacity of the person acting, meaning

³ Martin Hogg, *Promises and contract law: comparative perspectives* (Cambridge: Cambridge University Press, 2011) at 86–93; Charles Fried, *Contract as Promise*, 2nd ed (Oxford: Oxford University Press, 2015); Smith, *supra* note 2 at 43–44.

⁴ Morris R Cohen, “The Basis of Contract” (1933) 46:4 *Harvard Law Review* 553–592 at 575.

⁵ Krish Maharaj, “Good for Everyone or Not Good at All: Clarity and Commitment in Contractual Good Faith” (2020) 96 *SCLR* (2d) 107–121 at 130.

⁶ PS Atiyah, “The Liberal Theory of Contract” in *Essays on Contract* (Oxford: Oxford University Press, 1990) 121 at 123 (“The Liberal finds the entitlement of the promisee to the full value of the promised performance – the right to expectations damages – to be a natural corollary of basing the law on the promise principle.”).

⁷ Hogg, *supra* note 3 at 86–93.

that where *absolute* promises are made, they must accordingly be enforced *absolutely*.⁸ To do otherwise would be to undermine or disrespect the autonomy of the party acting, by implicitly curtailing their ability to act by diminishing the effect of their actions.

To make the point above another way, one can also say that Will theorists view the act of making a contractual promise or contracting as important because it is an *act of will* on the part of the individual(s) involved.⁹ It is the exercise of a legal right, a freedom, an ability or capacity, an expression of one's faculty for choice or of one's agency. And such acts by free people seized of such power are accordingly said to be of such absolute effect, as noted above, precisely because it is a necessary corollary of the power's existence to enforce its expression to the same degree as the degree of power the individual is said to possess.¹⁰ In other words, respect for the capacity imposes responsibility by necessity because one is not truly free to choose if there is not corresponding consequence for choice. Choice is not meaningful if it is without consequence, i.e., if nothing changes as a result, or less meaningful to the extent that things change less fully than the choice itself otherwise demands.

As we will see, the approach reflected in either of the alternative accounts above, as well as that of the promise-minded members of the school, leads to the high-water mark of enforcement, and in some respects appears incompatible with the body of doctrine they purportedly describe.¹¹ This incompatibility appears difficult to avoid however, given that an emphasis on respect for contractual capacity imposes responsibility on contracting parties by necessity because parties cannot be truly free to act or choose, if there is not corresponding

⁸ *Ibid* at 334 ("One would expect a high regard for promise in any legal system to be reflected both in a ready availability of remedies designed to secure actual enforcement of what has been promised (whether the performance promised was an act or forbearance from an act) as well as in substitutionary remedies which reflect, so far as is possible in substitutionary form, the so-called 'performance interest' of the parties (as defined below). If, however, enforcement of performance is an exceptional remedy, or if substitutionary remedies do not achieve the equivalent of enforcement but protect instead some other interest of the promisee, doubts must be raised as to whether a high regard for the value of promise is a hallmark of the system in question."); Smith, *supra* note 2 at 412–413.

⁹ Cohen, *supra* note 4 at 575; Hogg, *supra* note 3 at 86–87.

¹⁰ Atiyah, *supra* note 6 at 123.

¹¹ Smith, *supra* note 2 at 412–414, 418–426; Seana Valentine Shiffrin, "The Divergence of Contract and Promise" (2007) 120:3 Harvard Law Review 708–753; Hogg, *supra* note 3 at 86–88, 376–382.

consequence for choice.¹² In other words, the less effect a promise is given compared to the intention of the promisor, the less effectual the promise, and the less truly efficacious the party's supposed capacity *to promise* must be.¹³ Thus, a standard that requires less than full enforcement cannot stand with the Will Theory, and the Will Theory cannot stand less than full enforcement, for the individual will cannot be both supreme and subordinate at the same time.

2. The Importance of Promising

In contrast with those who ground the imperative to enforce contracts on their character as an act of will, those who emphasize promissory character of contractual promises ground their imperative in the need to respect the institution of “promising”.¹⁴ This justification for enforcing contractual promises struggles to distinguish these from promises simpliciter, even though it would appear to be an obvious necessity if the view of contract as promise is to recognize and accurately account in positive terms for the reality that not all promises prompt enforcement.¹⁵ Nonetheless, proponents of the view hold that the enforcement of contract is a necessary incident of an institution whose utility is derived from the fact that it creates commitments that are mandatory, even if it cannot always usefully

¹² Morton J Horwitz, “The Historical Foundations of Modern Contract Law” (1974) 87:5 Harvard Law Review 917–956 at 953-954 (Evidence of such an absolute view can be seen in America after the general triumph there of the will theory over older equitable conceptions of contract.).

¹³ Max Radin, “Contract Obligation and the Human Will” (1943) 43:5 Columbia Law Review 575–585 at 576 (Radin remarks when summarizing the demands of the Will Theory: “Men ought to be bound only when they deliberately chose to be and to the extent that they chose”).

¹⁴ Fried, *supra* note 3 at 17 (“But since a contract is first of all a promise, the contract must be kept because a promise must be kept... To summarize: There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.”).

¹⁵ Wallace K Lightsey, “A Critique of the Promise Model of Contract” (1984) 26:1 Wm & Mary L Rev 45–74 at 46; Fried, *supra* note 3 at 35 (Fried's premise that contracts ought to be enforced because they are promises runs into difficulty when it comes to restrictions on enforceability, and he appears to concede that some restrictions are needed. However, if that is so, then one must conclude that a contract is not enforceable merely because it is a promise. It must be something other, something more than that.).

distinguish between those commitments that are mandatory and those that are not.¹⁶ No doubt this justification may smack of circularity with respect to the subset of promises that fall within contract, but the tautology that contractual commitments are of value because they are enforceable and must be enforced in order to have value leads to the same conclusion as the emphasis on “will” explained above because effect and meaning pair and reflect in much the same way under this perspective. One need only replace “an act of will” with “a promise” in order to conclude the sentence “a contract is enforced and enforceable according to its terms because it is...” under this branch of the school as opposed to the former described above.

B. What is the Reliance Theory of contract?

The Reliance Theory of contract began indirectly with Fuller & Perdue’s “The Reliance Interest in Contract Damages”, one of the most seminal articles in the history of not only contract, but all of private law. This was an article so apparently insightful that it spurred the rise of this school of thought on promissory liability, even though, in its own terms, the article was only directed at questions of remedy rather than reasons for recognizing the creation of rights in contract in the first place.¹⁷ Perhaps it is unsurprising that Fuller & Perdue’s insight would have such an effect, though, given that it seems that their piece was the first (at least in modern times)¹⁸ to recognize the unarticulated notion latent in the authorities that the law may recognize an interest in our contractually-agreed expectations precisely because they can be expected, even wanted, to form the basis upon

¹⁶ Lightsey, *supra* note 15 at 46; Joseph Raz, “Book Review: Promises in Morality and Law” (1981) 95:4 Harvard Law Review 916–938 at 933 (“The purpose of contract law should be not to enforce promises, but to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice. One enforces a promise by making the promisor perform it, or failing that, by putting the promisee in a position as similar as possible to that he would have occupied had the promisor respected the promise. One protects the practice of undertaking voluntary obligations by preventing its erosion by making good any harm caused by its use or abuse.”).

¹⁷ LL Fuller & William R Jr Perdue, “The Reliance Interest in Contract Damages: 1” (1936) 46:1 Yale L J 52–96.

¹⁸ Smith, *supra* note 2 at 78 (Reliance theories are said to have a long historical pedigree).

which we will carry out further acts.¹⁹ No doubt, this may seem somewhat obvious once said, but it is clear that this insight was an essential pre-condition to the development of the Reliance Theory, or perhaps will be clear once I explicitly state what the theory actually is. In short, the Reliance Theory posits that contracts are and ought to be enforced in order to protect the interests of parties who have relied on any given contractual promise, and by necessary implication as a corollary of that motivation, that contracts are and should be enforced only as far as is necessary to leave a disappointed promisee no worse off for having so relied.²⁰

The latter point about the extent of reliance is a key distinction between the Reliance and Will Theories of contract, and *prima facie* suggests that the Reliance Theory will not permit windfalls whereas the Will Theory will.²¹ However, in practice it is arguably difficult to split the difference between the doctrines on this basis because to rely is understood in the sense of change of position, which includes not only costs/detriments incurred but also opportunities foregone.²² The idea of “opportunity” includes any alternative a promisee would have had to obtain the same gain. Although, as we will see, despite the apparent convergence on this point, there is still considerable distance between these theories, and more importantly between them and the doctrine they purport to describe.

C. What is the Efficiency Theory of contract?

The Efficiency Theory posits that the underlying purpose of contract (and contract law) is to promote the realization of “surpluses from trade”, and that this end provides both

¹⁹ Fuller & Perdue, “Reliance Interest in Contract Damages”, *supra* note 17 at 61-62 (“It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements.”; PS Atiyah, *Promises, Morals, and Law* (Oxford: Oxford University Press, 1983) at 1–8.

²⁰ Fuller & Perdue, “Reliance Interest in Contract Damages”, *supra* note 17 at 56 (“On the other hand, the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him.”).

²¹ Atiyah, *supra* note 6 at 121–125; Smith, *supra* note 2 at 413–417.

²² Fuller & Perdue, “Reliance Interest in Contract Damages”, *supra* note 17 at 54, 60–61; Smith, *supra* note 2 at 415–417.

normative direction and an apt positive account of the forces shaping contract's rules.²³ To grasp this putative explanation requires some exposition of its definitions and its key assumptions. The place to start is contract's alleged object — i.e., “surplus” — itself. Of course, the term itself is not exotic and its common meaning of excess over and above some other quantity is not hard to grasp, but it raises the question: surplus of what? And there is the rub, so to speak, because that which contract allegedly seeks to maximize, according to the Efficiency Theory, is epistemologically indeterminable.²⁴ It cannot be directly or objectively measured, observed, or known, and even in the abstract it is susceptible to only an imprecise explanation.²⁵ This “what” can be named though, and for lack of a better word, is commonly described as “utility” and in essence it means much the same as it did to Bentham and the utilitarians.²⁶ It is after some fashion some form of satisfaction, but just as those interested in quantifying happiness in the 19th century were not able to devise a machine to count the “utiles” a person experienced, so too are we hobbled.²⁷ I note that some might counter that “wealth” is a directly ascertainable quantity that efficiency theorists instead focus upon at times, but “wealth” falls to much the same peril in the end too, given that any object that may be said to be of “value” can only be so if it is seen as such, and that again leads us to a state of mind and the epistemological problem that we cannot truly know those other than our own.

²³ Anthony T Kronman & Richard A Posner, *The Economics of contract law* (Boston: Little, Brown, 1979) at 5.

²⁴ Richard A Posner, “Utilitarianism, Economics, and Legal Theory” (1979) 8:1 *The Journal of Legal Studies* 103–140 at 113–114, 119 (The trouble of utilitarians being unable to actually measure happiness (i.e. utility) is common to efficiency theory too, and normatively speaking efficiency theory can be thought of as being simply an applied form of utilitarianism.).

²⁵ Posner, *supra* note 24.

²⁶ *Ibid* at 104–105; Ilmar Waldner, “The Empirical Meaningfulness of Interpersonal Utility Comparisons” (1972) 69:4 *The Journal of Philosophy* 87–103.

²⁷ David Colander, “Edgeworth’s Hedonimeter and the Quest to Measure Utility” (2007) IDEAS Working Paper Series from RePEc at 215–217; Posner, *supra* note 24 at 114 (“Some utilitarians have faith that in the eventual discovery of a psychological metric that will enable happiness to be measured and compared across persons (and animals?), but in the two centuries that have elapsed since Bentham announced the felicific calculus no progress toward the discovery of such a metric has been made.”).

Having established the nature of contract's alleged end (i.e., the creation of surpluses of utility, or net creation of utility) under the theory, and its character as a practically undetectable and indeterminable product of the contractual process, one can now explain how exactly the theory holds that contract has any connection with this alleged end at all. The Efficiency Theory's explanation begins, as all do, with assumptions, and the key assumption of the efficiency argument is that the existence or creation of utility, and thus the creation of any surplus over and above a baseline, can be inferred even if it cannot be observed.²⁸ However, this view of perception as a matter of inference depends on further assumptions. The first is perhaps the foundational assumption of economics, which is that people are rational and act in their own interest.²⁹ The second is that since utility is a "good" thing, people must want more of it.³⁰ The third is that if people are rational, and utility is good, then, all other things being equal, a person faced with a choice affecting their present store or level of utility will choose the option that leaves them with the most utility afterward.³¹ Thus, the Efficiency Theory holds that contract is conducive to the creation of surplus utility because, should its assumptions hold true, we can infer that any party that chooses to contract does so on the basis that they will receive more utility than they are giving up through the provision of consideration. Moreover, if this holds true for both parties, then not only is each individual's utility increased but so too is overall utility — i.e., there is an overall net surplus of utility created when parties engage in contractual exchange, as both parties are left better off than they were before.³² I note that on its face, this may not sound particularly extraordinary, but given our inability to investigate or estimate utility with any certainty, it must be said that such an outcome of overall net surplus creation is preferable to a situation of "involuntary" exchange or expropriation, where we cannot know whether or

²⁸ Posner, *supra* note 24 at 120.

²⁹ Smith, *supra* note 2 at 126.

³⁰ Posner, *supra* note 24 at 122.

³¹ Richard A Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication Symposium on Efficiency as a Legal Concern" (1979) 8:3 Hofstra L Rev 487–508 at 489; Thomas J Miceli, *Economics of the law: torts, contracts, property, litigation* (New York: Oxford University Press, 1997) at 94 (consent is a key assumption of efficient contracts).

³² Posner, *supra* note 24 at 123; Kronman & Posner, *supra* note 23 at 2.

not there is an overall gain precisely because we cannot assess the size of the losses or gains involved.³³

Having identified and “defined” the object of the Efficiency Theory’s desire, if only imperfectly, one can at least move forward to explain how exactly the theory alleges that contract allows for this object to be obtained. In short, contract allows for or encourages the realization of “surpluses from trade” by providing a mechanism for enforceable voluntary exchanges.³⁴ These qualities are essential for the realization of surpluses of utility because only if an exchange is voluntary and “carried out” on the terms agreed upon by the parties, can we have any confidence that the overall store of utility common to the parties is in fact enlarged.³⁵ By providing for enforcement that aims to put the injured party, as far as money can do so, in a position as close to that which they would have occupied had the contract been performed, or by mandating specific performance in exceptional circumstances, contract provides the means to ensure that surpluses are obtained reliably and provides confidence necessary for parties to rely on contracts made with each other.³⁶

III. Why efficiency?

With each of the leading candidates for the overall normative theory of contract defined above, I will now move on to explain why it is that the Efficiency Theory ought to be preferred. To do so though, I must first canvass what I regard as the shortcomings of the other two. For it is apparent that each of the three has support for good reason, and that selection among them is not a question as to which is fit for purpose, but rather which among these fits *best*.

³³ Posner, *supra* note 24 at 121.

³⁴ Jeffrey L Harrison, *Law and economics in a nutshell*, 6th ed, Nutshell series (St. Paul, MN: West Academic Publishing, 2016) at 115–119.

³⁵ *Ibid* at 121.

³⁶ *Ibid* at 116.

A. The incompatibility of the Will Theory

Any discussion of the strengths and weaknesses of the Will Theory must begin by acknowledging that it is the theory with the longest pedigree and the most obvious overt influence on the development of modern common law contract doctrine during its genesis in industrial England.³⁷ Continental progenitors of the school — including Von Savigny, Puffendorf, and Pothier, for instance — all found admirers among the architects of English contract and implicit, if not explicit, adoption of their ideas in English decisions.³⁸ As such, it should be no surprise, as S.A. Smith points out, that the Will Theory also accords most closely with what contract cases (or judges in contract decisions) say that they are doing.³⁹ All of which means that there is an apparent entrenched appeal for the Will Theory that its proponents would likely argue cannot be overcome. As I will explain though, it is clear enough to my mind that it can, and that another theory can be argued to be its better.

In short, the positive and normative persuasion of the Will Theory has eroded and been undermined over time. Two key developments that contribute to this decline are the post-war rise of “extra-contractual” incursions into the sphere of contractual liability, and the approach taken to Mitigation itself as demonstrated in *White & Carter*.⁴⁰ To explain what each of these means for the Will Theory, though, requires some individual elaboration, which I will do in turn with each below.

³⁷ Hogg, *supra* note 3 at 87 (“The rise to prominence of the will theory as a means of explaining the force of promises, and hence of contract, is often ascribed to nineteenth-century legal and moral thought. This development, it is said, took the idea of the will, which had already been a feature of contract law prior to this point, and gave to it the pre-eminent position in the philosophical and moral explanation of the force of promises and contracts.”).

³⁸ Theodore Frank Thomas Plucknett, *A concise history of the common law*, 5th ed (London: Butterworth & Co, 1956) at 300; Catharine MacMillan, *Mistakes in contract law* (Oxford: Hart, 2010) at 4; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*, [1894] AC 535 (HL (Eng)) at 547 (Puffendorf is cited for authority on the enforceability of restraints of trade in Roman law.).

³⁹ Smith, *supra* note 2 at 417.

⁴⁰ *White and Carter (Councils) Ltd v McGregor*, [1962] AC 413 (HL (Scot)).

To start with, I will focus on the more general of the two objections to the ongoing persuasive primacy of the Will Theory, and that is the rise of the extra-contractual in contract law. To make the case for understanding this development as significant for the Will Theory, I must first explain what exactly I mean by “the extra-contractual”. Extra-contractual incursions into the sphere of contractual liability are those developments that have expanded the liability of contracting parties “in contract” without support from, or in spite of, the parties’ contract itself. A prime example of this trend, although defunct since *Photo Production*⁴¹ in 1980, is the doctrine of fundamental breach, which once permitted a court to avoid the effect of an exclusion clause in certain circumstances and to allow the injured party to sue under said contract as though the clause did not exist.⁴² As mentioned, said doctrine is now ostensibly no more,⁴³ but its evident popularity in the post-war period and the persistent sense post-*Photo Production* that such clauses are not quite cricket and cannot always be given literal effect supports the conclusion that in our present zeitgeist, not all of contract is in contracts themselves.⁴⁴ Likewise, as I will explain next, more recent developments of a different and arguably more radical character make the growth of this nascent attitude even clearer.

The more radical development referred to above is the gradual advance or incursion of “good faith” into the sphere of contractual responsibility. By this I mean the increasing recognition of duties, and thus liability, pertaining to contracts that quite apparently do not arise from the particular contracts they (supposedly) pertain to — the most prominent example of which, ostensibly, is the duty of honest performance in contract recognized in

⁴¹ *Photo Production Ltd v Securicor Transport Ltd*, [1980] AC 827 (HL (Eng)).

⁴² MH Ogilvie, “The Reception of *Photo Production Ltd. v. Securicor Transport Ltd* on Canada: *Nec Tamen Consumebatur*” (1981) 27:3 McGill L J 424–452 at 427 (“The Court of Appeal, led by Lord Denning, (Shaw and Waller LL.J. concurring) unanimously reversed [the trial decision that upheld the exclusion clause] on the grounds that the destruction of the factory constituted a fundamental breach of contract which discharged the contract including the exclusion clause, and that it was the presumed intention of the parties that the clause should not apply in the events which had occurred.”).

⁴³ The Supreme Court of Canada has left open two avenues to challenge an exclusion clause even if it has closed the main thoroughfare. These are unconscionability, and ‘paramount concerns of public policy’; See *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69.

⁴⁴ Krish Maharaj, “Limits on the Operation of Exclusion Clauses” (2011) 49:3 Alta L Rev 635–654; *Tor Line AB v Alltrans Group of Canada*, [1984] 1 WLR 48 (HL (Eng)) at (Exclusion clause worded broadly enough to include intentional delivery of wrong vessel disallowed).

Bhasin v. Hrynew.⁴⁵ The gist of *Bhasin* is that parties must perform their contracts honestly, which on its own seems perhaps unobjectionable, but arguably becomes otherwise when the duty conflicts with the requirements of the parties' own contract, or in other words, those rights and responsibilities that the parties themselves have undertaken and agreed to. Of course, intervening in the agreed allocation of rights and responsibilities of contracting parties is not new, but whereas existing doctrine provided relief from responsibility in situations of hardship, it is clear that developments of late are more than suspensory and negative.⁴⁶ Rather, their effect has been to introduce obligations at least on par with those that the parties themselves have chosen,⁴⁷ and potentially those superior to them, as with the duty of honest performance.⁴⁸ As mentioned above, what this ultimately means for our understanding of contract as a subject is that it indicates that there is a growing sense that contracts themselves are not where contractual obligations begin and end.

In weighing the significance of the developments discussed above in relation to the Will Theory, it is important to bear in mind how far a departure these are from the classical contract doctrine developed during the period in which continental thought was at its most influential in England. That good faith, for instance, should form any part of English contract was severely restricted, if not outright rejected during this period⁴⁹ — notwithstanding Lord Mansfield's pre-industrial attempt to introduce such a general principle in *Carter v. Boehm*.⁵⁰ That civilian contract lawyers are generally receptive to good faith

⁴⁵ *Bhasin v Hrynew*, [2014] SCC 71.

⁴⁶ Krish Maharaj, "The Trouble with Tort: Why Deception in *Bhasin* Cannot Presently Be Deceit" (2019) 1:1 *The Journal of Commonwealth Law* 119–140 at 125.

⁴⁷ *Yam Seng Pte Ltd v International Trade Corpn Ltd*, [2013] EWHC 111 at (This appears to be the English approach so far); David Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract" (2014) 77:3 *MLR* 475–492 at 6–8.

⁴⁸ Krish Maharaj, "An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel" (2017) 55:1 *Alta L Rev* 199–224 at 203–205.

⁴⁹ Woo Pei Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001) 1:2 *Oxford University Commonwealth Law Journal* 195–229 at 195 ("... reaction against good faith started roughly from the 1870s. This coincided with the rise of legal positivism and the laissez-faire theory, fueling the establishment of the classical theory of contract.").

⁵⁰ HG Beale, ed, *Chitty on contracts*, 33rd ed (London: Sweet & Maxwell, 2018) at 1–044; *Bhasin v Hrynew*, *supra* note 45 at paras 35–36.

makes this somewhat ironic,⁵¹ but the point remains that as a system of thought on rights and responsibilities in private affairs, the Will Theory appears to be at its most applicable when applied to a system that has or had contracting parties as its focus, and had as its end quite apparently nothing more or less than the realization of *their* ends.⁵² For such a system, respect for the will of the parties and the enforcement of contracts *because* it is their will appears all too readily obvious as the law's underlying *raison d'être* as the following influential passage from Sir George Jessel's remarks in *Printing and Numerical Registering Co v. Sampson* suggests:⁵³

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further.”

⁵¹ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, [1989] QB 433 (CA) at 439 (“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as “playing fair,” “coming clean” or “putting one’s cards face upwards on the table.” It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants’ attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them. English law has, characteristically, committed itself to no such overriding principle...”).

⁵² Yee, “Protecting Parties’ Reasonable Expectations”, *supra* note 49 at 195 (That the decline of good faith in England coincided with the rise of *laissez faire* seems unlikely to be a coincidence).

⁵³ *Printing and Numerical Registering Co v Sampson*, (1875) LR 19 Eq 462 (CA) at 465.

That the world has changed and that interference in freedom of contract is no longer considered regrettable except when absolutely necessary on grounds of criminality or indecency is evident from the developments in regulation of exclusion clauses and good faith discussed above, and this has undeniable consequences for the applicability of the Will Theory to contract law today. The upshot of these developments as noted above is that there appears to be a nascent view gradually gaining support to the effect that the terms of particular contracts are not where party rights and responsibilities begin and end. If that is true though, and if it is the longer-term direction of contract, it must put the substance of contract law at odds with the Will Theory because in imposing extra-contractual contractual obligations and liabilities, the law is clearly pursuing an end of its own and is not enforcing contracts as an end in themselves. If that is so, the positive and normative force of the Will Theory suffers irreparably with respect to contract generally. As I will further consider below, it is already arguably clear that the Will Theory is out of line with the substance of Mitigation as indicated by the rule from *White & Carter*.⁵⁴

The more specific and troubling objection to the positive or normative applicability of the Will Theory to contract comes from the well-known House of Lords' decision in *White & Carter (Councils) Ltd. v. McGregor*.⁵⁵ As readers will likely remember, the problem confronting their Lordships in *White & Carter* was to decide whether or not an innocent party facing repudiation of a contract from their opposite could refuse it and nonetheless perform, knowing full well that they would be providing an unwanted service and incurring unnecessary loss in the process.⁵⁶ Strictly speaking, given that an anticipatory breach by way

⁵⁴ *White and Carter (Councils) Ltd v McGregor*, *supra* note 40.

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 434 ("My Lords, the issue in this case is of some general importance in contract law. It is whether, where one party has contracted to perform certain services for a money price to be paid by the other contracting party he can, when his time of performance arrives, insist on performing these services so as to earn his price, against the will of the other party who wrongfully insists on repudiating the contract.").

of repudiation is ineffective unless accepted,⁵⁷ and that Mitigation only applies following a breach,⁵⁸ there was an argument to be made that the innocent party had no responsibility to accept the repudiation and cut their losses. However, that is not quite what their Lordships held, despite finding for the plaintiff in the result.⁵⁹ What Lord Reid held, in the most influential speech of the majority, was that even an innocent party who could perform without cooperation could not force unwanted performance upon their opposite *unless* they had a “legitimate interest” in doing so.⁶⁰ Strangely enough, his Lordship was not convinced that such an interest was missing in the circumstances.⁶¹ Nonetheless, the decision has been seen as significant although it is not without its critics.

No doubt there is some appeal in the view propounded by Lord Reid, and for myself, I approve. As noted above, criticism of Lord Reid’s speech as a whole can of course be made, the most obvious of which is that it did not appear that the plaintiff did have any such legitimate interest.⁶² However, this criticism has little bearing on the wider significance of the decision, and what arguably matters more is uncertainty as to what “legitimate interest” really means. It is very clear though that the notion of “legitimate interest” introduced by Lord Reid was more than a mere “flash in the pan,” as it has reappeared of late in the UK Supreme Court’s decision in *Makdessi v. Cavendish Square Holdings* as the new touchstone

⁵⁷ *Howard v Pickford Tool Co Ltd*, [1951] 1 KB 417 at 420-421 (“It is quite plain (and I refer, if it be necessary to quote authority, to the speech of Lord Simon, L.C., in *Heyman v. Darwins Ltd.*, that if the conduct of one party to a contract amounts to a repudiation, and the other party does not accept it as such but goes on performing his part of the contract and affirms the contract, alleged act of repudiation is wholly nugatory and ineffective in law.”).

⁵⁸ *Shindler v Northern Raincoat Co Ltd*, [1960] 2 All ER 239 (Manchester Assizes) at 249 (“It seems to me that, as a matter of law, it cannot be said that there is any duty on the plaintiff to mitigate his damages before there had been any act which is either an actual breach or an act which he has elected to treat as an anticipatory breach.”); *Canadian Western Natural Gas Co v Pathfinder Surveys Ltd*, [1980] AJ No 648 (ABCA) (Or more specifically, the plaintiff becoming aware of the breach).

⁵⁹ *White and Carter (Councils) Ltd v McGregor*, *supra* note 40 at 413.

⁶⁰ *Ibid* at 430–431.

⁶¹ *Ibid*.

⁶² S M Waddams, *The law of contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 772; *Finelli et al v Dee et al*, (1968) 67 DLR (2d) 393 (ONCA) at 395 (Laskin JA (as he then was) is critical of the result in *White & Carter*, but not Lord Reid’s dicta).

concept used in relation to the regulation of penalty clauses.⁶³ Thus, even if we are somewhat unclear as to what “legitimate interest” means, we can conclude that contract enforcement in this case relies on more than the bare fact of a contract having been made. This, in turn, implies that the enforcement of contract is a means and not an end because there would be no question of legitimacy if contracts were enforced for their own sake rather than as a means to accomplish some other or higher purpose. Having said this, I recognize that one might argue that such authorities are or could be anomalous. What one might say in reply is that these instances are part of a larger trend, and this trend or observable tendency is manifest in all of the limits imposed on strict enforcement or recovery in contract, including remoteness and Mitigation itself.⁶⁴ This is because their effect is often (if not always) to undercut the strict enforcement of claims on the expectation measure, which must run contrary to the Will Theory’s normative demands.

If the foregoing exposition in relation to extra-contractual developments and Mitigation itself is correct, it is beyond doubt that modern post-war contract has moved on much too far from its classical roots for the Will Theory to be an apt explanation for contract law any longer. What is more, if the long-term philosophical direction of contract is to trend further towards the recognition of extra-contractual obligations *and* other or further restrictions on party autonomy as to which obligations they *themselves* may agree, the more untenable the Will Theory’s position will become. As such, despite the Will Theory’s prima facie appeal and consistency with many of contract’s core tenets, it does not appear that it is the best fit for contract now or the foreseeable future, and for this reason we must look to some other alternative — the remaining two of which I will consider below.

⁶³ *Cavendish Square Holdings BV v Makdessi*, [2016] AC 1172 (HL (Eng)).

⁶⁴ Another example of a restriction on strict enforcement comes from construction cases involving “skimped performance” in which courts have preferred to assess damages on the basis of the difference in market value between what was provided and what was promised, rather than assessing damages on the basis of the cost to cure the defective/skimped performance, where the plaintiff does not intend to carry out the remediation work; See *Ruxley Electronics and Construction Ltd v Forsyth*, [1996] AC 344 [*Ruxley*] (HL (Eng)); See also *514953 BC Ltd dba Gold Key Construction and Chiu v Leung*, [2007] BCCA 114.

B. The incompatibility of the Reliance Theory

There is much to be said for the applicability of the Reliance Theory to modern contract, and in particular its fit with Mitigation, given that the doctrine's reallocation of loss in circumstances of plaintiff inaction, for instance, is normatively inconsistent with the Will Theory but appears inevitable under the rubric of reliance. Although, one could also say that it is Mitigation that contributes most to the Reliance Theory's fit with contract, given that Mitigation's effect is often to bring the award of damages in line with the reliance measure. This occurs commonly where Mitigation reduces an expectation award in circumstances where a plaintiff would have had the opportunity/ability to otherwise reorganize their affairs and obtain substitute performance and no good reason to rely on their contract with the defendant any further.⁶⁵ However, there is also a significant divergence between the Reliance Theory in terms of its demands and the substance of contract law on another aspect of damages that undermines any suggestion that reliance can provide a complete positive and normative account of contract overall. As I will explain below, that divergence comes in the form of the explicit rejection of the reliance measure or reliance interest as a recognized or protected value in contract law at all.

Before explaining the law's rejections of reliance, I should first say a few words as to the background of the issue leading up to this schism. As readers likely know, the notion of the reliance interest and the Reliance Theory itself began with Fuller & Perdue's seminal article, "The Reliance Interest in Contract Damages," published in 1937 and quickly caught on from there, at least in academic circles.⁶⁶ In the judicial sphere, reception to the idea of reliance appeared likewise warm and appeared to become canon to some extent, or at least more arguably legitimate, in the English Court of Appeal's decision in *Anglia Television v.*

⁶⁵ Fuller & Perdue, "Reliance Interest in Contract Damages", *supra* note 17 at 61 ("Viewed in this way the rule of "avoidable harms" is a qualification on the protection accorded the expectancy, since it means that the plaintiff, in those cases where it is applied, is protected only to the extent that he has in reliance on the contract foregone other equally advantageous opportunities for accomplishing the same end.").

⁶⁶ Gunter Treitel and PS Atiyah are two notable proponents of the reliance view; GH Treitel, "Damages for breach of contract in the High Court of Australia" (1992) 108 LQR 226–235; Atiyah, *supra* note 19; Smith, *supra* note 2 at 417 (Judges have been perhaps less receptive).

Reed in 1972. In this case, recovery of expenditure incurred in reliance, rather than profit lost (which was too speculative), was seemingly allowed for the first time.⁶⁷ Thus, it appeared by the mid-1970s that The Reliance Theory was on its way toward pre-eminence over its rivals given that it was already the most effective in terms of explaining the effect of Mitigation and providing a more plausible positive account of *White & Carter* than the Will Theory. However, a complete takeover was not to be, as the opening salvo of a rejection of Reliance Theory came not too much later in the leading 1978 British Columbia Supreme Court decision in *Bowlay Logging v. Domtar*,⁶⁸ with a subsequent and perhaps more fatal blow following in 1983 from the English Court of Appeal in *C & P Haulage (a firm) v. Middleton*.⁶⁹ Readers may already be familiar with *Domtar* and also *C & P*, but I will elaborate briefly on their facts before then speaking to their significance for the relative standing of the Reliance Theory below.

Bowlay involved a contract for the cutting of timber by Bowlay on Domtar's behalf.⁷⁰ The timber was to be transported to Domtar's yard in Golden, British Columbia for sorting on trucks supplied by Domtar.⁷¹ Owing to logistical challenges, Domtar ultimately supplied too few trucks for Bowlay to be able to carry out the contract efficiently.⁷² Bowlay alleged this to be a breach of the parties' contract, and claimed that said breach had forced them out of business.⁷³ Bowlay subsequently sued for breach of contract on this basis, and sought to recover the out-of-pocket expenses they incurred while performing.⁷⁴ Notably, Bowlay did

⁶⁷ *Anglia Television Ltd v Reed*, [1972] 1 QB 60 (CA).

⁶⁸ *Bowlay Logging Limited v Domtar Limited*, (1978), 87 DLR (3d) 325 (BCSC) at paras 42–43, aff'd (1982) 135 D.L.R. (3d) 179 (BCCA).

⁶⁹ *C & P Haulage (a firm) v Middleton*, [1983] 1 WLR 1461(CA) at 1468–1469; See also *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd (The Mamola Challenger)*, [2010] EWHC 2026 (QBD) [*The Mamola Challenger*].

⁷⁰ *Bowlay Logging Limited v Domtar Limited*, *supra* note 68 at para 3.

⁷¹ *Ibid* at paras 9–13, 26.

⁷² *Ibid* at para 9.

⁷³ *Ibid*.

⁷⁴ *Ibid* at para 28.

not claim lost profits because they could not prove they would have made any.⁷⁵ Domtar defended the claim on the basis that Bowlay was losing money, and would have lost more if the contract had continued.⁷⁶ The court for its part held that the defendant bore the onus of proving that a plaintiff's claim for wasted expenses ought to be disallowed on the basis that they would have been wasted in any event, even if the contract had been performed fully.⁷⁷ The court further held that this onus was met in the circumstances of the particular case, and that damages for the wasted expenditure could not be allowed because it would put Bowlay in a better position than they would have been in had the contract actually been performed.⁷⁸

C & P involved slightly more unusual facts. In this case, Middleton had contracted for a licence to occupy and operate an automobile mechanic's business out of certain premises owned by C & P.⁷⁹ The licence was for six months with renewal every six months.⁸⁰ Further, it was found implied by the County Court Judge at first instance that termination would require one month's notice.⁸¹ Apart from renewal and termination, the most important term of the licence for present purposes provided that any fixtures added to the premises were to be left in place at the end of the licence.⁸² A considerable number of such fixtures were added for the purposes of carrying on the garage business.⁸³ Part way through one of the six-month terms of the licence, the parties came into conflict over a trivial matter, but the reaction of C & P was to eject Middleton immediately.⁸⁴ Middleton removed what equipment he could and began operating again from a garage in his own home.⁸⁵

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at para 32.

⁷⁷ *Ibid* at paras 42–44.

⁷⁸ *Ibid* at para 44.

⁷⁹ *C & P Haulage (a firm) v Middleton, supra* note 69 at 1463.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid* at 1463–1464.

⁸⁴ *Ibid* at 1464.

⁸⁵ *Ibid.*

Middleton was required to honour a cheque to pay for such occupation of the premises as he had enjoyed before his ejection, but not required to pay further, and was thus saved the rent he would have otherwise had to pay to operate his garage business since he did not have to pay to use the garage located in his own home.⁸⁶ Middleton's counterclaim against C & P was for the value of the improvements (i.e., fixtures) he had made in order to operate from C & P's premises.⁸⁷ Objection was made in reply that the contract first and foremost allowed for C & P to keep such improvements, and second, that damages for the improvements would put Middleton in a better position than if the contract had been performed because he was overall better off from being allowed to operate from his own premises rent-free.⁸⁸ In the result, the court cited *Bowlay* with approval and held that they could not put Middleton in such a better position, and that nothing more than nominal damages could be allowed.⁸⁹

Each of the two above-mentioned decisions turns on somewhat different facts, but each stands ultimately for the same proposition, or perhaps propositions depending on the degree of specificity one wishes to employ. At the highest level of generality, one can say that each is authority for the view that contract does not award damages for a bad bargain. That much likely sounds trite, though, given that a bad bargain is presumably one from which the plaintiff loses nothing if it is left unfulfilled. The more specific statement of principle that can be extracted is that expenditure that would have been wasted in any event cannot be recovered merely because it was "wasted" by reason of a breach.⁹⁰ I note that this may also seem somewhat trite, but leaving aside its obvious appeal as a practical matter, the

⁸⁶ *Ibid* at 1463–1464.

⁸⁷ *Ibid* at 1464.

⁸⁸ *Ibid* at 1464-1468 (Middleton's use of the garage at his home was not permitted by local planning restrictions, but the local authority was very understanding in the circumstances and allowed Middleton to operate).

⁸⁹ *Ibid* at 1468.

⁹⁰ *Bowlay Logging Limited v Domtar Limited*, *supra* note 68 at para 40 ("The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant's breach."); *C & P Haulage (a firm) v Middleton*, *supra* note 69 at 1467-1468 ("In my judgment, the approach of Berger J. is the correct one. It is not the function of the courts where there is a breach of contract knowingly, as this would be the case, to put a plaintiff in a better financial position than if the contract had been properly performed."); *The Mamola Challenger*, *supra* note 69 at para 28.

statement clarifies that the reliance measure is merely a proxy for the expectation measure to be employed when the expected benefit or betterment that a plaintiff might have expected to receive is beyond ready estimation for evidentiary or epistemological reasons.⁹¹ What this means in short is that reliance alone is not reason enough for recovery, because reliance is not an interest protected by contract in and of itself or is at best protected only incidentally, because there is strictly speaking no reason why damages could not be paid for expenditure being wasted in a way *other than that which the plaintiff wanted*, it is simply clear from these decisions that *contract will not do so*. As such, it is likewise clear that there must be some other end underlying contract enforcement, and that Reliance Theory for all of its appeal lacks the positive force to prevail in the end.

C. The compatibility of the Efficiency Theory

Having now addressed the strengths and weaknesses of the Efficiency Theory's two leading competitors above, and having concluded that each has significant shortcomings that undermine their respective claims to positive and normative primacy over contract, I can now move on to expound on the comparatively stronger claim of efficiency in relation to the same. I note that said claim has three prongs and that I will address these in order. The first is the historic connection and influence of efficiency as understood in classical economics. The second is the somewhat embattled, but nonetheless enduring preference for efficient

⁹¹ *Commonwealth of Australia v Amann Aviation Pty Ltd*, (1991) 174 CLR 64 (HCA) at 82, Mason CJ and Dawson J (“*Hayes v Dodd* is a useful illustration of the statement that the expressions ‘expectation damages’, ‘damages for loss of profits’, ‘reliance damages’ and ‘damages for wasted expenditure’ are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim.”); *The Mamola Challenger*, *supra* note 69 at para 34; *L Albert & Son v Armstrong Rubber Co*, 178 F (2d) 182 (2d Cir 1949) at 189, L Hand (Chief Judge) (“In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee’s outlay, such a result imposes the risk of the promisee’s contract upon the promisor. We cannot agree that the promisor’s default in performance should under this guise make him an insurer of the promisee’s venture; yet it does not follow that the breach should not throw upon him the duty of showing that the value of the performance would in fact have been less than the promisee’s outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other.”).

breach. And the third and final is the compatibility of the Efficiency Theory with the demands of Mitigation and vice versa.

1. The historic connection of contract and economics

I have previously written at some small length to explain the case made by another at much greater length for understanding classical contract law as having been heavily influenced in its infancy by the then-emerging field of political economy, now better known as economics.⁹² That other is of course the late great Patrick Atiyah who wrote what I regard as the seminal work, *The Rise and Fall of Freedom of Contract*.⁹³ To capture in limited space what Atiyah explained in the larger part of a book is of course no mean feat, but in the interest of efficiency I will attempt to capture its essence in a space that is smaller still again, below.

To understand the thrust of Atiyah's observation, one should first cast one's mind back to 19th century England and imagine the ideal of the Victorian gentleman and the intellectual climate of the age. If one does so, one may note that in sharp contrast to today, where the trend towards ever-increasing specialization has led to various disciplines and avenues of intellectual inquiry being driven further apart into what could be likened to a loose archipelago, the intellectual environment of 19th century England was quite apparently a much more unified whole reminiscent of Pangea.⁹⁴ No doubt this is true at least in part because many of the divisions between specialities or subjects we think of as distinct today quite simply had not yet developed.⁹⁵ What is more, aristocrats of the age who had the advantage of a broad classical education were expected to be able to engage with ideas from across this landscape, and did so on topics from monetary policy to moral philosophy, both in

⁹² Maharaj, *supra* note 44 at 636–638.

⁹³ PS Atiyah, *The rise and fall of freedom of contract* (Oxford: Clarendon Press, 1985).

⁹⁴ *Ibid* at 293–294.

⁹⁵ *Ibid* at 293.

speech and in writing.⁹⁶ Of course, in the era of the professional academic, we might be tempted to dismiss such efforts as only so much idle chatter, but I would suggest that one need only look to the gentleman scientists of the age and their contributions to appreciate that this community of enthusiastic “amateurs” were more than merely bourgeoisie penning letters to the editor.⁹⁷ I pray the reader keep this in mind as I next move to consider the more specific set of circumstances concerning barristers and solicitors.

That lawyers of the 19th century would have been from fairly well-to-do backgrounds might seem somewhat obvious, but Atiyah highlights another more specific characteristic of the professional class that may have a profound effect on their opinions and worldview, and consequently the character of the doctrine they developed. The first point of interest is that the ranks of the profession at this time were thick with the younger sons of the landed gentry who, whilst fortunate enough by circumstance of birth to have access to education and opportunity, were left with no estate to inherit as a consequence of their order of arrival.⁹⁸ These orphans of privilege were thus to some extent forced to fend for themselves without the safety net of land and title, but well-positioned to play a role in shaping industrial England and reap the benefits of said rapid industrialization as the world moved away from the settled and relatively static patterns of their agrarian forebears.

With the above background in mind, it may be easy to accept Atiyah’s suggestion that the profession as at the time of modern contract’s genesis would have been a fairly sympathetic audience for the principles of laissez-faire.⁹⁹ After all, not only were they themselves forced to engage in industry of a sort as a profession, but they were also unable to practice collectively at this time and were likely to be sympathetic to a philosophy founded on self-interest as a consequence of their training, given the current of rugged individualism

⁹⁶ *Ibid* at 293–294.

⁹⁷ *Ibid* at 293 (“Many of the classical economists wrote extensively outside in areas outside economics; some of them were actually trained as lawyers, or had acquired a legal qualification; and conversely, a man going into the learned profession of the law was expected to cultivate some knowledge of the moral sciences.”).

⁹⁸ *Ibid* at 114.

⁹⁹ *Ibid* at 112–114.

so clearly evident in the early common law.¹⁰⁰ Thus, Atiyah's argument that the progenitors of modern contract would have been in touch with, influenced by, and ultimately acted upon the normative demands of laissez-faire in developing modern contract doctrine appears compelling.¹⁰¹ What is more is that it is particularly persuasive in relation to certain key aspects of doctrine that do not appear to admit of explanation otherwise. The position that there is nothing immoral about the decision to breach a contract,¹⁰² the law's preference for freedom of contract over restriction on grounds of public policy,¹⁰³ and the outsized importance of consideration,¹⁰⁴ all for instance appear to indicate a significant economic influence.

2. Efficiency is often honoured in the breach

As noted in the paragraph immediately above, and as readers well know, contract doctrine generally adopts an attitude of amorality towards breach of contract. It is not, for instance, ordinarily seen as being anywhere near as morally turpitudinous as the commission of a tort, even though the actions involved could be similar if one compares an unintended breach with negligence. What it is more, though, is that not only do breaches of the

¹⁰⁰ *Ibid.*

¹⁰¹ SM Waddams, "Book Review: The rise and fall of freedom of contract" (1981) 19:1 U W Ontario L Rev 198–199; Charles Fried, "Review of The Rise and Fall of Freedom of Contract" (1980) 93:8 Harvard Law Review 1858–1868; John F Hagemann, "Book Review: The rise and fall of freedom of contract" (1981) 26:1 SD L Rev 152–156; James C Oldham, "Review of The Rise and Fall of Freedom of Contract" (1982) 26:1 The American Journal of Legal History 81–83.

¹⁰² SM Waddams, *The law of damages*, 5th ed (Toronto: Canada Law Book, 2012) at paras 9.200 ("...general opinion usually takes the view that there is nothing dishonourable about, still less immoral, in a breach of contract coupled with an offer of fair compensation."); Oliver Wendell Holmes, "The Path of the Law" (1897) 10:8 Harvard Law Review 457–478 at 462.

¹⁰³ Beale, *supra* note 50 at 1–032; *Homburg Houtimport BV v Agrosin Private Ltd*, [2003] 1 AC 715 (HL (Eng)) at 750 Lord Bingham, ("Commercial men must be given the utmost liberty of contracting. They must be left free to decide on the allocate commercial risks."); *Printing and Numerical Registering Co v Sampson*, *supra* note 53 at 465 (CA), Sir George Jessel MR ("...you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting.").

¹⁰⁴ Smith, *supra* note 2 at 216 (Reliance theories appear unable to account for consideration); Fried, *supra* note 3 at 28–39 (Fried is frankly flummoxed by consideration and cannot reconcile it with contract as promise.); Posner, *supra* note 24 at 122–123 (Exchange is at the heart of wealth maximization ideal.).

comparatively blameless kind pass with little negative comment, so too do breaches that are perpetrated intentionally and cynically for the purposes of realizing a greater profit.¹⁰⁵ All that the law asks in such circumstances is that the party in breach pay damages for the loss suffered by their opposite, but typically no more, and especially no greater amount simply because they (the party in breach) have made a profit.¹⁰⁶ As such, one could infer that the law encourages breach in such circumstances, but as we know, one does not need to read between the lines on this point because the law's preference in this regard is made explicit as a matter of doctrine under the heading of "efficient breach".¹⁰⁷ Readers of course likely also know that efficient breach as a matter of doctrine is somewhat embattled¹⁰⁸ and has been challenged in recent years, but those exceptions like *Blake* and even the Supreme Court of Canada's own decision in *Bank of America Canada v. Mutual Trust Co.* themselves appear to acknowledge that they are the exception and not the rule.¹⁰⁹ One might ask why this matters, other than perhaps a coincidence of nomenclature that links the name of this doctrine to the

¹⁰⁵ Waddams, *supra* note 62 at paras 675, 731.

¹⁰⁶ James Edelman, *McGregor on damages*, 20th ed (London: Sweet & Maxwell, 2018) ss 15-025-15-027; *AB Corporation v CD Co (The Sine Nomine)*, [2002] 1 Lloyd's rep 805 at paras 9-10 ("It is by no means uncommon for commercial contracts to be broken deliberately because a more profitable opportunity has arisen... International commerce is on a large scale is red in tooth and claw .. Our solution to the present problem is that there should not be an award of wrongful profits where both parties are dealing with a marketable commodity- the services of a ship in this case-for which a substitute can be found in the market place. In the ordinary way the damages which the claimant suffers by having to buy in at the market price will be equal to the profit which the wrongdoer makes by having his goods or his ship's services to sell at a higher price. It is in the nature of things unlikely that the wrongdoer will make a greater profit than that. And if he does, it is an adventitious benefit which he can keep. The commercial law of this country should not make moral judgments, or seek to punish contract breakers.") [*The Sine Nomine*].

¹⁰⁷ Waddams, *supra* note 102 at para 9.200.

¹⁰⁸ The criticisms of efficient breach are numerous, but three of the most prominent are as follows. First, the measures of efficiency most commonly relied upon to establish that breaches can be efficient in theory are either impossible (Pareto optimality), or unconvincing (Kaldor-Hicks). Second, even if the metrics touted as the basis for holding certain breaches efficient are workable/acceptable in theory, they are useless because they are epistemologically impossible to apply. Third, breach is not as amoral a matter as is presumed, and *pacta sunt servanda* does have meaning; See Jeffrey L Harrison, "A Nihilistic View of the Efficient Breach" (2013) 2013:1 Mich St L Rev 167-210; See also Guido Calabresi, "The Pointlessness of Pareto: Carrying Coase Further" (1991) 100:5 The Yale Law Journal 1211-1237.

¹⁰⁹ *Bank of America Canada v Mutual Trust Co*, [2002] 2 SCR 60 at paras 31 ("Courts generally avoid [gain-based or restitutionary] damages so as not to discourage efficient breach (i.e., where the plaintiff is fully compensated and the defendant is better off than if he or she had performed the contract) (Waddams, *supra*, at p. 473). Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts.").

theory in question, and the answer as alluded to at the very outset of the chapter is that this aspect of contract doctrine is explicable only if efficiency is in fact the driving force behind contract.

To understand why it is that efficient breach is most explicable under the Efficiency Theory, one need really only harken back to the alleged purpose of contract enforcement under the theory, and that of course is to encourage the creation of net surpluses from trade — surplus utility being good, and more surplus being better. Taking this normative directive to its logical conclusion, it appears clear that any act that tends to encourage the creation of greater surpluses is to be applauded, subject to the constraints imposed by epistemological uncertainty of surplus creation.¹¹⁰ Thus, any breach of contract that leaves the injured party no worse off (by way of damages) and the party in breach better off, quite apparently ought to be encouraged under the Efficiency Theory. The same is clearly not true under its competitors. Beginning with the Will Theory, it is apparent that the intrinsic value of the “promise” or the “exercise of the capacity to promise” is irreconcilable with a doctrine that supports promises being broken. Likewise, although less obviously incompatible, the Reliance Theory has been said to render liability in contract much closer to liability in tort,¹¹¹ and it is hard to reconcile a normative direction that we must enforce contracts to protect reasonable reliance with a doctrine that encourages contracting parties to disappoint those whose reliance they have encouraged. To suggest otherwise is tantamount to suggesting that tort could abhor particular torts and yet also encourage their commission, which is almost oxymoronic. As such, of the three competing theories it would seem that efficient breach, and the general attitude of amorality of breach, is entirely explicable under the Efficiency Theory, but almost entirely incompatible with the others.

¹¹⁰ Shiffrin, *supra* note 11 at 730–731.

¹¹¹ Smith, *supra* note 2 at 44.

3. Efficiency is particularly apt to explain Mitigation

I have explained above how Mitigation is an apt fit with the Reliance Theory, or how we can understand the Reliance Theory as an apt fit with Mitigation. Here I will make the case for understanding Mitigation and the Efficiency Theory in much the same way, although a more fulsome analysis will have to wait until Chapter IV, where the following proposition (among others) will be explored in greater detail and a more compelling overall picture will emerge. The proposition I will consider for present purposes is that Mitigation allocates post-breach gains or losses in such a way as to help ensure (as far as possible) that an overall surplus of utility is realized or that any deficit is minimized. That this is particularly important is not necessarily obvious but, as I will explain, the accuracy of this view tends to undeniably support the positive and normative primacy of efficiency over the field because, as I will further explain, neither of its competitors would predict it, let alone compel it. First, though, I will turn to the question of gains below.

The purpose of Mitigation is generally understood today as being the prevention of “economic waste”, which it is said to prevent by precluding the recovery of “avoidable” loss.¹¹² Both of these assumptions are unpacked and ultimately dismissed as erroneous and incomplete in Chapter III. There are more reasons for that conclusion than I can presently cover here, but suffice it to say, one reason in short is that Mitigation is about much more than whether a given plaintiff could have, or should have, avoided a loss. Another conundrum that it must tackle, as mentioned above, is the allocation of gains made post-breach. It must also be said that this is not a small concern that can be easily brushed off, since arguably the most important foundational decision on the doctrine engaged with this problem rather than grappling with the putative “avoidability” of a given loss. This is of course the seminal modern authority, *British Westinghouse v. Underground Electric Railways*.¹¹³ As readers likely remember, the primary issue in *British Westinghouse* was whether or not credit should be given for the “post-breach gain” represented by the increased

¹¹² Waddams, *supra* note 62 at para 758.

¹¹³ *British Westinghouse Co v Underground Ry*, [1912] AC 673 (HL (Eng)) [*British Westinghouse*].

efficiency of new power turbines purchased by Underground to replace defective turbines provided by Westinghouse when Underground sought to recover (from Westinghouse) the cost of acquiring the replacement machines.¹¹⁴ The ultimate answer to this question was, rightly in my view, yes, although, as I discuss further in Chapters III and IV, the Court's reasons are somewhat lacking. For present purposes though, what matters most is what the reason really is rather than what the given reasons are, which I will turn to next.

At first blush, it might seem contrary to reason for the supplier of a defective product to be entirely off-the-hook for the cost of replacing theirs with one that work as advertised, some clause to that effect notwithstanding. However, in the circumstances of *British Westinghouse*, and in any number of other cases, there is clearly something to be said for such an outcome. Focusing on the specifics of *British Westinghouse*, it appears clear enough that Underground's acquisition of replacement machines from the firm of Parsons was an attempt to obtain a substitute for the satisfaction that Underground was denied as a consequence of the defects in the Westinghouse machines. That being the case, there would appear to be no reason for Underground to be denied an award for the cost of obtaining the Parsons machines under the rubric of reliance or will, the promise to provide conforming machines having been properly made by Westinghouse, and relied upon by Underground, who had mostly paid for them and foregone the opportunity to buy other machines.¹¹⁵ However, given the undeniable superiority of the turbines provided by Parsons, it is clear that the replacement would have put Underground in a far better position than they would have been in even if the Westinghouse machines had lived up to expectations.¹¹⁶ With that in mind, it appears justifiable to credit the "gain" made by Underground to the benefit of

¹¹⁴ *Ibid* at 676.

¹¹⁵ I note that one could suggest that Reliance could also deny recovery on the basis that it is not the plaintiff's reliance that caused the loss per se since the Parsons Machines had rendered the Westinghouse turbines obsolete, BUT this would be tantamount to saying that Reliance will not vindicate a bargain that subsequently turned out to be bad, which appears contrary to the ethos of the theory overall as indicated by *Domtar* and *C&P Haulage*; See *Bowlay Logging Limited v Domtar Limited*, *supra* note 68; See *C & P Haulage (a firm) v Middleton*, *supra* note 69.

¹¹⁶ *British Westinghouse*, *supra* note 113 at 691 (Their lordships concluded that Underground should have purchased the Parsons machines to replace Westinghouse's, even if Westinghouse's had not been defective, and even before they had worn out.).

Westinghouse and correspondingly deny Underground the cost of replacement on the basis that they had ultimately acquired greater utility through their subsequent purchase, and that the award of damages against Westinghouse would potentially inflict a greater loss of utility on Westinghouse than Underground would have received, leading to a potential net deficit of utility overall if the award of damages was made. As such, it appears that the Efficiency Theory provides an apt explanation for the outcome of the case on the basis of attempting to maximize utility, whereas its competitors clearly do not, or at least cannot in a way that is consistent with their own internal logic.

There is much more to say on the subject of post-breach gain, including how one might distinguish between circumstances in which a post-breach gain should be credited to the defendant, as it was in *British Westinghouse*, and when it should not, as was the case in *Hussey v. Eels*, for instance.¹¹⁷ Such other and further questions, though, are perhaps best left to Chapter IV, wherein a more exhaustive overall analysis of Mitigation's response to the various challenges that arise in its application will be carried out. Suffice it to say for present purposes, as with *British Westinghouse*, a compelling positive case can be made for understanding Mitigation in terms of efficiency, and what is more, a compelling normative case for addressing certain unresolved issues in light of the apparent fit between the existing caselaw and the Efficiency Theory overall.

IV. Thus, the law is economic

Above, I have highlighted the respective strengths and weaknesses of the three leading theories of promissory liability in contention for supremacy in Anglo-Canadian contract. Clearly, I have concluded that the Efficiency Theory is the best fit of the three, not only with contract as a whole, but also specifically with respect to Mitigation. I hasten to caveat this conclusion though, by adding that I make no case with respect to the application of efficiency to the law generally. Its shortcomings with respect to public law, and even tort, are quite simply too well known to make such an oversized case. I am nonetheless confident

¹¹⁷ *Hussey v Eels*, [1990] 2 QB 227 (CA) [*Hussey*].

that it is the most apt fit for contract as it stands now, and for where it appears to be heading. The real proof of the pudding for present purposes will of course appear in Chapter IV, where I will provide the framework for understanding the overall picture of Mitigation and ample detail for the reader to digest. If it is palatable, perhaps that will make the case for the Efficiency Theory better than any brief exploration of this long-unresolved issue ever could. In the meantime, I will ask the reader to bear with me.

CHAPTER II

EQUITY

I. Introduction

Equity is very much at the heart of this dissertation in more ways than one. First, it is central because in the technical sense,¹ it is essential to understanding both how and why Mitigation functions as it does. Second, equity — in the Aristotelian sense — explains why Mitigation is necessary and why, by necessity, it must come from the Court of Chancery rather than the common law. The aforementioned “how and why” of Mitigation will be considered and explained in Chapter IV, and so will be left to one side for present purposes. Instead, what I will expound upon in the present chapter for the purposes of making that later exposition more explicable is what exactly equity, in the technical sense, actually is. After that, I will turn to explaining the Aristotelian idea of equity and its relation to equity as lawyers understand it to establish that, despite the fact that the development of equity in the Anglo-Canadian tradition was largely unintended, it is far from unnecessary to our legal system.

II. What is equity in Anglo-Canadian law?

A. Origin of the Court of Chancery

The best available working definition of “equity”, in the technical sense in which the term is used in Anglo-Canadian law, is as follows: the body of rules and doctrine that historically fell within the jurisdiction of, and was administered by, the Court of Chancery

¹ Referring to the body of doctrine originating in and administered by the Court of Chancery prior to the Judicature Acts

prior to the *Judicature Act* reforms of the latter half of the 19th century.² Readers may find this raises more questions than it answers though, particularly if they are not already aware of the Chancery’s history, or that of the dual-court system that existed in England for much of the time since the end of Anglo-Saxon rule up to today.³ As such, explaining what exactly equity is realistically requires an explanation of the history of the court in which this body of jurisprudence arose and developed. I will recount this history below in brief, before then turning to the post-*Judicature Act* status of equity today.

As alluded to above, the story of the Court of Chancery begins in the period of political and legal transformation that followed the death of Harold Godwinson, the last Anglo-Saxon King of England, and the ascension of his successor, William of Normandy, in 1066.⁴ The Chancery’s story does not begin as one might expect, though, with its origin in some apparatus of government or the person of some appointee explicitly delegated the authority to adjudicate. Much to the contrary, and unlike the other courts of medieval England, the story of the Chancery begins without any suggestion that it was ever to “sit in judgment” at all. That the Chancery ever did so is as much as anything an accident of history or the culmination of many accidents, and an example of the English tendency to muddle through.⁵

Charting the course of these above-mentioned accidents is somewhat tricky for a number of reasons, but with respect to the earliest part of equity’s history, it is evident that much of the historical record is not available to us.⁶ As such, even though a full retelling of equity’s origins is beyond the scope of the present work, it is also in many respects

² Frederic William Maitland, *Equity, also the forms of action at common law, two courses of lectures* (Littleton, CO: FB Rothman & Co, 1984); Anthony Mason, “The place of equity and equitable remedies in the contemporary common law world” (1994) 110 *Law Quarterly Review* 238–259.

³ John McGhee, *Snell’s equity*, 33rd ed (London: Sweet & Maxwell, 2015) ss 1-003-1–004.

⁴ Frederick Pollock & Frederic William Maitland, *The history of English law before the time of Edward I*, 2nd ed (Cambridge: The University Press, 1898) at 79 (as with the story of all else in English law effectively).

⁵ Maitland, *supra* note 2 at 3; JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow and Lehane’s equity: doctrines and remedies*, 5th ed (Chatswood, NSW: LexisNexis Butterworths, 2015) ss 1–010 [*Meagher, Gummow and Lehane*].

⁶ John H Baker, *An introduction to English legal history*, 5th ed (Oxford: Oxford University Press, 2019) at 111–112; Heydon, Leeming & Turner, *supra* note 5 ss 1–010.

impossible. It is not even entirely clear, for instance, how Chancery’s jurisprudence acquired the name “equity”.⁷ Even so, certain matters can be covered with some certainty, which allows for at least a broad outline — the first piece of which is the nature and location of the Chancery within the apparatus of the medieval state. As alluded to above, one can say for certain that the Chancery was not located within that branch of government that we would today describe as judicial. Instead, as the name might suggest, the Court of Chancery began as an appurtenance to the office of the Lord Chancellor, or perhaps the department of state over which they presided and which bore their name.⁸ Given the acutely personal nature of the power exercised, in the early period at least, it is somewhat accurate to identify the jurisdiction with the holder of the office as a person rather than the office and its attendant administrative machinery. What I mean by this will become clearer below.

For those wondering how the Lord Chancellor acquired any kind of role in adjudication, given that his office then, as now, would be understood to form part of the executive branch of government, the answer in a word is: “appeals”. And by “appeals”, I mean appeals for relief from decisions handed down from the then-established courts of common law, as well as appeals for aid in light of the refusal or inability of common law courts to act or provide a remedy in certain circumstances.⁹ The latter circumstance was oddly not initially a problem within the medieval legal system precisely because the Chancery, who issued the writs with which every legal action had to begin, had initially assumed the power to modify or provide writs according to the needs of the party before them.¹⁰ However, that power was subsequently curtailed (at the insistence of those jealous of this authority) to allow only for writs to be issued following a limited series of prescribed

⁷ Baker, *supra* note 6 at 114–115 (It acquired the name in Tudor times, but more than this unclear.).

⁸ McGhee, *supra* note 3 ss 1-005-1-007; Heydon, Leeming & Turner, *supra* note 5 ss 1-015; Gary Watt, *Equity stirring: the story of justice beyond law* (Oxford: Hart, 2009) at 48 [*Equity stirring*].

⁹ Jill E Martin, *Hanbury & Martin: Modern Equity*, 19th ed (London: Sweet & Maxwell, 2012) ss 1-005 [*Hanbury & Martin*]; McGhee, *supra* note 3 ss 1-007 (For example, where common law processes of proof lead to an outcome that was inconsistent with the true facts e.g. where a sealed debt instrument might be held enforceable even though the debt had already been paid.); Baker, *supra* note 6 at 110–112.

¹⁰ Heydon, Leeming & Turner, *supra* note 5 ss 1-030; Pollock & Maitland, *supra* note 4 at 196–197.

standard forms.¹¹ This makes it somewhat ironic that the problem thereby caused would subsequently become the Chancellor's to solve, ultimately leading to a greater accretion of power and prestige to his office.¹² Irony, though, is often only evident with the benefit of hindsight, and for those present at the time, it was likely not apparent how exactly circumstances would subsequently unfold.

The way things did ultimately unfold saw responsibility for addressing the aforementioned problem of "appeals" come to the Chancellor by a somewhat circuitous route. As will become clear, there were good reasons for the locus of responsibility to largely end up where it started, given the overall significance of the medieval Chancellors to the administration of the state, as well as to justice. It is to be remembered, for instance, that the Chancellors of the period were all senior clerics, and thus literate, which was rare.¹³ They were also schooled in law of a sort — albeit the ecclesiastical or canon kind.¹⁴ Given the outsized role of religion and its influence across all aspects of public life at the time, it is easy to understand how the distinction could be felt to be one without a difference, particularly given that the Chancellors were already essential to the administration of justice as the source of all originating legal documents and the keepers of the Great Seal.¹⁵ To return to the trajectory by which the above-mentioned appeals ultimately fell within the Chancellors' jurisdiction, it appears that in response to the failings of the common law system, a practice of petitioning the King developed based on the theory that the King (as the fount of all justice) had a residual power to dispense justice where/when his judges could not.¹⁶ Perhaps coincidentally, that practice required petitioners to tread a path that lead to the Chancellor,

¹¹ Watt, *supra* note 8 at 49–50.

¹² SFC Milsom, *Historical foundations of the common law*, 2nd ed (London: Butterworths, 1981) at 284; McGhee, *supra* note 3 ss 1–007 (Pressure for a distinct equity jurisdiction only appears to have grown following this restriction on the Chancellor's authority.).

¹³ Maitland, *supra* note 2 at 2–3; AT Carter, *Outlines of English legal history* (London: Butterworth & Co, 1899) at 119.

¹⁴ Martin, *supra* note 9 ss 1–005.

¹⁵ Watt, *supra* note 8 at 48.

¹⁶ Baker, *supra* note 6 at 106–107; Maitland, *supra* note 2 at 3.

who was, among other things, head of the King's Council and, in point of fact, responsible for the receipt of petitions.¹⁷

Over time, as word and awareness of the practice of petitioning the King grew and spread, and the numbers of petitions and the business of dealing with them grew correspondingly burdensome, the practice of the Chancellor *receiving* petitions gradually shifted towards the Chancellor *addressing* them as well.¹⁸ By the 14th century, the practice had become so regularized and entrenched that it was frankly admitted that the Chancellor presided over a court, and petitions to this “court of conscience” were by this point customarily addressed to the Chancellor himself rather than the King or his council.¹⁹ Nevertheless, it is worth noting that while the practice of petitioning the Chancellor had ripened into a more regular procedure by this time, the practice of adjudication itself had not, or at least, had not yet.²⁰ Practice was thus somewhat ad hoc, and the principle guide for the Court's decision-making at this stage was little more than the conscience of the Chancellor himself, which varied not only with the circumstances, but also the Chancellor.²¹ One important aspect of the Court's jurisdiction or process that was however settled was the nature of its relation to the common law courts and the common (and statute) law over which they presided. In essence, the Chancery did not, and still does not, purport to interfere with a party's strict rights at law, nor their responsibilities.²² Instead, it purports to only act *in personam* — i.e., against a person's conscience — rather than corporeal subject matter or rights therein or thereto.²³ Even when forbidding the enforcement of a judgment debt, for instance, equity did not (and still does not) deny the existence of the debt — it only purported

¹⁷ Heydon, Leeming & Turner, *supra* note 5 ss 1–020.

¹⁸ Maitland, *supra* note 2 at 3; Baker, *supra* note 6 at 109–111.

¹⁹ Maitland, *supra* note 2 at 5; Watt, *supra* note 8 at 48 (It is not clear when or how equity and conscience first became identified with each other but if there was ever a distinction, it did not last long.); Heydon, Leeming & Turner, *supra* note 5 ss 1–025.

²⁰ Maitland, *supra* note 2 at 5–9; Martin, *supra* note 9 ss 1–006; Baker, *supra* note 6 at 111–113.

²¹ Martin, *supra* note 9 ss 1–006; Maitland, *supra* note 2 at 8–9.

²² Maitland, *supra* note 2 at 9–10; Baker, *supra* note 6 at 112–113.

²³ Maitland, *supra* note 2 at 9–10; Baker, *supra* note 6 at 112–113; Martin, *supra* note 9 ss 1–008.

to suspend the debtor's obligation to pay it, and the creditor's right to enforce it, on the theory that insistence on the right was unmeritorious in the circumstances owing to the existence of facts not contemplated by the legal rule giving rise to the right.²⁴ In this way, equity began to act as a supplement to the common law, although it would remain rough-and-ready and somewhat unpredictable for some time yet.

Given the more explicitly moral complexion of this "Court of Conscience", it is probably unsurprising that it and its administrators would shy away from the rigidity that characterized the system whose flaws and excesses led petitioners to them in the first place. This preference was, and to the extent that it survives still is, not without its critics,²⁵ with some like John Selden remarking in the 17th century that "[e]quity varies according to the length of the Chancellor's foot."²⁶ In fairness though, it would appear that by Selden's day, the caprice associated with the Chancery was in decline and that from its rough and ready beginnings, equity had grown into a system with a logic and internal coherence of its own.²⁷ What is more, it appears that between the 16th and 17th centuries, the Chancery and equity had at some point committed themselves to the principle of *stare decisis*.²⁸ As with much of else of equity's history, how and when exactly this occurred is hard to say, and it is possible that it happened only gradually rather than all at once. What can be said with some certainty, though, is that it was only during this period that reasons for decision began to be recorded, despite that practice having already been long-established at common law.²⁹ The inference that can and has been made about this is that if men only bothered to write reasons down

²⁴ Maitland, *supra* note 2 at 9–10; McGhee, *supra* note 3 ss 1-007-1–008.

²⁵ Maitland, *supra* note 2 at 9–10 (One will recall that one of equity's greatest critics was Lord Coke, who famously quarreled with and lost to Lord Ellesmere over the primacy of the common law over equity.); Baker, *supra* note 6 at 111–112 (The existence of complaints about this informal system by the end of the 14th century are some of the best available evidence for the existence of the Chancery as any kind of court by this time, given the paucity of the Chancery's own records).

²⁶ John Selden, *The table-talk of John Selden, esq.* (London: W. Pickering, 1847) at 64 ("Equity is a roguish thing. For law we have measure...Equity is according to him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure, we call a foot a Chancellor's Foot. What an uncertain measure would this be?").

²⁷ McGhee, *supra* note 3 ss 1–011; Baker, *supra* note 6 at 119–120.

²⁸ Baker, *supra* note 6 at 119–120.

²⁹ Maitland, *supra* note 2 at 8.

from this point onward, and not before, it is because it was only then that the reasons of prior decisions were understood to be important.³⁰

From the aforementioned point at which precedent took hold in the 16th or 17th centuries onward, equity reached a point of equilibrium in terms of its relation to the common law. Jurisdictional disputes between the two of course occurred, with titans such as Lord Coke and Lord Ellesmere vying for the supremacy of their respective jurisdictions.³¹ Ultimately, despite the fact that equity would win out in this jurisprudential and jurisdictional joust, the result was one of accommodation wherein equity ultimately settled into an auxiliary role whereby it occasionally supplanted the common law, but largely acted in such a way as to further the common law's purposes through doctrines such as relief against forfeiture and penalties or unconscionability, or remedies such as injunction and specific performance.³² Certainly, it is clear that equity never attempted to replace the common law, as it in fact took the existence of the common law as a given, and never purported to embody a self-contained system that could function on its own.³³ As such, it is perhaps apt to conclude this part by quoting Sir Nathan Wright LK to describe what equity came to do between the 16th century and its demise as an independent court, and still now does:³⁴

“Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and

³⁰ *Ibid* (“Remember this, our reports of cases in courts of law go back to Edward I’s day... On the other hand our reported cases in the Court of Chancery go back no further than 1557... This by itself is enough to show us that the Chancellors have not held themselves very strictly bound by case law, for men have not cared to collect cases”).

³¹ Carter, *supra* note 13 at 128.

³² McGhee, *supra* note 3 ss 1–012; Heydon, Leeming & Turner, *supra* note 5 ss 1-085-1–100; Martin, *supra* note 9 ss 1–014.

³³ Maitland, *supra* note 2 at 18–19.

³⁴ *Lord Dudley and Ward, an infant, by the Honourable Thomas Newport v the Lady Dowager Dudley*, (1705) Prec Ch 241 at 244 [*Dudley and Ward v. Dudley*].

protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.”

B. The status of equity today

The story of equity told above is the story of not only a branch jurisprudence or legal thought that grew and thrived in parallel with the common law system but is also quite obviously the story of a parallel court system. The latter story came to an end in the late 19th century in England, and not long thereafter in most jurisdictions in which England and English law held sway, with the passage of the *Judicature Acts* 1873 and 1875, which abolished the existing court structure and created a single “supreme court of judicature” in its place.³⁵ This new court of all conquering authority thus brought the common law and equity together under the same roof and put them both in the hands of the same adjudicators to apply as needed. The consequences of this reorganization have been much debated, with the overall question being whether the demise of the Chancery as an independent court also meant an end to equity’s existence as a separate branch of English “law”, so to speak, or whether it persisted as an independent body of jurisprudence.³⁶ Two camps have formed in response to this question, the first being those who regard the effect of the *Acts* to have been administrative only, with no effect on the underlying sources of authority, and the second being those who have arguably made too much of this administrative reorganization.³⁷ I realize that this may be unduly dismissive of the opinions of a great many, including such luminaries as the late great Peter Birks, Lord Diplock, and my own countryman, Lord Coke

³⁵ Maitland, *supra* note 2 at 15–16; Heydon, Leeming & Turner, *supra* note 5 ss 2–100, 1-115-1–195 (New South Wales is a notable exception, that appears to have maintained a quasi-separation between them until 1972.); AH Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on trusts: text, commentary and materials*, 8th ed (Toronto: Carswell, 2014) at 17 [*Oosterhoff on trusts*] (Canadian jurisdictions either received the Judicature Acts, or enacted similar reforms not long after.).

³⁶ Heydon, Leeming & Turner, *supra* note 5 ss 2-130-2–400.

³⁷ *Ibid.*

of Thorndon.³⁸ However, as I will explain below, there are two significant flaws in the arguments made by those who regard the *Judicature Act* reforms as having caused an underlying substantive fusion rather than a mere administrative union.

The first problem with the “fusion argument” is that it is out of step with the legislation itself. In all cases of which I am aware, *Judicature Act*-inspired legislation, and the acts that bear the name (or adjusted names, such as the *Law and Equity Act* in British Columbia, for instance), all provided that, in case of conflict between law and equity, equity prevails.³⁹ The legislation, thus, on its face appears to take as a given that law and equity are to remain separate and distinct despite their relocation within the same administrative structure. Furthermore, even if the implicit suggestion of separation between law and equity is not persuasive, fusion proponents do not have a compelling explanation as to how or why conflict would or could arise between law and equity if the systems were fused. Admittedly, rules would conflict on their face, but every equitable exception or avenue of relief would simply be a gloss on the relevant aspect of the common law if the two were united in substance, and any judge could simply read a common law rule down if necessary or desirable. Thus, it seems only necessary to specify which of the two bodies of jurisprudence is to prevail if the adjudicator in question must wear more than one hat and decide between them in resolving any particular issue.

³⁸ Peter Birks, “Equity in the modern law: an exercise in taxonomy” (1996) 26:1 U W Austl L Rev 1–99 [*Equity in the modern law*] (Birks schema tended to ignore historical origin in favour of substantive classification.); *United Scientific Holdings Ltd v Burnley Borough Council*, [1978] AC 904 (HL (Eng)), Lord Diplock (“If Professor Ashburner’s fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now...” at 925); *Day v Mead*, [1987] NZLR 443 (NZCA) at 452 per Cooke P (as he then was) (Mitigation may apply to a claim for breach of fiduciary duty, despite the weight of authority to the contrary, and the then [as now] accepted classification of mitigation as common law in character.); *Canson Enterprises Ltd v Boughton & Co*, [1991] SCR 534 (The Supreme Court of Canada too has from time suggested a blending of the two.).

³⁹ Coombs, Maurice, “Relationship between equity and the common law” (18 February 2020), online: *Halsbury’s Laws of Canada* <<https://advance.lexis.com/document/?pdmfid=1505209&crd=11121d73-6a03-4794-a642-e15750fdc882&pdcontentcomponentid=urn%3AcontentItem%3A5F4N-0691-JF75-MOS9-00000-00&pdcontentcomponentid=361173&pdteaserkey=sr0&pdicsfeatureid=1517129&pditab=allpods&ecomp=s7g3k&earg=sr0&prid=9c568fee-6c63-4450-99e8-8a62210fbbdf>>; Heydon, Leeming & Turner, *supra* note 5 ss 2–070; McGhee, *supra* note 3 ss 1–017.

The second problem with the fusion argument is that its proponents can provide no clear explanation as to how equitable title and the trust are supposed to operate within a fused framework of property law. The trust is, of course, only one aspect of equity's jurisdiction, but it is undoubtedly its most prominent contribution in the field of private law, and quite frankly too important to be brushed aside.⁴⁰ Thus, some convincing account of the trust's existence within a fused system must be provided if the fusion argument is to be taken seriously, even if the legislation itself is not seen as fatal to the idea at the outset. To date though, such an explanation has appeared to be a bridge too far. This is not surprising, given that the underlying logic of the trust has been moulded over the centuries by jurists in different courts who were able to give different answers to the same fundamental questions (e.g., who owns a particular piece of property?) without any obvious incoherence in their own thinking. To propose a theory now that somehow attributes ownership to two or more different persons for different purposes, while simultaneously believing each to be the true owner, appears confusing in the extreme.⁴¹ This is perhaps why it has not been done in a convincing way, and perhaps why it cannot be done. If that is the case though, then any view of law and equity as having been fused is simply untenable.

What we can say about equity today, having now dismissed the idea that it has been substantively fused with the common law as a consequence of the *Judicature Act* reforms, is that it persists. No doubt the administrative union of the court structure has had an effect on the continuing vitality of equity jurisprudence, particularly in Canada, but in theory it remains both independent and of coordinate stature with the common law itself,⁴² and in my view, there is little question that this is how it should be. One could retort, of course, that this

⁴⁰ Frederic William Maitland, *Maitland, selected essays*, Harold D Hazeltine, Gaillard Thomas Lapsley & Percy Henry Winfield, eds. (Cambridge: Cambridge University Press, 1936) at 129 ("If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea"); Oosterhoff, Chambers & McInnes, *supra* note 35 at 54–60 (A number of civilian jurisdictions have adopted the idea by way of statutory reform, making it arguably Anglophone law's most prolific legal export.).

⁴¹ Maitland, *supra* note 2 at 8–9 (A parallel is sometimes drawn between the division of equitable and legal title and the "double ownership" of Roman law, but Maitland describes the similarity as superficial. What's more, it would be an extraordinary outcome to conclude that the Judicature Acts introduced such an innovation without ever directly speaking to it.).

⁴² Heydon, Leeming & Turner, *supra* note 5 ss 2-325-2–400; Watt, *supra* note 8 at 79–82.

is more than anything a matter of subjective preference rather than a reflection of some underlying rational order in the world. To that though, I would suggest that there are in fact good reasons to understand law and equity as fundamentally dissimilar, and the distinction between them as one with a meaningful difference. To explain why this is the case, I will explain the Aristotelian idea of equity below before then explaining how equity in the English tradition fulfills a need in our legal system that Aristotle identified as common to every legal system, and how this need requires a distinction between law and equity to be maintained.

III. Equity according to Aristotle

A. Under or over inclusion – the impetus for equity

Rules are a fact of everyday life and appear almost *sine qua non* of anything we would consider a legal system. Despite the disaffection frequently directed at them, it is clear that rules do have benefits. The first is certainty, because to the extent that a rule contains objective criteria, it will provide direction as to what should or should not happen, or what is and is not allowed in the circumstances governed by the rule.⁴³ The second is largely a consequence of the first, and it is efficiency, for parties governed by certain rules will have certainty in arranging their affairs, and will thus be able to order their lives and their relations with others more expeditiously and with a lesser risk of disagreement after the fact.⁴⁴ It must be stressed, though, that these benefits inhere in rules only in so far as said rules provide guidance as to what will or should happen under the rule *ahead of time*.⁴⁵ Thus, as the predictive value of the rule on its face erodes, so too do the aforementioned benefits of

⁴³ Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Oxford University Press, 1993) at 137–138 [*Playing by the Rules*].

⁴⁴ *Ibid* at 145–146.

⁴⁵ Colin S Diver, “The Optimal Precision of Administrative Rules” (1983) 93:1 Yale LJ 65–110 at 68-72 (A rule that is only made clear *ex post* can provide no guidance in advance by definition, and thus engender no certainty, nor any efficiency.).

having a rule at all, and where the predictive value of the rule is undone, so too will these potential benefits be utterly undone. Assuming for the moment that this is correct, one might ask why the observation matters. After all, if certainty is good, why then would anyone ever want to undermine the certainty and predictive power of a given rule or produce rules that are uncertain? The idea sounds almost absurd. However, as I will explain below, there are reasons, the most important of which for present purposes being factors or facts which the maker of a rule did not expect or did not know.

In a perfect world, it would be possible to account for all the possible problems and permutations of fact that may confront parties grappling with the application or applicability of a particular rule. Aristotle in the *Nicomachean Ethics*, and our own experience, tell us, however, that for any rule there will inevitably be a multitude of issues not dreamt of by its maker, and this is at least one reason why certain rules, and the quality of certainty, can draw criticism because it is evident that almost any rule that is certain (within the limits of our ability to draft and understand them) will almost inevitably render some outcomes that we consider to be wrong.⁴⁶ Aristotle explains this issue in general terms as one of “over or under inclusion” in the sense that because the drafter of the rule could not countenance or practically account for every possibility in fashioning the rule, there will be circumstances where the rule on its face will apply when it should not, and will not apply when it should.⁴⁷ And for this reason, we can conclude that both those who govern and the governed themselves will at times want the certainty of rules to be undermined by way of easing their stricture, or perhaps more accurately, will want the stricture of rules to be eased even though the certainty of the rule will be undermined. Certainly, this was Aristotle’s conclusion, and despite the time that has elapsed since his day and the present, it appears no less true now

⁴⁶ Roger A Shiner, “Aristotle’s Theory of Equity” (1993) 27:4 Loy L A L Rev 1245–1264 at 1255–1256.

⁴⁷ Jesús Vega, “Legal Rules and Epieikeia in Aristotle: Post-positivism Rediscovered” in Liesbeth Huppens-Cluysenaer & Nuno MMS Coelho, eds, *Aristotle and The Philosophy of Law: Theory, Practice and Justice* Ius Gentium: Comparative Perspectives on Law and Justice (Dordrecht: Springer Netherlands, 2013) 171 at 188 [*Legal Rules and Epieikeia in Aristotle*]. Shiner, *supra* note 46 at 1255 (What is sometimes understood as a reference to gaps in the law is arguably better understood referring to the law going too far or not far enough in its application.).

than it was then, or than it was when the same issue confronted the early Chancellors of post-conquest England.

The problem of under or over-inclusivity highlighted above is one that appears inevitable in any rule-based legal order.⁴⁸ Clearly, we can or should see it present today in the Anglo-Canadian legal system and, if Aristotle is to be believed, it can have been no less of a concern even in a society as removed from ours as ancient Athens. If that is the case, though, it raises the question as to how societies or legal systems have responded, or should respond, since such a notorious problem can hardly have gone without a response. The answer to the former question is “varyingly”, but the answer to the latter is arguably in the manner that Aristotle prescribed himself which, tellingly, can be used to describe some of the responses actually provided by various legal systems, including that provided by the Anglo-Canadian legal system. That Aristotle’s prescription, or some version of it, ought to be our response to the above-explained intractable problem is not necessarily as evident as the problem itself. As such, I will elaborate on Aristotle’s solution below before then using an example to explain how and why it may be the most desirable option despite the existence of other more obvious alternatives.

To describe Aristotle’s prescription, or his vision, of equity as a response to the misleading universality of written rules and hardened custom (not unlike the common law), and their consequent under- or over-inclusion, begins best by way of reference to the source material itself. There is, of course, a considerable amount of material to grapple with, but two key passages from Aristotle’s work highlight the essence of his idea. The first comes from *Nicomachean Ethics* and concerns the role of the judge or adjudicator presented with such a problem:⁴⁹

“... it is then right, where the lawgiver’s pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would

⁴⁸ Schauer, *supra* note 43 at 31–35. HLA Hart, *The concept of law*, Clarendon law series (Oxford: Clarendon Press, 1961) at 123–125.

⁴⁹ Aristotle, *Aristotle. 19, The Nicomachean ethics*, revised ed, translated by H. Rackham, Loeb classical library 73 (Cambridge Mass: Harvard University Press, 2003) at V.10.1137b.

himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question.”

The second of the two passages referred to above comes from *Rhetoric* and concerns the role of equity specifically:⁵⁰

“to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator; not to the action itself, but to the moral purpose; not to the part, but to the whole.”

With the foregoing in mind, it would seem that Aristotle’s vision of equity as a response to the misleading universality of written rules and hardened custom (not unlike the common law), and their consequent under- or over-inclusion, is to resort to the underlying rationale for enacting the rule in the first place.⁵¹ It must be stressed, though, that this is not an invitation to the adjudicator to substitute their view of what is just for that of the lawgiver, or dispense with rules in order to avoid their application merely because they are harsh.⁵² Indeed, that level of autonomy runs counter to Aristotle’s foundational assumptions about the relationship between adjudicator and legislator, which took as a given that “...it is proper that laws, properly enacted, should themselves define the issue of all cases as far as possible, and *leave as little as possible to the discretion of the judges.*”⁵³ Thus, one can say overall that the relationship of Aristotelian equity to law, or rules, is one of rectification for the better realization of the rule itself, and not replacement of either the particular rule in a particular case with the judgment of the adjudicator, or rules in general.

Now that both the problem and Aristotle’s response have been framed, we can move on to consider an example as mentioned above. The purpose of doing so is to explain what

⁵⁰ Aristotle, *Aristotle: with an English translation: the “Art” of rhetoric*, translated by John Henry Freese, Loeb classical library (London: New York: W Heinemann; GP Putnam, 1926) at I.13.1374b [*Aristotle*].

⁵¹ Shiner, *supra* note 46 at 1252.

⁵² Miklós Könczöl, “Legality and Equity in the Rhetoric: The Smooth Transition” in Liesbeth Huppens-Cluysenaer & Nuno MMS Coelho, eds, *Aristotle and The Philosophy of Law: Theory, Practice and Justice Ius Gentium: Comparative Perspectives on Law and Justice* (Dordrecht: Springer Netherlands, 2013) 163 at 168 [*Legality and Equity in the Rhetoric*].

⁵³ Aristotle, *supra* note 50 at I.1.1354a.

Aristotle's approach has to commend itself as compared with other potential options, which is essential to the point I am trying make — i.e., that Anglophone equity is more than an accident of history, and is instead an essential aspect of Anglophone legal order. That point would be all the weaker, though, if it were to ultimately rest only on the intellectual pedigree of Aristotelian equity without any thought to the application of these ideas to the world today. As such, what the following discussion will demonstrate is that equitable intervention is still arguably the best of the options available to address law's under- or over-inclusivity, and is not merely an interesting anachronism.

B. Practicalities of the problem

Perhaps the most famous example of a rule that may at times run afoul of over-inclusion comes from the pen of H.L.A. Hart. Hart came up with the example for the purposes of illustrating the potential problems that arise when we are forced to determine whether certain specific concrete examples fall within the “penumbra” of meaning associated with a general term used in a rule, which is a problem in its own right, but also resembles the concern of under- or over-inclusivity.⁵⁴ Both problems simply reflect the practical limitations of language and our corresponding inability to precisely prescribe solutions to all problems ahead of time with written language as our only tool. For present purposes, I will adopt a variation of the example inspired by Richard Fallon that adds a further pressing complication.⁵⁵ In order to proceed to the example without further ado, one need only imagine a city park with a simple sign at its entrance that reads: NO VEHICLES IN THE PARK – VIOLATORS WILL BE FINED. With that image in mind, imagine further that there are people in the park, and that one of them has collapsed. The stricken person is clearly in need of medical assistance and an ambulance has been summoned, but upon arriving at the entrance to the park, the driver of the ambulance sees the sign and pauses.

⁵⁴ HLA Hart, “Positivism and the Separation of Law and Morals” (1957) 71:4 Harvard Law Review 593–629 at 607.

⁵⁵ Richard H Jr Fallon, “The Meaning of Legal Meaning and Its Implications for Theories of Legal Interpretation” (2015) 82:3 U Chi L Rev 1235–1308 at 1260.

Imagine then that he has somehow broken the fourth wall and turns to you before asking: can I enter? As we are wont to do in this profession, you probably respond: it depends.

If you did respond that it depends, you are correct in your intuition that determining the application of even a simple rule like the one above is not always a straightforward matter. One can of course default to a strictly literal interpretation of the sign/rule and conclude that if vehicles are not allowed, and “vehicle” is a general term for “anything by means of which people or goods may be conveyed, carried, or transported”, as per the OED, then this includes an ambulance, and it should accordingly not be allowed.⁵⁶ This would, of course, be a very unacceptable outcome if it led to a fine for the ambulance driver, or stopped them from entering the park entirely, but, it is hard to deny on a simple reading of the sign, even though we would intuitively want to exclude “ambulance” from the definition of vehicle. It is also, I will admit, perhaps somewhat artificial as far as problems go. One can readily imagine that the driver would ignore the sign and that anyone who noticed would turn a blind eye, assuming that they even thought to question the propriety of an ambulance attending to someone in need of assistance. Not all circumstances are quite so simple, however, and not every problem will come down to over- or under-inclusion on the basis of a single word that can be read up or down to achieve the desired result. This simple example does demonstrate why the relative certainty of clear rules can at times become a problem, though, and why we may at times want to avoid the strictures of clear rules.

Having established the nature of the problem, one can now turn to consider potential solutions, or how exactly we might ease the stricture of rules to avoid seemingly unfair or absurd results. The first option in a simple situation such as that above, is to simply ease the absolute quality of the rule and to simply carve out circumstances that we do not want to fall within it. For instance, the rule could instead read: **ONLY EMERGENCY SERVICE VEHICLES ALLOWED IN THE PARK – ALL OTHERS WILL BE FINED**. That would spare ambulances, firetrucks, and the police, and would have spared our driver above as well. What if the vehicles in question are not responding to an emergency, though? Can the police

⁵⁶ JA Simpson & ESC Weiner, *Oxford English Dictionary*, (Oxford: Oxford University Press, 2000) sub verbo “vehicle”.

simply drive through the park at their leisure, even though this would understandably disturb members of the public? Perhaps not, or rather perhaps it should not be allowed. So, perhaps the rule should instead be: ONLY EMERGENCY SERVICE VEHICLES ALLOWED IN THE PARK AND ONLY DURING AN EMERGENCY – ALL OTHERS WILL BE FINED. What if a firetruck is needed to get a cat out of a tree though? Is a stuck cat an emergency? I would be inclined to say no, but the answer is not obvious. What is hopefully obvious is that attempting to fashion a rule that covers every potential situation runs into almost insurmountable difficulty almost right away. What's more, the more carve-outs and exceptions and exceptions to exceptions that you incorporate, the less effective the rule becomes in terms of inculcating the kind of certainty that is the advantage of rules in the first place. Length alone would make most such rules unwieldy. Thus, this option appears to be largely a dead end in all but the simplest of cases.

The second option for easing the absolute quality of a rule, and thus its stricture, is to incorporate into it some form of discretion. There appear to be two ways to do this, each with its own strengths and weaknesses. As such, I will discuss each in turn, beginning with the first option, which is to grant discretion implicitly. I should note at the outset that almost any rule inevitably involves some discretion in its application in the sense that if a rule must be applied by some authorized actor or adjudicator, then even when dealing with an apparently absolute rule, said actor will have to decide on which side of the line any given situation falls in cases of doubt.⁵⁷ However, this amounts to a grant of discretion in the weakest possible sense, and may do little to address the problem because in a situation like the one explained above, the decision-maker may feel compelled to conclude that an ambulance is a vehicle on a simple reading of the word, even though it may not seem right to do so. As such, the author of a rule may wish to widen the ambit of the adjudicators' or actors' power to encompass answering more than questions of bare meaning and the extent of a given term's penumbra, and to do this they can simply incorporate subjective criteria to

⁵⁷ Könczöl, *supra* note 52 at 164 ("...in other matters [...] the judge should have authority to decide as little as possible; but it is necessary to leave to the judges the question of whether something has happened or has not happened, will or will not be, is or is not the case; for the lawmaker cannot foresee these things (Rhet. 1.1.1354b 11–16, trans. Kennedy)").

complement other objective criteria included in the rule. For instance, to continue with the example of the park, one could reframe the rule to read: NO VEHICLES IN THE PARK UNLESS REASONABLY NECESSARY – ALL OTHERS WILL BE FINED. This would permit the responsible authority leeway to permit vehicles of the firetruck variety into the park for cat-saving, since the vehicle is necessary for the purposes of saving the feckless feline. This option has limits, though, because even though the relatively more open texture of the subjective criteria “reasonable” and “necessary” provide guidance while permitting relatively greater freedom, they nonetheless represent a constraint that will at times potentially cause under- or over-inclusion to occur. For instance, imagine if an art student or students were to use a vehicle to transport a piece of art connected to an important social issue into the park in time for some important occasion as part of some project. The artwork, and thus the use of the vehicle, may not be reasonably necessary for any purpose connected with the park, but we might nonetheless be opposed to the fine, and so too might the parks board. With its limited discretion, the parks board may feel that its hands are tied, and we would thus still be left with our earlier problem, just with a different scope.

The second of the two options for incorporating discretion into a rule is to incorporate discretion explicitly by way of specifically delegating the power to decide to the relevant actor. For example, to do so with respect to the vehicle issue in our ongoing example, the sign in the park could read: VEHICLES ALLOWED ONLY AT THE DISCRETION OF THE PARKS BOARD – ALL OTHERS WILL BE FINED. This could certainly resolve the issue involving the ambulance, the police cruising for no reason, the firetruck out to rescue the cat up the tree, and even the errant artist. However, this solution comes with its own costs because it undermines our ability to know ahead of time what is and is not allowed, and accordingly how to plan for the future.⁵⁸ Imagine, for instance, if the rule above had been in place for some time and that students at a nearby art institute were usually permitted to install their art in a certain part of the park, or to use the space to make art for their projects, and to use vehicles as necessary for those ends. Imagine further that a certain student has

⁵⁸ John Braithwaite, “Rules and Principles: A Theory of Legal Certainty” (2002) 27 *Austl J Leg Phil* 47–82 at 50 [*Rules and Principles*].

incorporated a statue in the park into a piece that is built around the statue, and that the nature of the piece has prompted heated public debate. If the parks board is among those that are incensed by the piece, one could readily imagine that they might choose to fine the student in question, even while they choose to implicitly permit other pieces that better comport with their personal politics. Were this to occur, we might question the wisdom of leaving such matters to the park board's whim rather than coming up with a specific rule, especially if discretion is to be used as a substitute for particular rules rather than a supplement to them. This is not to say, of course, that all discretion is bad, but that it has its own drawbacks as compared with rules and cannot replace them or, at least — one would think — should not in a society that decrees that it is to be governed by the rule of law and not of men.

At this point, one might wonder what exactly the foregoing has to tell us about equity, or its necessity. I will of course get to this, but first I would like to restate what the foregoing has to tell us in sum, which is that rules, implicit discretion, and explicit discretion all have their advantages, but also their drawbacks. Further, I think it is clear that discretion and rules exist in a state of tension with one another. Neither is sufficient on its own, at least that is in the hands of everyday actors and decision-makers. And finally, unjust outcomes can and likely will arise under any system, and that in some instances, this may simply have to be tolerated as an inevitable consequence of having any system of governance at all.⁵⁹ That there must be some limit to our forgiveness of these flaws is perhaps evident, and that there will be some cases in which the apparent injustice of the relevant outcome, or its contradiction of the purposes underpinning the law itself, will contravene our shared values so far as to make us unwilling to permit it regardless of the justification offered by the law involved. Where this occurs, there will clearly be a need for some release from the stricture of the law, or perhaps the effect of the power conferred on a decision-maker thereby, and as I will explain in the following section, it is here that equity enters the frame.

⁵⁹ Baker, *supra* note 6 at 110–112 (Certainly the common law has, and in many ways still does, tolerate hard consequences as the cost of certainty and convenience in the law.).

C. Residual power a necessary response

If the foregoing explanation of the pitfalls of rules, discretion, and the use of exceptions is correct, then we can see that even a simple scenario such as Hart's ambulance in the park example raises some rather thorny problems. These problems are specifically either the potential under- or over-inclusivity of the rule involved, or the kind of uncertainty that the rule of law is supposed to resolve. Given that we live in a society committed to the rule of law, it appears that under- or over-inclusivity is the more persistent and pressing problem, and that we need some way to prevent mischief from being missed by under-inclusive rules, or legitimate activity from being mislabeled mischief by over-inclusive ones, or the inverse where the deserving and undeserving may be inappropriately denied or granted the benefit of a rule, respectively. The solution to this problem, according to Aristotle and the many modern and ancient legal systems that recognize the nature of the problem, is the recognition of some residual discretion for a decision-maker to depart from the strict requirements of a rule where its ordinary application would appear inconsistent with its underlying purpose or seem otherwise unjust.⁶⁰ This is the theory of equity discussed above, and readers will likely appreciate a more than superficial similarity as between Aristotle's idea and equity in the Anglo-Canadian tradition described above. It is important to bear in mind, though, that neither Aristotle nor Anglophone equity propose unlimited discretion as a panacea to all of the law's problems, nor purport to cure all of the law's ills as I will explain below.

Before moving on to explain the correspondence between Anglophone and Aristotelian equity, it bears repeating the following point made in the prior section: some

⁶⁰ René Cassin, Ralph A Newman & Hastings College of the Law, eds, *Equity in the world's legal systems: a comparative study, dedicated to René Cassin*, Studies in jurisprudence 1 (Brussels: Établissements Émile Bruylant, 1973) [*Equity in the world's legal systems*] (Contributors to the comparative study identify equitable elements in systems including Scots law, the law of ancient Israel, and the civilian traditions of the French, Germans, Swiss, Italians, Belgians, Dutch, and Spanish, as well as the more unusual Soviet and Chinese legal systems.); Sir Henry Sumner Maine, *Ancient Law - Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London: John Murray, 1920) at 48-79 [*Ancient Law*]; McGhee, *supra* note 3 ss 1-002; WW Buckland & Arnold Duncan McNair, *Roman law & common law: a comparison in outline*, 2nd ed (Cambridge: Cambridge University Press, 1952) at 1-6 [*Roman law & common law*] (In Roman law the Praetor performed a function that was equitable in nature.).

degree of imperfection in outcomes is simply the cost of having not only a rule-based order such as ours, but in reality, any legal system. Thus, from the outset, one has to acknowledge that only so much can be done to ameliorate the hardships of our system before we simply create a new set of problems. As such, we must accept that certain outcomes, while unsatisfactory, are not unjust, or at least not unacceptable. It must also be apparent that harsh rules must beget harsh outcomes, and that harshness alone is not a reason to refrain from applying a rule that is harsh by design. With the foregoing in mind, one can now explain how it is that equity in the Anglo-Canadian tradition fulfills the need for equity in the legal system, in the Aristotelian sense, without causing greater hardship than it cures.

The long and short of Anglophone equity's approach to the under- or over-inclusivity problem of the rule-based order that is the common law, and even statute, is that it acts as a pressure-relief valve to ease the tension that builds up in the legal system when outcomes deemed lawful also seem awful. It is undeniably selective, though, and avoids sliding into the pitfalls of unbounded discretion by acting only when it would seem contrary to conscience to allow a particular outcome.⁶¹ Critically, this occurs only when the conscience of a party to a dispute is tainted, which in turn taints their reliance on strict law. As such, when dealing with misappropriation of trust property, for instance, equity will enjoin the conscience of a trustee, or a third-party volunteer, or a party in knowing receipt, but it will not act against a third-party bona fide purchaser for value.⁶² Likewise, equity will not deny a party the right to plead the statute of frauds merely because it is satisfied that an oral agreement was made. Part performance of the contract such that would make it inequitable for the opposite party to withdraw or plead the statute must be shown.⁶³ Nor will equity prevent reliance on a limitation period, merely because it is cynical. Although, in the United

⁶¹ *Earl of Oxford's Case*, [1615] 1 Ch Rep 5, Lord Ellesmere ("The Cause why there is Chancery is, for Men's Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances... The Office of the Chancellor is to correct Men's Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called summum jus" at 6); McGhee, *supra* note 3 ss 1–010.

⁶² Oosterhoff, Chambers & McInnes, *supra* note 35 at 1243–1244.

⁶³ Heydon, Leeming & Turner, *supra* note 5 ss 20–225; *Maddison v Alderson*, [1883] 8 App Cas 467 at 475–476.

States, equity is known to “toll” statutes of limitations where the plaintiff has been prevented from acting in time because of the defendant’s control over them.⁶⁴ Whatever the particular context, Anglophone equity appears to act in circumstances when some general notion of equity in the legal system, in the Aristotelian sense, would appear to be necessary, but within bounds that prevent it from undermining the legal order. As such, to borrow further from Aristotle, if one is what one does, then it would appear that equity — as it has developed in Anglo-Canadian law — is the Anglophone incarnation of the general Aristotelian idea of equity.

Contrary to the conclusion above, naysayers may note that the correspondence or overlap between Anglophone equity and the Aristotelian ideal is not exact. There is, for instance, no obvious equitable answer to the ambulance in the park problem with which we began our analysis of the pitfalls of rule-based legal ordering — although, one could point out much the same about *Riggs v. Palmer*, the famous 19th century New York case of the unworthy heir who murdered his grandfather to inherit his estate.⁶⁵ In both cases, there is a rule that appears on its face to apply, and no obvious equity to prevent it. In *Riggs*, though, as we know, the statute and other rules governing inheritance were not allowed to apply to pass the estate to the unworthy grandson.⁶⁶ Likewise, I would suggest that a court seriously pressed on the issue would decline to fine an ambulance driver, even if necessity were not an available defence. In both cases, I think it is clear that equity of the Anglophone variety could play the required role if allowed, and if it is presently thought that it cannot, I would argue that it is our attitude to this aspect of the court’s authority that needs attention. It is evident, I think, from the universality of the idea that some notion of equity is indispensable, and yet in Canada especially, equity jurisprudence and indeed its scholarship have been allowed to grow moribund, even as the rules and regulations of the modern administrative

⁶⁴ Robert W Thompson, Scott T Jeffers & Codie L Chisholm, “The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions” (2012) 49:3 *Alta L Rev* 603–634 [*The Limits of Derivative Actions*].

⁶⁵ *Riggs v Palmer*, [1889] 115 NY 506.

⁶⁶ Rodger Beehler, “Legal positivism, social rules, and *Riggs v. Palmer*” (1990) 9:3 *Law and Philosophy* 285–293.

state have proliferated beyond imagining. As such, if there is a failure in our system to address problems long-understood, its root is our inadvertence to the fact that equity is not optional. However, there is no time like the present for reform, and likewise no impediment to judicial rediscovery of this heritage and its evolution to meet present and future needs.

IV. Conclusion

From the foregoing, one may surmise that I am generally minded to think that identity follows from function. This is, after all, the underlying rationale behind the argument that equity in our tradition must be our equivalent of the general philosophical notion, if it acts to achieve the same ends. One could ascribe this thinking to Aristotle's theory of essences and ends, to which I also refer above. One can also attribute this idea to the conclusion I will espouse and explain in depth in the remaining chapters, which is that Mitigation is equitable because it acts as equity would dictate it ought to. I understand, of course, that many will wonder "what's in a name?" and why it ought to matter. The answer from my perspective is that the function of the doctrine is impeded by a lack of understanding and the general dormancy of equitable doctrine beyond a few key areas. As with restitution, though, which experienced a great revival following the seminal work of Gareth Jones and Lord Goff in *The Law of Restitution* in 1966, I believe that equity, too, can return to rude health, and that Mitigation in particular can improve markedly in its use and utility if its underlying logic is finally made patent. Without further ado, these ideas will be lay bare in the chapters that follow.

CHAPTER III

MISUNDERSTANDINGS ABOUT MITIGATION

I. Introduction

In this chapter, we come finally to the subject at the heart of my enquiry, which I hope to explain in the manner foreshadowed in my introduction. Before I can proceed onward to my explanation of what mitigation is, though, it seems prudent that I first explain what mitigation is not. I note that this task may appear relatively straightforward at first blush, but to overcome more than a century of case law and comment on the subject is, in my view, no small challenge. Further, it seems inevitable that I must tackle this obstacle at some point given that there might otherwise appear to be no point to my work if there is no obvious reason to depart from the law of Mitigation as it stands now. As such, the focus of this chapter will be to demonstrate how present notions or descriptions of Mitigation are in fact inapt and fail to adequately capture or convey what it is the doctrine means.

A. Mitigation is not confined to contract

Given the relatively bright line that is or can be drawn between contract and the other known sources of private obligations on the basis of the voluntary nature of contractual obligations, as well as the strict nature of liability, it is easy to assume that Mitigation in contract would be unique to it. The paradigmatic measure of contractual damages and the contract test of remoteness, for instance, bear out that assumption, as they can and often are contrasted with equivalent but differing concepts elsewhere in

private law, most notably tort.¹ My vision at the outset of my research was, however, to demonstrate that while Mitigation as discussed today in textbooks may be unique to contract in application, the underlying concept itself (upon which I will expound in the following chapter) is not. I had expected that doing this would require nuanced and substantial work in abstraction in order to convince the reader that the relation between seemingly distinct doctrines is more fact than fiction. Surprisingly, however, it has proven altogether clear from the cases themselves that there is no meaningful distinction as between cases on Mitigation, whether they be in contract or elsewhere, and that the “rule” is the same in contract as in tort, and arguably any other context in private law where the question may arise.

Readers will no doubt be keen to see confirmation of the above conclusion. This poses little challenge, because courts in all of the jurisdictions canvassed routinely draw from tort cases on Mitigation when deciding contract cases.² Likewise, courts in all of these jurisdictions routinely cite Mitigation decisions in contract when faced with tort cases.³ What is more, I have yet to come across a case in which a distinction has been

¹ Harvey McGregor, Martin Spencer & Julian Picton, *McGregor on damages*, 19th ed (London: Sweet & Maxwell, 2014) at 22–003 (the measure of damage in contract may be contrasted with the rule in tort that the plaintiff should be restored to the position status quo ante); SM Waddams, *The law of damages*, 5th ed (Toronto: Canada Law Book, 2012) at para 14.420 (Remoteness in contract and tort may serve similar functions but can be contrasted); *Canadian Western Natural Gas Co v Pathfinder Surveys Ltd*, [1980] AJ No 648 (ABCA) at para 92 (ABCA), (The different tests for remoteness in contract and tort stated side by side).

² *Evans v Teamsters Local Union No 31*, [2008] 1 SCR 661 at para 97 [*Evans*] (Cites *Darbishire v Warran*, [1963] 3 All ER 310 (CA)); *Redpath Industries Ltd v Cisco (The)*, [1994] 2 FC 279 (FCA) [*Redpath*] (FCA)(cites *Hussey v Eels*, [1990] 2 QB 227 (CA)); *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH*, [1993] 2 Lloyd’s Rep 1 at 10 (CA), Bingham LJ (as he then was) (Cites *Darbishire v Warran*, [1963] 3 All ER 310 (CA)); *Canadian Western Natural Gas Co. v Pathfinder Surveys Ltd.*, *supra* note 1 at paras 13–14 (ABCA) (Cites *Esso Petroleum Co v Mardon*, [1976] QB 801 (CA)); *Apatu v Peach Prescott & Jamieson*, [1985] 1 NZLR 50 (NZHC), (The case involves a claim for the breach of an agency contract. The court cites *Darbishire* in its discussion of mitigation.); *Chand v Commonwealth Bank of Australia*, [2015] NSWCA 181 (In a claim for breach of contract, the court considers the House of Lords’ decision in *Smith New Court Securities Ltd v Citibank NA*, [1997] AC 254 (HL (Eng), which involved a claim for misrepresentation.).

³ *Janiak v Ippolito*, [1985] 1 SCR 146 at para 35 [*Janiak*] (Discusses and applies the Court’s earlier decision in *Asamera Oil Corp v Sea Oil and General Corp*, [1979] 1 SCR 633); *Hardie Finance Corporation Pty Ltd v Ahern (No3)*, [2010] WASC 403 at para 766 (Cites the High Court of Australia decision in *Burns v MAN Automotive [Aust] Pty Ltd*, (1986) 161 CLR 653 (HCA)); *Owners of Steamship Enterprises of Panama Inc v Owners of SS Ousel (The Liverpool) (No2)*, [1963] P 64 (CA) at 77–78 [*The Liverpool (No.2)*] (CA), Lord Merriman P (Cites *British Westinghouse Co v London Underground Electric Railway*, [1912] AC 673 (HL (Eng)) and opines that Viscount Haldanes’ classic statement on mitigation is equally applicable in contract and in tort.).

drawn between cases in contract or tort as far as Mitigation is concerned. They are simply Mitigation cases, and some courts have gone as far as stating that the rule of Mitigation in contract is one and the same⁴, although Mitigation arguably does not end there. There is, for instance, a line of decisions in the UK beginning in Northern Ireland that have applied Mitigation to cases of injured workmen decided under statute.⁵ Of course, these cases could be treated as having been “decided on their own facts” in light of the particular statutory context. However, given that there was no mention of Mitigation in the statute, and that later Mitigation decisions in tort have treated these as

⁴ *Panarctic Oils Ltd v Menasco Manufacturing Company*, [1983] [AJ No 889 (ABCA)] (“Though *Red Deer College v Michaels* was a case in contract, the rules relating to mitigation of damage are the same in contract and in tort: *The Liverpool [No. 2]*, [1963] P. 64, at 77-78; McGregor on Damages [14th Ed.], para. 230.” at para 55); *Tyco Australia Pty Ltd v Optus Networks Pty Ltd & Ors*, [2004] NSWCA 333 (The appeal herein was concerned only with the question as to whether credit had to be given for certain alleged collateral benefits, and cases in both contract and tort are considered without a distinction being made between them on that basis. What is more, is that the Court of Appeal here does not mention anywhere whether the plaintiff’s cause of action is in contract or in tort. The discussion simply proceeds as though the applicable principles are the same in either case.); *The Liverpool (No.2)*, *supra* note 3, Lord Merriman P. (“It has been common ground in this case that the classic statement about mitigation of loss by Viscount Haldane L.C. in his speech in the *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric* although made in an action arising out of a breach of contract, applies equally, *mutatis mutandis*, to tort.” at 77-78).

⁵ *Steele v Robert George and Co*, [1942] AC 497 (HL NI), Viscount Simon LC (“My Lords, the Workmen’s Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end or be reduced if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity ‘results from the injury’ within the meaning of s. 9 of the Act of 1925, after the time when the rejected remedy might be confidently expected to bring about a cure. As Fletcher Moulton L.J. put it in *Warncken v. R. Moreland & Son, Ltd.*, ‘a workman must behave reasonably, and if the incapacity, or the continuance of the incapacity after a certain time, is due to the fact that he has not behaved reasonably, then the continuing incapacity is not a consequence of the accident, but a consequence of his own unreasonableness.’ This view of the matter has been recognized by this House in *Fife Coal Co., Ltd. v. Cant*, and in *Fyfe v. Fife Coal Co., Ltd.*, as well as in many cases in the Court of Appeal in England and in the Court of Session in Scotland. Andrews C.J., in dealing with the present case in the Court of Appeal in Northern Ireland, admirably stated some of the considerations involved as follows: ‘If he [the workman] refuses to submit to an operation from defect of moral courage or because he is content to put up with the disablement and is willing to live on a pittance under the Workmen’s Compensation Act he is not entitled to compensation. To borrow the language of the Lord Justice Clerk’ (Lord Macdonald in *Donnelly v. Baird & Co., Ltd.*), “the workman should do what a man of ordinary manly character would undergo for his own good, 500in a case when no question of compensation being due by another existed.”” at 499-500).

authority irrespective of context,⁶ it would appear that Mitigation is applicable to the field of private law generally and that it is not specifically a contract doctrine.

II. Mitigation is not only concerned with loss

A. Existence of an impression

There is a general sense in much of the present literature on Mitigation that the doctrine is principally preoccupied with the question as to “what loss might have been avoided”. In some cases, this sentiment extends so far as to have caused at least one text-writer to omit the word “Mitigation” from their contents pages altogether, and to speak only of “avoidable losses”.⁷ Given the way in which the doctrine has classically been described, I would concede that this tendency is understandable to an extent. Nonetheless, I am of the view that the notion or idea that Mitigation is a doctrine principally concerned with “avoidance” of loss ought to be dispelled, as it is ultimately misleading.

B. Oversimplification of loss

My first reservation with respect to the above view of Mitigation is that it inadequately reflects the scope of what is meant by “loss” in contract. When expressed in terms of “avoidance”, the sense that I argue one gets is that “loss” is equivalent to a diminution in the plaintiff’s dominium (i.e., an actual worsening in the plaintiff’s affairs or an “actual loss”). This, however, only reflects a part of what “loss” means in contract, and perhaps elsewhere in Anglo-Canadian private law as well. It also tends to ignore two

⁶ *Morgan v T Wallis Ltd*, [1974] 1 Lloyd’s Rep 165 (QB), Browne J (“I was referred to a number of authorities, the first of which, in order of date, is *Steele v. Robert George & Co. [1937] Ltd.*, [1942] A.C. 497. I think that the principle decided in this case is accurately stated ... The Lord Chancellor, Lord Simon, stated the principle at p. 499. This of course, was a case under the Workmen’s Compensation Acts, but in my judgment the same principle is applicable to a common law claim as in this case.” At 167-168).

⁷ SM Waddams, *The law of contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at C-7.

other important distinctions that change the character of a loss and, likewise, as will become clear later in the chapter, the way in which Mitigation responds to such losses. To make that later exposition and the remainder of this chapter and the next explicable, though, I will first explain the nature of these often under-appreciated differences before explaining why they matter for the purposes of Mitigation.

1. To lose versus to lose out

Leaving aside sport and contests of other kinds, the lay meaning typically ascribed to the term “loss” is the idea of having “lost something”. To unpack the definition somewhat further, it is the idea that one no longer has a thing that one otherwise would have wanted to have — i.e., that one is worse off for no longer having the thing in question. For instance, one might speak of having “lost a limb”, but almost no one would say that one had “lost a tumour” if one had such a thing removed. Also, as a final observation, loss in this sense is clearly about events that have already occurred. To quote the OED, it can be understood as “the condition or fact of being lost”, and “lost” after all is the past participle of lose.⁸ Having said all this, one may wonder why it matters for the purposes of a technical discussion of loss arising from breach of contract and damages as a response to it. The reality is, though, that the lay idea of loss is pervasive and while it may suffice for certain purposes, particularly tort, it does not fit well with what is often meant in contract. Thus, the term “loss” tends to obscure the nature of the problems contract damages attempt to address when the term is used to describe the various adverse consequences that can arise from a breach of contract. Fortunately, having now expounded the lay idea of loss, I can move on to explain how “loss” in contract can mean something or things that are rather different.

To start, one should first note how various kinds of adverse consequences for a plaintiff arising from a breach of contract (Adverse Consequence) can superficially fall

⁸ JA Simpson & ESC Weiner, *Oxford English Dictionary*, (Oxford: Oxford University Press, 2000) sub verbo “loss”.

within the language of loss. This is possible because if to lose a “thing” means to be deprived of it, and if a thing must be of some value in the sense of being desired or desirable in order to be capable of being lost, then a breach that deprives the innocent party of the benefit of a contractual entitlement (even far in advance of any performance) can be thought of as occasioning a “loss” (perhaps best described as a “loss of expected benefit”). That is, in the sense that the plaintiff no longer has the contractual entitlement in a meaningful way, or has had the benefit thereof diminished, they are thus worse off to the extent of the diminution. However, there is a catch, and that is the fact that contractual entitlements pertain not to the present but instead typically to expectations about the future.⁹ What this means is that to fit the deprivation of a contractual entitlement within the lay idea of loss leads to a position of *reductio ad absurdum*, because to have been denied the realization of such a right cannot amount to a negative change in the present — even if the realization of the right were to have happened now or sometime earlier — because all the denial of the primary right may entail is the failure to change the present (or the recent past) for the better, which is not the same as having made the present worse. And that distinction is of utmost significance because, as noted above, to be “worse off” is *sine qua non* of a “loss” in the lay sense of having occurred at all. Thus, the Adverse Consequence arising from a breach for an injured party can be thought of as a “loss” nominally, but such “losses of expected benefits” may in substance have no effect in the sense expected under this particular definition, and this is why the term “loss” will frequently be inapt to describe the kinds of Adverse Consequences that can arise from a breach. In other words, “loss” will often be inapt to describe the

⁹ This aspect of contractual entitlements is so central to our understanding of contract that both the promise and the reliance theories of contract ground their normative imperative for contract enforcement on this fact in some way; Charles Fried, *Contract as Promise*, 2nd ed (Oxford: Oxford University Press, 2015) (“There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.” at 17); LL Fuller & William R Jr Perdue, “The Reliance Interest in Contract Damages: 1” (1936) 46:1 Yale L J 52–96 at 53–54 (Although the “reliance interest” is often juxtaposed with the “expectation interest”, it is undeniable that a plaintiff’s reliance, in whatever form it takes, arises from the expectations engendered by the contract).

Adverse Consequence of breach because the hardship arising from a breach is often not to be *worse off* at all, but instead to have “lost out” on the chance to be *better off*.¹⁰

Losing out in the way described above is, of course, not a positive development for the relevant party by any means, and that is not the point of drawing the distinction. What it is, though, is qualitatively different from loss in the lay sense, and as we will see in Chapter IV, that difference is significant in terms of how courts will approach the problem of allocating the burden of the injured contracting party’s disappointment — although the same is true of each of the distinctions discussed below in this section as well. What is somewhat unique about loss of betterment, though, is that to award damages for it is to make manifest an adverse event arising from breach that would not otherwise have been felt by *either* party as a “worsening of their circumstances” in the lay sense of loss. As such, to award damages for such disappointment must always make one party tangibly worse off (through an actual subtraction from their dominium) when neither would have otherwise been.

2. Direct versus consequential

The distinction between loss that is said to arise directly from a breach of contract, and that which can be said to arise consequentially, is at times quite fine, and not often made.¹¹ Nonetheless, a distinction to this effect is significant for the purposes of damage assessment and of long-standing, even if it is at times ill-defined. To explain why the difference is given such weight and ultimately why it matters for the purposes of Chapters III and IV, I should first explain what each is taken to mean. Starting with

¹⁰ It is of course *possible* that a failure to receive promised contractual performance can lead to a worsening in the injured party’s circumstances because some further event happens that would not have occurred but for the non-performance. E.g. a contractor fails to deliver a new boiler in time before a cold snap, the cold snap happens causing a pipe to burst and property is damaged. Nonetheless, there will frequently be cases in which a breach of contract has no deleterious effect on the injured party. For instance, if the boiler is not delivered but there is no change in the weather and nothing happens.

¹¹ James Edelman, *McGregor on damages*, 20th ed (London: Sweet & Maxwell, 2018) (“About the only good attempt at clarification is that of Bowen LJ in *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 CA” at 3-001, n 1).

“direct loss”, although not much discussed, I describe it as effectively any loss that one can infer from the specifics of the contract and the breach without other or further knowledge of the background circumstances of the parties or the transaction.¹² This fits most readily with Baron Park’s direction in *Robinson v. Harman*, that the plaintiff is to be put, as far as money can do it, in as good a position as if the contract had been performed,¹³ because one typically need only know what was promised and not performed in order to know what must be awarded in order for this to be done. By contrast, consequential loss is any loss flowing from a breach of contract that is peculiar to the particular plaintiff.¹⁴ This category falls squarely within the rule from *Hadley v. Baxendale*¹⁵ and faces a more restrictive regime for recovery, namely the rule of remoteness.

Having set out in brief the nature of the two categories and the difference between them in theory, I can now spell out the significance of this difference and why it is that consequential loss receives different treatment. In short, the answer is that although both direct and consequential loss must be understood as the consequence of a breach in some

¹² *Ibid* at 3–001 to 3–002, 3–008 3–010 (This could be understood as corresponding with what are described as “general damages” or “general damage”. Although, I decline to use that term for two reasons. First, as Edelman points out, the terms “general” and “special” damage are apt to cause confusion because they are used indiscriminately in a number of different senses at common law. This is why Edelman adopts the terminology “normal loss” and “consequential loss” instead. My second reason, and the reason for declining to adopt Edelman’s terminology, is that “general damage” is said to correspond with losses falling within the first limb of Hadley, as opposed to being recoverable apart from Hadley. Admittedly, what I describe as “direct loss” could be said to fall within the first limb of Hadley, but the first limb embraces much more than what I am trying to describe, and more than what might be generally understood when we speak of losses that are not explicitly “consequential”. I also note, that Edelman’s terminology appears to invite some confusion because both the first and second limb of Hadley pertain to consequences of a breach, with the only distinction between them being whether the consequences are usual [first limb] or unusual [second limb]. This begs the question then as to why only the second category is called “consequential” because if “normal” losses are defined simply as “usual” consequences, then it is clear that these losses must be consequential too.); See also *Monarch SS Co Ltd v Karlshamms Oljefabriker (A/B)*, [1949] AC 196 (HL (Eng)), Lord Wright (“The distinction there drawn [in *Hadley v Baxendale*] is between damages arising naturally [which means in the normal course of things], and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties: in the latter event it is laid down that the special facts must be communicated by and between the parties. The distinction between these types is usually described in English law as that between general and special damages...” at 221).

¹³ *Robinson v Harman*, [1848] 1 Exch 850, Parke B (“The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.” at 855).

¹⁴ Edelman, *supra* note 11 at 3–012 (The learned author and I agree on this much.).

¹⁵ *Hadley v Baxendale*, (1854) 156 All ER 145.

sense, it is not always clear that a defendant should be equally culpable for both despite being responsible for what we would accept as their cause, i.e., the breach. The reason for this uncertainty is the fact that a consequential loss is the manifestation of a risk, and to be required to pay for that risk is to be required to honour a secondary right arising under the parties' contract, but whether such a right exists in any given case is often far from clear.¹⁶ Ultimately, it depends on whether the defendant has agreed at least tacitly or implicitly to bear it in the first place — i.e., whether there is a corresponding primary right on the plaintiff's part and a duty on the defendant's. I note that this is almost beyond question in the case of direct loss, because the facts needed to be known for the law to assume assent to the risk and thus attribute responsibility for a direct loss are *not* peculiar to the knowledge of the plaintiff. By contrast, unless otherwise notorious, facts underpinning consequential loss *are* peculiar to the knowledge of the plaintiff, which is cause for concern because the assumption of consent underpinning contract and the allocation of responsibility to pay damages for breach is untenable if the defendant did not or could not have been expected to know what they were ostensibly consenting to. This, of course, does not completely clarify why it is that any such loss should fall on the innocent party instead, even if the defendant were ignorant of certain facts, but, as I will explain in Chapter IV in relation to how the law of damages determines which losses must fall on a plaintiff, the distinction turns on the point of enforcing contracts at all.

3. Accrued versus realized

A distinction between having accrued and being realized can be made in relation to adverse events falling within the lay idea of loss, and the various kinds of adverse events that may arise following a breach of contract. As such, the fact that Adverse Consequences arising from a breach can be divided in this way does not distinguish them

¹⁶ HG Beale, ed, *Chitty on contracts*, 33rd ed (London: Sweet & Maxwell, 2018) at 26–117 to 26–118 (Previously, this might have been understood as being “simply” a question of remoteness. In the wake of *SAAMCO* [a tort decision, but significant nonetheless] and *The Achilles*, however, it is not clear whether there is a new rule/test or a new spin on the old.).

from what we conventionally think of as loss. Nor does it affect the way in which damages should respond to such events, which is perhaps why the distinction between accrued and realized is not frequently addressed. As we will see in Chapter IV, though, the distinction can be significant in terms of Mitigation's response to damage claims in terms of the degree of sympathy a court may have for one party or the other depending on the character of the "loss" as realized or accrued.

Leaving the distinction's significance to the wider subject aside for the moment, the essential idea is that adverse events, or "losses", can be either accrued (to borrow the accounting term) in the sense that events have transpired that render it likely (if not certain) that the injured party will experience some undesirable outcome in the future, or realized in the sense that the negative outcome has in fact been felt in terms of a tangible worsening in the injured party's circumstances compared to what they were or would have been. As mentioned above, the rules of damage assessment do not distinguish between claims on the basis of whether they are accrued or realized in the sense that each is held equally compensable, all other things being equal. Nonetheless, one can identify a notable difference between them that will be discussed in greater detail in Chapter IV. That distinction is that when compared with losses or negative outcomes that are realized, accrued losses appear to be somewhat hypothetical for one of two reasons, which I will discuss below.

The first potential reason for accrued losses to appear more theoretical than real, compared with those that are realized, depends on the form of the alleged negative outcome. If the negative effect on the injured party is a worsening of their financial situation compared to what it was or what it ought to have been, through the diminution in the value of an asset for instance, the worsening in question typically cannot be quantified with complete certainty until it has crystallized, i.e., been realized. If that is the case, then it would appear that we cannot be sure that any such accrued loss actually exists because no value (whether greater or lesser than it was or was expected to be) can be assigned to the asset until or unless the asset in question is sold, at which time, though, we may learn that the value is in fact something significantly different from what we

thought or expected, as ultimately turned out to be the case in *Hussey v. Eels*, for instance, where the relevant property sold for a higher price than it was originally worth.

The second potential reason is that if the “loss” in question is an accrued loss of betterment, said “loss” will not be experienced as a worsening of the injured party’s circumstances in the lay sense of loss, or experienced at all, other than notionally in our awareness of the difference between the world the plaintiff finds themselves in, and that which should have been. This can be contrasted with a situation of “realized loss of betterment”, where the injured party enters into a substitute transaction in which they actually have either received less or given more in order to secure substitute performance, which has the effect of crystallizing the loss and rendering it certain because it has now been more tangibly realized. In such a situation, note that it is perhaps not 100% tangible, because in a situation where a seller loses profit they would have made on an earlier transaction, they are still not out-of-pocket if they sell for a lower price — although they have given up the possibility of realizing any such greater profit in the future because they have given up the goods.

Having said all of the above, whether or not the character of an alleged “loss” or adverse consequence is accrued or realized in the end is, of course, only one more factor considered by courts applying Mitigation in the larger framework of the law governing recovery for breach of contract. One aspect does, however, bear some emphasis, and that is what the distinction between accrued or realized loss has to tell us about the accuracy of the idea that Mitigation is concerned with the avoidance of loss, or whether a particular loss could have been avoided. In short, if a loss is accrued, it is yet to be experienced, and if it is not crystallized, its very existence is questionable, and these aspects alone might give us pause to consider if it makes sense to speak of avoiding such a thing. If the loss in question is not merely accrued, but also not true “loss” per se in the sense of a worsening of circumstances, as explained above, but a loss of benefit instead, the absurdity is compounded. Such a thing cannot be meaningfully avoided. One cannot

prevent a non-event.¹⁷ This suggests that Mitigation must be concerned with questions other than “avoidability”, at least some of the time. What these questions are, and why they are asked, will be considered below.

C. Mitigation is about more than loss alone

Given the diversity of contracting situations and the diversity of post-breach circumstances, it may seem obvious that Mitigation would be called upon to respond to a diverse range of issues in the assessment of damages. As suggested above, however, three issues stand out in particular as being as significant in a number of cases, if not more so, than the question of “avoidability” with respect to determining in whose favour Mitigation ought to apply. The first is the question as to what benefits a plaintiff may be allowed to demand or recover. The second is whether a subsequent gain by the plaintiff ought to be held to the defendant’s credit, i.e., in mitigation of the plaintiff’s claimed loss. And the third is what losses arising from an attempt to mitigate ought to be recoverable. I will elaborate on each of these below.

1. What benefits can the plaintiff rightfully extract from the defendant?

In assessing damages for breach of contract, the court’s ultimate aim is, as far as money can do it, to put the plaintiff in as good a position as they would have been in had the contract been performed.¹⁸ By contrast, in tort, the court’s aim is to put the plaintiff in as good a position as they would have been in had the wrong not occurred.¹⁹ In both, however, the court will frequently be forced to ask how “good” that position really was or

¹⁷ One could arguably stop an event from not happening, but that would be to simply make the event happen, which seems undesirable in the context of loss.

¹⁸ Waddams, *supra* note 1 at para 5.30; *Robinson v Harman*, *supra* note 13; *Wertheim v Chicoutimi Pulp Co*, [1911] AC 301 (PC (CAN)), Lord Atkinson (“And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed...” at 307).

¹⁹ Edelman, *supra* note 11 at 2–002 to 2–003.

would have been, and how much responsibility the defendant should bear for moving the plaintiff to it. This quandary can be expressed with respect to both by asking: what benefits ought the plaintiff be able to extract from the defendant as a consequence of the wrong? I note that this would appear more likely to be a problem with respect to the assessment of damages than it would with respect to Mitigation, but that is only so where the plaintiff is claiming the *prospective* cost of putting themselves in the desired position. Where the plaintiff is seeking to recover out-of-pocket costs that they have *already* incurred in an attempt to correct their position, the question is treated as being whether such costs were properly incurred in Mitigation. Why that should be so is not necessarily obvious, but can be explained on the basis that if the law requires that the plaintiff should take reasonable steps to mitigate for the apparent benefit of the defendant, then it is only right that the defendant should have to bear the cost of those steps.²⁰ In some cases, however, the defendant will decry the costs, forcing the court to ask whether the steps and the expenses were reasonable to correct the plaintiff's position, i.e., "mitigate their loss", or whether the plaintiff has attempted to improve their position at the defendant's expense by extracting greater benefits than they are entitled to.

Where the above question is raised, it is clear that the issue is not whether a loss could have been *avoided*, but rather whether the costs claimed were incurred to avoid the *loss*. Two examples can be given to illustrate the point. The first, in tort, comes from the well-known 1963 English Court of Appeal decision in *Darbishire v. Warran*.²¹ In that case, Warran had crashed into a motorcar belonging to Darbishire, inflicting substantial damage.²² The insurer's assessed value of the vehicle was approximately £80, although according to Darbishire's mechanic, a reliable replacement could not be had for less than £100.²³ Both figures were nonetheless substantially lower than the cost of repairing Darbishire's beloved car, which came to £192, and which Darbishire attempted to recover

²⁰ Waddams, *supra* note 1 at paras 15.290-15.305.

²¹ *Darbishire v Warran*, [1963] 3 All ER 310 (CA) [*Darbishire*].

²² *Ibid* at 311.

²³ *Ibid* at 312, 315.

form Warran.²⁴ The Court of Appeal's conclusion was that Darbishire could not recover an amount so far in excess of the value of the car,²⁵ and in so holding, Lord Justice Harman offered the following classic statement:²⁶

“For the purposes of the present case it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "duty to minimise the damage". The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases, but not at the expense of the defendant.” [Emphasis added]

The statement above is significant to my work for a number of reasons, but for present purposes is particularly relevant because it demonstrates that the application of the Mitigation doctrine may turn on issues other than “avoidability”. Of course, strictly speaking, one could rationalize the court's decision on the basis that the repair cost of £192 was avoidable in the sense that Darbishire could have incurred a lesser cost by replacing the car. It is likewise true, though, that the repair cost was unavoidable if Darbishire was to be *literally* returned to his prior position, since it was not established that a replacement of lesser cost would have been as good a vehicle. Leaving those arguments aside, however, it appears from the remarks of Lord Justice Harman that what determined the application of Mitigation in this case was the proportionality of Darbishire's claim relative to the Court's assessment of his loss. This is not to say that “avoidability” can never matter to the application of the doctrine, only that it need not always do so, as it did not in this case.

²⁴ *Ibid* at 312.

²⁵ *Ibid* at 314, 317, 318.

²⁶ *Ibid* at 315, Harman LJ.

The second decision that illustrates that the application of Mitigation may turn on the proportionality of the plaintiff's claim is the House of Lord's 1961 decision in *Whiter & Carter (councils) v. McGregor*.²⁷ The facts of McGregor are somewhat notorious, but to explain in short, the dispute began with a contract made between White and McGregor for the provision of advertising services by White.²⁸ The contract was to run for three years, but McGregor attempted to repudiate shortly after it was made.²⁹ White, however, would not accept, and instead proceeded to provide the unwanted service and brought an action against McGregor for the contract price upon completion.³⁰ In a move that surprised some, a majority of their Lordships ultimately found for White and held that White was *not* obliged to accept the repudiation and thus *a fortiori* not obliged mitigate the loss that White would cause themselves as a consequence of performing the unwanted contract.³¹

Their Lordships reasons for reaching the above conclusion are not uniform, and with the exception of Lord Keith in the minority, say nothing about Mitigation. The leading speech of Lord Reid is relevant, however, and speaks to a point similar to that taken by Harman L.J. in *Darbishire*:³²

“It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, **he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself.** If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it. And, just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalise the other party by taking one course when another is equally advantageous to him. If I may revert to the example which I gave of a company

²⁷ *White and Carter (Councils) Ltd v McGregor*, [1962] AC 413 (HL (Scot)).

²⁸ *Ibid* at 413.

²⁹ *Ibid*.

³⁰ *Ibid* at 426–427.

³¹ *Ibid* at 413.

³² *Ibid* at 431.

engaging an expert to prepare an elaborate report and then repudiating before anything was done, it might be that the company could show that the expert had no substantial or legitimate interest in carrying out the work rather than accepting damages: **I would think that the de minimis principle would apply in determining whether his interest was substantial, and that he might have a legitimate interest other than an immediate financial interest.**”

From the above, one can see that Lord Reid was of the view that a party to a contract should not be allowed to extract more from their opposite party by way of damages/remedies than that which they had a “legitimate” interest in obtaining. What exactly was meant by “legitimate” has never been entirely clear, but Lord Reid’s distinction between “legitimate interests” and “immediate financial interests” tends to indicate that the plaintiff’s interest must be more than simply their interest in obtaining windfall compensation. Instead, it seems that the remedy must speak to some interest that the plaintiff had under the contract — i.e., something they would otherwise lose — rather than simply their interest in “having the money”. To tie back to the question of Mitigation, if White could be permitted to unilaterally perform an unwanted contract and then sue for the price where their interest in doing so was legitimate, but not otherwise, then it would appear that White’s “responsibility” to limit their own loss from performance, and thus that of the defendant, is itself limited according to the benefits that White could have legitimately expected to receive. Whether White actually had an interest sufficient to justify providing the advertising services is somewhat open to question.³³ Consistent with the modern approach to Mitigation, though, it is for the defendant to prove that the plaintiff has failed to mitigate, and as Lord Reid points out in this case, McGregor had not proven that White’s interest in performance was illegitimate.³⁴

³³ Waddams, *supra* note 7 (“Lord Reid suggested that a plaintiff might be required to mitigate loss if there was no ‘substantial or legitimate interest’ in actual performance, but it is hard to see how this principle was applied to the case, for what legitimate interest would the pursuer have had in preparing and exhibiting unwanted advertisements?” at para 772).

³⁴ *White and Carter (Councils) Ltd. v. McGregor*, *supra* note 27 at 431.

To sum up what *Darbishire* and *White* demonstrate, it is plain that these decisions engaged the question of Mitigation but decided the doctrine's application on a basis other than "avoidability" of loss. Instead, both decisions are principally focused on whether the plaintiff's claim for monetary compensation (in *Darbishire*, damages, in *White*, the price) is an attempt to extract a greater benefit from the defendant than they can properly seek, even though they may apparently seek it as of right. As noted above, this is not to say that the "avoidability" of the plaintiff's loss will never be determinative. It is only to say that there are other questions that the application of Mitigation may also, or in the alternative, require that we ask.

2. Whether a subsequent gain by the plaintiff ought to be held to the defendant's credit

The second question I wish to highlight which Mitigation must frequently address is not strictly about the plaintiff's loss. Instead, it relates to transactions that occur after the breach/wrong, and any gains that the plaintiff may have made as a result. The question that is asked in relation to these later transactions is whether they are collateral, and the gain thus unrelated, or whether they are subsequent, and the gain thus in mitigation of the plaintiff's loss.³⁵ I note that on its face, one could describe the question as simply an inquiry into whether the plaintiff *has* in fact avoided their loss, as opposed

³⁵ See e.g. *Apeco of Canada Ltd v Windmill Place*, [1978] 2 SCR 385 (The question on appeal was whether a commercial landlord with multiple vacancies within a building had mitigated its loss from a repudiated lease when it successfully leased the same space to another tenant sometime later. Note, other space in the building remained vacant, and the space leased to the subsequent tenant was not the only suitable space in the building. The Court concluded that the subsequent transaction was not a substitute transaction while other comparable space remained empty, but opined in obiter that the matter would stand differently if no vacant space were to remain in the building.); See also *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltda*, [1970] 1 WLR 1306 (CA), (The plaintiff buyers contracted to buy 10,000 metric tons of Brazilian maize from the 1965 crop on C.I.F. terms, \$64 per 1,000 kilos, destination "free out" one port West Coast Italy at buyer's option. The contract was subsequently terminated for the seller's failure to ship on time, or supply documents by the deadline of August 22, 1965. The buyers for their part contracted to purchase the same cargo at a below market price after terminating the original C.I.F. contract, and made a handsome profit thereby. The buyers also pursued a claim in arbitration for breach of the original C.I.F. contract. Litigation ended in the Court of Appeal decision herein where the Court was asked to consider whether it was appropriate for the arbitrators to take the subsequent purchase of the same goods into account [i.e. treat it as consequent] or whether it ought to be treated as separate and disconnected [i.e. collateral]. The courts conclusion was that the second contract formed part of a continuous course of dealing and eliminated [i.e. mitigated] the plaintiff buyer's alleged loss completely.).

to asking whether they *could have* avoided it. This question could quite apparently be dealt with on a “but for basis”, but as I will demonstrate by way of reference to the following leading decisions that have attempted to draw the line between these two categories, the question in these cases is not as straightforward as it might appear.

The first decision I wish to discuss is the 1912 House of Lords’ decision in *British Westinghouse Co. v. Underground Ry.*³⁶ This case is arguably the leading modern authority on Mitigation, as it is the decision from which we get the most frequently cited exposition of the doctrine. It is not often discussed for its facts, though I argue it is as important for its particular outcome as it is for the dicta in the speech of Viscount Haldane speaking for their Lordships’ house. That outcome was a finding in favour of the appellant Westinghouse against whom Underground had claimed for breach of contract to supply steam engines meeting certain specifications as to fuel consumption and power output.³⁷ Westinghouse had defended Underground’s claim on the basis that the machines that Underground had replaced their machines with (machines from the firm of Parsons) were of such superior output and efficiency that Underground could not claim any further loss after the installation of the Parsons machines or the cost of procuring or installing the Parsons machines, because Underground ought to have procured the Parsons machines *even if* Westinghouse’s had not been defective.³⁸ As mentioned, though surprising, this argument was effective and their Lordships did conclude that not only should the efficiency gain experienced by Westinghouse be held to the account of Westinghouse,³⁹ but so too did the inevitability of such a purchase, which thereby excused Westinghouse from any responsibility for the cost of the subsequent transaction.⁴⁰

³⁶ *British Westinghouse Co v Underground Ry*, [1912] AC 673 (HL (Eng)) [*British Westinghouse*].

³⁷ *Ibid* at 674, 692.

³⁸ *Ibid* at (“The appellants contend, first, that they are not liable for the cost of the Parsons machines because the purchase of those machines was not the consequence of any defect in the appellants’ machines, but arose from other considerations.” at 678-679).

³⁹ *Ibid* at 687.

⁴⁰ *Ibid* at 676–677, 691–692, Viscount Haldane.

Cockburn v. Trusts and Guarantee Co. is the second leading decision I wish to canvass.⁴¹ Similar to *British Westinghouse*, *Cockburn* is old authority, but as with *British Westinghouse*, it is undoubtedly indicative of what the law is given its pedigree and its long-standing. The basic facts of *Cockburn* are that Cockburn was employed by the Dominion Linen Manufacturing Co. as its sales manager for a five-year term at a salary of \$5,000 per annum, guaranteed by one Kloepfer (a director of Dominion).⁴² Three years into the contract, Dominion went into liquidation and Cockburn's contract was terminated.⁴³ Following his termination, Cockburn and an associate jointly purchased Dominion's assets and sold them at a profit.⁴⁴ Cockburn's share of the gain on sale was \$11,000.⁴⁵ Following these events, Cockburn brought an action against the estate of Kloepfer to recover the \$9,000 unpaid balance of his salary under the guarantee provided by Kloepfer.⁴⁶ Cockburn had succeeded at trial and lost on appeal before being granted leave to appeal to the Supreme Court of Canada (SCC).⁴⁷ The only question at issue in the appeal to the SCC was whether or not the gain Cockburn had made on selling Dominion's assets had to be brought into account in the assessment of damages.⁴⁸ The Supreme Court of Canada concluded that it did.⁴⁹

Their Lordships were unanimous in their conclusion in *Cockburn*, but not completely unanimous in their reasons. It appears, though, that each of them was content that if the subsequent transaction arose from the circumstances of the breach, in the sense of being impossible without the breach, then the gain made could properly be taken into

⁴¹ *Cockburn v Trusts and Guarantee Co*, (1917), 55 SCR 264 [*Cockburn*].

⁴² *Ibid* at 264–265.

⁴³ *Ibid* at 265.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* at 269–270.

⁴⁶ *Ibid* at 264.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at 265.

⁴⁹ *Ibid* at 266, 268, 271.

account.⁵⁰ This is not necessarily a principle that all of their Lordships would have subscribed to generally, but in the totality of the circumstances seemed to them to apply here.⁵¹ There is nothing to indicate that their Lordships felt that the transaction itself was particularly unique, but the reasons of Mr. Justice Anglin suggest that their Lordships saw it as unjust to allow Cockburn to effectively profit from the demise of his employer twice⁵² — first from the sale in liquidation, and second from the guarantee provided by the firm’s director. In one sense, the Court here has reached the opposite conclusion from their Lordships in *British Westinghouse*, because here the later transaction has been treated as “subsequent”, whereas the acquisition of the Parsons machines in *British Westinghouse* was effectively treated as collateral *even though* the need to acquire replacement machines clearly arose from *British Westinghouse’s* breach.⁵³ In another sense, though, it appears that both cases reached the same conclusion, which is to say that the plaintiff’s claim could not be granted because it would have resulted in a windfall. For Underground Railway, the windfall would have been the cost of machines it should have acquired anyway, and for Cockburn, the salary he would have made using the assets of his employer, which assets he himself sold at a substantial profit.

The third and last decision to be discussed is *Hussey v. Eels*, a 1989 decision of the English Court of Appeal.⁵⁴ Unlike the first two decisions, *Hussey* is both relatively modern and one in which the plaintiffs prevailed. To explain, the Husseys had purchased a bungalow from the Eels in 1984, which the Eels had negligently misrepresented as

⁵⁰ *Cockburn*, *supra* note 41, Sir Charles FitzPatrick CJ (“I think this consideration of whether he could have made his profit from other sources if the contract had been fulfilled may be some test of whether such profits are to be taken into account in ascertaining the loss sustained by the breach of the contract.” at 265).

⁵¹ It is worth noting that such a principle was not conclusive in *British Westinghouse* because the acquisition of the replacement machines undoubtedly arose from the circumstances of the breach, but their acquisition was treated as collateral.

⁵² *Cockburn*, *supra* note 41 at 269–271.

⁵³ *British Westinghouse*, *supra* note 36 (Viscount Haldane opined that the purchase of the replacement Parsons machines formed part of a continuous course of dealing with the situation in which Underground found itself at 691-692).

⁵⁴ *Hussey v Eels*, [1990] 2 QB 227 (CA) [*Hussey*].

being free from subsidence.⁵⁵ Two years later in 1986, after the subsidence of the bungalow had come to light, the Husseys brought an action against the Eels seeking damages of £17,000.⁵⁶ In 1988, a decision was handed down by the trial judge in which he found for the Husseys on liability, but dismissed the action on the basis that the Husseys' loss had been offset by a gain of £25,250 that they had made in October of 1986 by selling the land to developers with a planning permission permitting the demolition of the existing bungalow and the erection of two new structures.⁵⁷ The matter then reached the Court of Appeal, where the trial judge's decision was unanimously overturned in a judgment delivered by Lord Justice Mustill, as he was then.⁵⁸

On appeal, counsel for the Husseys argued that Mitigation applied only to continuing losses and could not apply to losses that had crystallized.⁵⁹ That proposition was questioned by Mustill LJ, but not rejected.⁶⁰ In result, though, it is arguable that it was followed because Mustill LJ's ultimate conclusion was that that the resale did not relate to the original purchase, essentially because the original purchase provided the occasion, but was not the cause of the resale.⁶¹ Put another way, one could sum up

⁵⁵ *Ibid* at 227, 230.

⁵⁶ *Ibid* at 230.

⁵⁷ *Hussey*, *supra* note 54 (This profit figure is the difference between the purchase price of £53,250 and the sale price of £76,094.74 at 230-232).

⁵⁸ *Ibid* at 241.

⁵⁹ *Hussey*, *supra* note 54 ("Mr. Roddick takes the initial point that there can never be a question of mitigating a loss which has already crystallised, and that the loss has crystallised here in terms of the conventional measure of damage for an unsatisfactory purchase made in reliance on an actionable misrepresentation by the vendor." at 232).

⁶⁰ *Ibid* ("It is also true that superficially Mr. Roddick's proposition does appear at first sight to gain support from the cases on failure to perform contracts for the supply of goods or services for which there is an available market, where the courts have tended to proceed directly to a conventional measure of damage without investigating what the injured party has actually done after the breach. [I say 'at first sight' because these conventional measures of damages depend on the fiction that the innocent party has gone into the market to sell against the defaulting buyer, or to buy-in against the defaulting seller. The loss is therefore 'crystallised,' not in terms of the immediate consequences of the breach, but of a deemed mitigation.] Nevertheless, I would not be prepared without a very full review of the authorities to underwrite a generalisation such as Mr. Roddick proposes, especially in the field of damages where broad statements of principle tend to be unreliable." at 232-233).

⁶¹ *Ibid* ("It seems to me that when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception." at 241).

Mustill LJ's reason for treating the resale as collateral by saying that the effect of the misrepresentation was now spent in the sense of being past.⁶² What was done was done, one might say, and the Husseys were now simply getting on with their lives. To the extent that one accepts the view that Mitigation is a question of loss avoidance, there is an appeal in this rationale because it would seem evident that what is *done* cannot be *avoided* and that if the effect of the impugned transaction was now spent, then any subsequent act by the Husseys could not affect their loss because one cannot change what is in the past. As I will explain, however, this is not a view of the decision that I would propose or accept, because the loss was arguably never suffered at all.

In my view, the problem with treating the Husseys' loss as having occurred in the past, and thus to some extent immutable, is that the Husseys' loss appears to have principally been a financial or economic one. The property the Husseys bought was certainly less useful than what they had wished, but the real effect of this was to simply make the property worth less in market terms than what they had bargained for, and that defined the measure of their claim even though they had not yet suffered any out-of-pocket costs by or at the time the action began. Of course, such a putative "loss" can be recognized in the sense that it can be "accrued" even if it has not yet been "incurred", as I explained above in section II.B.3, but an accrued loss like an accrued expense is merely the present recognition of a *future* event, said future event being the "cost" or diminution in wealth that must someday be suffered. For the Husseys, though, that future event never came, and it is hard to reason how their efforts to obtain the necessary planning permission to build the replacement structures and carry out the profitable resale were *not* the reason that the Husseys' loss never happened. This is not to say that I disagree with the outcome in the Husseys case, or that I think that Mitigation ought to have led to the Husseys' gain on sale being treated as mitigation of their loss; instead, all I am suggesting is that if Mitigation ought *not* apply to bring the Husseys' gain within the assessment of

⁶² *Ibid* ("To my mind the reality of the situation is that the plaintiffs bought the house to live in, and did live in it for a substantial period. It was only after two years that the possibility of selling the land and moving elsewhere was explored, and six months later still that this possibility came to fruition." at 241).

their loss (or lack thereof), avoidance (or the supposed lack thereof) cannot be the reason why.

In addition to the three cases canvassed immediately above, there is a wealth of others that can also be reviewed⁶³ — not least because the question of whether to hold a gain to the credit of the defendant is a choice one for the defence to litigate, but also because it seems that nothing so simple as “avoidance” is the deciding factor in these cases, much as it does not appear to have been the deciding factor in the three discussed above. As noted and repeated earlier in this part, I argue that this indicates that Mitigation engages with many questions and not *just* or *only* a mechanical question of avoidance of any loss. As such, in the cases on subsequent gain, I would suggest that the apt question to ask is: “which party has the better claim to credit for any gain?” More particularly, one might ask whether the defendant by their breach handed the plaintiff the opportunity for profit, or whether the plaintiff, through playing a particularly poor hand well, became the author of their own good fortune? At least it seems these are the questions courts are actually asking among potential others as well.

⁶³ *Hunt River Camps/Air Northland Ltd v Canamera Geological Ltd*, [1998] NJ No 325 (NFLDCA), (Whether plaintiff owner’s use [for profit] of plane that the defendant had chartered on a standby basis ought to be taken into account as mitigation of damage in owner’s claim against defendant for repudiation of charter.); *Erie County Natural Gas and Fuel Co v Carroll*, [1911] AC 105 (PC), (Whether subsequent gain on sale of a property counted as mitigation of earlier loss caused by defendant’s breach of contract that had forced the plaintiff to expend funds altering the property.); *McKenna’s Express Ltd v Air Canada*, [1993] PEIJ No 85 (PEISCTD), (Plaintiff had obtained a truck to perform a contract for Air Canada, which Air Canada subsequently repudiated. The plaintiff obtained new contracts, necessitating new and different trucks. Air Canada claimed these new contracts mitigated the plaintiff’s loss from its repudiated contract. Question as to whether these subsequent contracts were collateral or consequent.); *Jewelowski v Propp*, [1944] KB 510, (Plaintiff had been induced by way of a fraudulent misrepresentation to lend 1,000 l. to a particular company. The company collapsed and the plaintiff acquired assets of the company in liquidation, before then reselling them at a profit. Question as to whether the plaintiff’s profit on the sale of the assets had to be counted in mitigation of his loss on the debenture.); *Swynson Ltd v Lowick Rose LLP (In Liquidation) (formerly Hurst Morrison Thomson)*, [2016] 1 WLR 1045 (CA), (As a result of reorganizing certain intra-corporate debt, it appeared that certain losses suffered by certain companies following negligence of the defendant had been wiped out. Question as to whether it was proper to treat the effect of these intra-corporate loans as mitigating the loss.).

3. What losses or costs ought to be recoverable from a defendant, particularly when these may run afoul of the rule of remoteness?

For the most part, Mitigation is concerned with whether the plaintiff has or ought to have reduced a loss caused by the wrong or default of the defendant. On some occasions, though, Mitigation is instead brought to bear on the question of responsibility for loss arising in the course of attempting to mitigate the original loss caused by the wrong or default of the defendant.⁶⁴ That such a question ought to be addressed by Mitigation is no doubt clear; that the current conventional view of Mitigation properly addresses this problem, is not. Nonetheless, a number of cases have and will continue to call for courts to consider this question, which is yet another quandary apparently having little to do with whether the loss could have been avoided rather than a number of other issues instead. To explain and illustrate the point, I will again turn to examples from the case law to demonstrate what I mean.

The first case I wish to discuss is the 1998 decision of the English Court of Appeal in *Humber Oil Terminal Trustees Ltd v The Owners of the Sivand (The Sivand)*.⁶⁵ As the name would suggest, the plaintiff/respondent Humber was the leasehold owner and operator of a marine oil terminal at Immingham in the Humber Estuary.⁶⁶ In September 1983, the Sivand collided with and damaged part of Humber's harbour works as a result of the negligence of the defendant/appellant Owners' servants.⁶⁷ The damage inflicted by the collision put the terminal out of operation, which made repair a matter of

⁶⁴ See *Wilson v United Counties Bank Ltd*, [1920] AC 102 (HL (Eng)), Lord Birkenhead LC ("If one man inflicts an injury upon another the resort by the sufferer to reasonable expedients for the bona fide purpose of counteracting, curing or lessening the evil effects of the injury done him, does not necessarily absolve the wrongdoer, even though the sufferer's efforts should, in the result, undesignedly aggravate the result of injury." at 125); See also *Farish v National Trust Company*, [1974] 54 DLR (3d) 426 (BCSC); See also *Ossory Canada Inc v Wendy's Restaurants of Canada*, [1997] 36 OR (3d) 483 (ONCA), (The court must determine whether the loss was incurred in a bona fide attempt to mitigate though, if they are not, then they are not recoverable.).

⁶⁵ *Humber Oil Terminal Trustee Ltd v Owners of the Sivand*, [1998] CLC 751 (EWCA) [*The Sivand*].

⁶⁶ *Ibid* at 763.

⁶⁷ *Ibid*.

urgency in order to bring the terminal back online.⁶⁸ Humber contracted with Harbour & General PLC to have the repairs done under the terms of the ICE Contract 5th Edition (revised in 1979).⁶⁹ To carry out the work, Harbour & General used a jack-up barge that stabilized itself in place at the worksite by sinking legs into the seabed beneath it.⁷⁰ Unfortunately, while continuing to carry out the repair work in April 1984, the sub-surface beneath one of the jack-up barge's legs collapsed causing the barge to capsize, resulting in its total loss.⁷¹ The consequences of the accident for Humber were that Harbour & General claimed and recovered an extra payment under clause 12 of the ICE Contract for the consequences of the unforeseen accident in terms of additional costs incurred by Harbour & General to complete the work.⁷² Only this extra payment was the subject of litigation between Humber and the Owners, with all other costs of repair not in dispute and having been paid by the time the matter reached the Court of Appeal.⁷³

Humber's position was that the additional cost was recoverable as the ordinary cost of repairs to the property that had been damaged by the Owners' vessel — i.e., as the reasonable cost of mitigation.⁷⁴ The Owners resisted Humber's claim on two grounds.⁷⁵ The first is that the collapse of the seabed beneath the jack-up barge's leg was a *novus actus interveniens* that broke the chain of causation between the negligence of the Owners' servants and the extra payment component of Humber's loss.⁷⁶ The second, in the alternative, is that if there was no break in the chain of causation, then the extra payment component of Humber's loss was simply too remote given that it was the

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid* at 762–763.

⁷² *Ibid* at 763.

⁷³ *Ibid* at 752.

⁷⁴ *Ibid* at 753.

⁷⁵ *Ibid* at 752.

⁷⁶ *Ibid.*

product of an unforeseen/unforeseeable event.⁷⁷ The Court was unanimous in dismissing the appeal, but split evenly as to which issues mattered with respect to framing the decision.⁷⁸ Evans LJ framed his reasons according to the narrative advanced by the Owners with respect to causation and remoteness; Hobhouse LJ (as he then was) framed his solely in terms of Mitigation as argued by the respondents; and Pill LJ took the middle ground between them, addressing both sets of issues.⁷⁹

Of the three sets of reasons, the one that I would submit is most correct with respect to the relative of causation and remoteness, on the one hand, and Mitigation on the other is Hobhouse LJ's. Although, I would not go so far as to agree that his Lordship was strictly speaking correct when he said that "...[q]uestions of foreseeability are not relevant, save so far as they may enter into the question of the reasonableness of what the plaintiff did in mitigation."⁸⁰ Instead, the question I would suggest is whether or not remoteness rightly ought to apply. I say this because it is altogether possible that a loss incurred in the course of mitigating could fail the test of remoteness, while having been nonetheless incurred "reasonably" in mitigation. Imagine, for instance, similar circumstances to those in *The Sivand* with the difference that a firm affiliated with Humber contracts to do the work for "free", subject only to an indemnity for any costs/loss incurred. If the affiliated firm were to negligently cripple a passing oil tanker causing millions of pounds in damages, and then seek to recoup the substantial cost from Humber, it would arguably be too remote a cost to lay at the Owners' door, which is not to say that I agree that the barge collapse was *not* too remote, but that a crippled oil tanker arguably must be. Nonetheless, if accepting the offer were reasonable, then according to Hobhouse LJ, the indemnity payment ought to be recoverable as the reasonable cost of mitigating, even if the particular course of action (i.e., accepting an offer to perform repairs for *free*, subject to such an indemnity) was perhaps unforeseeable. In such

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 763, 765, 767.

⁷⁹ *Ibid* at 752–763, 765, 765–766 Evans, Hobhouse & Pill LJJ.

⁸⁰ *Ibid* at 765.

circumstances, the question would seem to be which doctrine ought to prevail, and contrary to Hobhouse LJ's view, it would seem that there must be some upper limit with respect to how far even reasonably incurred, if unforeseeable, costs or losses ought to be recoverable. As has been suggested with respect to frustration, where costs become unfathomable, it may well be that the ordinary rule must give way.⁸¹ As other the cases discussed below will demonstrate, though, circumstances do not necessarily need to approach the extraordinary before it becomes possible for Mitigation to stand aside.

Outside of accident cases like the *The Sivand*, parties are not infrequently faced with losses that have been exacerbated by the less dramatic, but often no less independent factor of the plaintiff's impecuniosity. Older decisions such as *The Liesbosch Dredger* have (arguably) held that losses arising from the impecuniosity of the plaintiff, such as greater expenses incurred in the course of mitigating owing to the need to finance such steps, are too remote to be recovered.⁸² *The Liesbosch Dredger* has long been criticized though,⁸³ and has since been all but overruled by the House of Lords in *Lagden v. O'Connor* in 2003.⁸⁴ Despite their Lordship's decision, however, the matter is apparently not quite settled, as the more recent Supreme Court of Canada decision in *Southcott*

⁸¹ *Ocean Tramp Tankers Corporation v/o Sovfracht (The Eugenia)*, [1964] 2 QB 226 (CA) [*The Eugenia*], Lord Denning MR ("To see if [frustration] applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound." at 239-240).

⁸² *Owners of Dredger Liesbosch v Owners of Steamship Edison*, [1933] AC 449 (HL (Eng)) [*The Liesbosch*].

⁸³ Harvey McGregor, *McGregor on damages*, 17th ed (London: Sweet & Maxwell, 2003) at para 332; Brian Coote, "Damages, The Liesbosch, and Impecuniosity" (2001) 60:3 CLJ 511–536; RFV Heuston, *Salmond and Heuston on the law of torts*, 21st ed (London: Sweet & Maxwell, 1996) at 515 (The authors state it is hard to reconcile the requirement to mitigate with a bar on allowing recovering for the cost of borrowing to do so.); Percy Henry Winfield, WVH Rogers & JA Jolowicz, *Winfield and Jolowicz on tort*, 16th ed (London: Sweet & Maxwell, 2002) at 238 (The authors find it impossible to justify treating a claimant's impecuniosity as extrinsic, but taking into account his physical disabilities.).

⁸⁴ *Lagden v O'Connor*, [2003] UKHL 64 [*Lagden*].

Estates v. Toronto District Catholic School Board,⁸⁵ and *Lagden* itself, suggest.⁸⁶ To plumb the depths of this issue and set out what precisely the cases do imply the law to be requires some examination of them in light of their facts which, as I have done with other cases above, I will do with these below.

The facts of *The Liesbosch* can be stated succinctly as follows. The owners of the *Liesbosch* (The Owners) were contracted to carry out the construction of piers and quay walls in the harbour at Patras in western Greece, which entailed the use of the titular dredger, the *Liesbosch*.⁸⁷ Work proceeded under the contract until the *Liesbosch*'s moorings were negligently fouled by the SS Edison in November 1928, causing the *Liesbosch* to be dragged out to sea with the SS Edison, and ultimately lost.⁸⁸ The Owners, requiring a replacement dredger in order to continue their work but lacking the financial resources to buy a replacement immediately, leased a replacement, which they then went on to buy with the aid of the harbour board.⁸⁹ Subsequently, The Owners pursued a claim against the owners of the SS Edison ("The Edison") for, *inter alia*, the loss of the *Liesbosch* and the costs associated with leasing the replacement dredger until the *Liesbosch*'s replacement was purchased.⁹⁰ The total figure of £23,514 claimed by The Owners resulted in award of £19,820 following a hearing before the Registrar.⁹¹ The Edison unsuccessfully challenged the award in the Probate, Divorce, and Admiralty

⁸⁵ *Southcott Estates Inc v Toronto Catholic District School Board*, [2012] 2 SCR 675 at paras 28–29 [*Southcott*]; Although, Canadian courts have long restricted the application of *The Liesbosch* to damages exacerbated by impecuniosity that appeared to fail the applicable test of remoteness, whether in contract or in tort; See Waddams, *supra* note 1 at paras 15.330-15.380; See also *Freedhoff v Pomalift Industries Ltd et al*, (1970) 13 DLR (3d) 523 (ONSC), var'd (1971) 19 DLR (3d) 153 (ONCA).

⁸⁶ *Lagden*, *supra* note 84, Lord Nichols ("There remains the difficult point of what is meant by 'impecunious' in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make. I am fully conscious of the open-ended nature of this test." at para. 9).

⁸⁷ *The Liesbosch*, *supra* note 82 at 457.

⁸⁸ *Ibid* at 456–457.

⁸⁹ *Ibid* at 457–458.

⁹⁰ *Ibid* at 458.

⁹¹ *Ibid* at 459.

Division for the reason that the award was approximately double the £9,177 value of the *Liesbosch* when she was lost.⁹² This of course led to two further appeals, ending with the much-debated decision of the House of Lords in 1933, wherein their Lordships held that under the rule of remoteness then prevailing, the additional loss over and above the value of the *Liesbosch* when it sank, arising from the impecuniosity of The Owners, was too remote to recover as a reasonable cost of mitigation.⁹³

When attempting to discern the legal significance of *The Liesbosch*, it is important to remember, as my countryman Brian Coote has pointed out, that the three decisions of the Probate Division, the Court of Appeal, and the House of Lords differ in as much as each of them framed the case in terms of different issues, which led to differing conclusions.⁹⁴ Thus, where the Probate Division considered the matter one of mitigation, the Court of Appeal and House of Lords did not⁹⁵ — the latter instead focusing on causation and remoteness as the basis for decision.⁹⁶ As such, one can argue, as others have, that *The Liesbosch* is more squarely a decision on remoteness rather than Mitigation, which is after a fashion true.⁹⁷ However, this is also part of my point,

⁹² *The Edison*, [1931] P 230 (PDA) (The 9177 l. value assigned to the *Liesbosch* was in fact the price paid for her replacement, and in any event less than half what was claimed [23,514 l. 9s. 4d.] and what The Registrar ultimately allowed them [19,820 l. 12s. 7d.] at 231 - 232).

⁹³ *The Liesbosch*, *supra* note 82, Lord Wright (“The respondents contend that all that is recoverable as damages is the true value to the owners of the lost vessel as at the time and place of loss. Before considering what is involved in this contention, I think it desirable to examine the claim made by the appellants, which found favour with the Registrar and Langton J., and which in effect is that all their circumstances, in particular their want of means, must be taken into account and hence the damages must be based on their actual loss, provided only that, as the Registrar and the judge have found, they acted reasonably in the unfortunate predicament in which they were placed, even though but for their financial embarrassment they could have replaced the *Liesbosch* at a moderate price and with comparatively short delay. In my judgment the appellants are not entitled to recover damages on this basis... In the present case if the appellants’ financial embarrassment is to be regarded as a consequence of the respondents’ tort, I think it is too remote...” at 459-460”).

⁹⁴ Coote, *supra* note 83 (“The proceedings before the Probate Division and the appeals which followed are illustrations of the truth that the answers a court will, or should, give depend crucially on how it classifies the problem before it. The Probate Division seems to have seen the main issue as being one of mitigation. In the Court of Appeal, the emphasis was on the measure of damages and in the House of Lords it was to an important degree on causation and remoteness.” at 513).

⁹⁵ *Ibid* at 513.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

because Mitigation must (I argue) confront the question as to whether it is to apply and in so doing, potentially effect or displace the other rules of contract, including remoteness. In *The Liesbosch*, it clearly did not, which I argue was not incorrect in and of itself, and can be looked to as an example of Mitigation attempting to grapple with this question. Admittedly, given that the rule of remoteness applied in *The Liesbosch* is now defunct, I would agree that the decision cannot support a hard rule to the effect that Mitigation can *never* cover losses arising from impecuniosity. However, as noted above, the modern decisions in *Lagden* and *Southcott* do not go so far as to insist that Mitigation must *always* apply to losses arising from impecuniosity, and that in the end is my point: that it is simply a live question.⁹⁸

The House of Lords and the Supreme Court of Canada in *Lagden* and *Southcott* take different views of impecuniosity, albeit on very different facts. *Lagden* involved a poor motorist attempting to claim the cost of hiring a vehicle to replace the one damaged by the defendant, and *Southcott*, a single purpose corporation that technically did not have the assets to acquire a replacement property when the defendant reneged on a land sale. In *Lagden*, Lord Nicholls criticized *The Liesbosch* and the rule that Mitigation does not apply to losses or costs arising from impecuniosity, but even still noted that impecuniosity is generally a question of priorities.⁹⁹ A majority of their Lordships ultimately ruled that for a poor motorist like *Lagden*, his relative impecuniosity made the greater cost reasonable in mitigation and in so doing, purported to lay *The Liesbosch* to rest.¹⁰⁰ By contrast, the Supreme Court of Canada regarded the relative impecuniosity of

⁹⁸ *Lagden*, *supra* note 84 at para 9; *Southcott*, *supra* note 85 at paras 28–29.

⁹⁹ *Lagden*, *supra* note 84 (“In your Lordships’ House Ms O’Connor sought to derive assistance from *Dredger Liesbosch (owners) v SS Edison (owners)* [1933] AC 449, [1933] All ER Rep 144 and Lord Wright’s much discussed observations ([1933] AC 449 at 460-461, [1933] All ER Rep 144 at 158) regarding not taking into account a claimant’s want of means when assessing the amount of his loss. For the reasons given by my noble and learned friends Lord Hope of Craighead and Lord Walker of Gestingthorpe these observations, despite the eminence of their source, can no longer be regarded as authoritative. They must now be regarded as overtaken by subsequent developments in the law.” at para 8).

¹⁰⁰ *Ibid*, Lord Walker (“My Lords, since I have the misfortune to differ from the majority of your Lordships as to the disposal of this appeal, I will state my reasons briefly at the end of this opinion. But the House is, I understand, unanimously of the view that we should lay to rest what is left of *Dredger Liesbosch (owners) v SS Edison (owners)* [1933] AC 449, [1933] All ER Rep 144, and I wish to say something on that topic.” at para 90).

Southcott as no excuse for its failure to acquire a replacement property, even though it literally did not have the means to do so.¹⁰¹ There are obviously a number of differences between these plaintiffs and these cases, but the difference in substance as I see it goes back to the remarks of Lord Nicholls and the Court's assessment of the parties' priorities, which is yet another question that bears no relation to whether loss *could* have been avoided, but instead whether it *should* have been.¹⁰²

D. Mitigation is quite evidently more about allocation than avoidance

In light of the foregoing in section II.C, it is evident that there is much to be said against the view of Mitigation as “avoidance of loss” in as much as it applies to the determination of questions other than and further than simply “what loss might the plaintiff have avoided?” Some of these have been considered in sections II.C.1 to II.C.3. These questions are each unique in so far as none appear to be an obvious subset or variation of the others. If one were to attempt to synthesize a general theme, though, I would argue that Mitigation, in all the guises it goes by in the decisions canvassed above, is ultimately a question of allocation. It may be the allocation of responsibility for losses, the provision of benefits, or the benefit of subsequent transactions, but in all cases, it appears that Mitigation is tasked with weighing competing claims of obligation and entitlement and dividing spoils and suffering between claimants and defendants alike rather than focusing *only* on what a plaintiff might have done differently.

To tie back to the introduction of the chapter, what this section demonstrates in the larger context of this chapter, and the wider dissertation, is that the paradigm currently used to explain or describe mitigation, which has the notion of loss avoidance at its core, is at least in that respect inapt to describe what Mitigation really is or really does. As mentioned at the very beginning of the chapter, the reason for pointing this out is that the value of a new theory of Mitigation, such as the one I will propose in Chapter IV, would

¹⁰¹ *Southcott*, *supra* note 85 at paras 26–29, Karakatsanis J.

¹⁰² *Lagden*, *supra* note 84 at para 9.

be speculative at best, if there were no clear demonstrable need for reform. In my opinion, that need is demonstrated by the fact that parties and courts referred to in the cases canvassed above must inevitably have been hindered by the law of Mitigation as it is, or was at the time of each case, to the extent that embedded but inaccurate notions within the literature on Mitigation cause it to fail to predict what it is the court will do, or for the court itself to point to what it ought to do. Likewise, I argue that the same problem arises in the cases I will discuss below in sections III and IV, in which I will challenge two further notions in the law of Mitigation that are also as inaccurate as they are enmeshed.

III. Mitigation is not really a rule

Common law lawyers are not infrequently guilty of being taxonomically lax when it comes to describing the various components of the common law and of equity, or using looser language than might otherwise be ideal. Although, in light of the organic and often times loose nature of the common law and equity, this is a tendency that can readily be understood, if not always happily accepted despite the benefits. The benefits of this “Anglophone arrangement”, based as it is on precedent and an “uncodified” corpus — particularly that part of it that makes up the private and commercial component of its jurisprudence — are its flexibility and dynamism.¹⁰³ Indeed, these may well be the source of its true genius, as they have permitted the common law and equity to grow

¹⁰³ *R v Kneller (Publishing, Printing and Promotions) Ltd*, [1973] AC 435 (HL (Eng)), Lord Simon (“But the common law proceeds generally by distilling from a particular case the legal principle on which it is decided, and that legal principle is then generally applied to the circumstances of other cases to which the principle is relevant as they arise before the courts ...The passage I have cited from *Mirehouse v. Rennell*, 1 Cl. & F. 527 , 546 indicates that the fact that the authorities show no example of the application of the rule of law in circumstances such as the instant does not mean that it is not applicable, provided that there are circumstances, however novel, which fall fairly within the rule.” at 492-494); Fok PJ, “Outraging Public Decency: In Your Face and up Your Skirt - The Dynamism and Limits of the Common Law Lectures” (2017) 47:1 Hong Kong LJ 33–54 at 34–35; Sir Frederick Pollock, *The genius of the common law* (New York: Columbia University Press, 1912) at 112 (“What shall be the attitude of a good lawyer and a good citizen towards the problems among which the lot of the Common Law is cast? He will recognize, in the first place, that they are alive and not to be solved out of a digest, and that the work is never finished. If it ever seemed to be finished, the law would have ceased to be a living science and would be fit for nothing more than to be petrified in an official Corpus Juris. For principles, even the most certain, are capable of infinite application, and the matter is always changing.”).

apace with many of the developments that have reshaped the social, political, and economic fabric of the modern world. Of course, these qualities require a certain degree of flexibility in order to permit the application of existing jurisprudence to changing circumstances, which leads, it seems, to the aforementioned taxonomical laxity and looseness of language as concepts are stretched, remoulded or repurposed, and the strictures of the law finessed wittingly or unwittingly. This imprecision is not necessarily objectionable in and of itself, though, and it is probably not immediately evident as to why it is relevant. The complaint that can be made, however, is that witting or unwitting imprecision, coupled with the ingenuity of the common law lawyer, can and does lead in a number of circumstances to situations of startling difference between what the law *is*, and what it *says* it is.¹⁰⁴ In few places, I would argue, is this more evident than it is with Mitigation.

The potential divergence between the reality and rhetoric of Mitigation are many, including, for instance, the gap between the doctrine's ostensible preoccupation with loss avoidance discussed above and its actual engagement with questions of allocation. Such divergence is at times easily identifiable as being embodied in what I have referred to above as "inaccurate notions", much like the notion of loss avoidance. Others are somewhat more general, such as the assumption that Mitigation is a "rule", at least in the sense that it is mandatory, and it is this descriptor that I will focus on challenging in this section. The point I will demonstrate below through an examination of decisions that highlight the inaccuracy of this view is that the description of Mitigation as a rule is inapt for two reasons, which I will examine in turn. The first reason is that what we could describe as "the rule" is simply inaccurate when compared to the doctrine's operation in the case law, and the second is that what emerges from the case law once we are no longer content to accept the standard explanation of Mitigation does not appear to be a rule.

¹⁰⁴ Pollock, *supra* note 103 at 114 ("Any man who knows how to handle the professional apparatus of reference can find, with moderate industry, something like a show of authority for almost any- thing: and it is the delight of a certain class of advocates to snatch an advantage [though it is apt to be a fleeting one] by this method. But the law is not made by casual and hasty decisions in courts of first instance.").

A. The rule as stated is wrong

As stated above, I take issue with the notion that Mitigation is a rule. In addition to this, I make the related but distinct objection that even if Mitigation were a rule, the rule as it is presently understood is simply inaccurate. One might of course ask what difference it makes if the rule's expression is wrong when there is no rule, and why I should engage with it. The response in short is that my argument as to why it is that Mitigation is not a rule presupposes the rule's inaccuracy, and more importantly, that my argument in Chapter IV as to what Mitigation really is requires an explanation as to what Mitigation is not, which requires that this point be addressed along with the others tackled in this chapter. As such, it seems I must tackle this issue first as a preliminary matter and engage with the problematic way in which the rule is presently framed. To do so, I will critique two aspects of the rule that are on their face quite apparently inaccurate. These are: first, that the rule imposes a duty upon the plaintiff, and, second, that the plaintiff is the party to whom the rule is addressed.

Before proceeding to address the two inaccuracies referred to above, though, something must first be said about the nature of legal relationships and the taxonomy of legal concepts, since the failure to adequately account for these is an essential cause of the error. As such, I will briefly elaborate upon the most salient framework for understanding the nature of each error.

1. Mitigation cannot be a duty because no one has a right

Anyone familiar with legal scholarship will likely be aware that much ink has been, is currently being, and will be spilled on the nature of "rights" — for some reason more perennially popular than any other legal concept, such as duty. Much of this writing, though, is not much concerned with providing a framework for understanding the concept of "right", which is in some respects a positive endeavour, but more so with the

normative endeavour of arguing for a particular conception of what “rights” ought to be.¹⁰⁵ Works of this latter variety have in my view little to offer my work, and perhaps private law lawyers generally, but of the former, one work stands out as particularly authoritative and particularly relevant to the present question. This work is *Fundamental Legal Conceptions* by Wesley Newcomb Hohfeld, a professor at Yale Law School between 1913 and 1918 and before that a professor at Stanford.¹⁰⁶ The virtues of Hohfeld’s work are many, but arguably, its greatest is its attempt to introduce greater rigour and precision to the language of the law and the language of rights by providing a framework for more precisely defining and understanding its essential vocabulary — said vocabulary being the terminology used to denote or describe legal relationships, which is ultimately fundamental given that law and rights effectively only exist in order to regulate the relations between “persons”, however defined. Hohfeld’s work sets out to do this by disambiguating the various senses in which “right” is understood and explaining these in light of both the concept that is opposite and the concept that is a necessary corollary, referred to as a “correlative”.¹⁰⁷ The tables of these jural opposites and jural correlatives is set out below:¹⁰⁸

Jural Opposites

Right	Privilege	Power	Immunity
No Right	Duty	Disability	Liability

¹⁰⁵ Ronald Dworkin, *Taking rights seriously* (London: Duckworth, 1978); Joseph Raz, *The morality of freedom* (Oxford: Clarendon Press, 1986); Lukas H Meyer, Thomas W Pogge & Stanley L Paulson, *Rights, Culture and the Law* (Oxford: University Press, 2003).

¹⁰⁶ Wesley Newcomb Hohfeld, *Fundamental legal conceptions, as applied in judicial reasoning*. (New Haven: Yale University Press, 1964) at vii–x.

¹⁰⁷ *Ibid* at 35–65.

¹⁰⁸ *Ibid* at 36.

Jural Correlatives

Right	Privilege	Power	Immunity
Duty	No Right	Liability	Disability

The top line of each of the above tables contains the four distinct senses in which Hohfeld argued the term “right” was used.¹⁰⁹ These concepts can be described or thought of as the beneficial or positive aspect of a pair.¹¹⁰ The bottom line of the first table contains the concept regarded by Hohfeld as the opposite position from the term above it.¹¹¹ By contrast, the bottom line of the second table contains the concept that must necessarily describe the position of some opposite party (Party B) if Party A is to have the benefit of the concept immediately above it.¹¹² For example, if Party A is to have a Power then some person (i.e., Party B) must have a Liability (i.e., be liable to being effected by said Power).¹¹³ Of the eight concepts above, though, the two that are most relevant for present purposes, as I will elaborate upon below, are Right and Duty.

There are clearly a number of senses in which the term “right” can be understood, but in Hohfeld’s schema, the term Right is narrowly defined as being equivalent to a “claim” in the sense of being some assertion that necessarily demands or requires action or abstention from some other person.¹¹⁴ Duty is the correlative of Right in this sense, because in order for any such claim to be meaningful or valid it must, it seems, be mirrored by a coextensive obligation that requires the opposite party to act, or to refrain from acting, in accordance with the claim of the holder of the right (the “Right

¹⁰⁹ *Ibid* at 35–36.

¹¹⁰ *Ibid* at 35–64.

¹¹¹ *Ibid*.

¹¹² *Ibid*.

¹¹³ *Ibid* at 50–51.

¹¹⁴ *Ibid* at 36–38.

Holder”).¹¹⁵ Such an obligation may clearly be either positive or negative, but must in any event be mandatory.¹¹⁶ This aspect of Duty is essential to the Hohfeldian conception of Right (“claim rights”), which it helps to define, and helps to distinguish this sense of the general term “right” from what may be called “liberty rights”, which Hohfeld describes as Privileges.¹¹⁷ Privileges, such as the “right to free speech”, differ from Rights proper in Hohfeld’s schema in the sense that no other party is obliged to assist a party to speak, or to refrain from interfering with the exercise of free speech.¹¹⁸ One can, for instance, speak over someone else freely, even though the first speaker’s “right to free speech” may be defeated.¹¹⁹ By contrast, a property-holder’s Right to the possession of their property cannot be defeated by contrary action in the same way.¹²⁰ Any other party must comply with the property-holder’s claim to possession by abstaining from interference with the property.¹²¹ This particular Right is clearly negative in the sense of not requiring a third party to take steps to protect the property-holder’s interest, but it is nonetheless mandatory in the sense that it is a claim with which others must comply and which they cannot treat with indifference like a hypothetical rude conversationalist speaking over another and disregarding their liberty right or “Privilege” of free speech.

2. There is no positive obligation to act

Having now set out Hohfeld’s schema in brief and elaborated on the Right & Duty correlative relationship above, I can now say that I gratefully adopt this view as correct generally, and for the purposes of critiquing “the rule” of Mitigation such as it is. Now,

¹¹⁵ *Ibid* at 38.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* at 38, 42–43.

¹¹⁸ *Ibid* at 38–41 (Hohfeld gives an odd example to do with eating shrimp, but I think the example of speech makes the case more clearly).

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at 38.

¹²¹ *Ibid* at 38–39.

undoubtedly there is a spectrum of opinion as to what the rule is, and/or how it works, and thus various expressions of it, which makes debunking or critiquing its definition somewhat more difficult. However, consistent with the approach that I have taken up to this point, I will focus upon what is said of Mitigation in the “leading cases”, and in particular, what was said by Viscount Haldane in the leading modern authority, *British Westinghouse*:¹²²

“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which **imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach**, and debars him from claiming any part of the damage which is due to his neglect to take such steps.” [Emphasis added]

If we critique the accuracy Viscount Haldane’s expression of the rule of mitigation against the yardstick established by Hohfeld, it becomes apparent that the use of the term “duty” is almost certainly inappropriate. The cause for concern arising from the use of the term of course relates to the nature of the corresponding right that the duty must give rise to in order to satisfy Hohfeld’s definition. In order to work in this regard, the plaintiff’s “duty to mitigate” must reflect a corresponding mandatory claim that the defendant has as against the plaintiff that would permit the defendant to secure performance of the duty or a remedy for its breach. However, in light of the case law, it can be said with virtual certainty that any such “claim of right” on the defendant’s part is presently unknown to the law.¹²³ Further, the court’s themselves have had little hesitation in highlighting points of discrepancy. In *Darbishire v. Warran*, for instance, the English Court of Appeal noted that the plaintiff commits no wrong against anyone by failing to act reasonably,¹²⁴ and in *British Columbia Forest Products*, a minority of the Supreme Court of Canada noted that refusing to externalize loss does not constitute a failure to

¹²² *British Westinghouse*, *supra* note 36 at 689.

¹²³ Waddams, *supra* note 7 at para 758.

¹²⁴ *Darbishire*, *supra* note 21, Pearson LJ (“The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else.” at 315).

mitigate,¹²⁵ and both confirm that an alleged failure to mitigate can only be raised in response to the plaintiff's plea for damages flowing from the breach.¹²⁶ As such, it appears that even if Mitigation could be described in terms of a rule, then assuming the correctness of Hohfeld's view, the rule as framed is inaccurate or, as former Chief Justice McLachlin has put it, at least "misleading".¹²⁷

3. Mitigation is a two-way street

A further objection that can be made to the rule as quoted above from *British Westinghouse* is that it is also inaccurate and misleading to describe Mitigation as being focused solely on the plaintiff. The reason for this is that the action or inaction of the plaintiff may not be the factor that determines the doctrine's application. Instead, it appears that, from the decisions that I will canvass below, courts can and will weigh the actions of both parties in their analysis, and in some cases, it will be the defendant's behaviour that will effectively determine the doctrine's application.

The first decision I wish to note in this respect is the 2007 decision of the Manitoba Court of Appeal in *2438667 Manitoba Ltd. v. Husky Oil*.¹²⁸ In this case, the

¹²⁵ *British Columbia v Canadian Forest Products Ltd*, [2004] SCJ No 33 (SCC) [*Forest Products*], Lebel, Bastarache and Fish JJ., dissenting ("The principles behind mitigation, in particular the principle of economic efficiency, require the injured party to exploit any new 'capacity to earn' triggered by the defendant's tort. Mitigation principles do not require the injured party to attempt to recoup its losses by charging higher prices to other customers." at para 184).

¹²⁶ Beale, *supra* note 16 at 26–089; See also *Driver v War Services Homes Commissioner*, (1923) 44 ALT 130 (VSC) [*Driver*], Irvine CJ ("... This [expression that the plaintiff has a duty to mitigate his loss], I think, does not mean that he is under any duty in the ordinary sense, towards the party breaking the contract, but that he cannot be said to have really incurred any loss which might have been avoided by his taking such steps as a reasonably prudent man in his position would have taken to avoid further loss to himself; and the best test is, what would such a man do to avoid such a further loss to himself, supposing that, from insolvency of the other party, or from some other reason, he could not get any damages." at 134).

¹²⁷ *Southcott*, *supra* note 85, McLachlin CJC, dissenting ("A plaintiff is not contractually obliged to mitigate, and in this sense the term 'duty to mitigate' is misleading. However, if the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced" at para 72); See also *Whittaker v Unisys Australia Pty Ltd*, [2010] VSC 9, Ross J. ("While it is frequently asserted that there is a 'duty' to mitigate it is somewhat misleading to speak in terms of a duty. Rather, the principle of mitigation operates *pro tanto* as a conditional bar on the recovery of damages." at para 171).

¹²⁸ *2438667 Manitoba Ltd v Husky Oil Ltd (cob Husky Oil Marketing Comp)*, [2007] MJ No 233 (MBCA) (The agreements were with a predecessor firm later acquired by Husky, but Husky is the opposite contracting party for all intents and purposes connected with the litigation.).

three plaintiffs, all merchants in the retail gasoline business, had supply agreements with Husky Oil.¹²⁹ Under the agreements, the plaintiffs were entitled to guaranteed rebates per litre of gasoline sold.¹³⁰ Some time into the term of the agreements, though, Husky chose to unilaterally change its pricing structure and cut the rebates.¹³¹ The plaintiffs considered switching suppliers, but succeeded in negotiating new agreements with Husky.¹³² Unfortunately, Husky promptly ignored the new agreements and resumed acting under the new terms it had unilaterally imposed.¹³³ At this juncture, the plaintiffs were again forced to consider switching suppliers, but were put off from doing so by threatened litigation from Husky and opted to continue working (unhappily) under the terms imposed.¹³⁴ This was the general state of play when the plaintiffs commenced an action against Husky for breach of their original supply agreements.¹³⁵

The plaintiffs in *Husky* brought their claim against Husky seeking specific performance of the agreements, and thus the rebates they were owed.¹³⁶ In one sense, the claims were fairly uncomplicated, given that the sums could be readily ascertained according to the original formula, and neither remoteness nor mitigation strictly speaking applied.¹³⁷ This did not, however, prevent Husky from attempting to complicate the dispute in its defence, wherein it argued waiver of Husky's breach, and more importantly, that the plaintiffs' decision to remain with Husky rather than switch suppliers constituted a failure to mitigate.¹³⁸ Neither argument found much favour with the Court of Appeal,

¹²⁹ *Ibid* at paras 2–6.

¹³⁰ *Ibid* at paras 5–6.

¹³¹ *Ibid* at para 6.

¹³² *Ibid* at paras 7–11.

¹³³ *Ibid* at paras 12–15.

¹³⁴ *Ibid* at para 23.

¹³⁵ *Ibid* at paras 14–17.

¹³⁶ *Ibid* at para 17.

¹³⁷ *Asamera Oil Corp v Sea Oil and General Corp*, [1979] 1 SCR 633 at 668–669 [*Asamera*] Estey J. Beale, *supra* note 16 at 26–114, 26–117.

¹³⁸ 2438667 *Manitoba Ltd v Husky Oil Ltd (cob Husky Oil Marketing Comp)*, *supra* note 128 at paras 36–37.

but it is of course the latter that we are most concerned with. The response of R.J. Scott CJM, with respect to the alleged failure to mitigate, was that it simply did not lie in the defendant's mouth to complain of a failure to mitigate when that failure has been caused by, or materially contributed to, by the defendant's own actions.¹³⁹ Thus, it was not in any way a failure on the plaintiffs' part to have foregone the opportunity to switch suppliers in light of Husky's pressure to remain.

The Court's finding on the Mitigation issue in *Husky* explained above demonstrates the point made at the beginning of this section (i.e., III.A.3), or at least I would argue that it does in light of the fact that it was Husky's behaviour that decided the issue. I would accept, though, that one could explain *Husky* as an exception to a rule that generally focuses on the plaintiff's conduct rather than evidence of inaccuracy in how the rule is expressed. However, other decisions demonstrate that the defendant's conduct does not need to rise to the level of intentional interference in the plaintiff's attempts to mitigate in order to affect the application of the doctrine.

A decision that demonstrates that much less blameworthy conduct may nonetheless attract similar treatment is, perhaps surprisingly, another decision involving the sale of gasoline, namely, *Esso Petroleum v. Mardon*.¹⁴⁰ As alluded to, the facts of *Mardon* obviously differ with respect to the behaviour of the supplier, Esso, but also materially differ with respect to the parties' relationship, as well as the character of the

¹³⁹ 2438667 *Manitoba Ltd v Husky Oil Ltd (cob Husky Oil Marketing Comp)*, *supra* note 128, RJ Scott CJM ("Recognizing that each case turns on its own particular facts, there are cases which confirm the view that a defendant is not entitled to complain of a failure to mitigate that is caused, or materially contributed to, by the defendant's own actions." at para 55); See also *Smith v Tamblyn (Alberta) Limited*, (1979) 23 AR 53 (Alta SCTD), Laycraft J (as he then was) (... The defendants now appear to urge that she [the plaintiff] did not mitigate her damage by overriding the obstacles that they had put into her path. In my view a defendant cannot be heard to complain of failure by the plaintiff to mitigate the damages when he himself has made it more difficult. ..." at para 19); See also *Garrett v Quality Engineered Homes Ltd*, [2006] OJ No 588 (ONSC) at para 37; See also *Copperview Haven Ltd v Waverly Park Estates Ltd*, [1984] 4 WWR 673 (BCCA), Lambert JA ("It is not necessary for me to deal with the legal merits of that argument because there were a series of letters from the solicitors to the purchasers insisting on payment and pressing for payment during the period when the purchasers, if they had been properly advised, might have considered exercising the remedy of rescission. In my opinion, in the circumstances of this case and in the face of those letters written by the very solicitors who are making this argument, they cannot set up that argument with respect to the obligation to mitigate." at 685); See also *Walker v Sharpe*, (1920) 56 DLR 668 (SKCA), Newlands JA at 669; See also *Canadian Flexible Skate Co Ltd v Monarch Brass Mfg Co Ltd*, [1924] 2 DLR 387 (ONCA).

¹⁴⁰ *Esso Petroleum Co v Mardon*, [1976] QB 801 (CA).

dispute and the defence. As such, I will expand upon the facts somewhat in order to provide a more fulsome explanation of the significance of the Court's decision.

The facts of *Mardon* begin in 1961 when Esso sought to establish an outlet for their petroleum in Southport.¹⁴¹ Eventually, they located a prime site on a busy thoroughfare, which they calculated would carry a trade of 200,000 gallons per year, and which they then obtained.¹⁴² Thereafter, Esso sought out an experienced businessman to operate the Southport site, which they found in Phillip Lionel Mardon.¹⁴³ In April 1963, Mardon agreed to take a three-year lease of the site and to operate the filling station thereon on the strength of Esso's projected throughput, which would have, had it been accurate, led to a profitable trade in petroleum and a handsome return for Mardon's trouble.¹⁴⁴ Unfortunately, "accurate", Esso's estimate was not.¹⁴⁵ Instead, the actual and reasonable throughput of petroleum at the Southport site was somewhere in the range of 60,000 to 70,000 gallons per year.¹⁴⁶ Not much needs to be said about the reason for the inaccuracy other than to say it arose from the negligence of Esso's servants.¹⁴⁷ Although, it may be of interest to note that the error arose because Esso's servants failed to revise their estimate to account for the fact that the planning permission granted subsequent to acquisition required that the station be built "back-to-front".¹⁴⁸ That is to say that Esso had to have the forecourt, pumps, and the entrance at the back of the lot away from the main road, which obviously limited the site's accessibility and ultimately, its custom.¹⁴⁹

¹⁴¹ *Ibid* at 814.

¹⁴² *Ibid*.

¹⁴³ *Ibid* at 815.

¹⁴⁴ *Ibid* at 804–806.

¹⁴⁵ *Ibid* at 814–815.

¹⁴⁶ *Ibid* at 816.

¹⁴⁷ *Ibid* at 814–815, 820.

¹⁴⁸ *Ibid* at 814.

¹⁴⁹ *Ibid*.

By 1964, Mardon's financial straits had become dire on account of the much lower than expected volume of business.¹⁵⁰ With losses mounting and his initial capital investment gone, Mardon notified Esso of his intention to quit the site and the business in July 1964 in order to stave off total bankruptcy.¹⁵¹ After some delay and much urging from the regional manager responsible, who was anxious to have Mardon stay on, Esso for its part offered Mardon a revised lease agreement in September 1964 (the "1964 Lease") with rent reduced to £1,000 down from £2,500, and a surcharge (presumably some form of rebate) on petrol sold.¹⁵² Through no fault of Mardon's, though, losses continued to mount, and by 1966, Mardon was left cut off from petrol supplies for non-payment and then subjected to an action by Esso for repossession, monies owed for petrol, and mesne profits.¹⁵³ Mardon responded to Esso's suit with a counterclaim for damages for negligent misrepresentation and breach of warranty.¹⁵⁴ Mardon's counterclaim succeeded at trial, but damages payable were held to be limited to those accrued up to the time at which Mardon entered into the 1964 Lease.¹⁵⁵ The correctness of that holding was the primary issue on appeal.

¹⁵⁰ *Ibid* at 816.

¹⁵¹ *Ibid*.

¹⁵² *Ibid*.

¹⁵³ *Ibid* at 816–817.

¹⁵⁴ *Ibid* at 802, 817.

¹⁵⁵ *Ibid* at 821.

On appeal, Lord Justices Shaw¹⁵⁶ and Ormrod,¹⁵⁷ and Lord Denning M.R.,¹⁵⁸ unanimously agreed that the trial judge had erred when he awarded damages only up to the date of entry into the 1964 Lease and denied Mardon's claim for damages thereafter, and dismissed Esso's argument to the contrary. The argument advanced by Esso's counsel was that the decision to accept the 1964 Lease rather than to quit the venture altogether was not a reasonable choice in the circumstances.¹⁵⁹ Their Lordships' view was that to accept the 1964 Lease was effectively Mardon's *only choice* given that by July of 1964, he had lost his initial capital investment and had incurred mounting debt,¹⁶⁰ all of which meant that Mardon's "... only hope was to carry on in the hope of recovering his position if he could."¹⁶¹ As such, the losses arising under the 1964 Lease can be readily understood as a continuation of the earlier losses and recoverable as such, or as recoverable losses arising from reasonable action in Mitigation. Certainly, saying as much would be enough to be the end of the matter; however, I would argue that this

¹⁵⁶ *Esso Petroleum Co v Mardon*, *supra* note 140, Shaw LJ ("[The trial judge] took the view that the new agreement then made between Mr. Mardon and Esso, having been entered into voluntarily by Mr. Mardon, had no relation to the first agreement and its consequences. Accordingly, so the judge held, any loss suffered by Mr. Mardon while the second agreement was in operation and thereafter was unrelated to the negligent misrepresentation and to the breach of any warranty. It would follow, as the judge held, that such late loss was not to be taken into account in assessing the compensation to which Mr. Mardon was entitled. This conclusion in this respect is a fallacious one and has its origin in an erroneous view of what took place between the parties in September 1964." at 833).

¹⁵⁷ *Ibid*, Ormrod LJ ("The judge held that the losses after [entry into the 1964 Lease] were irrecoverable because Mr. Mardon was not induced by the plaintiffs' breach of duty to enter into the new agreement in September 1964, the rental surcharge arrangement. He therefore took September 1964 as the 'cut-off point.' With the greatest respect I do not think that this is the right way of approaching the problem." at 829)".

¹⁵⁸ *Ibid*, Lord Denning MR ("The judge limited the loss to the period from April 1963 to September 1964, when the new agreement was made. He said that from September 1, 1964, Mr. Mardon was carrying on the business 'on an entirely fresh basis, of which the negligent misstatement formed no part.' I am afraid I take a different view. It seems to me that from September 1, 1964, Mr. Mardon acted most reasonably. He was doing what he could to retrieve the position, not only in his own interest, but also in the interest of Esso." at 821).

¹⁵⁹ *Ibid* at 810.

¹⁶⁰ *Ibid* at 821, 833, Ormrod LJ ("It was in these circumstances that Mr. Mardon attempted to carry on with the business. Was this an unreasonable decision? In my judgment he had scarcely an option to do otherwise. He was trapped, as he said, by his losses and his only hope was to carry on in the hope of recovering his position if he could." at 829).

¹⁶¹ *Ibid* at 829, Ormrod LJ

reading would pay insufficient regard to the weight placed by Court on Esso's actions separate from those of Mardon.

In my view, it is noteworthy that though all three members of the Court expressed themselves slightly differently when discussing Mardon's decision, all three made express mention of the fact that Esso was anxious to retain Mardon and continue sales at the Southport site.¹⁶² None of their Lordships suggested that Esso had attempted to force Mardon's hand, as Husky did in *Husky*, but nonetheless they appeared uniformly unwilling to allow Esso to have its cake and eat it too, in the sense that they appear unwilling to countenance allowing Esso to encourage Mardon to continue for their benefit and yet disavow a clearly desperate and obviously doomed decision.¹⁶³ As such, it appears that Esso's encouragement had some effect on the Court's conclusion. How much effect precisely we cannot know, for we cannot tell what if anything the Court may have done differently had Mardon chosen to "double down" on the venture without Esso's influence. We can say, though, that three separate sets of reasons all note the fact of Esso's interest, suggesting that Esso was doing Mardon no favour, and it is hard to accept that such observations and such facts were not material.¹⁶⁴

Leaving aside the decisions above, one might ask what there is to suggest that the defendant's conduct matters except where it involves a direct attempt to interfere with or influence the plaintiff's attempts to mitigate. That the defendant's behaviour prior to the breach, or the general quality of their actions, should have an influence upon findings

¹⁶² *Ibid* at 821, 833, Ormrod LJ ("In fact, as the plaintiffs' internal memoranda make perfectly plain, they were more than anxious to retain him as a tenant of this service station because they foresaw great difficulty in finding anyone to take it over. It was very much in their interest to keep this service station open and selling their petrol." at 829)".

¹⁶³ *Ibid* at 821, 829, Shaw LJ ("The second agreement was thus in a practical sense an extension of the first, for it was the best means that offered a prospect of salvaging something from the wreck for both sides. Esso cannot claim to be exonerated from liability as from September 1, 1964. The judge's conclusion that they could so claim erred in law." at 833).

¹⁶⁴ *Ibid* at 821, 829, 833, Lord Denning MR ("It was Esso who were anxious for him to stay on. They had no other suitable tenant to replace him. They needed him to keep the station as a going concern and sell their petrol. It is true that by this time the truth was known - that the throughput was very far short of 200,000 gallons - but nevertheless, the effect of the original misstatement was still there. It laid a heavy hand on all that followed. The new agreement was an attempt to mitigate the effect. It was not a fresh cause which eliminated the past. It seems to me that the losses after September 1, 1964, can be attributed to the original misstatement, just as those before." at 821).

with respect to Mitigation is not anywhere explicitly averred, at least not that I have found. It appears from some decisions, though, that there is scope within the doctrine for courts to take such matters into account. One such decision is that of Mr. Justice Roskill (as he was then) in *Harlow & Jones v. Panex*.¹⁶⁵ Unlike the cases above on the sale of gasoline with a delinquent supplier, this case involved a contract for the sale of Soviet steel billets by the plaintiffs, Harlow & Jones, to the defendants, Panex, a delinquent buyer.¹⁶⁶

The facts of *Panex* are somewhat involved, but it is fair to say that the case boils down to a dispute over the delivery and acceptance of a single shipment of Soviet steel under a contract between Harlow & Jones as sellers and Panex as buyers.¹⁶⁷ The relevant terms were 10,000 metric tons of steel blooms of cross-section 180 x 180 millimetres; \$62.25 per ton; FOB Ventspils; August/September 1966 at supplier's option.¹⁶⁸ These terms were negotiated in May 1966 as a variation of an earlier contract.¹⁶⁹ This may explain the unusual term with respect to the supplier's option for selection of the delivery period, but otherwise need not concern us. One should however note that in 1966, the market for steel fell somewhat dramatically, settling at a market price well below the contract price prior to the delivery period.¹⁷⁰ In Mr. Justice Roskill's view, the fall in the market explained much of what transpired after May 1966.¹⁷¹

¹⁶⁵ *Harlow & Jones, Ltd v Panex (International), Ltd*, [1967] 2 Lloyd's Rep 509 (QB) [*Panex*]; See also *Burns v MAN Automotive (Aust) Pty Ltd*, [1986] 161 CLR 653 (HCA), Gibbs CJ ("... a plaintiff's duty to mitigate his damage does not require him to do what is unreasonable and it would seem unjust to prevent a plaintiff from recovering in full damages caused by a breach of contract simply because he lacked the means to avert the consequences of the breach. There are in the present case, the additional features that the financial difficulties of the appellant were largely brought about by the actions of the respondent in supplying him with a defective engine and refusing properly to rectify the defects, although the respondent should have known that the appellant lacked the financial resources that would have enabled him to pay to have the engine reconditioned." at 659).

¹⁶⁶ *Panex*, *supra* note 165 at 510.

¹⁶⁷ *Ibid* at 510–511.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid* at 510.

¹⁷⁰ *Ibid* at 514.

¹⁷¹ *Ibid*.

Following the May negotiations and agreement, and apparently the fall in steel prices, Panex entered into correspondence with Harlow & Jones between June and early August 1966 in an attempt to arrange delivery by way of two shipments of 5,000 tons rather than a single shipment of 10,000, despite the strict contractual position.¹⁷² For their part, Harlow & Jones acquiesced to this variation and attempted to make the necessary arrangements on the assumption of two shipments instead.¹⁷³ In August, however, Panex abruptly reverted to the strict contractual position and demanded that the entire 10,000 tons be brought forward for loading in a single hull on short notice.¹⁷⁴ When Harlow & Jones responded, advising that this could not be done in the time frame demanded, Panex purported to treat this as repudiation and withdraw.¹⁷⁵ This left Harlow & Jones in the unfortunate position of holding 10,000 tons of steel at a foreign port in a falling market, although the Russians were kind enough to take 1,500 tons of it back at cost.¹⁷⁶

After Panex's abrupt withdrawal in August 1966, Harlow & Jones attempted to sell the remaining 8,500 tons of unwanted steel but failed to do so until January 1967.¹⁷⁷ Following the collapse of the sale, Harlow & Jones brought a suit against Panex, seeking lost profit on the transaction, as well as the cost of storage charges of approximately £20,000 incurred while the steel remained in port at Ventspils.¹⁷⁸ Panex's defence to the claim alleged, *inter alia*, that Harlow & Jones had failed to mitigate by unreasonably

¹⁷² *Ibid* at 520.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid* at 523.

¹⁷⁵ *Ibid* at 525.

¹⁷⁶ *Ibid* at 510–514, 530.

¹⁷⁷ *Ibid* at 530.

¹⁷⁸ *Ibid* at 530–531.

failing to accept earlier, albeit low, offers to sell the steel.¹⁷⁹ Mr. Justice Roskill differed with the defendants on this point, and his comments are worth repeating in full:¹⁸⁰

“As a matter of arithmetic those figures are correct, but the point is this. The defendants broke this contract. It is they who put the plaintiffs in this difficulty. Of course, a plaintiff has always to do what is reasonable to mitigate his damages. **But he is not bound to nurse the interests of the contract breaker, and so long as acts reasonably at the time it ill lies in the mount of the contract breaker to turn round afterwards and complain, in order to reduce his own liability to a plaintiff, that the plaintiff failed to do what he might have been wiser to do.** I have already said there was no market at any material time. **I think the plaintiffs were in great difficulty, and I think the difficulties were entirely of the defendants’ making.**” [Emphasis added]

With the utmost respect to Mr. Justice Roskill, I suggest that it is fair to say that the passage above is not strictly wrong, but nor is it entirely right. I say this because although it is true that the plaintiff is not to be judged with the benefit of hindsight or held to a standard of perfection,¹⁸¹ it is clear that to permit the defendant to question the plaintiff’s actions after the fact is to some extent *the understood point* of the doctrine.¹⁸²

¹⁷⁹ *Ibid* at 530.

¹⁸⁰ *Ibid*.

¹⁸¹ *Banco de Portugal v Waterlow & Sons*, [1932] AC 452 (HL (Eng)) [*Banco de Portugal*], Lord MacMillan (“I confess I am not disposed to regard with much sympathy the criticism which [the defendants] have directed at the Bank’s action. Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency.” at 506); See also *Karacomina v Big Country Developments Pty Ltd & Big Country Developments Pty Ltd v Chadlace Pty Ltd & Ors J W Wall Investment Co Pty Ltd & Ors v Big Country Developments Pty Ltd & Ors Hollingsworth & v Big Country Developments Pty Ltd & Ors*, [2000] NSWCA 313, Giles JA (“A plaintiff who acts unreasonably in failing to minimise his loss from the defendant’s breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less. This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which he has not. Since the defendant is a wrongdoer, in determining whether the plaintiff has acted unreasonably a high standard of conduct will not be required, and the plaintiff will not be held to have acted unreasonably simply because the defendant can suggest other and more beneficial conduct if it was reasonable for the plaintiff to do what he did.” at para 187).

¹⁸² Why else ask if the plaintiff has acted reasonably?

Further, Mr. Justice Roskill's dicta above can be contrasted with the decision of the Court of Appeal in *Darbishire*, where it was noted by Lord Justice Harman that "...[t]he true question was whether the plaintiff acted reasonably as between himself *and* the defendant and in view of his duty to mitigate the damages"¹⁸³ [emphasis added], which conflicts with Mr. Justice Roskill's dicta above and in particular, his suggestion that the plaintiff need *not* "nurse" the defendant's interests. Of course, this aspect of *Darbishire* is itself open to question and has been criticized, most notably by the Supreme Court of Canada in *Janiak v. Ippolito*, wherein the Court also noted its preference for Mr. Justice Roskill's remarks above.¹⁸⁴ As such, it may be fair to say that the opposing view from *Darbishire* is not strictly correct either, and I am sympathetic to that view.

So, we might ask, what then is the situation? That is undoubtedly a fair enough question, but to answer it we must be prepared to look past the cases themselves and acknowledge that while each judge and each case purports to be speaking to the same matter, in reality, each is speaking to very different parties and very different facts. *Darbishire*, for instance, involved a negligent but not otherwise reproachable defendant and a somewhat eccentric plaintiff. *Panex*, by contrast, involved reasonable plaintiffs, and a group of defendants that included an individual that Mr. Justice Roskill described as "...a man to whom, in relation to business transactions, truth is a stranger".¹⁸⁵ Easy to see, then, that the courts in each case would have had different operative motivations in mind — the Court in *Darbishire*, to prevent a defendant from having to pay for the plaintiff's eccentricity; and the Court in *Panex*, to avoid letting a reprehensible defendant off lightly for underhanded and cynical behaviour. It seems almost obvious when put in that way that each court, and many other courts in many other cases besides, will apply the doctrine to the facts in their *entirety*, and further, that those facts must by necessity involve the defendant's acts as well. As such, I argue that at the very least, Mitigation must, and does, consider the effect of the defendant's actions on the plaintiff's ability to

¹⁸³ *Darbishire*, *supra* note 21 at 313, Harman LJ.

¹⁸⁴ *Janiak*, *supra* note 3 at para 30, Wilson J.

¹⁸⁵ *Panex*, *supra* note 165 at 515.

mitigate, but also, and further, considers the quality of the defendant's actions even prior to this point to determine whether the court ought to apply the doctrine in the defendant's favour — irrespective of whether the plaintiff has failed to mitigate or not.

To tie the point made in the preceding paragraph back to the central thesis of the section set out above in III.A, the fact of courts considering both the acts of the defendant and the plaintiff in their application of Mitigation is significant for two reasons. The first reason is that it highlights the potential pitfall of the “Anglophone arrangement” mentioned earlier, which is that great gaps can grow between what the law is and what it says it is when doctrines are adapted to new facts or situations without conscious acknowledgment of the change. The second reason is that it demonstrates an important, but apparently hitherto now unappreciated inaccuracy in the accepted rule — i.e., that the doctrine as expressed says nothing about defendants — but in reality, it applies to their behaviour as well as the plaintiff's, or to put it another way, it demonstrates that the accepted rule is wrong.

B. What remains is not a rule

Having challenged the inaccuracy of the rule in the two respects above, I will now turn to consider whether what we refer to as the doctrine of Mitigation is even aptly described as a “rule”. Again there are two aspects of the doctrine's operation that I wish to examine in order to make the case, and these are: first, that the use of a “reasonableness” criterion to assess the behaviour of parties quite apparently makes the doctrine a principle; and second, that the approach taken to determining whether a subsequent transaction ought to be treated as consequent or collateral does not conform to any single theory, and again indicates that the doctrine is more a principle than a rule.

1. Mitigation is more discretionary than it is mandatory

The terms “rule” and “principle” are sometimes used interchangeably when describing mitigation, which again smacks of taxonomical imprecision and can have a tendency to mislead.¹⁸⁶ The weight and application of principles varies with circumstance, while rules, on the contrary, either apply or do not apply.¹⁸⁷ As such, Mitigation can only be one or the other, and given its general, if inaccurate, description as a “duty”, it would appear that the weight of opinion presently militates in favour of categorizing the doctrine as a rule. A “sometimes” duty simply does not make sense in light of the requirement that a duty be in some sense *mandatory* in order to constitute a duty at all,¹⁸⁸ meaning that it would be *prima facie* incorrect to describe Mitigation as a principle if one takes the designation “duty” at face value. However, if one contrasts what the authorities *say* that Mitigation is in this respect (i.e., a duty) with what Mitigation apparently *does*, it appears that Mitigation’s designation as a rule is as inaccurate as the generally accepted exposition of the rule, which I discussed above in III.A.3. As I will explain below, said inaccuracy pertains to the “disconnect” between the operation of the doctrine and what it means to be a rule.

Before going further, I wish to refer the reader back to the classic exposition of the rule from the speech of Viscount Haldane in *British Westinghouse* discussed above in III.A.2:¹⁸⁹

¹⁸⁶ *British Westinghouse*, *supra* note 36, Viscount Haldane (His Lordship refers first to a principle requiring the plaintiff take reasonable steps to mitigate their loss, before citing *Staniforth v Lyall*, (1830) 7 Bingham 169 as an illustration of the “rule”. at 689).

¹⁸⁷ John Braithwaite, “Rules and Principles: A Theory of Legal Certainty” (2002) 27 *Austl J Leg Phil* 47–82 at 50 (“Ronald Dworkin sees rules as ‘applicable in an all-or-nothing fashion’ when they are crafted to exhaustively include all of their exceptions: ‘If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.’ Dworkin, in contrast, sees legal principles as not setting out legal consequences that follow automatically when the conditions provided are met. A principle states a reason that argues in one direction, but it does not prescribe a particular decision. Because principles have less specificity in this way, unlike rules principles can conflict. Decision makers assign weights to principles to resolve such conflicts: ‘it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.’”).

¹⁸⁸ Hohfeld, *supra* note 106 at 36–38.

¹⁸⁹ *British Westinghouse*, *supra* note 36 at 689, Viscount Haldane.

“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all **reasonable** steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.” [Emphasis added]

The most important part of the exposition above is the word “reasonable”, and although I have criticized the accuracy of Viscount Haldane’s expression of the doctrine in two respects above, I would readily concede that Viscount Haldane’s reference to a “reasonableness” standard is correct. That is to say that it accurately reflects the way in which courts assess the behaviour of parties (both plaintiffs and defendants) in the sense that it *is* the yardstick they apply. As I will explain, though, it is the use of this yardstick that undermines Mitigation’s ostensible character as a rule, other aspects of the exposition notwithstanding.

The significance of the “reasonableness” standard with respect to Mitigation’s categorization as a rule is that it effectively supplants any suggestion of an “objective standard”. A hypothetical critic might riposte that the resort to “reason” can hardly be anything but a rational recourse to values and judgment of right-minded people, and that it is no less objective for being abstract. After all, it is generally accepted that the “reasonable person” is an apt and neutral arbiter of negligence in matters criminal and civil, given that it is meant to put the question of fault on a footing that the ordinary person without the benefit of hindsight will understand, and to remove it from the subjective peculiarities of particular people, including the defendant or the victim.¹⁹⁰ However one justifies the standard, though, I am inclined to support the view of Lord Radcliffe, who had occasion to “peek behind the curtain” when considering the question

¹⁹⁰ John Gardner, “The Many Faces of the Reasonable Person” in *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019) at 293–294 (“One aspect of the all-purpose or ‘vanilla’ reasonable person that garners a lot of attention from lawyers is the so-called ‘objective’ character of any standard that he sets. Recall that he is ‘available to be called upon when a problem arises that needs to be solved objectively’. Since ‘objective’ is a word that performs a lot of different philosophical and legal services, I will instead speak of the standards set by the reasonable person as ‘impersonal.’ They are impersonal in that they do not bend to the varying personal characteristics of those who are judged by them.”).

of the reasonable person's point-of-view in *Davis Contractors v. Fareham*, wherein he made the following remarks:¹⁹¹

“By this time, it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, **the court itself.**” [Emphasis added]

In short, the above is my reason for regarding recourse to reasonableness as a retreat from the view of Mitigation as a “rule”, because as Lord Radcliffe acknowledges frankly, the arbiter in the end is simply the court, and a court given the authority to say what is “just” is a court possessed of a discretion. Of course, the discretion imparted by Mitigation is admittedly bounded, but it has nonetheless been the view since antiquity that the existence of discretion is diametrically opposed to the existence of a rule.¹⁹² Either a predetermined maxim governs, or the arbiter does, and although the two may be mixed and matched in varying degrees, past a certain point of flexibility it simply no longer makes sense to speak of a “rule”.¹⁹³ I argue that such a point is reached with the role of reasonableness in Mitigation for the reason that it allows courts to rationalize all but the absurd, and to thus reach opposing outcomes on markedly similar facts. To

¹⁹¹ *Davis Contractors Ltd v Fareham Urban District Council*, [1956] AC 696 (HL (Eng)) at 728–729 (HL (Eng)).

¹⁹² One can, for instance, point to Aristotle's admonition that laws should leave as little up to the adjudicator as possible, because it undermines the certainty that rules/law are supposed to provide; Aristotle, *Aristotle: with an English translation: the “Art” of rhetoric*, translated by John Henry Freese, Loeb classical library (London: New York: W Heinemann; GP Putnam, 1926) at I.1.1354a (“...it is proper that laws, properly enacted, should themselves define the issue of all cases as far as possible, and leave as little as possible to the discretion of the judges.”); Jesús Vega, “Legal Rules and Epieikeia in Aristotle: Post-positivism Rediscovered” in Liesbeth Huppel-Cluysenaer & Nuno MMS Coelho, eds, *Aristotle and The Philosophy of Law: Theory, Practice and Justice* Ius Gentium: Comparative Perspectives on Law and Justice (Dordrecht: Springer Netherlands, 2013) 171 at 173 (“Rules play a substantial role in Aristotle's philosophy of law. As it is widely known, their importance comes above all from a fundamental thesis about the ‘rule of laws, not of men’ [EN V.6.1134a35] which is based upon the postulate of law as a system of general, positive rules conceived as the essential instruments for the public organization of the polis.”).

¹⁹³ Braithwaite, “Rules and Principles”, *supra* note 187 at 50–51; Roger A Shiner, “Aristotle's Theory of Equity” (1993) 27:4 Loy L A L Rev 1245–1264 at 1257 (Even Aristotle concedes that some degree of imprecision is likely inevitable though: “It is the mark of an educated man, Aristotle tells us in a famous passage, to look for precision in each class of things just so far as the nature of the subject permits.”).

illustrate this point, I will consider two seemingly parallel lines of authority with respect to post-breach negotiation with the defendant and two markedly different views of “reasonable”.

i. Two wrongs do not make a right

The first line of cases that I will discuss can be described as starting from the position that strict primary rights do not give rise to a strict entitlement to secondary rights, although that language is, admittedly, nowhere in appearance. Nonetheless, the underlying rationale behind the first line of authority on post-breach negotiation appears to give short shrift to any suggestion that a plaintiff may in any event, and always, insist on their entitlements to the end of the earth, as we see in the first of all notable decisions on this topic: *Payzu v. Saunders*.¹⁹⁴

Many readers will doubtless be familiar with *Payzu v. Saunders*, or at least the name, but it bears emphasizing that this seminal 1919 case of the English Court of Appeal is where the jurisprudence on post-breach negotiation began. The facts of *Payzu* may likewise be well known, but can be restated in short as follows: Saunders and Payzu were respectively the supplier and buyer of silk under a standing contract for supply with goods to be provided on credit and payment on account at regular intervals by cheque.¹⁹⁵ All went well under the parties’ contract for a time until one such cheque went missing in the post.¹⁹⁶ Payzu attempted to furnish a replacement cheque, but this was delayed, exacerbating the dispute and ultimately leading to Saunders’ repudiation of the existing contract.¹⁹⁷ Saunders’ repudiation of the existing contract was not a complete refusal to deal with Payzu further, though.¹⁹⁸ Instead, Saunders offered to continue supplying silk

¹⁹⁴ *Payzu Ltd v Saunders*, [1919] 2 KB 581 (CA).

¹⁹⁵ *Ibid* at 581–582.

¹⁹⁶ *Ibid*.

¹⁹⁷ *Ibid*.

¹⁹⁸ *Ibid*.

but only on a cash payment on delivery basis.¹⁹⁹ Payzu refused the offer, however, and instead chose to commence an action for breach of contract.²⁰⁰

On its face, the action by Payzu appears fairly straightforward. The market for silk had risen a great deal during the war years on account of the need for such raw materials in the war effort. For instance, parachutes — now a necessity for airmen, among other uses — consumed fabrics of all kinds in great quantity. As such, Payzu's claim for loss would have seemed somewhat uncomplicated given the relative scarcity of supply in the civilian market. Saunders, however, defended the claim on the basis of a failure to mitigate by Payzu when its principals refused Saunders' offer to continue supply under revised terms.²⁰¹ This argument was accepted by Mr. Justice McArdie at trial,²⁰² and was later upheld by the members of the Court of Appeal, including Lord Justice Scrutton, who made the following remarks:²⁰³

“The plaintiff must take “all reasonable steps to mitigate the loss consequent on the breach,” and this principle “debars him from claiming any part of the damage which is due to his neglect to take such steps”: *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London*, per Lord Haldane L.C. Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience... **in commercial contracts it is generally reasonable to accept an offer from the party in default.**” [Emphasis added]

Coming from a jurist as eminent as Lord Justice Scrutton, the above-quoted passage is exceptionally strong authority for the proposition that post-breach negotiation cannot be arbitrarily refused by a plaintiff, and that a defendant's attempt to deviate from the plaintiff's primary contractual rights does not in and of itself justify doing so.

¹⁹⁹ *Ibid* at 582.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid*.

²⁰² *Ibid* at 585–586.

²⁰³ *Ibid* at 589.

However, as the cases below demonstrate, the passage leaves a number of connected points unclear, including whether the plaintiff's obligation is only to consider offers rather than make them, and when exactly might a plaintiff refuse an offer that would otherwise have been deemed "generally" reasonable to take.

The next noteworthy case on this side of the divide, and the next of the five to come chronologically, is the lesser known 1944 King's Bench decision in *Houndsditch Warehouse Ltd. v. Waltex Ltd.*²⁰⁴ The case involved a sale by sample of 300 men's leather braces by the defendants, Waltex, to the plaintiffs, Houndsditch.²⁰⁵ The goods were delivered by Waltex and correspondingly taken up and paid for by Houndsditch,²⁰⁶ but the parties later came into conflict when Houndsditch alleged that the goods, or some part of them, did not in fact correspond with the sample.²⁰⁷ Houndsditch commenced an action against Waltex for breach of contract, seeking damages on the basis of the non-conformity of the goods.²⁰⁸ Pending trial, solicitors for Waltex wrote to the solicitors for Houndsditch, offering to accept the return of the braces for a refund, subject to the right to reject those that were not in the same condition as at the date of delivery.²⁰⁹ The solicitors for Houndsditch rejected the offer, however, on the basis that the braces would be needed at trial in order to prove Houndsditch's case.²¹⁰ Unfortunately, it was not clear whether or not the offer was in compromise of the action, i.e., would require Houndsditch to abandon its claim to damages in respect of those braces returned, or whether it was outside of the scope of the action and without prejudice to damages.²¹¹ This ambiguity would have a significant effect on the outcome of the case.

²⁰⁴ *Houndsditch Warehouse Ltd v Waltex Ltd*, [1944] 1 KB 579 [*Waltex*].

²⁰⁵ *Ibid* at 579.

²⁰⁶ *Ibid* at 579–580.

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid* at 580.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid*.

²¹¹ *Ibid* at 581.

The conclusion reached by Mr. Justice Stable on these facts was that it would have been well within reason for Houndsditch to refuse an offer from Waltex that required Houndsditch to abandon its claim against Waltex for damages.²¹² Without such a stipulation, though, Stable J opined that it would have been unreasonable for Houndsditch to refuse the offer and, importantly, in light of the ambiguity, Stable J held that it was unreasonable for Houndsditch to have refused without clarifying terms.²¹³ As such, Houndsditch was held to have failed to mitigate, and its damages award was correspondingly reduced.²¹⁴ In one sense, this outcome amounts to a relatively simple application of *Payzu*. In another sense, though, as I will discuss below, it is significant for establishing that a plaintiff may reasonably refuse an offer that is contingent on the compromise of an action, and that a plaintiff may reasonably be expected to take an active rather than passive role in post-breach negotiations.

Continuing the theme of favouring compromise, the last and most recent case to be discussed in this line is the oft-cited *Soitros Shipping Inc. and AECO Maritime S.A. v. Sameiet Solholt (The "Solholt")*, a 1983 decision of the English Court of Appeal.²¹⁵ In this case, the parties entered into a transaction by way of a contract dated May 7, 1979, wherein Soitros, the appellants, contracted to buy a vessel called the Solholt from Sameiet Solholt, the respondents, for \$5,000,000 USD.²¹⁶ Under the contract, delivery was to take place at a safe port in the UK, or on the continent between Gibraltar and Bergen, at the seller's option, and in any event, no later than August 31, 1979.²¹⁷ Late

²¹² *Waltex*, *supra* note 204, Stable J ("If it was an offer to compromise part of the claim, in my judgment, the plaintiffs were under no obligation to accept it." at 581).

²¹³ *Ibid*, Stable J ("As there was some obscurity as to what the offer meant, it is unfortunate that the plaintiffs' solicitors did not keep the negotiations open long enough to obtain a clear definition of its terms. In refusing the offer, lock stock and barrel, as the plaintiffs did by their letter of March 17, 1943, they were not acting reasonably." at 581)".

²¹⁴ *Ibid* at 581.

²¹⁵ *Soitros Shipping Inc and AECO Maritime SA v Sameiet Solholt (The "Solholt")*, [1983] 1 Lloyd's Rep 605 (CA) [*The Solholt*].

²¹⁶ *Ibid* at 607–609.

²¹⁷ *Ibid* at 605.

delivery entitled the buyer to cancellation, the return of the deposit with 5% interest, and compensation for any losses caused to the buyer by non-fulfillment.²¹⁸

As it turned out, Sameiet were late making delivery of the vessel on account of an overrun on a fixture that was to end prior to August 31, and in the event, Sameiet were only able to make delivery on September 1.²¹⁹ Soitros's response to Sameiet's late delivery was to cancel for breach of condition on September 3 while the Solholt sat waiting for inspection in dry dock at South Hampton.²²⁰ This was somewhat unusual, given that the Soitros was faced with a rising market, and the market value of the Solholt had now risen by \$500,000 USD over the contract price.²²¹ Following cancellation, Soitros offered to purchase the Solholt at a reduced price of \$4,750,000 USD.²²² Sameiet refused the offer, however, leaving Soitros to buy into the market and/or pursue its available remedies for breach.²²³ Of these, Soitros chose to pursue a claim for damages, but not to buy in a replacement vessel.

At trial, Soitros predictably claimed the \$500,000 USD difference between the contract price of \$5,000,000 USD and the increased market value as at the end of the delivery period. Sameiet, for its part, defended against Soitros' claim on the basis of a failure to Mitigate.²²⁴ At first blush, it is not obvious how exactly Sameiet could frame such an argument, given that the loss as at the end of the delivery period was in some sense unavoidable on account of the fact that the market was rising. However, in a fashion similar to that of the arbitrator in *Heaven & Kesterton*, Mr. Justice Staughton

²¹⁸ *Ibid.*

²¹⁹ *Ibid* at 606–607.

²²⁰ *Ibid.*

²²¹ *Ibid* at 607.

²²² *Ibid* at 609.

²²³ *Ibid* at 605–609.

²²⁴ *The Solholt*, *supra* note 215, Sir John Donaldson MR (“However, in [counsel for the sellers’] submission... it was reasonable to expect the buyers to seek to enter into a new contract for the purchase of the vessel and that, had they done so, they would have succeeded in purchasing it at the contract price, thereby extinguishing their loss. Accordingly such loss as they have in fact suffered is attributable to this unreasonable conduct and not the sellers’ breach of contract.” at 609”).

concluded that it was reasonable for Soitros to have pursued the “repurchase” of the vessel on the original terms, and that the failure to do so constituted a failure to mitigate, which effectively eliminated Soitros’ damages claim.²²⁵ Soitros of course appealed this finding up to the Court of Appeal.

The Court of Appeal ultimately upheld Mr. Justice Staughton’s trial decision, finding that Soitros ought to have offered to reinstate the contract on the original terms.²²⁶ On its face, one can argue that this conclusion amounted to a significant further extension of the plaintiff’s obligations in post-breach negotiations that initially appear to have been to simply consider reasonable offers as per *Payzu*,²²⁷ and then to actively investigate those made as per *Houndsditch*.²²⁸ Here though, even the making of an offer that would have halved the defendant’s exposure was unreasonable, as indeed was anything less than reinstatement. This is effectively the high watermark in a post-breach world, but not all courts have shared this view, as we shall see.

ii. A right to rights undoes all wrong

The first case in what amounts to a parallel line of authority that seems to trace its roots to *Payzu*, but appears to take a sharply differing perspective on “reasonable” in post-breach negotiations, is the decision of Mr. Justice Devlin (as he then was) in *Heaven & Kesterton Ltd. v. Etablissements Francois Albiac & Cie*.²²⁹ In this case, the English plaintiffs, Heaven & Kesterton, contracted to purchase 200 standards of frame-sawn U.S. redwood on CIF terms from the French defendants, Etablissements Francois, in 1954.²³⁰ Unfortunately, documents tendered by Etablissements in early 1955 were rejected by

²²⁵ *Ibid* at 610.

²²⁶ *Ibid*.

²²⁷ *Payzu Ltd v Saunders*, *supra* note 194 at 589.

²²⁸ *Waltex*, *supra* note 204 at 581.

²²⁹ *Heaven & Kesterton Ltd v Etablissements Francois Albiac & Cie*, [1956] 2 Lloyd’s Rep 316 (QB) [*Heaven & Kesterton*].

²³⁰ *Ibid* at 316–317.

Heaven & Kesterton on the basis of late shipment and non-conformity of the documents themselves with the contract specification.²³¹ Although it is important to note, as I will discuss below, that there is also a suggestion that the goods themselves were *also* non-conforming.²³² Heaven & Kesterton pursued arbitration of the dispute, seeking damages for the difference between the contract and market prices for the timber, leading to an award of £200 and a request by Heaven & Kesterton to have the issue of quantum stated as the special case decided here by Mr. Justice Devlin.²³³

The issue in the case stated was which of two putative sums reflected the correct quantum for the award which, unsurprisingly, in turn depended on whether Heaven & Kesterton had failed to acquit themselves of their “duty” to mitigate.²³⁴ The two sums in question were £540 and the above-mentioned £200.²³⁵ The former sum was assessed by the arbitrator on the basis of the difference between the contract price and the market price per standard of timber on February 15, 1955, and March 17, 1955 (the two dates on which documents were tendered and rejected), which came to £3 per standard, multiplied by the contract quantity of 200 standards.²³⁶ I note that it is not clear as to why this comes to £540 and not £600, but it is much too late in the day to investigate the facts of a 64-year-old case. The second sum is derivative of the first and equates to the remaining “unavoidable” loss of £1 per standard which the arbitrator found that Heaven & Kesterton would have suffered *if* they had made a successful offer to purchase the timber from Establissements at a lower price, *after* having rejected it rightfully under the original contract.²³⁷

²³¹ *Ibid* at 318.

²³² *Ibid* at 321.

²³³ *Ibid* at 320–321.

²³⁴ *Ibid*.

²³⁵ *Ibid*.

²³⁶ *Ibid* at 320.

²³⁷ *Ibid*.

Mr. Justice Devlin's conclusion was that £540 was the correct sum to award and that the arbitrator had been wrong to conclude that Heaven & Kesterton's "failure" to offer to buy the rejected goods constituted a failure to mitigate.²³⁸ In Mr. Justice Devlin's view, it would be one thing if the goods were compliant and rejected only for late shipment or defective documents, and the *seller* were to make a reasonable offer to sell the goods to the plaintiff/buyer for whose needs such goods would suffice.²³⁹ Such an offer would have to be considered when determining whether the plaintiff/buyer had acted reasonably to mitigate their loss, according to "some sort of principle", as Mr. Justice Devlin put it, although it would seem that *Payzu* was somewhere in his Lordship's mind.²⁴⁰ However, His Lordship further opined that where, as here, the plaintiff/buyer had no reason to suspect that the defendant/seller would be willing to sell the now-rejected goods to the plaintiff/buyer again, it was *not* unreasonable for the plaintiff/buyer to have *not* made such an offer.²⁴¹ Further, and more importantly in His Lordship's view, if the plaintiff/buyer were to be required to positively pursue the purchase of goods that they had already rightfully rejected for defect or non-conformity on pain of a reduction in their damages for failing to do so, it would all but undo the plaintiff/buyer's right to reject

²³⁸ *Ibid* at 321.

²³⁹ *Ibid* at 321, Devlin J (as he then was) ("Now, this, I think is certainly the law. If goods are rejected in a c.i.f. contract for some reason that has nothing to do with quality ... it is open to the seller to go to him and say: 'Well, then, I tender you these goods...' ... If the seller does that, that is a matter which must be taken into consideration in arriving at what is the proper sum of damages to award to the buyer. It may or may not be conclusive, but it has to be taken into consideration in answering the question of whether or not the buyer has acted reasonable, as it is his duty to do, in mitigating damage ... But I think it is quite plain that there is no room for considerations of that sort in the circumstances of this case..." at 321).

²⁴⁰ *Ibid* at 321 (Mr. Justice Devlin does not cite *Payzu* by name, but his description of the principle in question closely mirrors the dicta of Lord Justice Scrutton in that case.); *Payzu Ltd v Saunders*, *supra* note 194, Scrutton LJ ("Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience... in commercial contracts it is generally reasonable to accept an offer from the party in default." at 589).

²⁴¹ *Heaven & Kesterton*, *supra* note 229 at 321; In circumstances where the parties relationship has soured, it is not unreasonable for a plaintiff to have not considered making any kind of offer to the defendant; See *Karacominakis v Big Country Developments Pty Ltd & Big Country Developments Pty Ltd v Chadlace Pty Ltd & Ors J W Wall Investment Co Pty Ltd & Ors v Big Country Developments Pty Ltd & Ors Hollingsworth & v Big Country Developments Pty Ltd & Ors*, *supra* note 181, Giles JA ("Whether the plaintiff acted unreasonably is a question of fact. It is possible that a plaintiff will be held to have acted unreasonably in failing to enter into a new contract with the defendant, following breach of contract by the defendant and termination of the contract. But the fact of the breach and its effect on the relationship between the parties may be material to reasonableness" at para 188).

for non-conformity (as opposed to a technicality) in the first place, since their final position would be the same as if they had accepted the goods and sued only for breach of warranty.²⁴² This further buttressed His Lordship's conclusion that the arbitrator had been wrong in law to reduce Heaven & Kesterton's damages for failure to pursue repurchase.²⁴³

As I will discuss below, I do not know whether the last objection noted by Mr. Justice Devlin above is sound in principle, and further, I would note that it is not clear that the timber was at all non-conforming, because it was not clear that the plaintiffs ever did inspect the goods. The only positive evidence to this effect was the arbitrator's finding that a loss of £1 per standard was unavoidable, which indicated that the goods were worth less than that which Heaven & Kesterton had contracted to buy. As such, if the right to reject alone is not enough to excuse efforts to repurchase rejected goods, it is not clear that Heaven & Kesterton did in fact act "reasonably" as at the time or only did so in hindsight.

The last decision I will discuss in this line before attempting a denouement of this section is the above-mentioned case of *Strutt v. Whitnell*.²⁴⁴ The facts of *Strutt v. Whitnell* differ somewhat from those of the preceding cases, but the same theme nonetheless presents itself. In this case, the plaintiff/respondent, John Strutt, was a property developer who had sold a dwelling house in Clacton-on-sea to his then-friends, the defendants/appellants, Norman and Christine Whitnell, in 1969.²⁴⁵ By 1970, certain structural defects in the house became apparent, though, which led to a friendly agreement for Strutt to repurchase the house in order to pursue a claim against the

²⁴² *Heaven & Kesterton, supra* note 229, Devlin J ("[limiting damage to the difference between the contract value of the goods and the actual value of the defective goods] is tantamount to depriving a buyer of his right to reject altogether, and saying that, notwithstanding that he is properly rejecting he is to be put in the same position as if he had taken up the goods, and as if his only remedy was to be compensated for the damage on the basis of defective quality. That seems to me to be manifestly wrong in law." at 321).

²⁴³ *Ibid* at 321.

²⁴⁴ *Strutt v Whitnell*, [1975] 1 WLR 870 (CA) [*Strutt*].

²⁴⁵ *Ibid* at 871.

builder,²⁴⁶ the Whitnells lacking the necessary privity of contract to do so themselves. Unfortunately, the repurchase was complicated by the presence of a tenant in the house whom the Whitnells had expected to vacate, but who would not, and who could not be turned out on account of protection under the *Rent Acts*.²⁴⁷ The Whitnells' failure to deliver the property in a vacant state reduced its value by approximately £1,900, as later found by the Registrar, which prompted Strutt to notify the Whitnells that he would sue for damages, and which brings us to the pertinent part of the dispute.²⁴⁸

The Whitnells' response to Strutt's stated intention to sue was simply: "Don't do that, we will buy it back".²⁴⁹ Strutt, for his part, dismissed the suggestion, claiming that he himself had already sold the property along with a portfolio of others.²⁵⁰ Strutt's reply was apparently untrue,²⁵¹ but the Whitnells gave Strutt another chance to avoid the problem by repeating their offer prior to formal commencement of the suit.²⁵² When the matter was heard before the Registrar, the Whitnells made no defence as to liability, focusing instead on quantum and specifically, the allegation that Strutt had failed to mitigate in the terms required by *Payzu* by refusing the Whitnells' offer to repurchase the property.²⁵³ The Registrar, for his part, found for Strutt and held that the refusal of the Whitnells' offer was not a failure to mitigate.²⁵⁴ Although, the record of decision was said to be brief and arguably insufficient to justify the finding, but this was to some extent remedied by the more fulsome decision of the Court of Appeal.²⁵⁵

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid* at 871–872.

²⁴⁹ *Ibid* at 871.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid* at 870–871.

²⁵⁴ *Ibid* at 871.

²⁵⁵ *Ibid* at 872.

The Court of Appeal confirmed the Registrar's decision in three separate and concurring judgments.²⁵⁶ Lawton and Cairns LJ, and MacKenna J differed slightly in their wording, but all three grounded themselves on the footing that the plaintiff cannot be deprived of a substantial right to damages on the basis that an alternative was arguably made available to them by the defendant, even if the plaintiff's refusal was capricious, i.e., unreasonable.²⁵⁷ How exactly this was to be reconciled with *Payzu* is not immediately obvious but is seemingly addressed in the opinion of Mr. Justice MacKenna.²⁵⁸ In his view, *Payzu* could be distinguished on the basis that *Payzu* was not asked to give up property in exchange for an alternative to some or all of its damages because *Payzu* had not received goods, but had instead been denied them when the defendant refused to fulfill further orders of silk under the original contract.²⁵⁹ Admittedly, that distinction has some attraction if one sees particular value in the Clacton-on-sea property, which was not apparent, but which Lord Justice Cairns speculated might have been present.²⁶⁰ However, Lord Justice Cairns further opined that even if the offer were to simply pay the damages sought without any loss of property,

²⁵⁶ *Ibid* at 874–875.

²⁵⁷ *Ibid* at 873–874, MacKenna J (“I would say that the buyer is entitled to retain his property without any investigation of his reasons for wishing to do so and that his right to recover the difference between the two values is not contingent upon his having acted reasonably in the matter of the seller's offer to repurchase.” at 875).

²⁵⁸ *Strutt*, *supra* note 244, MacKenna J (“*Payzu Ltd. v. Saunders* [1919] K.B. 581 is distinguishable. In that case the defendant in breach of contract had failed to deliver goods to the plaintiff at the contract price and on the contract conditions, but had offered him goods of the same kind at the same price but on less favourable conditions. If the plaintiff had accepted them he would have suffered only a small loss because of the less favourable conditions, which he could still have recovered by way of damages. But he refused the offer. In those circumstances it was held that he could not recover the difference between the market price and the contract price. He would not have suffered loss if he had accepted the defendant's offer which it was reasonable for him to do. There was no question in that case of the plaintiff being required to return goods which had already become his property or forfeit his right to substantial damages. That is the difference between *Payzu Ltd. v. Saunders* [1919] 2 K.B. 581 and [the present case].” at 875).

²⁵⁹ *Ibid* at 875.

²⁶⁰ *Strutt*, *supra* note 244, Cairns LJ (“[The plaintiff] may have thought values of property were going to rise and that if he held on to the house for a substantial number of years he would get a much better price for it and in so thinking he may well have been right. At any rate it does not seem to me that it can be said that it was shown here that he had no good reason for refusing the offer. He must have had some commercial reason in his mind and one would imagine that it was the hope that the house would improve in value and possibly the hope that eventually he would be able to get the sitting tenant out and obtain a better price.” at 873-874).

refusal of this offer would not constitute a failure to mitigate.²⁶¹ For this to be reconciled with *Payzu* is in my view impossible. Of course, as I will explain below, the obvious incompatibility of the authorities on this point is in fact the point I am trying to make.

iii. There is neither rhyme nor reason from which to distill a rule

Before weighing in with my view as to the significance of these decisions to one another and/or the wider picture, a few words ought to be said about why these decisions and why they matter. It is true that large claims on thin foundations can at times be likened to colossi on feet of clay, and certainly *if* we were dealing here with any of the natural sciences, it would be difficult to sustain much of any claim with such a small sample. However, with the juridical “sciences”, which are really anything but, it is evident that the elucidation of any truth requires discernment in selection as much as it does depth of analysis. That is not to say that we ought to be overly judicious in selection at the risk of under-inclusion but, as I have previously stated, it is necessary in some respects to confine oneself to the leading cases if one is to ultimately make any headway at all. In that connection, I believe the five cases surveyed are in and of themselves an apt group, for all remain good law, all are still cited (some frequently), and what’s more with respect to grouping these cases in particular, it is not the first time that this has been done.²⁶²

Moving on to the substance of these decisions and what they say as a whole, the first thought that comes to mind with respect to my argument, which I will get to, is in fact a prospective rejoinder. Namely, what do these decisions show us, other than the fact that reasonableness is a question of fact, and that outcomes will differ where facts are

²⁶¹ *Ibid.*, Cairns LJ (“It seems to me that if Mr. Scrivener’s contentions were right it would logically follow that if the offer that had been made by the defendants had been not ‘We will take the house back’ but ‘We will pay you £1,900 damages’ and the plaintiff had then, for some reason, refused that offer and had brought an action for damages it could be said that he ought to have accepted the offer and thereby mitigated his damages and therefore he was entitled to nothing at all. That cannot be.” at 873).

²⁶² Michael G Bridge, “Mitigation of damages in contract and the meaning of avoidable loss” 105(Jul) LQR 398–423 (The four are discussed in detail in connection with one another).

materially different? What is unusual about this? My response is that while we could rationalize some of the divergence on differences of fact, what we are really seeing are “decisions on their own facts”, this being the legal euphemism for decisions in seeming contradiction of the rule, or at least what others see it to be.²⁶³ Certainly, this appears to be so where the differences between cases are seemingly minor despite the difference in outcome, as a number of such differences seem to be, and it is almost undeniable where there does not appear to be an arguable difference at all. To my mind, three clear instances of such an inexplicable divergence appear in the cases, and as I will demonstrate, it is these that make the case for dispensing with the rationale of mitigation as “rule”, precisely because they cannot be meaningfully explained as differences arising from circumstance as the hypothetical rejoinder above would imply.

The first notable instance of divergence between authorities arises with respect to circumstances in which the plaintiff is expected to accept an offer from the defendant. Beginning with *Payzu*, it seemed that a party would generally be expected to do so, but later cases have disagreed. For instance, in *Heaven & Kesterton*, Mr. Justice Devlin took the view that a plaintiff buyer could not reasonably be expected to accept an offer where goods had been rejected for non-conformity, as opposed to a technicality relating to documents, for instance, because this would effectively undo the right to reject and leave the plaintiff with only the right to damages for breach of warranty. Leaving aside the centrality of documents to a CIF sale such as that in *Heaven & Kesterton*, the question that arises when this view is contrasted with *Payzu* is: what is the real difference between having to effectively pay more for the same goods (as in *Payzu*) and paying the same amount for goods worth less? In both instances, the plaintiff retains the right to damages to make up the difference and would still be entitled to refuse where the bargain is no longer sensible at all, i.e., when it is unreasonable. As such, it would appear that there is a split with little obvious justification, and such split is certainly not isolated. Other comparable instances are *Strutt v. Whitnell* or *Panex*, where it was found reasonable for

²⁶³ The phrase appears often, and everyone understands it, but no legal dictionary nor collection of legal phrases appears to include anything resembling a definition. I trust you will accept what we both know the phrase to mean.

the plaintiff to refuse to resell the defective property to the defendants to avoid his loss, and *Houndsditch*, in which the plaintiff buyers were held *unreasonable* for refusing to do the same.²⁶⁴ All in all, the divergence amounts to a fundamental difference as to when or whether a plaintiff enjoys freedom from contract, but as I will explain, it is not a disagreement with an obvious answer.

The second point of disagreement is likely less obvious, but bears consideration, and it is the issue of onus in relation to post-breach negotiations, and who ought to have the benefit of the doubt in relation to ambiguities in post-breach offers. This issue of onus was first prominently raised in *Heaven & Kesterton* by the arbitrator's finding that Heaven & Kesterton ought to have been the ones to make an offer and were unreasonable not to have,²⁶⁵ which Mr. Justice Devlin overruled, arguing that it was not for the plaintiff to know that the defendant would treat with him if approached, and effectively not unreasonable for the plaintiff *not* to enquire.²⁶⁶ By contrast, the three members of the Court of Appeal in the *Solholt* took the view that it did lie in the defendants' mouth to argue that one could reasonably expect the plaintiff to have approached them first, and even more remarkably, should have tried again at a higher price when the defendants refused their offer.²⁶⁷ How one can reconcile the two decisions is not clear unless one retreats to the arcana of each case's facts, but even there the distinction breaks down. For instance, one could distinguish as between the two on the basis that the goods in *Heaven & Kesterton* were ultimately found to be defective whereas the titular ship in the *Solholt* was not. However, it was a "technical" breach that provided the occasion for cancellation in *both* cases, and in *Heaven & Casterton*, the existence of actual defects in the goods, as opposed to the documents, were only apparently confirmed well after the fact, and quite

²⁶⁴ *Strutt*, *supra* note 244; *Panex*, *supra* note 165; *Waltex*, *supra* note 204.

²⁶⁵ *Heaven & Kesterton*, *supra* note 229 at 321.

²⁶⁶ *Ibid* at 321.

²⁶⁷ *The Solholt*, *supra* note 215 at 609–610.

possibly without the plaintiffs ever having inspected them.²⁶⁸ As such, there appears to be little reason to distinguish between the cases in terms of their circumstances, but instead only the apparent preferences for or against party autonomy reflected in the result.

The question as to which party is to have the benefit of the doubt with respect to factual ambiguity in post-breach negotiation is closely connected to the issue of onus just discussed, and again attracts no unanimity of opinion. *Houndsditch* was the first case to have grappled with the issue, and in it Mr. Justice Stable concluded that the plaintiff had acted unreasonably by refusing the defendant's offer to repurchase defective goods, even though the offer was itself potentially unreasonable.²⁶⁹ The potential problem that His Lordship identified was that the offer may have required that the plaintiff abandon their claim against the defendant; a requirement that appears to invalidate a post-breach offer by definition.²⁷⁰ However, whether or not the defendant's offer required such a compromise was not clear, leaving open the question as to whether refusal was reasonable or not.²⁷¹ In the circumstances, though, Mr. Justice Stable's conclusion was that refusal of even the potentially unreasonable offer was itself unreasonable, because it was unreasonable for the plaintiff to refuse without first enquiring as to the defendant's

²⁶⁸ *Heaven & Kesterton*, *supra* note 229, Devlin J ("... in addition to that, it is plain that the goods themselves were not up to the contract quality. Whether the buyer rejected them on that ground is not quite clear from the case, because it is not clear whether he ever inspected the goods." at 321).

²⁶⁹ *Waltex*, *supra* note 204, Stable J ("As there was some obscurity as to what the offer meant, it is unfortunate that the plaintiffs' solicitors did not keep the negotiations open long enough to obtain a clear definition of its terms. In refusing the offer, lock stock and barrel, as the plaintiffs did by their letter of March 17, 1943, they were not acting reasonably." at 581)".

²⁷⁰ *Cellular Baby Cell Phones Accessories Specialist Ltd v Fido Solutions Inc*, [2017] BCCA 50 [*Fido*], Goepel JA ("The duty to mitigate does not require a party to release claims it may have against a wrongdoer. If Cellular Baby had sold its business to Pepper it would have lost its right to pursue Fido for its other losses. It would not be in as good a position as if Fido had properly performed. While Cellular Baby had an obligation to take reasonable steps to attempt to mitigate its damages, the duty to mitigate does not require it to release Fido from potential damage claims. To do so would not be fair, just or reasonable." at paras 80-81).

²⁷¹ *Waltex*, *supra* note 204 at 581.

terms.²⁷² The counterpoint to this is of course *Heaven & Kesterton* where Mr. Justice Devlin excused the plaintiffs' failure to confirm the state of the goods before terminating and effectively refusing any further dealing with the defendant, even though His Lordship was of the view that a technical breach would not justify a failure to negotiate post-breach.²⁷³ This effectively gave the plaintiff the benefit of the doubt, and the benefit of the subsequently proved non-conformity of the goods, whereas Mr. Justice Stable placed the onus on the plaintiff — even where the goods were proven defective before the plaintiff acted.²⁷⁴ The distinction is clearly to some extent influenced by each judge's view of the plaintiffs' obligation to negotiate, but there is also an obvious evidentiary difference of opinion that is flatly difficult to reconcile, but again this simply goes to the point I am attempting to explain.

Turning now finally to what these differences mean, I would first point out that I do not believe any of these decisions are strictly speaking “wrong”, at least in the sense that they are not “wrong” in law. Certainly, that much appears to be borne out by the present state of the case law, in which all of these authorities are still seemingly good law within one jurisdiction,²⁷⁵ despite the contradictions examined in detail above, and at

²⁷² *Ibid* at 581; A contrary position has been taken more recently in the New Zealand, where a plaintiff was held to have acted reasonably in refusing an ambiguous offer, even though they do not appear to have attempted to clarify the scope of the offer; See *Wu v Body Corporate 366611*, [2014] NZSC 137, Elias CJ, McGrath, Glazebrook and Tipping JJ (“In addition, the offer of 25 March 2008 was made without prejudice. It was not accepted, the non acceptance being the alleged failure to mitigate. In our view, it is contrary to the without prejudice principle to allow the respondents to invoke the offer and its non acceptance as amounting to a failure to mitigate. Neither party to an unaccepted without prejudice offer can invoke the offer for this or indeed any other purpose. Further, even if that is not so, the offer was objectively unclear as to its ambit and how far it would bind Mr Wu in the longer term. It was not reasonable to expect him to accept it in that situation.” at para 142).

²⁷³ *Heaven & Kesterton*, *supra* note 229 at 321.

²⁷⁴ *Waltex*, *supra* note 204 at 581.

²⁷⁵ *The Solholt*, *supra* note 215 at 608–609 (*Payzu*, *Strutt*, and *Heaven & Kesterton* are all discussed, and the confusion in the caselaw noted.); See also *Bridge*, *supra* note 262.

least persuasive, if not more, in all others with which I am here concerned.²⁷⁶ Of course, this view only re-emphasizes the issue and changes the suspected problem from individual judicial error to systemic inconsistency and confusion. My response is that while the relation between these decisions is not clear, they are in fact compatible if we remember that “reasonableness” in reality provides no yardstick, despite the fact that we would all claim to know what is unreasonable if we saw it, and as such, there is in fact no objectively ascertainable “quality” inherent in the decisions that permits their comparison in this sense. Each is simply a decision in its own context.

To elaborate further on what I mean, and what this means for Mitigation, I would remind the reader of the point made earlier, which is that discretion exists in opposition to or in tension with rules. As such, when we ask whether the plaintiff was reasonable in *Payzu*, or whether they were reasonable in *Panex* — cases with opposite outcomes on similar facts — the answer may be *Panex*, but it may also be *Payzu*, or both, or neither, because the answer in any given case may well be one over which right-thinking people can differ, and importantly, it is apparently one over which courts are prepared to permit each other to differ. As such, it appears clear that every decision in relation to the failure or fact of Mitigation is in effect an act of discretion, which undoes the widely held impression that Mitigation is a rule. This is not to say that the doctrine of Mitigation affords courts an entirely free hand, but it is evident that context informs decisions on Mitigation to a greater extent than more orthodox examples such as the rule in

²⁷⁶ *Westland Investment Corp v Carswell Collins Ltd*, [1996] AJ No 21 (ABQB) [*Westland*], (“In cases where the defendant [after the defendant’s breach] makes an offer to the plaintiff which would have the effect of reducing the losses that would otherwise be incurred by the plaintiff, the general rule is that it is reasonable that the plaintiff accept the offer [*Payzu Ltd. v. Saunders supra*] ... One of the exceptions to this rule is that it is unreasonable for the plaintiff to accept an offer made by the defendant which requires the plaintiff to abandon legal rights [S.M. Waddams, *Law of Damages*, (Canada Law Book; Toronto, 1994) at 15-11]. Hence, the plaintiff is not required to accept an offer which requires the plaintiff to surrender his right to an action for damages [*Shindler v. Northern Raincoat Co.*, [1960] 1 W.L.R. 1038] or a right to reject goods [a right accorded by the common law of the sale of goods] [*Heaven & Kasterton Ltd. v. Establissements Francois Albiac & Cie* [1956] 2 Lloyd’s 316 at 321 (Q.B.D.), Devlin J.]. If a defendant makes an offer without indicating whether the effect of its acceptance is to deny the plaintiff his legal rights, it is unreasonable for the plaintiff to reject that offer without attempting to determine whether the defendant intends that the plaintiff surrender his legal rights [*Houndsditch Warehouse Ltd. v. Waltex Ltd.* [1944] 1 K.B. 579 at 581, Stable, J.]” at paras 45-46); *Murphy v Mitanski*, [2012] SASC 158 (Considers *Payzu* and *Strutt v. Whitnell*); *Wu v Body Corporate 366611*, *supra* note 272 (Considers *Payzu* and *Houndsditch*).

L'Estrange v. Graucob,²⁷⁷ or even the rule of remoteness beginning with *Hadley*,²⁷⁸ and as such, some different categorization or description other than “rule” is quite apparently necessary. Although, as noted earlier, a further aspect of Mitigation will also be considered in order to reinforce the point that after having debunked the accuracy of the rule as commonly stated, as I did in III.A, what remains is actually not a rule at all.

2. No single thread explains the difference between consequent and collateral

The differing views of “reasonable” canvassed above are not entirely clear about their differences, but the cases on the distinction between collateral and consequent transaction are somewhat more explicit as to their different bases for opinion, and on the whole clearly do not conform to any one theory. Instead, it is apparent that a number of competing views coexist and in so doing demonstrate that there is in fact no mandatory maxim that operates to resolve the question in all cases, which tends to support the view that Mitigation cannot be a rule. Of course, it is possible to argue that certain cases are simply more amenable to the application of one theory rather than another, and that there are simply a series of rules. However, as we will see from the cases themselves, it is apparent that there are instances in which more than one theory is arguably applicable and that these cases may disagree as to the appropriate outcome. Likewise, there are also cases that appear to flatly disagree with the seemingly applicable theory which, again, like the cases on post-breach negotiation, indicates that Mitigation does not operate as a rule at all.

The theories that I will consider below are the asset creation theory, the “but for” test, and the ordinary course of business rule. Before moving on to consider them, though, a few words should be said as to their significance. In short, each of these is an answer to a potentially difficult question, which is whether a subsequent “transaction” is

²⁷⁷ *L'Estrange v F Graucob Ltd*, [1934] 2 KB 394.

²⁷⁸ *Hadley v. Baxendale*, *supra* note 15.

consequent to the breach or collateral to it, and thus whether or not to treat a gain arising from said transaction as having been made in mitigation of the plaintiff's loss or not.

i. The asset theory

Although I stated above that each theory on the question of consequent vs. collateral transactions is an answer to that question, the truth is actually that each theory is in fact actually a further question — albeit one whose answer is supposed to resolve the larger question of collateral vs. consequent in the context of the particular case. Under the asset creation theory, the question is whether the defendant's breach released to the plaintiff some capacity, benefit, or general thing of value (i.e., asset), that the plaintiff would not otherwise have had, and whether that asset was the means by which the subsequent gain was made.²⁷⁹ If the answer is “yes”, then the gain made ought to be brought into account to the benefit of the defendant when assessing the plaintiff's loss, or so the asset creation theory goes,²⁸⁰ Note, though, that in principle, the theory is equally applicable to loss situations in which an asset has not been employed and the question as to whether or not the plaintiff has failed to mitigate, or conversely, whether mitigation was not possible on the basis that the wrong did not create an opportunity to do so, or in other words an “asset”.²⁸¹

This line of reasoning is most common, perhaps surprisingly, in the context of wrongful dismissal on the basis that one can argue that dismissal has the effect of

²⁷⁹ *Karas et al v Rowlett*, [1944] SCR 1, Rand J (“... 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.” at 8).

²⁸⁰ *Asamera*, *supra* note 137, Estey J (“The cases which establish the exceedingly technical rules relating to recovery of damages for the non-return of shares turn on the theory that only where a breach of contract gives rise to an asset in the hands of the plaintiff will the law require him to mitigate his losses by employing that asset in a reasonable manner. Thus if an employer wrongfully dismisses an employee the breach results in the employee obtaining an asset, an ability to work for another employer, or at least the opportunity to offer his services to that end, which he did not enjoy prior to the dismissal.” at 656).

²⁸¹ *Ibid*, Estey J (“A different consideration arises where the plaintiff-buyer has prepaid the contract price and has not received delivery. As in the case of non-return of shares, the breach does not give rise to any asset in the hands of the plaintiff since he has already parted with his funds and on that basis some courts have held that the injured party need not purchase like goods in the market. This view received indirect support in *Gainsford v. Carroll et al* ([1824], 2 B. and C. 624.) and in *Shaw v. Holland*’ at 657-658).

returning to the plaintiff his or her capacity to work, which would otherwise be committed to the defendant employer's enterprise, and thus creates an asset in their hands.²⁸² More generally, the rationale can be seen as apt in any case in which any "thing" of value that might have otherwise been pledged as consideration or the "price" is returned to the plaintiff as a consequence of the breach, which would seem then to indicate a specific affinity to contract as opposed to tort or other branches of the law of obligations. This, it seems, is not so. For while the creation of some asset in the plaintiff's hands as a consequence of the "wrong" is much more usual in contract than tort, for instance, the same reasoning may apply, as demonstrated in the first of the cases considered below.

The first decision to be considered under the asset creation theory is the 1969 English Court of Appeal decision, *The World Beauty*.²⁸³ The facts of the case involve a collision between two ships, the titular *World Beauty* owned by the defendants, and the *Andros Springs* owned by the plaintiffs.²⁸⁴ The collision occurred in Suez Bay on April 21, 1958.²⁸⁵ Liability for the collision was apportioned 75% to the defendant owners of the *World Beauty*, and 25% to the plaintiff owners of the *Andros Springs*.²⁸⁶ As a result of the collision, the *Andros Springs* was delayed on her current voyage by 37 days on account of reduced speed and the need to stop for repairs, and only became free on June 7, 1958.²⁸⁷ The *Andros Springs*'s delay and detention rendered her unable to fulfill a charter entered into in 1957 (the "1957 Charter") that was due to end on September 15, 1958, but the owners of the *Andros Springs* overcame this by chartering in a replacement vessel, the *Andros Thunder*, that carried out the remainder of the 1957 Charter.²⁸⁸ As for

²⁸² *Schluessel et al v Maier et al*, 2001 BCSC 60.

²⁸³ *The World Beauty; Owners of The Steam Tanker Andros Springs v Owners of The Steam Tanker World Beauty*, [1969] 3 All ER 158 (CA) [*The World Beauty*].

²⁸⁴ *Ibid* at 159.

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid*.

²⁸⁷ *Ibid*.

²⁸⁸ *Ibid*.

the Andros Springs, her replacement by the Andros Thunder left her free three months earlier than she was otherwise expected to be, i.e., approximately three months before she was due to be returned on September 15, 1958.²⁸⁹ This posed something of a challenge for the owners because of a follow-on fixture set to begin no later than October 31, 1958 and set to run for eight years (the “M Charter”), and which was particularly lucrative owing to the fact that rates had soared in the aftermath of the Suez Canal affair in late 1956 when the charter was agreed to.²⁹⁰ The owners of the Andros Springs dared not attempt to fix a charter to fill the period from early June to late October, or to charter her on the spot market, but were able to negotiate with the charterers to bring the M Charter forward 100 days from October 19, 1958 (the likely delivery date) to July 11, 1958.²⁹¹ This was clearly advantageous to the owners of the Andros Springs but raised the problem of how to account for that benefit in the litigation arising from the collision in Suez Bay.²⁹²

Both the judge at first instance and the members of the Court of Appeal were in agreement that the owners of the Andros Springs had benefitted from the possession of a free ship three months earlier than they would otherwise have had it, i.e., June 7, 1958 as opposed to September 15, 1958, and that this ought to be taken into account in the context of assessing the value of mitigation or the failure thereof.²⁹³ I note that even though this is a tort decision, dealing as it does with liability for a collision, the issue of Mitigation here turns on the existence of an asset in the plaintiff’s hands, “created” in a sense by the wrong, and the use to which that asset was or could have been put. Counsel for the defendants argued that the actual profits of \$357,705 earned under the M Charter

²⁸⁹ *Ibid* at 160.

²⁹⁰ *Ibid* at 159.

²⁹¹ *Ibid* at 160.

²⁹² *The World Beauty*, *supra* note 283, Lord Denning MR (“The one point in controversy is how to calculate the advantage which the plaintiffs gained by reason of the Andros Springs taking up the seven year Mobil time charter three months earlier than she would have done.” at 160).

²⁹³ *Ibid* at 160–161, 162, 164.

during the 100-day advancement was the appropriate value.²⁹⁴ This was rejected by Lord Justice Wilmer at first instance on the basis that the \$357,705 earned in the 100-day period would have been earned in any event and, given that the charter had simply been brought forward and not lengthened, this appears to be the right conclusion, since the profit was not in and of itself a consequence of the plaintiffs having had the Andros Springs free during the 100 days.²⁹⁵ To rule otherwise would, it seems to me, contravene the “but for” rationale present in other cases, and all members of the Court of Appeal here appear to have agreed. Here, though, unanimity ends.

Lord Justice Wilmer at first instance took the view that the benefit of the 100 days was the time value of early receipt, and further took the view that receiving what was effectively the last three months of the contract at the start amounted to receiving the \$357,705 profit seven years early.²⁹⁶ Lord Justice Wilmer calculated this amount as compound interest at 5% for seven years, reaching a sum of \$142,772.²⁹⁷ On appeal, Lord Justice Winn accepted this general premise but not the method, preferring instead to calculate the present value of \$357,705 seven years early, which was \$249,001, and to take the difference between this sum and the \$357,705 figure as the gain.²⁹⁸ Lord Denning MR and Fenton Atkinson LJ disagreed with both premise and means, preferring instead to assess the value of access to a free ship as the sum of the daily profit to be made from her on the spot market during the relevant period, i.e., from June 7, 1958, when she became free to October 19, 1958, when she would otherwise have likely been delivered.²⁹⁹ That assessment reached a tentative sum of \$52,528 in profit for the period,

²⁹⁴ *Ibid* at 160–161.

²⁹⁵ *The World Beauty*, *supra* note 283, Lord Denning MR (“I think that that argument is mistaken. Lord Herschell had not in mind such a case as this. I agree with what Willmer LJ said in the court below ([1968] 2 All ER at p 680; [1969] P at p 22): ‘The earning of these profits [that is, the \$350,705 in three months] flowed not from measures taken in consequence of the collision, but from the fact of the charter having been negotiated months previously. Collision or no collision, these profits would have been earned in any event.’” at 161).

²⁹⁶ *Ibid* at 161.

²⁹⁷ *Ibid*.

²⁹⁸ *Ibid* at 161, 164.

²⁹⁹ *Ibid* at 161, 164–165.

but the matter was referred to the Registrar for a final determination of the amount that could have been earned with more certain evidence of the chartering rates then prevailing.³⁰⁰

Of the two or three³⁰¹ approaches, I am personally in favour of the approach taken by Lord Justice Winn, although I also see an argument for the approach of Lord Justice Wilmer. The difference between the two approaches is the degree to which the Court is prepared to consider the risk of non-payment or breach by the charterers under the M Charter. I must note, though, that I do not agree with the assertion that the benefit gained by the 100-day advancement is equivalent to receiving the last 100-day's profit seven years early. To me, it seems that the owners of Andros Springs simply received the first 100-day's profit 100 days early, and the second 100-day's profit 100 days early and so on, unless there was something highly unusual about the profit to be made at the end of the charter, but this is nowhere averred to. Furthermore, it is irrelevant, since neither Lord Justices' view carried the day. Instead, clearly it is the idea of "asset creation" that was here determinative and the notion that the plaintiffs as reasonable business people ought to have been expected to have employed a revenue producing asset as best they could, and ought to be held to account on that basis³⁰² as they clearly were by way of the judgments of Lord Denning MR and Lord Justice Fenton Atkinson, but there lies the rub and the point of conflict with other theories of post-breach gain distribution.

The problem with the majority view as I see it, is that Lord Denning MR explicitly acknowledged that it was unreasonable to risk the very lucrative M Charter by attempting to let the Andros Springs on the spot market during her brief free period³⁰³ — the upshot of which being that the Andros Springs was really no asset during this period, because to have employed her in any way other than under the M Charter would have

³⁰⁰ *Ibid* at 162.

³⁰¹ Depending on whether one sees a significant difference between Wilmer and Winn LJJ.

³⁰² *The World Beauty*, *supra* note 283 at 161, 162.

³⁰³ *Ibid* at 160–161, Lord Denning MR.

been to act as other than “reasonable men”.³⁰⁴ Thus, to value the Andros Spring’s free period this way was tantamount to obliging the plaintiff to do something “... otherwise than in the ordinary course of business...”,³⁰⁵ since any reasonable owner in their shoes would not have acted that way.³⁰⁶ As the quotations suggest, this runs contrary to perhaps the leading authority on mitigation and post-breach gain, namely *British Westinghouse*, because the gain, or perhaps failure to mitigate since the Andros Springs was not actually let on the spot market, was only hypothetically but *not* reasonably available. Yet nonetheless, the asset creation theory here prevailed despite the fact that the hypothetical act of going into the market was one that the defendant could, and likely would, have criticized had the plaintiffs done it and lost the M Charter, as the Nova Scotia Court of Appeal surmised the defendant would have done in *1874000 Nova Scotia Ltd. v. Adams*, had the plaintiff suffered a loss.³⁰⁷

The counterpoint to *The World Beauty* is the Supreme Court of Canada decision in *Asamera Oil*,³⁰⁸ as this decision was not reached under the asset creation theory, but arguably could have been. The facts of *Asamera* are tortuous owing to the length of the litigation and the somewhat complicated relationship between the parties. They do however bear some elaboration, as the facts of Mitigation cases are, it seems, almost always essential to understanding what, if anything, the decision might really mean.

The story of the *Asamera* litigation began when the Baud Corporation (plaintiff, and wholly owned subsidiary of Sea Oil and General Corp) loaned 125,000 shares in *Asamera* oil to one Thomas Brook (president of and effectively controlling mind of

³⁰⁴ *The World Beauty*, *supra* note 283, Winn LJ (“It appears to me that the Mobil charter contract made in August 1957 was one of the relevant circumstances in relation to which the decision was taken, as Lord Denning MR has narrated, very sensibly and properly by the plaintiffs to keep her off the ‘spot’ market from 7th June 1958 onward” at 163).

³⁰⁵ *British Westinghouse*, *supra* note 36 at 689.

³⁰⁶ *The World Beauty*, *supra* note 283 at 162–163.

³⁰⁷ *1874000 Nova Scotia Ltd v Adams*, [1997] NSJ No 172 (NSCA), Chipman JA (“Had [The Plaintiff] gone on to incur more extensive losses in his attempt to turn the company around ... [the defendant] could probably be heard to say that he should have cut his losses when he saw the situation shortly after October 31, 1989.” at para 92).

³⁰⁸ *Asamera*, *supra* note 137.

Asamera) in October and November of 1957.³⁰⁹ Subsequent to the loan of the shares, an agreement appears to have been reached in (or is at least dated as at) November 10, 1958 for the return of the shares by Brook to Baud by the end of 1959.³¹⁰ As one could probably guess, the shares in Asamera were not returned.³¹¹ Not long thereafter in 1960, an action was commenced seeking specific performance (i.e., return of the shares), but proceedings thereafter dragged on for a decade with trial only beginning in 1969.³¹² Further, the trial itself took a year-and-a-half, with judgment only entered in 1972.³¹³ Part of the reason for the dilatory progress of the litigation was the fact that interlocutory proceedings and discoveries took years on account of relevant actors being dispersed between Canada, Europe, and Indonesia.³¹⁴ Note that Asamera was involved in oil exploration in Sumatra.³¹⁵ Another reason was the fact that an injunction was granted in 1960 to restrain the sale of the shares by Brook in 1960, and that between 1961 and 1966 Baud and Brook had, at Brook's request, an agreement to pause the litigation.³¹⁶ Most importantly, though, it was also arguably in Baud's interest not to rush because the value of Asamera's shares was highly speculative on account of the fact that it was involved in the rather speculative business of oil exploration in Southeast Asia.³¹⁷ Thus, it was apparently not at all clear until the mid-to-late sixties that it was worthwhile to sue for the shares at all.³¹⁸

³⁰⁹ *Ibid* at 638.

³¹⁰ *Ibid*.

³¹¹ *Ibid*.

³¹² *Ibid* at 638, 670.

³¹³ *Ibid* at 670.

³¹⁴ *Ibid*.

³¹⁵ *Ibid* at 666.

³¹⁶ *Ibid* at 670.

³¹⁷ *Ibid* at 649–650.

³¹⁸ *Ibid* at 666.

It is important to note that at no point between 1960 and the SCC appeal in 1977 did Baud attempt to replace the 125,000 shares.³¹⁹ It is also important to note that between 1957 and 1960, the price of Asamera’s shares crashed from \$3 to \$0.29,³²⁰ but that the shares had more than recovered by July of 1967³²¹ when Brook revealed in his pleadings that he had actually sold “the shares” in 1958,³²² and that Asamera shares had been steadily climbing in value since 1965 when Asamera had finally struck oil.³²³ Furthermore, Baud elected to pursue damages in lieu of specific performance, and claimed these at the highest intermediate value between breach and the date of trial.³²⁴ Baud partially succeeded in this respect, but its damages in lieu were ultimately reduced by the SCC for Baud’s failure to buy into the market to replace the shares itself, i.e., for failing to mitigate.³²⁵

The challenge posed by the SCC’s conclusion in *Asamera* is that Brook’s breach did not in any way create an asset in Baud’s hands.³²⁶ Indeed, it was quite the opposite, as Baud was neither free from any commitment it had to Brook, such as the obligation to pay a purchase price, nor left with a thing or capacity, such as time and opportunity to work, as Baud’s counsel pointed out.³²⁷ Writing for the Court, Mr. Justice Estey responded to the point by noting that the presence or absence of an asset was not

³¹⁹ *Ibid* at 666–667.

³²⁰ *Ibid* at 649.

³²¹ *Ibid* at 650.

³²² *Ibid* at 642.

³²³ *Ibid* at 650, 666.

³²⁴ *Ibid* at 634, 654.

³²⁵ *Ibid* at 673–675.

³²⁶ *Ibid* at 657.

³²⁷ *Ibid* at 656–657.

determinative but only one factor to be considered,³²⁸ which underscores my larger point that Mitigation is not a rule, but also highlights a disparity in the treatment of materially similar claims, since no similar reduction would have been made in an action for the price.³²⁹ Although the absence of an opportunity to have another pay the price seems obvious, one should remember that a debt as a chose in action is arguably no more or less fungible than shares in a closely held corporation are replaceable. Of course, one could retort that sale of the debt would not change the ultimate outcome for the defendant, who must remain liable to pay, but the same must be true of one who misappropriates property. Even if Baud had purchased replacement shares, this would not extinguish its title to those held by Brook, or Brook's liability. Further, as the Court pointed out in *Rochweg v. Truster*,³³⁰ it is generally as possible for the defendant to make restitution as it is for the plaintiff to buy in a replacement, and there was no reason in this case as to why Brook could not have purchased replacement shares after litigation had begun. As such, I would argue that the same rationale as it applies to the action for the price ought to arguably apply to a claim for the return of specific property, and if so, a plaintiff in a "no asset" situation, such as Baud, ought to be treated as though mitigation were not possible. This, however, is not the law, and the asset creation theory does not hold this much sway either in the context of post-breach gain or post-breach loss. The following sections will demonstrate much the same about other potential theories.

³²⁸ *Asamera*, *supra* note 137, Estey J ("The creation of an 'asset' on a breach of contract cannot be an invariable prerequisite to the operation of the principle that a party injured by a breach of contract must respond in mitigation to avoid an unconscionable accumulation of losses. Nor should the absence of such an 'asset' invariably exonerate a plaintiff from taking mitigative action. The presence or absence of such an 'asset' is but one of many factors which bear on the task of determining in a particular case what is or is not reasonable on the part of the injured party in all the circumstances." at 659-660).

³²⁹ Edelman, *supra* note 11 at 26–114; Waddams, *supra* note 1 at para 15.560 (Such a claim is analagous to an action in debt, and it is hard to understand how a claim in debt could be mitigated. How is one supposed to get another to pay the debtors debt?).

³³⁰ *Rochweg v Truster*, [2002] OJ No 1230 (ONCA) at para 121, Cronk JA ("In my view, no discount to the restitutionary sums for which Rochweg is accountable is appropriate or necessary on account of mitigation principles. While it is true that the individual appellants were free, after September 29, 1995, to purchase Teklogix shares on the open market at a price which, at various times, was less than \$4.95 per share, it is also the case that Rochweg could have limited his exposure to the individual appellants at any time after September 29, 1995 by transferring to them the value of the shares in issue at a time when they were trading at or below \$4.95 per share on the open market." at para 121).

ii. When “but for” is but a suggestion

There is a certain attraction to the notion that the question of entitlement to a post-breach gain can be easily settled by way of asking whether said gain could or would have happened but for the defendant’s breach. At the very least, one could describe the method as clear and, in that connection, likely to be efficient in the sense of reducing the complexity and cost of dispute resolution of the issue. It is, for instance, readily applicable to the circumstances of *The World Beauty*,³³¹ even though it was valuation that was most controversial in that case. The method is not perfect, though, and it is far from universally subscribed. Misgivings are noted even in decisions that have applied it as the basis for decision, such as *Cockburn*³³² discussed below, and it is clearly disapproved of in decisions that decline to apply it.³³³ We might ask then why exactly it persists, and the answer to this appears to be the following passage from Viscount Haldane’s speech in *British Westinghouse*:³³⁴

“But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever* [9 Ch.D. 20.], at p. 25: “The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.

³³¹ *The World Beauty*, *supra* note 283.

³³² *Cockburn*, *supra* note 41, Idington J (“Without committing myself to the entire reasoning adopted in support of the judgment appealed from herein I think the conclusion reached is right and that the appeal should be dismissed with costs.” at 266).

³³³ *Jewelowski v Propp*, *supra* note 63, Lewis J (“The duty of a person to minimize his damages is a proposition which is well-known, but the question is whether he must expend money to enable him to do so. For the plaintiff it is contended that for this purpose he must be looked on as an outsider and his profit is not to be taken into consideration just because he had the good fortune and business astuteness to make a good bargain. It is a question of some difficulty and one on which there does not appear to be any authority, but it seems to me that the argument for the plaintiff is right, so that a plaintiff who is claiming damages for fraudulent misrepresentations cannot be called on to spend money to enable him to minimize the damages. It seems to me that such a rule would be going far beyond the rule that a plaintiff must minimize his damages.” at 511-512); *Hussey*, *supra* note 54; *1874000 Nova Scotia Ltd v Adams*, *supra* note 307.

³³⁴ *British Westinghouse*, *supra* note 36 at 689.

As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. **But when in the course of his business he has taken action arising out of the transaction which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.**" [Emphasis added]

The highlighted portion of the second paragraph is problematic for a number of reasons in my opinion, but it is nonetheless reasonably clear that whatever has happened "arising out of the transaction" (i.e., the broken contract) must be accounted for if it has had the apparent effect of reducing the plaintiff's loss. As we see from the following decisions, though, this is not always a straightforward matter to determine, nor does it always yield a satisfactory outcome.

The first decision on point is *Cockburn v Trusts & Guarantee Co*,³³⁵ the oldest of the leading Canadian authorities on Mitigation. As I noted earlier when I discussed it section II.C.2, the case arises on slightly peculiar, but not unprecedented, facts, which I will repeat in brief. In the case, Cockburn had been contracted as a sales manager with the Dominion Linen Manufacturing Company for a five-year term at a salary of \$5,000 per year, with a guarantee of said salary by one Kloepfer, a director of the company.³³⁶ Unfortunately, three years into the five-year term, Dominion Linen went into liquidation leaving Cockburn with two years of salary (i.e., \$10,000) unpaid.³³⁷ Following the loss of his employment, Cockburn was able to retrieve his situation by purchasing the assets of Dominion with an associate, and selling these at a profit of \$11,000 to himself.³³⁸ Following these actions, Cockburn also took steps to enforce the guarantee executed by Kloepfer (since deceased) by way of an action against the executors of his estate, which

³³⁵ *Cockburn*, *supra* note 41.

³³⁶ *Ibid* at 264–265.

³³⁷ *Ibid* at 265.

³³⁸ *Ibid*.

was the source of the litigation leading to the present appeal in the Supreme Court from the decision of the Divisional Court who had found for Kloepfer.³³⁹

In reaching its decision, the Court did not deliver a single unanimous decision. However, all five members appeared content to ground themselves on the general proposition established by the highlighted portion of Viscount Haldane's dicta above.³⁴⁰ Namely, that if a gain had arisen from the transaction in the sense of not having otherwise been possible, then it was appropriate to account for the gain when assessing Cockburn's claim for loss.³⁴¹ The Court's view of Cockburn's profit was also uniform, with each satisfied that it could not have occurred but for the demise of Dominion's business, and thus the breach that deprived Cockburn of the remaining two years of his salary.³⁴² As such, their Lordships unanimously dismissed Cockburn's appeal from the decision of the Divisional Court and held that the \$11,000 profit from the sale of Dominion's assets had to be treated as having been made in mitigation of Cockburn's loss.³⁴³

The above outcome appears to be a fairly straightforward application of a "but for test" to determine whether a given transaction and the gain resulting were consequent or collateral, as explained above. However, there are two potential objections that one can make to this conclusion. The first is that Cockburn specifically bargained for a guarantee, and if said guarantee formed a part of the consideration for his contract with Dominion, or a separate collateral contract as between himself and Kloepfer, one must ask whether it is as "shocking to the conscience" that Cockburn be able to recover as the Court seemed to think. Certainly, Cockburn had benefited from sale of the assets, but Kloepfer had voluntarily assumed liability under the guarantee, and I would question whether Kloepfer had justifiable claim to the fruits of Cockburn's industry in light of the

³³⁹ *Ibid* at 264–265.

³⁴⁰ *Ibid* at 264–271.

³⁴¹ *Cockburn, supra* note 41, Sir Charles Fitzpatrick CJ ("I think this consideration of whether he could have made his profit from other sources if the contract had been fulfilled may be some test of whether such profits are to be taken into account in ascertaining the loss sustained by the breach of the contract." at 265).

³⁴² *Ibid* at 264–271.

³⁴³ *Ibid*.

second objection. The second point of disagreement is that the effect of Viscount Haldane's dicta is to create an asymmetry in the treatment of the plaintiff's claim. By this I mean that given that Cockburn's efforts would not have been expected of a reasonable man in his line of work, any further loss occasioned, or simply a failure to profit on Cockburn's part, would have been treated as a failure to mitigate and correspondingly been to his detriment, even though any possible gain is accountable.³⁴⁴ I question why all risk should lie upon the plaintiff's shoulders in this way, and why Kloepfer ought to have had the benefit of a defence but no greater liability if Cockburn's efforts had ended poorly.

A counterpoint to *Cockburn* that indicates, as mentioned above, that the "but for" rule is far from uniform in application is the Nova Scotia Court of Appeal decision in *1874000 Nova Scotia Ltd. v. Adams*.³⁴⁵ *Adams* is a tort decision in negligent misrepresentation, but nonetheless bears comparison to *Cockburn* on the basis of the plaintiff's actions post-breach, despite the markedly different footing of liability in each. The facts of *Adams* involve the acquisition of a company known as Action Business Machines Ltd. ("ABM") by a successful businessman named Joseph P. Shannon in February 1989, and the efforts made by Timothy Adams and the accounting firm of Collins Barrow to convince Shannon to do so.³⁴⁶ Adams, though the named defendant in the style of cause, was not the principal defendant in the action, as proceedings were

³⁴⁴ *Cockburn*, *supra* note 41, Duff J ("I do not entertain the slightest doubt that the appellant's dealings were not dealings which he was under any obligation to engage in for the purpose of mitigating damages, but that, as Lord Haldane points out, is not necessarily decisive. Even though the course taken by him was not one which would ordinarily be taken in the course of business by a reasonable and prudent man in his circumstances, still, having done what he did, the whole of the facts may properly be looked at for the purpose of estimating damages..." at 268), Anglin J ("The \$11,000 profit which he made, although the making of it required some assumption of risk and responsibility and also an expenditure clearly beyond anything involved in his engagement by his former employers, and likewise beyond anything which it was his duty to them, or to the respondent, to undertake, is within the rule of accountability stated by Lord Haldane. The action which produced it arose out of his former employment in the sense in which the Lord Chancellor uses the phrase 'arising out of the transaction,' as is shewn by his illustration from *Staniforth v. Lyall* [7 Bing. 169.]" at 270).

³⁴⁵ *1874000 Nova Scotia Ltd v Adams*, *supra* note 307.

³⁴⁶ *Ibid* at paras 1–9.

ultimately continued against Collins Barrow only.³⁴⁷ Adams was ABM's original owner, though, and an integral part of the story leading to this case.³⁴⁸

Adams' involvement with ABM began when it was incorporated and began business under the name Maritime Cash Register in 1974, selling and maintaining cash registers and eventually point-of-sale systems, checkout scanners, and software used to manage these.³⁴⁹ ABM prospered in the Maritimes under Adams' management but ran into difficulties following an expansion into Ontario, and by 1988 found itself incurring significant losses and facing the prospect of involuntary receivership if it could not repay a \$947,000 loan to Lloyd's Bank.³⁵⁰ This dire situation is what motivated Adams to sell, and William Moore, a partner at Collins Barrow (ABM's auditors), to seek out options for either refinancing or the sale of ABM on Adams' behalf.³⁵¹ Although not obviously interested in the transaction in a direct way, it was Moore who contacted Shannon on January 30, 1989, about the prospect of acquiring ABM and provided ABM's audited 1988 financial statements prepared by Collins Barrow as part of his effort to interest Shannon in the deal.³⁵² As it turns out, Moore was successful despite ABM's cash flow difficulties, and a deal for Adams' shares in ABM for a price of \$700,000 was concluded by mid-February in order to address ABM's debt issues before matters came to a head with ABM's creditors.³⁵³ Unfortunately, it turned out that ABM's economic troubles were *not* limited to its banking situation and Ontario operations.³⁵⁴

A larger problem lurking in the background of Shannon's acquisition of ABM, unbeknownst to Shannon and possibly Adams, was that ABM's inventory was in need of

³⁴⁷ *Ibid* at para 22.

³⁴⁸ *Ibid* at para 3.

³⁴⁹ *Ibid* at 3.

³⁵⁰ *Ibid* at paras 6–9.

³⁵¹ *Ibid* at paras 7–8.

³⁵² *Ibid* at para 8.

³⁵³ *Ibid* at paras 8–13.

³⁵⁴ *Ibid* at para 16.

a \$1.8-million write-down, and that \$165,202 in deferred development costs on its balance sheet ought to have been written off completely.³⁵⁵ The fact of the error was later discovered by Shannon when Deloitte replaced Collins Barrow as auditors and determined that a write-down of ABM's assets ought to have occurred in 1987, i.e., well before the 1988 financial year for which Shannon had been provided financial statements in Moore's initial overture.³⁵⁶ Shannon's discovery of the apparent mistake of course prompted the litigation against Collins Barrow for negligence in the preparation of ABM's audited financial statements that had the effect of inducing Shannon's purchase.³⁵⁷ Even before the discovery, it is important to note that Shannon's experience of managing ABM was challenging and that the company had "started to deteriorate" after acquisition, and had required much larger capital investment to keep afloat than Shannon had anticipated.³⁵⁸

Perhaps unsurprisingly, liability was not much at issue as between Collins Barrow and Shannon on appeal, with no question raised with respect to the correctness of the trial judge's finding of negligent misrepresentation by Collins Barrow leading to Shannon's acquisition of ABM.³⁵⁹ Instead, all questions before the Court were specifically directed to the correctness of the trial judge's damage award of \$5,454,000, including, importantly, the trial judge's finding on mitigation.³⁶⁰ As noted above, ABM had begun to come apart not long after Shannon's acquisition of ABM, and early on it appears that Shannon had considered cutting his losses and liquidating the business³⁶¹ — a course of action that was arguably reasonable in light of ABM's mounting losses and operational

³⁵⁵ *Ibid* at para 17.

³⁵⁶ *Ibid*.

³⁵⁷ *Ibid* at paras 16–22.

³⁵⁸ *Ibid* at para 16.

³⁵⁹ *Ibid* at para 23.

³⁶⁰ *Ibid* at paras 22–23.

³⁶¹ *Ibid* at para 16.

challenges.³⁶² However, Shannon elected to pursue the riskier and arguably unreasonable path of rehabilitating ABM and turning the company around.³⁶³ To his credit, Shannon did in fact succeed in doing this, and by the end of 1991 ABM had cleared net earnings of \$755,000; a far cry from its position when acquired.³⁶⁴ The mitigation issue as between Collins Barrow and Shannon was how this net profit ought to be treated in the assessment of Shannon's loss, with Collins Barrow arguing for it to be held to their credit as an act of mitigation by Shannon,³⁶⁵ and Shannon arguing that it was not connected to ameliorating the loss caused by Collins Barrow's negligence at all, which had already been incurred in effect, and thus ought to be excluded from the assessment.³⁶⁶

Chipman JA for the Court analyzed the state of the law on "subsequent transactions" and concluded that, as I have even now some fifteen years later, it is at best unclear, with no single test or direction drawing the line between collateral and consequent.³⁶⁷ In His Lordship's analysis, though, the connection between Collins Barrow's negligence and Shannon's successful reorganization of the business was too tenuous to bring ABM's subsequent profits into the assessment,³⁶⁸ or as His Lordship put it himself, the negligence of Collins Barrow was *sine qua non*, but not *causa causans* of the subsequent improvement in ABM's fortunes.³⁶⁹ Further, His Lordship noted that the

³⁶² 1874000 *Nova Scotia Ltd v Adams*, *supra* note 307, Chipman JA ("I believe it would have been reasonable for Shannon to cut his losses. He could have done that. Instead, largely for reasons of pride and the maintenance of his reputation, Shannon chose to go on with the company." at para 91).

³⁶³ *Ibid* at paras 16–20.

³⁶⁴ *Ibid* at para 19.

³⁶⁵ *Ibid* at paras 23–76.

³⁶⁶ *Ibid* at para 91.

³⁶⁷ 1874000 *Nova Scotia Ltd v Adams*, *supra* note 307, Chipman JA ("It is clear from these passages that while the rule is easy to state and difficult to apply, it is left to a court in making the judgment call whether subsequent profit earned by a plaintiff is 'completely collateral' to the defendant's wrongdoing." at para 88).

³⁶⁸ *Ibid* at para Chipman JA ("I believe it would have been reasonable for Shannon to cut his losses. He could have done that. Instead, largely for reasons of pride and the maintenance of his reputation, Shannon chose to go on with the company. From there on, it was Shannon's game to win or lose. The subsequent steps taken by Shannon and his resulting success were intervening or collateral events which should not be credited to Collins Barrow by way of mitigation." at 91).

³⁶⁹ *Ibid* at para 91.

second rule of mitigation (as per McGregor on damages), which provides that a plaintiff may recover further losses incurred in the course of a reasonable attempt to mitigate, would likely not have applied here given the risks involved in attempting the turnaround,³⁷⁰ and if further losses had been incurred, it was likely that Collins Barrow would have argued that such losses were the product of unreasonable actions and were thus unrecoverable.³⁷¹ The implication of these remarks was that it ought not lie in Collins Barrow's mouth to approbate and reprobate the outcome of the plaintiff's efforts according to their pecuniary advantage.

My opinion with respect to the Court's decision is that I am in agreement with the result, but not all of its rationale. Beginning with agreement, I strongly support the proposition that there ought to be some measure of symmetry between allocation of loss and gain under the operation of the doctrine, which appears absent from older authorities such as *Cockburn*, but does appear here. Specifically, the Court acknowledged the fact that Collins Barrow would likely have disclaimed liability if Shannon's efforts had exacerbated his loss, and stated that they should not have the option of setting up two such incompatible positions with the benefit of hindsight.³⁷² Sauce for the goose, sauce for the gander, one might say. I am skeptical of the Court's articulate major premise, however, which is that Shannon's efforts were *res inter alios acta* and that *sine qua non* is not equivalent to *causa causans*.³⁷³ As I will discuss in section IV, I regard this line of reasoning as fallacious because causation in the sense employed here is equivalent to stating a conclusion rather than an explanation, and thus simply "kicks the can further down the road", so to speak, by simply deferring to a further opaque question. The

³⁷⁰ *1874000 Nova Scotia Ltd v Adams*, *supra* note 307, Chipman JA ("Had Shannon gone on to incur more extensive losses in his attempt to turn the company around, it is unlikely that the expenses so incurred could fall within the second rule of mitigation. Collins Barrow could probably be heard to say that he should have cut his losses when he saw the situation shortly after October 31, 1989. See *Haida Inn Partnership*, *supra*, pp. 314, 316." at para 92).

³⁷¹ *Ibid* at para 92.

³⁷² *Ibid* at paras 92–94.

³⁷³ *1874000 Nova Scotia Ltd v Adams*, *supra* note 307, Chipman JA ("The misrepresentation of Collins Barrow was but a *sine qua non* and not a *causa causans* of Shannon's subsequent successful reorganization." at para 91).

objection will be fully realized in section IV, as stated, but for present purposes I would point out that the Court of Appeal's ratio here gets us no further than the prior preference for "but for" or *sine qua non* reasoning of the *Cockburn* or *British Westinghouse* variety, given that asking whether the plaintiff's subsequent actions broke the chain of causation is equivalent to asking whether the wrong and subsequent gain are linked, which is effectively the first question all over again. The only alternative is to treat the question of *res inter alios acta* as being equivalent to whether the plaintiff's actions were unreasonable, but while this would hold in the present case, it certainly does not hold in all such cases where an allegation of intervening cause is invoked to exclude a plaintiff's gain, and in and of itself seems an odd test to apply unless efficiency and symmetry are to be preferred above all.³⁷⁴ Although, even if "intervening cause" were a sufficient test to apply, it may have been arguably inappropriate or inapplicable in this case for the reasons below.

My aforementioned concern as to the applicability of a "*res inter alios acta*" justification in a similar case pertains to the nature of the award made. As mentioned earlier, Shannon was awarded \$5,545,000 in damages by the trial judge, but it is important to note that this global sum included \$1,400,000 for lost returns (assessed at 10% for seven years) on the \$2,000,000 invested into ABM by Shannon.³⁷⁵ This is troubling because while arguments can be made for uncoupling Shannon's \$755,000 post-breach gain from Collins Barrow's negligence on the basis of intervening cause, or the absence of *causa* in the sense that Shannon would almost inevitably have reaped some profits from his time and capital even without Collins Barrow's negligence and thus his acquisition of ABM, it is hard to see how Shannon's lost *potential* gain and his *actual* gain are not linked. The reason for this is that these sums are inextricably bound up as alternatives, or the "opportunity cost" of having one or the other, given that "but for" the loss of one (i.e., the potential gain) Shannon could not have had the other (i.e., the actual

³⁷⁴ *Hussey, supra* note 54 (The plaintiffs' decision to seek planning permission to develop the property after discovering the misrepresented subsidence appeared to have been eminently reasonable, but the profits were nonetheless excluded).

³⁷⁵ *1874000 Nova Scotia Ltd v Adams, supra* note 307 at para 22.

gain). If this is so, it would have been impossible to exclude Shannon's actual gain from the assessment of his loss without arguably overcompensating him, and yet this was the result. However, in light of the differential treatment of "reasonable" and "unreasonable" attempts to mitigate with respect to the plaintiff's ability to recover for any further loss, the exclusion of Shannon's actual gain is defensible on grounds of equality of treatment as between plaintiff and defendant as noted above. As also noted above, though, not every unusual gain reaped by a plaintiff is the product of an "unreasonable" course of action, even if it is somewhat outside the ordinary course of business. Where that is the case, and the same conduct should/would have been covered by the doctrine even had it led to a loss, it would be in keeping with the ethos of equality alluded to by the Court here to require the plaintiff to account for their gain, despite the arguable lack of connection where the plaintiff has gone above and beyond the ordinary effort expected. As such, in these types of circumstances, a "but for" rationale would be an apt justification for including the plaintiff's gain in the assessment of loss, and particularly so where the damages claimed overlap in some respect with the actual gain made.

An apt example of a case in which this view could have applied is the English Court of Appeal's decision in *Hussey v. Eels*.³⁷⁶ I say "could", of course, because it did not.³⁷⁷ Before delving into the Court's reasoning, again I must speak to the facts. The parties' dispute arose in connection with a contract for the sale of a bungalow in Farnham, Surrey, by the defendants, Mr. and Mrs. Eels, to the plaintiffs, Mr. and Mrs. Hussey, for £53,250 in 1984.³⁷⁸ The particular cause of the dispute was a representation by the Eels that the bungalow had never been subject to subsidence, when in fact it had, as the Husseys learned once the transaction was complete.³⁷⁹ The Husseys also learned that the cost to repair the subsidence was £17,000 which, in the circumstances, they could

³⁷⁶ *Hussey*, *supra* note 54.

³⁷⁷ *Ibid* at 241.

³⁷⁸ *Ibid* at 230.

³⁷⁹ *Ibid*.

not afford.³⁸⁰ Faced with a defective bungalow and no economic way to repair it in the circumstances, the Husseys' response was first to build an alternative dwelling in the garden in 1984, and to then seek planning permission for another to be put up on the land once the original bungalow had been demolished.³⁸¹ Thereafter, the Husseys sold the land to developers in late 1986 with the planning permission for a net price of £76,094, realizing a nominal profit on the resale of £22,844.³⁸² In addition to pursuing resale of the land, the Husseys also brought an action against the Eels for negligent misrepresentation in January 1986 before completion of the resale.³⁸³

The Husseys successfully established liability at first instance in the County Court, but had their claim dismissed on the basis that their gain on resale had wiped out their loss.³⁸⁴ The County Court accepted the Husseys' loss as the difference between the value of the land as it was with the subsidence and its value as it should have been.³⁸⁵ On appeal, the correctness of this conclusion on the effect of the gain on the plaintiffs' loss was the only finding in issue.³⁸⁶ The leading judgment in the case is from Lord Justice Mustill (as he then was), with whom the other two members of the Court concurred,³⁸⁷ wherein he considered the issue from two perspectives as advanced in the alternative by the defence.³⁸⁸ Firstly, obtaining planning permissions and reselling the land was simply mitigation in the sense of being the reasonable and prudent course, thus falling within the scope of the "duty" to mitigate as framed by Viscount Haldane in *British*

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid* at 230–231.

³⁸³ *Ibid* at 231.

³⁸⁴ *Ibid* at 231–232.

³⁸⁵ *Ibid* at 231.

³⁸⁶ *Ibid* at 231–232.

³⁸⁷ *Ibid* at 241.

³⁸⁸ *Ibid* at 232.

Westinghouse.³⁸⁹ And secondly, even if the Husseys' efforts to obtain the planning permission and resell the land fell outside of the scope of the doctrine, the subsequent gain had to nonetheless be taken into account as Viscount Haldane held the plaintiffs' gain had to be in *British Westinghouse* itself.³⁹⁰

The first line of argument, which was premised on the Husseys' actions falling within the expected scope of Mitigation, was readily dismissed on the basis that it was implausible to suggest that the plaintiffs had a duty to pursue the planning permission and resale.³⁹¹ The second line of argument, though, was given significantly greater credit and rejected only after a review of a number of classic authorities on the point.³⁹² In the end, Lord Justice Mustill's ultimate conclusion was that the original purchase of the land and bungalow, and the Husseys' decision to unlock the development value in the land, were not part of a "continuous transaction", and thus, the Husseys' gain should *not* be held to the Eels' credit.³⁹³

The upshot of the Court of Appeal's conclusion for present purposes is that one apparently cannot make any prediction as to the inclusion or exclusion of a gain with any certainty, or at least the level of certainty that one would expect if courts were applying a rule. In the Husseys' case, for instance, I argue that there is no reason to exclude the

³⁸⁹ *Hussey*, *supra* note 54, Mustill LJ ("In the course of his argument in support of the notion thus briefly conveyed by the judge [counsel for the defendants] advanced two distinct propositions. 1. The plaintiffs owed a duty towards the defendants to mitigate the loss resulting from their purchase of the house in reliance on the misrepresentation; the sale to the developers was a performance of this duty; the result of this mitigation was to be taken into account in computing the loss." at 232).

³⁹⁰ *Ibid*, Mustill LJ ("In the course of his argument in support of the notion thus briefly conveyed by the judge [counsel for the defendants] advanced two distinct propositions ... 2. Whether the re-sale was mitigation or not, the fact is that when the plaintiffs' dealings are regarded as a whole it can be seen that they have suffered no loss." at 232)".

³⁹¹ *Ibid*, Mustill LJ ("Given therefore that alternatives [a] [continuing to live in the bungalow despite its serious faults] and [b] [repairing the bungalow] were legitimate, the proposition that the plaintiffs were under a duty to spend more than two years in applications for planning permission, and that having obtained it were under a further duty to move out of the house in which they had hoped to live and to buy somewhere else, all for the benefit of the defendants who had by their actionable wrong put them into this dilemma, need only be stated to be rejected, and the rest of the argument falls with it." at 233).

³⁹² *Ibid* at 233–241.

³⁹³ *Hussey*, *supra* note 54, Mustill LJ ("It seems to me that when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception." at 241).

Husseys' gain if "reasonable steps" are understood as including sets of differing or mutually exclusive "reasonable steps" on a spectrum of options, and further, that a given set of steps is not automatically unreasonable because it is outside of the plaintiffs' ordinary course of business. Certainly, there is authority for the latter proposition that where a plaintiff is left with few options but the unusual, they will not be disentitled to recovery for losses arising from such attempts to mitigate simply because the step was not in keeping with what one would expect in the "ordinary course".³⁹⁴ As such, I would venture that the Husseys would certainly not have been denied recovery here if their steps taken to unlock the development value of the land had failed, and as such, I cannot see why these steps should not count as mitigation and the gain correspondingly seen as being in mitigation of the Husseys' loss *if* the reasonableness of the steps is the essential criterion. What is more, this approach aligns with the criteria of reasonable contemplation, or reasonable foresight employed with respect to remoteness, and would provide a rather more elegant and predictable solution than the current helter-skelter approach, if nothing else. In this light, the notion that these post-breach steps were not a part of a continuous transaction and the gain correspondingly collateral is rather specious, and as I will explain in section I.V, simply a conclusion rather than a justification.

In the overall context of the point that I am trying to make with respect to Mitigation as a rule, I should hasten to add to my conclusion on the Court's reasoning in the Husseys' case that it is not that it is wrong in absolute terms with respect to the result. Instead, I am only trying to demonstrate that it is wrong in so far as we take the governing statements from Viscount Haldane, and others of similar authority, seriously. If we do not take them at face value, as I argue we should not, then there is potentially no issue, since it may well be possible to justify the Court of Appeal's conclusion. To do this though, we must accept that Mitigation is not acting as a "rule" in these cases. The only alternative is to accept that the cases and the courts are simply unruly.

³⁹⁴ *Burns v MAN Automotive (Aust) Pty Ltd*, *supra* note 165 (The plaintiff's damage claim for having been sold a defective truck was not disallowed simply because he used the truck for intra-state haulage rather than inter-state haulage as he had originally intended.); *Esso Petroleum Co v Mardon*, *supra* note 140 (Mardon's efforts to keep operating the Southport site even after supplies of petrol were cut off did not disentitle him from his claim for losses that continued after the point when the petrol was cut off).

iii. *All in a day's work, or is it?*

In most of the decisions discussed above, the gain in question has been of a somewhat unusual character. Of course, this likely owes to the unusual exigent circumstances in which plaintiffs have found themselves: Cockburn unemployed by reason of his employer's collapse;³⁹⁵ Shannon facing a loss of capital following his unsuspecting acquisition of a collapsing company;³⁹⁶ the owners of the Andros Springs, who had an unusually lucrative eight-year charter owing to the Suez Crisis; and so on.³⁹⁷ Many are, however, cases where what is done fits with what a plaintiff ordinarily does, or what might be expected of them as reasonable business people even if there had been no wrong or breach. In such cases, the question as to whether or not a gain ought to be held to the account of the defendant (i.e., treated as consequent or collateral) appears straightforward in light of Viscount Haldane's dicta in *British Westinghouse*. Courts do not, however, always treat it as being so, nor do they come to the seemingly obvious conclusion even when *this* rule appears as though it ought to apply. Two contrasting decisions in this respect are *Bellingham v. Dillon* and *The Fanis*, which I will discuss below beginning with *Bellingham*.

Bellingham is an English Queen's Bench tort decision from 1972.³⁹⁸ The facts involve an unfortunate, and perhaps ironic,³⁹⁹ automobile accident in which Bellingham's vehicle was struck while his vehicle was parked.⁴⁰⁰ Liability was not seriously at issue in this case, but difficulties arose with respect to business losses claimed as a result of the

³⁹⁵ *Cockburn*, *supra* note 41 at 265.

³⁹⁶ *1874000 Nova Scotia Ltd v Adams*, *supra* note 307 at para 17.

³⁹⁷ *The World Beauty*, *supra* note 283 at 159.

³⁹⁸ *Bellingham v Dhillon*, [1973] QB 304 [*Bellingham*].

³⁹⁹ It's ironic if you consider that his business was disrupted by the kind of person that needed his services the most.

⁴⁰⁰ *Bellingham*, *supra* note 398 at 305.

disruption Bellingham's injuries caused to his business as a driving instructor.⁴⁰¹ Front and centre of these was the question as to how to deal with the fact that Bellingham had been able to acquire a driving simulator sometime after the accident at a price much lower than what he would have paid for it if the accident had not disrupted his business and delayed his purchase.⁴⁰² The difference in price, including substantial hire purchase charges that were avoided, was described as a windfall gain,⁴⁰³ but it was not immediately obvious, according to Mr. Justice Forbes, that the gain was as accountable in tort as it would be in contract.⁴⁰⁴ His Lordship's conclusion, was that there ought to be no distinction between the assessment of businesses losses in tort or contract and thus no distinction as to the application of Mitigation.⁴⁰⁵ For myself, I do not necessarily accept that assessment should always match in contract and in tort, but in the circumstances of the case, no controversy arises.

With respect to the Mitigation issue, Mr. Justice Forbes concluded that acquiring the simulator at the much lower price later on was what any reasonable person in Bellingham's shoes would do,⁴⁰⁶ and that it was thus fitting to take the "gain" (saving in cost) into account when assessing Bellingham's claim for loss of profits with respect to his planned use of the same piece of equipment.⁴⁰⁷ This is to treat the gain as consequent. Admittedly, this example seems a little unusual on its face in light of the fact that the decrease in the simulator's price following the accident was a coincidence, but the same

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid* at 306.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid* at 309.

⁴⁰⁵ *Bellingham, supra* note 398, Forbes J ("The action of the plaintiff was that of a reasonable and prudent man of business. It was his duty to mitigate his damage by buying this equipment just as much when that damage arose in tort as if it had arisen in contract. It seems to me that when the plaintiff's claim for damages is based on loss in his business so that a detailed examination has to be made of his accounts and methods of trading, there should be no difference on this point between actions in contract and tort." at 609).

⁴⁰⁶ *Ibid*, Forbes J ("The plaintiff was only doing what a prudent and reasonable businessman would do in buying so cheaply this equipment when it came on the market. In doing so, he would have been discharging his duty to mitigate his damages..." at 308).

⁴⁰⁷ *Ibid* at 308–309.

would be true if the good in question were any ordinary commodity like cotton or steel. As such, if the rule should apply to bring any cost-saving into account in the latter case, which undoubtedly it should, then so too should it in the former case where acquisition at the lower price was likewise a reasonable action in the ordinary course of business — *reasonable action* that would be expected of the plaintiff, being the touchstone of Viscount Haldane’s dicta. Of course, not all cases appear to take this view.

As mentioned above, an example in apparent opposition to *Bellingham* is *The Fanis*.⁴⁰⁸ A shipping case, *The Fanis* clearly arises on markedly different facts from *Bellingham*, but nonetheless bears comparison on the application of Mitigation, as I will explain. The basic facts of *The Fanis* pertain to a charter of the titular vessel that was breached by the owners,⁴⁰⁹ forcing the plaintiff charterers to fix a substitute vessel in order to meet their own commitments.⁴¹⁰ This the charterers did by chartering the ship the *Chusovoy*.⁴¹¹ The plaintiffs nonetheless suffered a loss, which was assessed at \$53,844 USD in arbitration proceedings preceding the decision here.⁴¹² The correctness of this assessment was (of course) the issue leading to the decision herein referred, which was an appeal to the Queen’s Bench on a point pertaining to Mitigation.⁴¹³ Namely, the issue was whether the arbitrator was wrong to treat a profit of \$21,943 USD the plaintiff charterers had made in the course of their replacement charter of the *Chusovoy* as collateral, i.e., to exclude it from the assessment.⁴¹⁴ As my exposition above suggests, this is a case in which the decision to include or exclude the gain was made out of step with respect to the “principle” enunciated by Viscount Haldane in *British Westinghouse* with respect to acts in the ordinary course, and in so doing, I argue, undermined the

⁴⁰⁸ *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The “Fanis”)*, [1994] 1 Lloyd’s Rep 633 (QB) [*The Fanis*].

⁴⁰⁹ *Ibid* at 634–635.

⁴¹⁰ *Ibid* at 635.

⁴¹¹ *Ibid*.

⁴¹² *Ibid*.

⁴¹³ *Ibid*.

⁴¹⁴ *Ibid* at 605.

claimed primacy of that articulation of principle. To explain why, though, a few words must first be said to explain the gain.

In short, the charterers profited from the redelivery of the *Chusovoy* with more “bunkers” than required by the bunker clause in the charter party, and the fact that these were paid for by the owners of the *Chusovoy* at a rate higher than that which the charterers had paid.⁴¹⁵ Note, the term “bunker” in maritime parlance is used interchangeably to describe either a tank used to store fuel oil on a vessel, or simply such fuel oil itself, of which there are various kinds.⁴¹⁶ In this case, the charterers were obliged under the bunker clause to redeliver the *Chusovoy* with about 405 metric tons of intermediate fuel oil (“IFO”) and 25 metric tons of marine diesel oil (“MDO”).⁴¹⁷ Furthermore, any other overage or underage was payable under the clause at a rate of \$365 USD per metric ton of MDO and \$175 per metric ton of IFO,⁴¹⁸ although the owners of the *Chusovoy* had the right to reject any overage if they wished.⁴¹⁹ Nonetheless, the charterers redelivered the *Chusovoy* with 100 metric tons of IFO and 60.595 metric tons of MDO in excess of the amounts required under the bunker clause, which the owners accepted.⁴²⁰ The decision to accept the overage is somewhat surprising in light of the fact that IFO was available at \$81 USD per metric ton at the time of redelivery, and MDO was available at \$158 per metric ton at the same, which was the reason for the charterer’s substantial profit.⁴²¹ The reasons for the owners’ decision are not known, but it suffices for present purposes to simply note that it happened, and that the resulting gain of \$9,400 USD on the IFO (100 x (175 - 81)) and gain of \$12,543 on

⁴¹⁵ *Ibid* at 635.

⁴¹⁶ JA Simpson & ESC Weiner, *Oxford English Dictionary*, (Oxford: Oxford University Press, 2000) sub verbo “bunker”.

⁴¹⁷ *The Fanis*, *supra* note 408 at 635.

⁴¹⁸ *Ibid*.

⁴¹⁹ *Ibid* at 636.

⁴²⁰ *Ibid* at 635.

⁴²¹ *Ibid*.

the MDO (60.595 x (365-158)) was excluded from the arbitrator's assessment of Mitigation, and again by Mr. Justice Mance (as he was then) on appeal.⁴²²

Before turning to the conclusion reached by Mr. Justice Mance, a few words of explanation are needed with respect to the nature of the gain. The most important point to note is that such a gain was not unusual, and in Mr. Justice Mance's words there was:⁴²³

“... no particular reason ... for supposing that charterers might not have made an equivalent (though differently calculated) windfall profit out of their operation of the bunker clause in the charter relating to the Fanis herself, or in any other charter containing a similar bunker clause into which they may have entered at any time...”

Of course, in any given case, the possibility of profit may well have been constrained by the discretion of the owner, as it was by owners of the Chusovoy who could have rejected the additional bunkers.⁴²⁴ Nonetheless, there seems to have been nothing unusual with respect to pursuing such an opportunity if it were to arise under a particular charter, and thus no reason as to why operating a bunker clause in this way in a substitute charter should not be thought of as a reasonable and prudent course of action in the ordinary course of business for a plaintiff who had apparently entered such charters before, and thus no reason to treat the profit as collateral.

Turning now to Mr. Justice Mance's conclusion on the matter, it is plain that His Lordship did not take the view expressed above, and instead insisted that a “common sense” overall judgment considering the nature of the breach, the gain, and any intervening factors was necessary in order to determine whether there was a causal connection between the breach and the gain in question sufficient to render it

⁴²² *Ibid* at 635–637.

⁴²³ *Ibid* at 636.

⁴²⁴ *Ibid* at 636 (Note, in their submissions the owners claimed that the charterers would not have made an equivalent profit on their charter of the Fanis, despite the existence of an equivalent and materially similar clause in the plaintiff's original charter of the Fanis. In fairness though, given that damage is to be assessed on the basis of the least costly method of performance, it does arguably lie in the defendants' mouth to assert this.); *Bhasin v Hrynew*, [2014] SCC 71 at paras 108-111, Cromwell J (The least costly method of performance was used as basis for assessment even with respect to breach of duty of honest performance).

consequent.⁴²⁵ On that basis, His Lordship concluded that the connection between the defendant owners' breach and the \$21,943 gain made by the plaintiff charterers was insufficient,⁴²⁶ the breach in this case being said to be the occasion, but not the cause of, the plaintiff charterers' gain.⁴²⁷ There is much to be said both for and against this conclusion. For present purposes, I will confine myself to a contrast with *Bellingham* and the foundational decision in *Staniforth v. Lyall*.⁴²⁸

To begin the contrast first with *Bellingham*, it is evident that there, the plaintiff did only what was prudent in the circumstances by acquiring the simulator (i.e., the same thing that he was deprived of) when it later became available at a reduced price owing to his competitor's insolvency. Likewise, the plaintiffs in *The Fanis* only did what would seem prudent for a charterer in need of a vessel and not otherwise inimical to making a profit, a profit in fact of the same kind as they might have made on the original charter. The difference in the Courts' conclusions then, is hard to sustain in light of the governing statement from Viscount Haldane. The point is also further underscored by comparing *The Fanis* to the foundational decision in *Staniforth v. Lyall*, relied upon by Viscount Haldane in *British Westinghouse*, where the description "occasion" but not "cause" might have as easily been said with respect to the defendant charterers' breach, and in which case, the plaintiff's gain might have easily been treated as collateral and excluded from the assessment of loss.⁴²⁹ That gain of course arose when the defendant charterers failed

⁴²⁵ *The Fanis*, *supra* note 408, Mance LJ ("The general issue is in my view appropriately stated as being whether any profit or loss arose out of or was sufficiently closely connected with the breach to require to be brought into account in assessing damages. Resolution of that issue involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the profit or loss, the manner in which it occurred and any intervening or collateral factors which played a part in its occurrence, in order to form a commonsense overall judgement on the sufficiency of the causal nexus between breach and profit or loss." at 636-637).

⁴²⁶ *Ibid* at 637.

⁴²⁷ *The Fanis*, *supra* note 408, Mance LJ ("In other words the Chusovoy charter was not the cause of the profit; its performance was at most the occasion of which the charterers were able to make use to achieve a windfall profit." at 636.

⁴²⁸ *Staniforth v Lyall*, (1830) 7 Bingham 169 [*Staniforth*].

⁴²⁹ *Ibid* at 172 (The defendants chartered the plaintiff's vessel for a voyage to New Zealand to collect a cargo bound for England. No such cargo was provided, but the plaintiff's made the return journey by a more circuitous route and realized a profit from trading along the way).

to provide a cargo upon the vessel's arrival in New Zealand, prompting the plaintiff owners to take a longer return route to England in order to take advantage of trading opportunities along the way.⁴³⁰ Given that the course taken by the owners in *Staniforth* was a comparatively more speculative act in mitigation, especially in the era of sail, than the act of the plaintiff in *The Fanis*, which was to simply charter an alternative vessel and redeliver her with more fuel, any belief in consistency within the case law becomes even harder to sustain.

Having pointed out the inconsistency above, one must ask: what of it? Clearly, the upshot of *The Fanis* and other decisions in that vein, as mentioned above, is that it undermines the primacy of that part of Viscount Haldane's dicta pertaining to acts in the ordinary course of business, meaning that there is an apparent lack of consistency and little actual support for the notion that gains arising from reasonable acts in the ordinary course of business are always accountable as a "rule". What this means in the larger picture, along with the points made above with respect to the "but for" test and the "asset creation" theory, is that Mitigation lacks credibility as a "rule" as much with respect to the allocation of gains as I argued it does in III.B.1 with respect to the treatment of "avoidable losses". This in turn feeds into a larger frame with respect to the nature of Mitigation, as I will sum up below.

3. Conclusion on the idea that Mitigation is in anyway a rule

In III.B, I have demonstrated that in addition to the theoretical inaccuracy of describing Mitigation as a rule, there is the further objection that what remains to be said about the doctrine's operation in practice undermines any suggestion that it applies like one. Granted, there are likely to be instances of consensus on particular points; however, these instances are more apt to be described as individual rules unto themselves as opposed to aspects of Mitigation. The "breach date" rule in the law of sale, for instance, affects both the scope of recovery with respect to remoteness and the extent to which

⁴³⁰ *Ibid.*

Mitigation can bring further losses or gains into account.⁴³¹ Note, though, that this appears to be an aspect of the law of sale more than that it is the doctrine of Mitigation given its application to both Mitigation and Remoteness.⁴³² Of course, there are commentators and authorities that suggest or simply state that Mitigation and Remoteness, and in fact causation as well, are all closely related, if not perhaps aspects of one another. In that connection, though, the assumed unity of this trinity is in fact the final inaccurate notion that I will proceed to debunk in part IV below.

IV. Mitigation is not causation, nor is it remoteness

It may interest some readers to note that the doctrines that define the scope of compensable loss in contract and tort, once liability is established, are three in number. The significance of the figure is of course its suggestion of unity, of three being one much like Vishnu, Brahma, and Shiva; or the Father, the Son, and the Holy Spirit; or even that most exalted trio: Bruce, Baker, and Clapton.⁴³³ For those not already aware as to why the association might seem apt, though, I should say that the potential significance of the suggestion arises from the view or views held in some quarters that all three are closely connected.⁴³⁴ I note that views of the relationship or relationships herein are not uniform,

⁴³¹ *Jamal v Moolla Dawood, Sons & Co*, [1916] 1 AC 175 (PC Lower Burma) [*Jamal v. Moolla*], Lord Wrenbury (“It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.” at 179).

⁴³² Edelman, *supra* note 11 at 25–023 to 25–036 (The only significant exception to the breach date rule for remoteness purposes appears to apply only when there is no available market for a substitute, or the claimant cannot access it. That is consistent with outcomes in mitigation though, because a plaintiff cannot be found to have failed to mitigate when there was no available opportunity to do so.).

⁴³³ This, of course, was the lineup of the band “Cream”, known for their pioneering work in rock music that paved the way for later acts, such as “Led Zeppelin”.

⁴³⁴ Anne Michaud, “Mitigation of Damage in the Context of Remedies for Breach of Contract Droit Compare” (1984) 15:2 Rev Gen 293–340 at 309 (“Mitigation appears to be very closely related to other doctrines which also play a role in measuring the extent of recoverable losses, namely causation, contributory negligence and remoteness...”).

with some regarding three as united by a common focus on foreseeability,⁴³⁵ and others viewing Mitigation as an aspect of either Causation⁴³⁶ or Remoteness,⁴³⁷ with others still suggesting that these latter two are indistinguishable, at least when applied to the decisions of human actors.⁴³⁸ In that connection, the purpose of this section will be to debunk the notion that Mitigation can be explained as an aspect of either Remoteness or Causation, and the view that Mitigation shares a connection with either of the other two on the basis of a shared emphasis on foreseeability.

⁴³⁵ GHL Fridman, *The law of contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 734 (“Mitigation principles are closely related to remoteness and causation. In relation to all three, the essential ingredient seems to be foresight. Conduct that ought to be undertaken by the plaintiff must be foreseeable, and therefore reasonably to be expected from the plaintiff, if it is to constitute mitigation.”); See also *AJ Hustins Enterprises Ltd v Byrne Architects Inc*, [2000] 29 CLR (3d) 9 at para 134 (NSSC), (Cites the aforementioned passage from Fridman).

⁴³⁶ Waddams, *supra* note 1 at para 758 (“Behind [Mitigation] there lie two notions, one of causation...”); *Hodgkinson v Simms*, [1994] 3 SCR 377 at para 92 (Cites this paragraph of Waddams on Damages from an earlier edition.); Beale, *supra* note 16 at 26–087, n 497; *Thai Airways International Public Company Ltd v KI Holdings Co Ltd & Anor*, [2015] EWHC 1250, Legatt J (as he then was) (“In an analysis first expounded by Harvey McGregor in his treatise on damages, the concept of mitigation is often said to comprise three distinct rules ... Whilst distinguishing these rules may sometimes be useful, it is important not to lose sight of their underlying unity. As Robert Goff J observed in *Koch Marine Inc v D’Amica Societa di Navigazione ARL (The “Elena D’Amico”)* [1980] 1 Lloyd’s Rep 75 at 88, the three rules are all aspects of the principle of causation.” at paras 32-33); *Koch Marine Inc v dAmica Societa di Navigazione arl (The Elena dAmico)*, [1980] 1 Lloyd’s Rep 75 (QB), Robert Goff J (“Now, in my judgment, these three aspects of Mitigation are all really aspects of a wider principle which is that, subject to the rules of remoteness, the plaintiff can recover, but can only recover, in respect of damage suffered by him which has been caused by the defendant’s legal wrong. In other words, they are aspects of the principle of causation.” at 88).

⁴³⁷ Stephen A Smith, *Contract theory* (Oxford: Oxford University Press, 2004) at 428 (“Thus described, the mitigation rule is best explained as one aspect of the general concept of remoteness; the reason plaintiffs cannot recover for losses they could have avoided by acting reasonably is that such losses are too remote.”); MP Furmston, *Cheshire, Fifoot and Furmston’s law of contract*, 16th ed (Oxford: Oxford University Press, 2012) at 780 (“In relation to the computation of damages, mitigation is substantially an aspect of remoteness, since it is within the contemplation of the parties that the plaintiff will take reasonable steps to mitigate his loss. This interrelationship was emphasised by Oliver J. in *Radford v. De Froberville...*”); *Radford v De Froberville*, [1977] 1 WLR 1262 at 1272 (It appears that Oliver J. thinks that mitigation [in contract] is more closely connected to measure than remoteness, but his reasoning does support Furmston and Smith somewhat.).

⁴³⁸ Michaud, *supra* note 434 at 298–309.

A. More far-fetched than far out: Mitigation as Remoteness

More than one commentator has taken the view that Mitigation can be described as an aspect of remoteness⁴³⁹, and to tackle this view, which I will admit has its attraction, I will explain how the rationale of Remoteness clashes with the reality of Mitigation in three important respects. The first of these is the relation between reasonableness as it ostensibly applies in Remoteness and as it appears to in Mitigation. The second is the inapplicability of foreseeability to losses incurred in the course of mitigation. And the third is the Remoteness doctrine's inapplicability to decisions on gain allocation. Prior to doing so, though, I should first elaborate more fully on the theory of Mitigation as an aspect of Remoteness.

1. The remoteness rationale

The rationale for describing Mitigation as an aspect of Remoteness is concisely put by MP Furmston in *Cheshire & Fifoot* as follows:⁴⁴⁰

“In relation to the computation of damages, mitigation is substantially an aspect of remoteness, since it is within the contemplation of the parties that the plaintiff will take reasonable steps to mitigate his loss.”

I note that this explanation is correct, but in my opinion oddly inverted. It would be clearer to say that a defendant would not contemplate an unreasonable failure by the plaintiff to mitigate their loss, and that any loss arising from the plaintiff's unreasonable behaviour is thus too remote to recover. In this sense, Mitigation, or at least that aspect of it concerned with un-avoided consequential loss, can be explained in terms of remoteness. As noted above in IV.A, however, there are a number of reasons as to why this explanation does not hold up on closer inspection.

⁴³⁹ Furmston, *supra* note 437 at 780; Smith, *supra* note 437 at 428.

⁴⁴⁰ Furmston, *supra* note 437 at 780.

2. Reasonable is relative

Arguably, the strongest reason for objection to the explanation of Mitigation as an aspect of remoteness is the difference between the meanings of “reasonableness” as it applies in both doctrines. The first and most obvious difference is the subject of assessment. In Remoteness, it is the contemplation of the defendant based on what they knew or ought to have known, which is at best an unarticulated mental state.⁴⁴¹ In Mitigation, it is behaviour that is in question,⁴⁴² and there lies the rub. Imagine for instance the following example: there are two parties, Party A and Party B. Party A runs a hardware and garden supply store, and Party B is an enthusiastic home gardener who has won numerous accolades for the beauty of his flower garden, and is also on record as the most stubborn man alive. Party B has ordered a special garden hose from A to be delivered on August 1, but owing to problems with the supplier, Party A is two weeks late delivering the hose. Party B’s response is to insist on performance and to refuse any substitute, or to buy a replacement elsewhere. Further, and more troubling, though, Party B sticks to his position even when his existing hose breaks on August 7, leaving him unable to continue watering his garden during the hottest month of the year. By the date of delivery on August 15, Party B’s flowers have all perished, and so have his chances of winning a likely 10th consecutive prize for best garden in the city and \$5,000 from Gnome and Garden Magazine. In this situation, given how notoriously stubborn Party B

⁴⁴¹ Beale, *supra* note 16 at 26–117; Fridman, *supra* note 435 at 679 (“The rationale for the exclusion of losses that are not reasonably foreseeable is that it would be unfair to require the defendant to pay full damages where, if he had been aware of them, he might have declined the risk or made other arrangements.”).

⁴⁴² Fridman, *supra* note 435 at 730; Michaud, *supra* note 434 at 308 (“The concept of remoteness is used to ascertain the prima facie extent of recoverable losses following a wrong; mitigation comes into play later in the process of compensation and gives the definitive extent of recoverable losses. Also, while the doctrine of remoteness is based on a requirement of foreseeability at the time when the contract is made, the same requirement, if it were held to apply to mitigation, could lead to a dangerous situation in which the issue of the reasonableness of a plaintiff’s attitude following a breach would be entirely overlooked. Mitigation, which is basically an issue of reasonable attitude at the time of the wrong, ought not to be confused with remoteness, which is concerned with foreseeability at the time of the contract...”); Smith, *supra* note 437 at 428 (“Mitigation is just what [reasonable] people normally do.”).

is known to be, one could be forgiven for assuming that Party A would have had a potentially bizarre overreaction by Party B in contemplation at the time the contract was made. It would shock the conscience of ordinary people, though, if that were reason for permitting Party B to recover consequential loss for the destruction of his garden. And yet, if we accept the rationale of Mitigation as Remoteness, neither it nor Remoteness itself would seem to be an answer to Party B's claim were he to sue for that loss.

A potential rejoinder to my criticism of the distinction between reasonable contemplation versus reasonable behaviour above is that I have simply misunderstood Remoteness, the hypothetical argument being that I have failed to account for the effect of the decisions in *South Australia Asset Management Company*⁴⁴³ and *The Achilles*,⁴⁴⁴ which have arguably shifted Remoteness from a question of contemplation/foresight to a question of "consent" with respect to the "scope of the duty undertaken".⁴⁴⁵ With this in mind, so proponents of the view of Mitigation as Remoteness might argue, it is clear that Party B's loss would be too remote in the sense that Party A could not plausibly be said to have undertaken responsibility for the welfare of Party B's garden in the event that Party B refused to use another hose. To riposte the rejoinder, though, I would point out that the "scope of the duty" approach is not universally accepted,⁴⁴⁶ particularly as it is now after having been further developed by the House of Lords in *The Achilles*.⁴⁴⁷ As such, even this explanation is open to question. Irrespective of which formulation of Remoteness is preferred, there is another and further objection to the view that reasonable contemplation can explain the operation of Mitigation, namely whose thoughts and behaviour we are talking about.

⁴⁴³ *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, [1997] AC 191 (HL (Eng)) (Note, this is the name under which the appeal was published because it was amalgamated with two other appeals. However, the case is typically referred to as "*South Australia Asset Management*" or "*SAAMCO*").

⁴⁴⁴ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*, [2009] AC 61 (HL (Eng)) [*The Achilles*].

⁴⁴⁵ *Ibid* at paras 17–23, Lord Hoffmann; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, *supra* note 443 at paras 21, 32, Lord Hoffmann and Lord Hope of Craighead.

⁴⁴⁶ Beale, *supra* note 16 at 26–117 ("However, judgments since *The Achilles* have emphasised that the decision in *The Achilles* has not brought about a major change...").

⁴⁴⁷ *The Achilles*, *supra* note 444.

I have previously pointed out that while Mitigation is understood to focus on the behaviour of the plaintiff post-breach, the reality is that cases applying the doctrine not infrequently consider the behaviour of the defendant both pre- and post-breach, as well as the plaintiff's behaviour when deciding whether to permit recovery of certain losses. This distinguishes Mitigation from Remoteness in the sense that Remoteness, no matter how described, is a one-way street. By this I mean that Remoteness as currently understood does not afford an opportunity for an adjudicator to weigh the defendant's conduct, nor do proponents of the view of Mitigation as Remoteness suggest that it does.⁴⁴⁸ Instead, those in favour of the view, such as Furmston, propose the same unidirectional view from the defendant's breach to the plaintiff's response already reflected in traditional formulations of Mitigation that describe the doctrine as the *plaintiff's* duty.⁴⁴⁹ As such, for the reasons already given extensively in section III.A.3 above, I argue that neither the reasonable contemplation test, nor the more recent "scope of the duty" analysis, can adequately explain how adjudicators apply Mitigation because it is not always the plaintiff's behaviour to which the doctrine will apply. Instead, as in *Husky Oil*⁴⁵⁰ and *Panex*,⁴⁵¹ it may well be the defendant's conduct that determines whether a consequential loss will be deemed recoverable, and this cannot be explained by hypothetical recourse to the scope of the defendant's duty, or their reasonable contemplation, *if* we are to assume that the defendant would not contemplate unreasonable behaviour or otherwise apparently accept responsibility for it.

My final point, and the only reply to the conclusion reached in the prior paragraph that I can conceive of, because there is almost always some reply, is that a defendant's

⁴⁴⁸ Smith, *supra* note 437 at 428–430.

⁴⁴⁹ Furmston, *supra* note 437 at 780 ("...mitigation is substantially an aspect of remoteness, since it is within the contemplation of the parties that the plaintiff will take reasonable steps to mitigate his loss."); Smith, *supra* note 437 at 428 ("Thus described, the mitigation rule is best explained as one aspect of the general concept of remoteness; the reason plaintiffs cannot recover for losses they could have avoided by acting reasonably is that such losses are too remote. They are too remote because when determining which losses are reasonably foreseeable [or which 'naturally flow'] as a result of a breach, the background assumption is that the relevant parties will act reasonably. Mitigation is just what [reasonable] people normally do.").

⁴⁵⁰ *2438667 Manitoba Ltd v Husky Oil Ltd (cob Husky Oil Marketing Comp)*, *supra* note 128.

⁴⁵¹ *Panex*, *supra* note 165.

contemplation may be taken to reasonably include unreasonable behaviour from the plaintiff if it were a response to unreasonable behaviour from the defendant. A tit-for-tat if you will. Likewise, one could justify a loss of the defendant's ability to limit their liability according to the scope of the duty they have undertaken, if their deviation were itself an unreasonable act prompting the same from the plaintiff. However, in each case, the suggestion that we are dealing with an issue of Remoteness begins to assume an air of unreality because little-to-nothing we are now discussing actually pertains to the parties' hypothetical expectations going into the contract in terms of classic Remoteness, nor their bargained rights and responsibilities in the vein of *The Achilles*.⁴⁵² We are strictly weighing competing claims of right from parties that are both, in some sense, "in the wrong", which the language of remoteness is simply not apt to address without excessive contortion. As such, I dismiss this suggestion for its apparent artificiality.

3. The consequences of consequences cannot be foreseen

It is clear from both case law and academic commentary that the costs of mitigation, even if these include a greater loss incurred in the course of mitigation, are

⁴⁵² *The Achilles*, *supra* note 444.

recoverable from a defendant.⁴⁵³ What is less clear is how precisely recovery of such cost or loss is to square with Remoteness when certain costs or losses incurred in order to Mitigate may not realistically have been within the reasonable contemplation of the defendant at the time of contract formation, or even reasonably foreseeable as at the time of the “wrong” in tort cases. In these circumstances, it becomes apparent that there is in fact a conflict between these doctrines, which forces a court to either acknowledge the disagreement and state which doctrine is to prevail, or else to attempt to massage the difference. The obvious way of doing so is to finesse an explanation of the particular loss or cost such that it falls within the parameters of the applicable remoteness rule. As we will see below, however, the cost of doing so is often an air of unreality in the court’s reasons.

The decision that comes foremost to mind on this point is the decision of the English Court of Appeal in *The Sivand*,⁴⁵⁴ which I have already discussed above in relation to questions that Mitigation may have to address other than the “avoidability” of

⁴⁵³ *Fox v Wood*, (1981) 148 CLR 438 (HCA), Gibbs CJ (“Where the plaintiff is able to take steps to restore his regular receipt of income and thereby to avoid further loss, and where he incurs costs in doing so, the costs may be recoverable from the defendant ... The criterion is whether the plaintiff has reasonably incurred the costs in mitigating or in reasonably attempting to mitigate that damage and it is a question of fact whether the plaintiff has acted reasonably ... In the present case, there can be no doubt as to the reasonableness of the respondent’s conduct in seeking and receiving regular payments of workers’ compensation under the conditions prescribed by the Act. ... It may be that the receipt of workers’ compensation removed any practical detriment which would have flowed from a loss of wages in a corresponding amount, and that interest ought not to have been awarded in favour of the respondent; but the appellant’s liability to pay for the cost of mitigating the respondent’s damage is not dependent upon the appellant’s being relieved of a corresponding or greater liability.” at 646-647); See also *Feeney v Gulley*, [2016] NZHC 2062, RM Bell AsJ. (The plaintiff had lost out on the purchase of a home owing to the negligence of the defendant solicitor. The plaintiff purchased a substitute, and expended significant funds renovating the replacement property in order to make it livable. The plaintiff subsequently sued for the associated losses, including the cost of renovations. The defendant solicitor brought a “strikeout” application seeking to delete the renovation costs [among others] from the plaintiff’s claim on the basis that they inflated the cost of the replacement property to be greater than the original property sought. The Court held, however, that there is nothing in principle that would disqualify the renovation costs from recovery because costs of mitigation are always recoverable if they are incurred reasonably, even if they ultimately increase rather than diminish the plaintiff’s loss.); Edelman, *supra* note 11 at 9–101 to 9–102 (“The claimant, during his efforts to mitigate the damage, may incur further loss, which will often be a loss which is not in addition to, but in place of and less than, the loss which he is attempting to mitigate. This is particularly so in the case of expenses... Moreover, [mitigation] goes further and allows recovery for losses and expenses reasonably incurred in mitigation even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken.”).

⁴⁵⁴ *The Sivand*, *supra* note 65; See also *Fox v Wood*, *supra* note 453 (The plaintiff was put to some time and expense in attempting to obtain workers compensation benefits to replace income she lost as a consequence of her injuries, that cost was sought and allowed as a cost of mitigation, even though receipt of the benefits did nothing to reduce the liability of the defendant.).

loss. The question earlier considered was when Mitigation will permit the recovery of remote losses. Readers will recall from earlier discussion that *The Sivand* was a tort case that arose when the titular vessel collided with the oil terminal belonging to the plaintiffs, causing significant damage in need of repair before the terminal could be put back into operation.⁴⁵⁵ The cost of said repairs would, of course, fit neatly into the rule that the costs of mitigating are themselves as much recoverable as any “unavoidable” loss incurred as a consequence of the wrong. What was more controversial, and the key issue on appeal from the decision of the arbitrator, was the recoverability of the sum paid by the plaintiffs to the contractor pursuant to the standard terms of their contract, to indemnify the contractors for the loss of a jack-up barge that unexpectedly capsized while being used to carry out the repairs.⁴⁵⁶ Though without fault on the part of the contractor or the plaintiff, the recoverability of this loss was questioned on the basis of unforeseeability of the precise cause of the accident.⁴⁵⁷ This cause, of course, was the unexpected “freak” collapse of the sub-surface of the seabed beneath one of the jack-up barge’s legs, which none had any reason to expect might occur based on what was known of the harbour floor at the relevant time.⁴⁵⁸

Readers may remember that the three sitting members of the Court, Evans, Hobhouse, and Pill LJJ, were divided in their opinions as to whether remoteness and incidentally causation precluded recovery of the barge loss.⁴⁵⁹ Of their Lordships, Evans and Pill LJJ chose to address the argument advanced by the owners of the *Sivand* that the barge loss was too remote to be recovered. Each concluded that it was not, and did so on the basis that while the extent of the loss arising from the seabed collapse and subsequent loss of the barge was unforeseeable in terms of its extent, it was not unforeseeable in

⁴⁵⁵ *The Sivand*, *supra* note 65 at 763.

⁴⁵⁶ *Ibid* at 752, 763.

⁴⁵⁷ *Ibid* at 751.

⁴⁵⁸ *Ibid* at 752.

⁴⁵⁹ *Ibid* at 752–763, 765, 765–766, Evans, Hobhouse & Pill LJJ.

terms of its “kind”, and was thus recoverable, even as surprising in scale as it was.⁴⁶⁰ This, it was said by both Lord Justices, was an application of the thin skull principle.⁴⁶¹ There is good reason, however, to take issue with that claim.

The bases for the conclusion reached by Evans and Pill LJ were that some trouble with ground conditions of the seabed were foreseeable in a legal, if not practical, sense, given the technological limitations of the available sensing equipment, and as mentioned, the notion of “thin skull”, which in this case related back to knowledge of ground conditions.⁴⁶² Their Lordships described the localized weakness of the seabed as an existing state of affairs which, like a thin skull, had to be taken as it was even though it made the extent of the resulting loss greater than was foreseeable.⁴⁶³ It was enough that some trouble of the kind was foreseeable, and no break with the original accident

⁴⁶⁰ *Ibid* at 762, 766–767.

⁴⁶¹ *The Sivand*, *supra* note 65, Evans LJ (“The appellants” final submission is that the rule or principle underlying the ‘thin skull’ case applies only when the relevant factor is a pre-existing state of affairs. Like Staughton LJ in *The Eurus* [1998] CLC 90, I do not find it necessary to decide this issue of law in the present case. It seems to me that the reason for the collapse of the barge and therefore for the additional cost of repairs was the nature of the sub-soil of the sea-bed. Either this was constant, but its inability to support the jack-up legs of the barge was not discovered by what are generally regarded as sufficient tests, or it changed when on previous experience it ought to have remained constant. In either case, the failure was due to the characteristics of the sub-soil, coupled with the contractor’s non-negligent failure to discover what those characteristics were. That seems to me to constitute a pre-existing state of affairs, even if the rule is subject to the qualification for which the appellants contend.” at 762), Pill LJ (“It was the defendants’ misfortune that the damage their vessel caused was caused to a structure located at a point above the seabed where a combination of difficult ground conditions was liable to and did occur. The liability of the defendants is founded on one aspect of the principle that a tortfeasor takes his victim as he finds him. The conditions encountered cannot in my judgment be equated with an earthquake or freak storm.” at 767).

⁴⁶² *Ibid* Evans LJ (“... ‘reasonable foreseeability’ does not limit the extent of damages when the kind or type of damage could be reasonably foreseen. This is, in effect, for the purposes of legal analysis a ‘thin skull’ type of case. The factor which increased the cost of repairs and therefore the amount of damages cannot be regarded as an independent, supervening cause. It follows that the reasonable cost is recoverable in full.” at 762), Pill LJ (“The arbitrator found that the cause of the collapse of the barge was ‘a very unusual combination of soil strength and applied stresses around the base of leg No. 2 just before failure occurred’. There was a ‘transient combination ... which came together only near the point of failure’. He found that ‘everyone involved in the operation was taken by complete surprise by the collapse’. The condition which led to the collapse and the collapse itself were neither foreseen nor foreseeable. The fallacy in the defendants’ argument is in my view in equating the foreseeability or otherwise of the difficult ground conditions with the legal concept of foreseeability as a test of liability for particular damage. It does not follow from the fact that competent and experienced contractors did not and could not reasonably foresee the exceptional conditions which were in the event encountered that the defendants can escape liability for the additional expense resulting from those conditions.” at 766”).

⁴⁶³ *Ibid* at 762, 766–767.

occurred merely because the resulting trouble was greater than anyone had anticipated.⁴⁶⁴ In that connection, Lord Justice Pill contrasted the seabed collapse with an earthquake or freak storm, which the plaintiffs likewise accepted would have broken causation or rendered the resulting barge loss too remote to recover.⁴⁶⁵ Here, however, is the rub because surely if practically unforeseeable trouble with ground conditions was legally foreseeable, and the instability in the seabed a pre-existing “thin skull” type condition, the same must be true of a terrible storm or even an earthquake. Taking the storm example first, it is obvious that expense or delay caused by inclement weather would be generally foreseeable in kind, and that the susceptibility of England to storms is nothing new. As such, there is quite apparently nothing to distinguish even a “freak storm” from the seabed collapse that caused the barge to capsize. The same likewise goes for an earthquake. If a fault line were present, a necessary prerequisite for an earthquake, then an earthquake would be as legally foreseeable as the seabed collapse by reason of the notoriety of such conditions in places where they inhere, and the fault line would, like the weakness of the seabed, have to be understood as a pre-existing condition or state of affairs. All of this, however, begins to border on the potentially absurd.

Particular causes and their extraordinary qualities aside, the point I am attempting to make with my criticism above is that the remoteness doctrine (whether in tort or contract) risks losing meaning if we stretch it too far in an effort to address the consequences of consequences. This is not to say that we return to the rule in *Re Polemis* in tort,⁴⁶⁶ or older understandings of remoteness in contract, but simply that present understandings of remoteness in either sphere may not be apt to achieve the outcome desired in the circumstances of every case. Where this is so, as it appears to have been in

⁴⁶⁴ *The Sivand*, *supra* note 65, Evans LJ (“...foreseeability’ does not limit the extent of damages when the kind or type of damage could be reasonably foreseen. ... The factor which increased the cost of repairs and therefore the amount of damages cannot be regarded as an independent, supervening cause.” at 762).

⁴⁶⁵ *Ibid*, Pill LJ (“It was the defendants’ misfortune that the damage their vessel caused was caused to a structure located at a point above the seabed where a combination of difficult ground conditions was liable to and did occur. The liability of the defendants is founded on one aspect of the principle that a tortfeasor takes his victim as he finds him. The conditions encountered cannot in my judgment be equated with an earthquake or freak storm.” at 767”).

⁴⁶⁶ *Polemis & Furness, Withy & Co, In re*, [1921] 3 KB 560 (CA).

The Sivand itself, I argue that it is apparent that remoteness cannot explain or justify outcomes otherwise mandated by Mitigation. Instead, I argue that it becomes clear that Mitigation is in reality acting as an exception, or simply operating irrespective of the remoteness of loss arising from reasonable action taken in mitigation. As such, I argue that the reasons of Lord Justice Hobhouse (as he then was) are much to be preferred, and that loss arising from reasonable acts in mitigation ought to be simply regarded as recoverable per se without regard to remoteness, as His Lordship held.⁴⁶⁷ A more fulsome consideration of this approach will take place in Chapter IV, but for now I would conclude by noting that this approach is simply more explicable than invoking the legal foreseeability of the practically unforeseeable.

4. Remoteness irrelevant with respect to gain allocation

In III.B.2 above, I examined the approach courts have taken in determining whether a subsequent transaction is collateral or consequent, i.e., whether or not a gain arising from that transaction ought to be treated as having been made in mitigation of the plaintiff's loss or not. My conclusion was that of the theories advanced to explain how this determination is to happen, none are definitive. Furthermore, I noted that a rule that embraced subsequent transactions that fell within the defendant's reasonable

⁴⁶⁷ *The Sivand*, *supra* note 65 Hobhouse LJ ("In my judgment this case involves a simple application of the doctrine of the mitigation of loss. The complications sought to be introduced by the defendants are both inappropriate and mistaken." at 765); See also *Fox v Wood*, *supra* note 453, Gibbs CJ ("Where the plaintiff is able to take steps to restore his regular receipt of income and thereby to avoid further loss, and where he incurs costs in doing so, the costs may be recoverable from the defendant. In principle, a tortfeasor's liability for the cost of mitigation of damage is not to be tested in the same way as his liability for an item of damage which is said to have been caused by the tort. Where particular steps in mitigation are a commonplace, it is natural to think of their costs as items of damage which are foreseeable by the tortfeasor and not too remote to be excluded from the items for which he is liable: for example, the cost of a surgical operation to ameliorate personal injury ... But foreseeability and remoteness are not the criteria of a tortfeasor defendant's liability for a cost incurred by the plaintiff in mitigating or attempting to mitigate damage for which the defendant is liable or for which he would have been liable but for the plaintiff's ability to avoid the damage by taking a step in mitigation. The criterion is whether the plaintiff has reasonably incurred the costs in mitigating or in reasonably attempting to mitigate that damage and it is a question of fact whether the plaintiff has acted reasonably ... In the present case, there can be no doubt as to the reasonableness of the respondent's conduct ... [and] the appellant's liability to pay for the cost of mitigating the respondent's damage is not dependent upon the appellant's being relieved of a corresponding or greater liability." at 646-647).

contemplation, or that were reasonably foreseeable in tort terms, would provide a reasonably elegant solution, but this is quite apparently not how Mitigation actually works.⁴⁶⁸ The following two contrasting case examples will help to make this clear, and to underscore the point that Remoteness cannot adequately explain Mitigation in its entirety.

The first decision to discuss is the Supreme Court of Canada decision in *Cockburn*, which readers may recall involved the plaintiff's employment being terminated when his employer went into liquidation, and the plaintiff, Cockburn, then subsequently acquired and sold his former employer's property at a profit.⁴⁶⁹ The profit in this case was more than the loss suffered by Cockburn from early termination of his contract, and the SCC concluded that in keeping with *British Westinghouse*, the gain made had to be brought into account.⁴⁷⁰ The most challenging aspect of this conclusion, though, is the fact that the steps that Cockburn took were not those that would necessarily be "reasonably expected of a prudent man in the ordinary course of his business".⁴⁷¹ Instead, much to the contrary, the steps that Cockburn took were more speculative in nature, with greater attendant risk than simply seeking alternative salaried employment.⁴⁷² As such, one could argue that Cockburn's actions would not have been within the reasonable contemplation of either his defunct employer or the guarantor of his salary sued herein. That being the case, under any theory of Mitigation that claims symmetry with Remoteness, Cockburn's subsequent acts and transactions ought to have been treated as collateral and excluded from assessment of his loss. That, however, was

⁴⁶⁸ See section III.B.2.ii above.

⁴⁶⁹ *Cockburn*, *supra* note 41 at 265.

⁴⁷⁰ *Ibid* at 264–271.

⁴⁷¹ *Cockburn*, *supra* note 41, Duff J ("Even though the course taken by him was not one which would ordinarily be taken in the course of business by a reasonable and prudent man in his circumstances, still, having done what he did, the whole of the facts may properly be looked at for the purpose of estimating damages provided that what he did was what a reasonable and prudent person might do properly 'in the ordinary course of business.'" at 268).

⁴⁷² *Ibid*, Anglin J ("The \$11,000 profit which he made, although the making of it required some assumption of risk and responsibility and also an expenditure clearly beyond anything involved in his engagement by his former employers, and likewise beyond anything which it was his duty to them, or to the respondent, to undertake..." at 270).

not the case, and might not be even today with a general trend away from treating all subsequent transactions as consequent on a but for basis as the SCC did here.

The second decision on point is the English Court of Appeal's decision in *Hussey v. Eels*, also discussed above.⁴⁷³ As readers will recall, the case involved the sale of a property, incorrectly said to be free of subsidence, by the Eels to the Husseys, and the subsequent resale of the property at a profit. In their action against the Eels with respect to the Eels negligent misrepresentation on the subsidence issue, the Husseys sought damages for the difference in value caused by the subsidence and were awarded the full amount, which was upheld on appeal.⁴⁷⁴ Of course, this required the Court at first instance and on appeal to conclude that the Husseys' profitable resale of the property, after engaging in a redevelopment and obtaining a planning permission for further work should a buyer/developer wish to do it, was a collateral rather than consequent transaction.⁴⁷⁵ Earlier, I have taken issue with the Court of Appeal's rationale for other reasons, but this decision also raises concerns from a remoteness perspective. In short, I cannot think of a clearer example of acts within the reasonable contemplation of a defendant than the resale of a defective property. Although, one might object that the Husseys need to sell owing to their inability to afford repair of the subsidence amounts to impecuniosity, which ought to render the subsequent transaction too remote.⁴⁷⁶ Having said this, though, in light of the UK Supreme Court's decision in *Lagden v. O'Connor* it is now apparent that the previous rule thought to stem from *The Liesbosch* no longer dictates that conclusion.⁴⁷⁷ If that is correct, then there is no reason to regard the Husseys' development work and resale as anything other than reasonable, and thus as anything other than within the reasonable contemplation of the Eels as at the time the contract was made. As such, there is no obvious way to reconcile a decision to exclude

⁴⁷³ *Hussey*, *supra* note 54.

⁴⁷⁴ *Ibid* at 230, 241.

⁴⁷⁵ *Ibid* at 241.

⁴⁷⁶ *The Liesbosch*, *supra* note 82; *Southcott*, *supra* note 85.

⁴⁷⁷ *Lagden*, *supra* note 84 at para 90.

the Husseys' gain from the assessment of their loss with remoteness and thus a glaring flaw in the suggestion that Remoteness is an apt rationale for Mitigation.

The conclusion that I hope is readily apparent from consideration of both *Cockburn* and *Hussey* is that Remoteness does not explain the approach taken to determining the status of subsequent transactions as either consequent or collateral — the larger point of saying which is that it further undermines the suggestion that Mitigation can be understood as an aspect of Remoteness. Undoubtedly, the charge can be made that the cases and discussion in IV.A.2 through IV.A.4 are too circumscribed to support so large a point, or that those cases discussed are inconsistent with the Remoteness rationale, but also to that extent, incorrect. This only makes sense, however, if the claim of Remoteness' primacy is normative rather than positive. That is quite apparently not the case though, meaning that the lack of fit between Remoteness and leading Mitigation decisions canvassed in the preceding sections is an apt rejoinder and, I argue, reason enough to dismiss as inaccurate the notion that Mitigation can be explained as an aspect of Remoteness with respect to any of the questions/issues it addresses, and further, also reason to treat suggestions of a close relationship between the two doctrines with caution.

B. Causes matter less than whose cause is best

In much the same way that Remoteness is sometimes offered as an explanation of the underlying rationale of Mitigation, causation is likewise not infrequently used to explain the underlying reasoning behind the application of the doctrine. As with Remoteness, this explanation is open to criticism for both a lack of fit with Mitigation as it appears to apply, as well as conceptual weakness as a rationale. As such, it is another inaccurate notion that I wish to dispel before moving on to my explanation of the doctrine in Chapter IV. To do so, I will first expand on the rationale in detail before considering its chief weaknesses. The first of these is the apparent absence of any meaningful guidance from the suggestion, and the second is the epistemological problem of understanding the effects of acts upon objects with agency.

1. What is meant by cause in the context of Mitigation

Given that Mitigation addresses a number of different questions pertaining to the assessment of loss, the explanations offered by proponents of causation vary according to the context/question. With respect to loss the defendant alleges a plaintiff could have avoided, the question is said to be whether the loss suffered was caused by the original breach/wrong or the plaintiff's neglect to take reasonable steps.⁴⁷⁸ Where recovery is denied, the explanation in terms of causation is simply that the loss is not a consequence of the original wrong, and not recoverable as such.⁴⁷⁹ With respect to cost or loss incurred in the course of mitigation, the question pertains to the reasonable necessity of the subsequent conduct leading to the cost or loss.⁴⁸⁰ Those costs or losses regarded as unreasonable are those that are too far removed from the breach, in the sense that they did not need to happen in order to restore the plaintiff to the position they were or ought to have been in, and are thus, according to proponents of causation, simply not "caused" by

⁴⁷⁸ See Waddams, *supra* note 1 at para 15.70 ("A plaintiff is not entitled to recover compensation for loss that could, by taking reasonable action, have been avoided. This rule rests party on the principle of causation: losses that could reasonably have been avoided are caused by the plaintiff's inaction rather than by the defendant's wrong..."); See also *Thai Airways International Public Company Ltd v KI Holdings Co Ltd & Anor*, *supra* note 436, Legatt J ("As Robert Goff J observed in *Koch Marine Inc v D'Amica Societa di Navigazione ARL* ("*The 'Elena D'Amico'*") [1980] 1 Lloyd's Rep 75 at 88, the three rules are all aspects of the principle of causation. Thus, as I have indicated, the essential purpose of the mitigation rules is to identify, in the light of what the claimant has done or not done to avoid loss resulting from the defendant's breach of contract or other legal wrong, which costs and benefits accruing to the claimant are to be treated as consequences of the defendant's wrong and which are to be treated as caused by the claimant's own action or inaction." at para 33).

⁴⁷⁹ *Standard Chartered Bank v Pakistan National Shipping Corp and others*, [1999] 1 All ER (Comm) 417, aff'd [2001] EWCA Civ 55, Toulson J (as he then was) ("The orthodox view is that the rule as to avoidable loss is merely an aspect of the fundamental principle of causation that a plaintiff can recover only in respect of damage caused by the defendant's wrong. The rule is not that the plaintiff owes any obligation to the wrongdoer to mitigate his loss (despite the much repeated use of the phrase 'duty to mitigate'), but that he cannot recover for a loss avoidable by reasonable action on his own part because, if he could reasonably have avoided it, it will not be regarded as caused by the wrongdoer." at 432).

⁴⁸⁰ See e.g. *The Sivand*, *supra* note 65 (The plaintiff tort victim's decision to contract for repair work on terms that allowed the contractors to recover the costs of an unforeseen accident that occurred during the repairs was reasonable. Also, the subsequent accident during the repairs was not a *novus actus*, and the original accident was the "cause" of the extra loss despite the second accident.).

the original breach/wrong.⁴⁸¹ On the last prominent question of gains and subsequent transactions, the causation analysis posits that those gains made as a consequence of a continuous series of transactions/steps in response to a breach are caused by the breach and are thus accountable to the defendant.⁴⁸² Others posit that any gain that could not have happened but for the wrong/breach is accountable on the basis that it is the wrong/breach that caused the gain.⁴⁸³

I note that the causation explanation offered in respect of the various roles of Mitigation referred to above have a superficial attraction. The relative clarity of the proposition alone renders it appealing in so far as it provides a seemingly persuasive justification for any given conclusion, given that it seems obvious that a loss or gain not “caused” by the breach/wrong should be excluded from consideration. As I will explain, though, the appeal is only skin deep.

⁴⁸¹ See e.g. *Baumgartner v Remus*, [1997] 116 Man R (2d) 274 (MBQB), MacInnes J (“In this case, as I have found, the report was reasonable and was accurate for the purpose for which it was provided. But if reliance were a meaningful issue, it is my view that the plaintiffs’ reliance upon the report was minimal for a limited purpose only. It was not the effective or dominant cause of their loss. It gave them the opportunity to incur losses, but it did not cause the losses which they suffered... In my view, in these circumstances, the expenses which the plaintiffs incurred in pursuing their own plan were not in reasonable mitigation. Clearly, the plaintiffs were entitled to proceed as they chose, and as they did, but they cannot hold the defendant responsible for the costs which they incurred in so doing.” at paras 48, 57); See also *Ossory Canada Inc v Wendy’s Restaurants of Canada*, *supra* note 64 at 502.

⁴⁸² *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltda*, *supra* note 35, Salmon LJ (“Since the November purchase was not a transaction independent of or disconnected with the May contract but formed part of a continuous dealing between the same parties in respect of the same goods resulting, on balance, in a profit to the buyers, Mr. Goff’s argument [however attractively he puts it], on analysis, comes to this – that the buyers, who in reality have made a handsome profit, are, in law, entitled to recover damages for a fictitious loss. I should be reluctant to come to such an absurd and unjust conclusion unless compelled to do so by the clearest authority.” at 1314); *British Westinghouse*, *supra* note 36, Viscount Haldane LC (“As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.” at 689); *Cockburn*, *supra* note 41 at 267 Duff J (quotes from portion of Viscount Haldane LC’s speech in *British Westinghouse* dealing with the judgment of James LJ in *Dunkirk Colliery v. Lever*); *Dunkirk Colliery Co v Lever*, (1878) 9 ChD 20 (CA).

⁴⁸³ See e.g. *Cockburn*, *supra* note 41 Sir Charles Fitzpatrick CJ (“If the contract had been carried out and the appellant, continuing his employment, had been paid his salary of \$5,000 a year for two years it is clear he could not have earned the \$11,000 which he did from other sources. He has therefore not only sustained no loss, but is better off than if the contract had been fulfilled. I think this consideration of whether he could have made his profit from other sources if the contract had been fulfilled may be some test of whether such profits are to be taken into account in ascertaining the loss sustained by the breach of the contract.” at 266); See also *Schluessel et al v Maier et al*, *supra* note 282.

2. Causation inconclusive

The short form explanation as to how causation determines the application of the Mitigation doctrine is that the relevant consequence (loss or gain) will be ascribed to the most “efficient” or “operative” cause, sometimes called *causa causans*, with consequences flowing according to which party bore responsibility for that cause.⁴⁸⁴ All other “causes”, which can be described as necessary but not sufficient (sometimes called *causa sine qua non*, *causa proxima*, *res inter alios acta*, or *causa causata*), are by contrast effectively ignored.⁴⁸⁵ The limitations of this approach may already be apparent, but to illustrate the point in detail I will consider the following two decisions below.

The first case I wish to consider is the High Court of Australia’s 1961 decision in *National Insurance Co of New Zealand Ltd v. Espagne*.⁴⁸⁶ The basic facts of *Espagne* are that the plaintiff had been left permanently blind and unable to work following an automobile accident that occurred while he was a passenger in a vehicle owned by one

⁴⁸⁴ This language has been employed in discussions of legal responsibility generally to similar effect; See e.g. *Lloyd v General Iron Screw Collier Co (Ltd)*, (1864) 159 ER 284 (Exch), Pollock CB (“It appears to me clear, upon the authorities, that Mr. Brett’s proposition is correct, and that, in cases of this kind, we must look, not at the *causa proxima*, but the *causa causans*, or real cause of the loss.” at 542); See also *The Chartered Mercantile Bank of India, London, and China v The Netherlands India Steam Navigation Co Ltd*, (1883) 10 QBD 521 (CA), Brett LJ (“But a loss may be the immediate result of a collision, brought about by the negligence of those on board the carrying ship. If that must be treated as a loss by collision it will be covered by the exception of collision alone; but in a bill of lading as distinguished from a policy of insurance we are entitled to look at what was the real cause of the loss, that is, as it is expressed in our legal phraseology, we may look at the *causa causans* instead of merely looking at the *causa proxima*...” at 531); See also *Grant v Owners of SS Egyptian Respondents The Egyptian*, [1910] AC 400 (HL (Eng)) [*The Egyptian*], Lord Shaw (“The second principle is that the defendants are not liable for any further damage which could have been avoided or minimized by the exercise of reasonable care on the part of the plaintiffs. This is really not a separable proposition from the other in the sense of being independent of it; it is only a development or corollary of the former proposition; because the latter further damage is caused not as the natural and direct consequence of the defendants’ act, but by reason of the neglect of that care which was reasonable in the circumstances on the part of the owners of the Nelson. That neglect is found to be established in fact. It led — and causally considered it alone led — to the sinking of the ship, and accordingly the responsibility therefor cannot be placed upon the defendants.” at 403”).

⁴⁸⁵ See e.g. *Payne v Railway Executive*, [1952] 1 KB 26 (CA), Cohen LJ (“I respectfully agree with his conclusion and his reasoning. It seems to me that the accident in this case was not the *causa causans* of the receipt by the first plaintiff of the disability pension, but the *causa sine qua non*. The *causa causans* was his service in the Royal Navy.” at 36); See also *National Insurance Co of New Zealand Ltd v Espagne*, (1961) 105 CLR 569 (HCA), Windeyer J (“*Causa causans* may be and often is used to mean the cause or ‘real cause’, being that to which legal responsibility attaches, as distinct from a *causa sine qua non*, a matter that in the particular case does not attract legal responsibility.” at 594).

⁴⁸⁶ *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485.

Archer, and driven by one Brinskey, both defendants in the action.⁴⁸⁷ The National Insurance Co of New Zealand Ltd (“The National”) was joined pursuant to statute as Archer’s insurer.⁴⁸⁸ I note that only The National appeared at trial, and that Brinskey could not be served and had no part in the proceedings whatsoever. The outcome at trial was a finding of negligence on the part of Brinskey, liability of which was shared joint and severally, and for which damages, including damages for loss of income, were assessed by the jury at £24,491 9s. 10d.⁴⁸⁹ This amount was awarded in full, notably without any deduction for a disability pension that Espagne has been awarded under statute in February 1958, of which he had received £526 up to the date of trial, and was continuing to receive at the rate of £9 10s. 0d. per fortnight.⁴⁹⁰ The appeal to the High Court of Australia considered herein was solely on the propriety of this non-deduction from the damages awarded.⁴⁹¹

The issue as to whether or not a pension granted in respect of disability suffered as a result of a tort ought to count in Mitigation of the loss flowing from said accident was by no means a new problem, even in 1961. Much to the contrary, authority points to such issues having arisen not infrequently in tort cases since the early 19th century with respect to not only pensions, but also proceeds from insurance and acts of private benevolence (hereafter “Receipts”).⁴⁹² Despite the abundance of litigation on point, the weight of authority generally favoured exclusion of such Receipts from the assessment of

⁴⁸⁷ *Ibid* at 570.

⁴⁸⁸ *Ibid*.

⁴⁸⁹ *Ibid*.

⁴⁹⁰ *Ibid* at 570–571.

⁴⁹¹ *Ibid* at 570.

⁴⁹² *Forgie v Henderson*, (1818) 1 Murray 410, (Dealt with an allowance made to the plaintiff by a “friendly society”.); *Bradburn v Great Western Railway Co*, (1874) LR 10 Ex 1 (Dealt with proceeds of insurance.); *Baker v Dalgleish Steam Shipping Co*, [1922] 1 KB 361 (CA), (Dealt with a pension under the *Fatal Accidents Act*, 1846.); *Shearman v Folland*, [1950] 2 KB 43 (CA), (Dealt with proceeds of insurance.); *Redpath v Belfast and County Down Railway*, [1947] NI 167 (NICA), (Dealt with support provided by a “distress fund” i.e. a charity.).

loss rather than their inclusion to the credit of the defendant.⁴⁹³ As such, the task before the Court was relatively straightforward in so far as there was ample authority, and thus ample justification, for confirming the decision of the trial judge. However, that the task of justifying the authorities themselves was by no means straightforward is demonstrated by the probing opinions of the Chief Justice Sir Owen Dixon and Mr. Justice Windeyer.⁴⁹⁴

The “problem” with the authorities on point that had been cited to the High Court, and by which the judges of the High Court felt themselves bound, is that the justifications offered for the exclusion of such Receipts were/are somewhat lacking in substance. Two of the more prominent of these were the desire to preclude the non-exoneration of wrongdoers, and a concern to prevent the misappropriation of benefits not intended for the benefit of the tortfeasor.⁴⁹⁵ In the larger context of tort, both of these are problematic. First, because they appear to introduce a punitive element into tort damages that is

⁴⁹³ *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485 at 571–572; See also *Parry v Cleaver*, [1970] AC 1 at 17–18 (HL (Eng)), Lord Reid (Pensions were quite consistently excluded until *Browning v. War Office* [1963] 1 QB 750 where the defendant was given credit for the plaintiff’s pension from the US Air Force by the Court of Appeal. In this case though, a 3:2 majority held that Parry’s pension ought to be excluded. So, the issue with respect to pensions has been somewhat inconsistent in the UK. Charity and insurance appear to be consistent excluded though.); See also Waddams, *supra* note 1 at para 15.860 to 15.880 (The position in Canada is arguably mixed, but in many instances, such receipts are excluded on grounds of causation.).

⁴⁹⁴ *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485 at 571–574, 583–601.

⁴⁹⁵ *Ibid* at 572–573, 596–598; See also *Shearman v Folland*, *supra* note 492, Asquith LJ (as he then was) (“The contrary argument for the plaintiff may be introduced by a quotation from Mayne on Damages [11th ed.] p. 151, in a passage where the learned editor is considering what evidence is allowed in mitigation of damages to arrive at the actual damage directly resulting from the defendant’s act: ‘Matter completely collateral, and merely *res inter alios acta* cannot be used in mitigation of damages.’ The plaintiff contends that the hypothetical hotel expenses are matters ‘completely collateral.’ It is easier to formulate this maxim than apply it. What in a given case is, and what is not, ‘collateral’? Insurance affords the classic example of something which is treated in law as collateral. Where X. is insured by Y. against injury which comes to be wrongly inflicted on him by Z., Z. cannot set up in mitigation or extinction of his own liability X.’s right to be recouped by Y. or the fact that X. has been recouped by Y. *Bradburn v. G.W.R.*[3]; *Simpson v. Thomson*[4]. There are special reasons for this. If the wrongdoer were entitled to set off what the plaintiff was entitled to recoup or had recouped under his policy, he would in effect be depriving the plaintiff of all benefit from the premiums paid by the latter, and appropriating that benefit to himself.” at 45-46).

contrary to their ordinary compensatory nature,⁴⁹⁶ and second because it would seem trite to say that no sum given or received in Mitigation is ever realistically intended for the benefit of the tortfeasor. Flawed as they are though, these rationales are not my primary concern. Instead, my focus is on the seemingly more common rationale for the exclusion of Receipts from account as mitigation, which is the equally lacking explanation in terms of causation.⁴⁹⁷

The problem with the causation explanation for the inapplicability of Mitigation to Receipts such as insurance monies, pensions, and private benevolence, as identified by both Sir Owen⁴⁹⁸ and Mr. Justice Windeyer,⁴⁹⁹ is that the result when attempting to justify the exclusion of such Receipts on this basis often borders on the unreal. Take, for instance the case of insurance monies, receipt of which have been said to be caused by

⁴⁹⁶ *Haines v Bendall*, (1991) 172 CLR 60 (HCA), Mason CJ, Dawson, Toohey and Gaudron JJ, (“The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed. Compensation is the cardinal concept. It is the ‘one principle that is absolutely firm, and which must control all else’. Cognate with this concept is the rule, described by Lord Reid as universal, that a plaintiff cannot recover more than he or she has lost.” at 63); Edelman, *supra* note 11 at 1–008 to 1–009 (Although damages today do embrace a variety of ends besides compensation, compensation still makes up the greatest part of the business of awarding damages.).

⁴⁹⁷ See e.g. Waddams, *supra* note 1 at para 15.870 (“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 afterward. As Wright J. put it, in another context, in *Joyner v. Weeks*: ‘a cause of action vested in the plaintiff against the defendant, and this could not be taken away or affected by the subsequent *re inter alios acta*.’”).

⁴⁹⁸ *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485, Sir Owen Dixon CJ (“To inquire whether the advantage is collateral or not seems to me to ignore the fact that *ex hypothesi* the advantage arises because the plaintiff suffered the injuries. To say it is *res inter alios acta* appears difficult when the very man injured is one of the parties between whom the thing is done; how can he come within the word ‘*alios*’?” at 572).

⁴⁹⁹ *Ibid*, Windeyer J (“Why then was one the cause and the other not? The selection of one causal factor rather than another as that on which legal responsibility depends seems to me very different from asserting, for quite another purpose, that money is received under a contract because the contract was made and not because it was performed according to its terms. The statement has been often quoted. But to me it and some cases in which it has been relied upon seem to provide some justification for Dr. Glanville Williams’ generalization [in (1954) 17 *Modern Law Review* pp. 68, 69] that ‘a vague doctrine like that of legal causation is a convenient formula for purporting to justify an opinion which in fact proceeds from an intuitive sense of justice applied to the case as a whole’.” at 594-595).

the contract, but not the event (i.e., the tort) triggering its operation.⁵⁰⁰ Likewise, disability pensions granted to disabled servicemen have been excluded on the basis that the cause of the pension was the victim's service, but not the tort that disabled the serviceman.⁵⁰¹ I note that with respect to *Espagne's* pension, both McTiernan and Menzies JJ concluded that the decision of the Minister to grant the pension was itself the pension's cause, rather than the accident that rendered *Espagne* eligible.⁵⁰² These and other peculiar instances demonstrate that when courts attempt to isolate or determine the most "efficient" or "operative" cause, sometimes called *causa causans*, and contrasted with *causa sine qua non*, a necessary but insufficient cause, they are, to quote Glanville Williams, "...purporting to justify an opinion which in fact proceeds from an intuitive sense of justice applied to the case as a whole."⁵⁰³ This in fact was the view of Mr. Justice Windeyer, which Sir Owen Dixon appears to have shared, and I argue that it is not difficult to see why.⁵⁰⁴

The reason for the difficulty of inexplicable decisions referred to above, and the apt criticism offered by Williams, may at first seem somewhat perplexing. As noted, though, it is in fact not hard to discern the reasons for this state of affairs. The underlying issue here, and for all attempts to rationalize Mitigation as causation, is that for all its

⁵⁰⁰ *Bradburn v Great Western Railway Co*, *supra* note 492, Bramwell B ("In *Dalby v. India and London Life Assurance Company* it was decided that one who pays premiums for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shews that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendants' negligence." at 2); *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485, Menzie J ("In [*Bradburn*] the Court of Exchequer rejected without elaborate reasoning – and with some dismay that it had been advanced – a contention that damages for injuries caused the defendant's negligence should be reduced by what the plaintiff had received under an accident insurance policy. Although the accident was the occasion which gave rise to the entitlement under the policy, the insurance monies were not regarded as having been received because of the accident." at 581).

⁵⁰¹ *Payne v Railway Executive*, *supra* note 485, Cohen LJ ("I respectfully agree with his conclusion and his reasoning. It seems to me that the accident in this case was not the *causa causans* of the receipt by the first plaintiff of the disability pension, but the *causa sine qua non*. The *causa causans* was his service in the Royal Navy." at 36).

⁵⁰² *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485 at 573–574, 582.

⁵⁰³ *Ibid* at 595.

⁵⁰⁴ *Ibid* at 572, 594–595, Sir Owen Dixon CJ and Windeyer J.

pseudo-scientific appeal, “cause” appears to have little fixed meaning. The true state of affairs instead was well put by none other than Viscount Haldane in *Thom or Simpson v. Sinclair*:⁵⁰⁵

“My Lords, the expression ‘cause’ is almost invariably used in a way that lacks precision. In strict logic the cause cannot be pronounced to be less than the sum of the entire conditions. But in ordinary speech and practice we select some one or more out of what is an infinite number of conditions to be treated as the cause.”

As such, to use the words of Sir Owen, it appears the weakness of the Mitigation as causation argument is that the assignment of the label cause, or *causa causans*, seems “...to simply be the expression of a voluntary preference for one of a [range of] essential factors which must combine in producing the result and to bring it forward at the expense of the other which is correspondingly pushed back.”⁵⁰⁶ In my view, the apparent truth of this statement undoes the superficial attraction of assigning responsibility for loss or gain in Mitigation according to which party is responsible for the “cause” to which the Court ascribes the loss or gain. The circularity of the rationale is simply too apparent for it to be otherwise.⁵⁰⁷ Further, and apart from its apparent emptiness, even if one favoured the causation rationale for Mitigation, it is also obvious from the authorities on the issue of proceeds of pensions, insurance, and benevolence, including *Espagne*, that when the issue of cause arises in connection with such monies, it is frequently *not* even the most

⁵⁰⁵ *Thom Or Simpson (Pauper) v Sinclair*, [1917] AC 127 at 135 (HL (Scot)), Viscount Haldane.

⁵⁰⁶ *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485 at 572, Sir Owen Dixon CJ

⁵⁰⁷ With the foregoing in mind it would appear that Mitigation as causation breaks down to the maxim that outcomes flow according to cause, and cause is ascribed according to outcome.

obvious “cause” that prevails.⁵⁰⁸ What is more is that these cases are not unique among Mitigation cases in so far as they demonstrate a disjuncture between the adjudicator’s selection of cause with respect to the relevant loss or gain, and the cause that appears to be the most efficient/operative.

The second case I wish to consider, and an apt and very recent example of the type of behaviour mentioned above, appears in the English case *Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain v Fulton Shipping Inc of Panama* (“*The New Flamenco*”), wherein opinions on the Mitigation issue changed back-and-forth at each stage.⁵⁰⁹ To clarify the reason for the disagreement, I will first set out the basic facts below.

In brief, the dispute in *The New Flamenco* pertained to a claim for breach of a charter party.⁵¹⁰ At the relevant time, Fulton, the owners of the *New Flamenco* (a small cruise ship, hereinafter the “Vessel”), had a two-year voyage charter with Globalia, the charterers (the “First Charter”).⁵¹¹ This charter was due to end in October 2007, but in June of that year, the parties orally agreed to renew for a further two years to November 2009 (the “Second Charter”).⁵¹² The charterers denied that they had agreed to the

⁵⁰⁸ This is now simply recognized in Australian jurisprudence following *Espagne*; See *Northern Sydney Local Health District v Amaca Pty Ltd (under NSW administered winding up)*, [2017] NSWCA 251, McColl JA (“Thus, as Windeyer J explained in *National Insurance Company of New Zealand Ltd v Espagne*, in assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating the plaintiff’s loss, relevantly if they were given or promised to the plaintiff by way of bounty, to the intent that the plaintiff should enjoy them in addition to, and not in diminution of, any claim for damages. The decisive consideration in determining how such a payment is to be treated is not whether the benefit was received in consequence of, or as a result of, the injury, but what was its character. That is determined by the intent of the person conferring the benefit. The test is by purpose rather than by cause... In *Redding v Lee*, after referring to this principle, Gibbs CJ identified one of its rationales as being that “[t]he common law has treated this matter as one depending on justice, reasonableness and public policy”, referring to *Parry v Cleaver*. After seeking to “discover the principle according to which the cases have been decided”, including discussing *Espagne*, his Honour concluded, “it is difficult to suggest a more exact criterion [than that set out in *Espagne*] once it is accepted, as it must be, that justice requires that certain benefits must be disregarded in the assessment of damages notwithstanding that they would not have been received but for the injuries for which the plaintiff sues and notwithstanding that in fact they have mitigated the plaintiff’s loss.” at paras 35-36).

⁵⁰⁹ *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The New Flamenco)*, [2017] 1 WLR 2581 (UKSC (Eng)) at paras 9–28 [*The New Flamenco*].

⁵¹⁰ *Ibid* at para 1.

⁵¹¹ *Ibid* at para 2.

⁵¹² *Ibid* at para 3.

renewal, however, which the owners accepted as repudiation of the Second Charter before taking redelivery of the Vessel in October 2007 as per the First Charter.⁵¹³ Unfortunately for the owners, there was no market for chartering such a vessel in 2007.⁵¹⁴ As such, instead of re-chartering, which they could not do, the owners sold the Vessel.⁵¹⁵ The sale price was \$23,765,000 USD, which was \$16,765,000 USD more than what the sale price would have been at the end of the charter in 2009 (i.e., \$7,000,000 USD).⁵¹⁶

Following the charterers' repudiation of the Second Charter, the owners commenced an arbitration claim against the charterers for the net profits they would have earned during the unexpired portion of the renewed charter.⁵¹⁷ The owners' claim amount was €7,558,375.⁵¹⁸ The charterers defended quantum on the basis that the profit realized from the sale of the vessel, equal to €11,251,677, was a benefit arising from a step taken in mitigation that more than offset (i.e., mitigated) the owners' claimed loss of profits.⁵¹⁹ The owners appear to have denied that the benefit obtained from sale should be taken into account in mitigation of loss because, inter alia, the benefit was not caused by the breach, and because the benefit was of a kind different from that to be had under the contract.⁵²⁰ The arbitrator for his part ruled against the owners on both of these points,⁵²¹ his conclusion on the latter point being that the benefit received subsequent to the breach did not as a matter of law have to be of the same nature as the loss claimed in the sense that the crystallized capital value of the vessel was different in kind from lost earnings, and on the former point, that the sale had become necessary because of the breach and that the

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid* at para 34.

⁵¹⁵ *Ibid* at para 3.

⁵¹⁶ *Ibid* at paras 6–7.

⁵¹⁷ *Ibid* at paras 4–5.

⁵¹⁸ *Ibid* at para 5.

⁵¹⁹ *Ibid* at paras 6–7.

⁵²⁰ *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The New Flamenco)*, [2014] EWHC 1547 (QB) at para 13 [*The New Flamenco (QBD)*] (QB).

⁵²¹ *The New Flamenco*, *supra* note 509 at paras 12–13.

breach was thus its cause.⁵²² As alluded to above, though, this was far from the final word on these points, and thus far from the final word on the application of Mitigation to the facts of this case.

In the final result, the adjudicators called upon to decide the issues raised by this case, from the arbitrator, to Mr. Justice Popplewell in the High Court, to the Court of Appeal, and finally the UK Supreme Court, went back-and-forth, alternatively finding for the charterers on both points and then owners on both points at each step.⁵²³ I note that in my view, the UK Supreme Court ultimately reached the correct outcome, and were very much correct in their conclusion that the alleged benefit (i.e., the €11,251,677 *capital “gain”*) had no effect whatsoever on the owners’ *loss of income*.⁵²⁴ I would also argue that this was in fact the central issue. However, this opinion is built on my view of the “nature of the benefit” issue, and it is the causation aspect of the case that is the most important for present purposes. As such, I will leave consideration of the nature of the benefit to one side.

As noted above, the four sets of decision-makers involved in *The New Flamenco* split in their conclusions on the causation point, with the arbitrator and the Court of Appeal on one side and Mr. Justice Popplewell and the UK Supreme Court on the other.⁵²⁵ The conclusion reached by the arbitrator and the Court of Appeal, in light of the absence of an available chartering market in which to re-fix the vessel, was that the efficient or operative cause of the owners’ sale of the vessel was the charterer’s repudiation of the Second Charter.⁵²⁶ By contrast, Mr. Justice Popplewell and the UK Supreme Court concluded that the repudiation merely provided the occasion for the sale,

⁵²² *The New Flamenco (QBD)*, *supra* note 520 at paras 10–12.

⁵²³ *The New Flamenco*, *supra* note 509 at paras 9–28.

⁵²⁴ *The New Flamenco*, *supra* note 509, Lord Clarke (“The relevant mitigation in that context is the acquisition of an income stream alternative to the G income stream under the original charterparty. The sale of the vessel was not itself an act of mitigation because it was incapable of mitigating the loss of the income stream.” at para 34).

⁵²⁵ *Ibid* at paras 9–29.

⁵²⁶ *Ibid* at paras 9–14, 25–28.

but was not its cause.⁵²⁷ Lord Clarke for the Supreme Court founded this conclusion on the grounds that the repudiation did not make the sale any more or less possible (reminiscent of the asset theory), since the vessel could have been sold subject to the existing charter party if the owners had so wished, and because the termination of the Second Charter had not made it *necessary* to sell the vessel.⁵²⁸ On the latter point, Lord Clarke noted the possibility of fixing the vessel on the spot market or for a shorter charter party.⁵²⁹

My perspective on the reasons offered by the four levels of decision-makers in this case is that the outcome on the causation point was pre-determined by the question the relevant adjudicator chose to ask. For Mr. Justice Popplewell in the High Court and the UK Supreme Court, the question was whether or not the sale of the vessel *could* have happened irrespective of the breach.⁵³⁰ For the arbitrator and the Court of Appeal, the question was whether or not it *would* have happened.⁵³¹ Both of course are valid approaches to the problem, given that there is effectively no test per se, but the fact of reasonable minds differing so markedly as to which approach is best in the context of an actual case demonstrates that the difficulty of assigning responsibility based on cause is more than just an abstract issue.

The decisions of the High Court and The UK Supreme Court also demonstrate the apparent disjuncture between legal cause and apparent cause. They do so in the sense that each fastens upon the fact that the sale could have happened anyway and that other types of chartering arrangements were possible, including letting the vessel on the spot

⁵²⁷ *Ibid* at paras 15–17, 33.

⁵²⁸ *Ibid* at paras 32–33.

⁵²⁹ *Ibid* at para 34.

⁵³⁰ *The New Flamenco*, *supra* note 509, Lord Clarke (“The repudiation resulted in a prospective loss of income for a period of about two years. Yet, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time. Indeed, it could have been sold during the term of the charterparty.” at para 32); *The New Flamenco (QBD)*, *supra* note 520, Popplewell J (“A further indication that the capital benefit to the Owners derived from selling the Vessel in 2007 rather than 2009 was not legally caused by the breach is to be found in the fact that a sale of the Vessel was the kind of transaction which it was open to the Owners to enter into irrespective of the Charterers’ breach of charterparty.” at para 70).

⁵³¹ *The New Flamenco*, *supra* note 509 at paras 9–14, 27–28.

market, while ignoring the fact that in the absence of a market for charters on their desired terms (or possibly any terms),⁵³² the decision to sell was as much an option open to address the early return of the vessel as re-fixing it on undesirable terms. The only meaningful difference between the two is that the owners actually chose the former. Of course, one might argue, as the UK Supreme Court did, that the owners did not *need* to sell, which breaks the connection between the repudiation and the decision to sell.⁵³³ As I will discuss more fully in the next section, there lies the rub, because if alternatives are enough to distance subsequent acts from earlier wrongs, one has to ask when any subsequent act will count as causally connected to a wrong. For present purposes, it is enough to note that although selling the vessel was an alternative to re-fixing it on undesirable terms, neither the High Court nor the UK Supreme Court suggest that this would mean that a decision to re-fix instead of sell would have been unconnected to the breach. As such, there really is no obvious reason as to why a different cause ought to be assigned to the sale, but again, two of the four adjudicators in the history of this case did so, and only, it seems, to bypass the obvious, much like two of the five members of the High Court of Australia in *Espagne*.⁵³⁴ As problematic as the selection of cause in these cases is, even I would admit that it is readily understandable in light of the outcomes reached. Hopefully, it is now apparent as to why “causation” often does not provide a stable bridge to reach them.

3. Agency undermines the application of causation

A peculiar challenge not apparently addressed by any proponent of the Mitigation as causation theory is reconciling the notion of causation as an explanation for certain

⁵³² *The New Flamenco (QBD)*, *supra* note 520 at para 70; *The New Flamenco*, *supra* note 509 at paras 32–34.

⁵³³ *The New Flamenco*, *supra* note 509, Lord Clarke (“The repudiation resulted in a prospective loss of income for a period of about two years. Yet, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time.” at para 32).

⁵³⁴ *National Insurance Co of New Zealand Ltd v Espagne*, *supra* note 485 at 574–583, McTiernan and Menzies JJ.

consequences, and thus responsibility for certain outcomes, with the agency of actors involved. The explanation for this may well be that it is simply an oversight, but it is also quite possible that successive generations have simply taken heed of Sir Fredrick Pollock's warning that "...the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."⁵³⁵ Whether we have wittingly steered clear of the issue or simply neglected it, it is apparent that agency is a complex stumbling block for proponents of a positive or normative theory of Mitigation as causation, and unfortunately an obstacle of the metaphysical kind so abhorred by Pollock. Further, I argue that it is an unavoidable obstacle that any plausible theory of Mitigation as causation must overcome. Though I note that I am not optimistic about the prospects of this being done.

The reason for my pessimism with respect to reconciling causation with the agency of actors is the nature of the problem. In short, it is an epistemological rather than evidentiary conundrum in the sense that it pertains to our ability to know rather than our ability to investigate. The reason for this is that agency, and the capacity for choice, are effectively immune from external observation in the sense that we cannot directly observe the exercise of a party's capacity for free choice and thus never objectively ascertain a party's reasons for acting.⁵³⁶ Instead, all we can know are the acts themselves, which is to say that all we can observe are the outward manifestations of the exercise of

⁵³⁵ Sir Frederick Pollock, *The law of torts: a treatise on the principles of obligations arising from civil wrongs in the common law: to which is added the draft of a code of civil wrongs prepared for the government of India*, 9th ed (London: Stevens and sons, 1912) at 37.

⁵³⁶ Recognition of this problem has underpinned English law's preference for objective standards going back to Saint Germain; Christopher Saint Germain & William Muchall, *Doctor and Student; or, Dialogues between a Doctor of Divinity and a Student in the Laws of England: Containing the Grounds of Those Laws; Together with Questions and Cases concerning the Equity Thereof*, 17th ed (London: A Strahan and W Woodfall, 1787) at 179 ("... no action can lie against him upon [a promise made secretly and not spoken] for it is secret in his own conscience and whether he intended for to be bound or nay. And of the intent inward in the heart, man's law cannot judge, and that is one of the causes why the law of God is necessary, [that is to say] to judge inward things"); Cf Margaret Schabas & Carl Wennerlind, "Retrospectives: Hume on Money, Commerce, and the Science of Economics" (2011) 25:3 *The Journal of Economic Perspectives* 217–230 at 225 (Not everyone agrees that man's mind is so unknowable, and Hume for instance was of the view man's motivations were more amenable to investigation in the moral sciences than natural phenomena studied in the physical sciences. I would hazard to say though, that weight of opinion among lawyers would be that Hume is not correct.).

the capacity for choice, which is not the same as the exercise itself.⁵³⁷ As such, unlike those of objects without any kind of will, the reasons for the movements and changes of human actors are in a sense simply beyond our knowing, which undermines the suggestion that we can assign causes to them, and thus responsibility. Of course, this may prompt the response that English law has not been deterred by similar challenges elsewhere, and has not shied away from the investigation of subjective states of mind through objective means.⁵³⁸ Determining a party's intention with respect to creating legal relations in contract is an example, for instance.⁵³⁹ My response to that point is that in these other instances, objective evidence is either understood as the best available proxy for the subjective state in question⁵⁴⁰ or, as perhaps is most common with subjective intentions in contract, objective evidence of a party's mental state is understood as being more important than the actual subjective mental state itself.⁵⁴¹ The reason for this is that that which a party (Party A) evinces as their state of mind is more likely to have an effect

⁵³⁷ See W David Curtiss, "State of Mind Fact or Fancy" (1947) 33:3 Cornell L Q 351–359 (Fraud would not be possible if inward motives could not diverge from outward acts.).

⁵³⁸ It is not an impediment with respect to adjudicating claims for deceit; *Edgington v Fitzmaurice*, (1885) 29 ChD 459 (CA), Bowen LJ ("A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else" at 483).

⁵³⁹ See Joseph M Perillo, "The origins of the objective theory of contract formation and interpretation" (2000) 69:2 Fordham Law Review 427–477.

⁵⁴⁰ It is an accepted basis for inferring knowledge or intent with respect to promissory estoppel, for instance; See *Owen Sound Public Library Board v Mial Developments Ltd et al*, (1979) 26 OR (2d) 459 (ONCA), Lacourcière JA ("On the basis of the authorities mentioned, I agree with the learned trial Judge that intent and knowledge on the part of the promisor are necessary ingredients of promissory estoppel. However, the authorities make it clear that intent to create legal relations does not require a direct statement to that effect. Rather, such an intent can be based on an inference drawn from the evidence." at 467).

⁵⁴¹ A party's outward manifestation of their intention is what others will rely on, of course; See Smith, *supra* note 437 at 173 ("Indeed, these scholars [quite rightly] say that an objective approach is required if reliance is to be protected. If the aim of contract law is to protect persons who rely on representations [as reliance theories claim], judges should focus on objective, external appearances—because it is upon those same external appearances that the parties themselves rely.").

on another party's (Party B) actions than any secret thought or intention.⁵⁴² Either way, it is generally the most obvious conclusion as to what the relevant party's mental state was that is resorted to, and in that way, the objective approach can be defended as appropriate for its purpose. The same, however, is not true in Mitigation decisions purportedly decided on the basis of causation.

Above, I have been at pains to point out that adjudicators in Mitigation decisions ostensibly decided on the basis of causation, and particularly those involving subsequent transactions, not infrequently ignore what is the most apparent cause of the act or event in question. *Payne v. Railway Executive* and decisions like it, for instance, have for more than a century engaged in elaborate mental gymnastics in order to explain how it might be that an accident triggering an insurance policy or an entitlement to a pension did not cause the payments the plaintiff went on to receive.⁵⁴³ Further, even *The New Flamenco* does little to plausibly distance the repudiation of the charter from the sale of a vessel that the owners could not re-let.⁵⁴⁴ As I have noted above, these decisions are problematic but also unsurprising. There is merit in the view that the proceeds of a plaintiff's prudence through insurance, or worse, private benevolence, should not be held to the credit of a tortfeasor, and that a capital receipt should not be held to ameliorate a revenue account loss. As such, it is not shocking that courts and adjudicators would want to reach these outcomes. It is apparent, though, that "cause" cannot be used as the bridge to link these facts to their respective outcomes unless we divorce the term completely from its common meaning. Certainly, it is possible and arguably already the case that a "legal cause" need not coincide with what others might regard as the "actual cause", or more importantly, the "obvious cause", and if this is the position taken, then I would have to concede that my objection with respect to the agency of the actors is not actually relevant.

⁵⁴² See Joseph M Perillo, "Robert J. Pothier's influence on the common law of contract" (2005) 11:2 Texas Wesleyan Law Review 267- at 277 ("Objective evidence of the offeror's state of mind, although not known to the offeree, was sufficient to show an agreement. The result appears to be right. The objective test is designed to do justice by protecting a person who puts a reasonable interpretation on the words of another.").

⁵⁴³ *Payne v Railway Executive*, *supra* note 485; See also Waddams, *supra* note 1 at para 15.870.

⁵⁴⁴ *The New Flamenco*, *supra* note 509 at para 34.

However, this poses an apparent “Catch 22”, given that it renders the concept of legal cause somewhat arbitrary and consequently deprives Mitigation as causation of any normative force as a theory.⁵⁴⁵ Clearly, it cannot be done.

With the foregoing in mind, it should now be apparent that the theory of Mitigation as causation lacks substance despite its simplicity and prima facie appeal. If this is so, then the last major purported explanation of Mitigation hitherto established before my work is undone.

V. Conclusion

As I stated at the beginning of this chapter, my goal herein has been to dispel inaccurate notions with respect to Mitigation. These can be largely grouped as questions pertaining to the doctrine’s scope, or its underlying rationale. In both cases, I have demonstrated how these notions lack positive or normative force, or both, by way of recourse to the case law itself. That is to say, I have demonstrated that these notions both fail in many instances to describe or predict what the law is, or will do, and likewise fail to explain what the law ought to do. In short, I have demonstrated that these theories, assumptions, paradigms, explanations, and definitions simply fail. The gap between what the law is and what it claims to be, according to these established views, is simply too wide for any juristic gymnast to span. I hasten to add, though, that this has not been an act of destruction without an end. I am not a “critical” scholar. Instead, the point has been, as I stated above, to clear the ground for my work by demonstrating that the present law on Mitigation is lacking in a fundamental sense, in that it cannot even be called a prediction as to how any given case may be resolved. Predictions of some utility are perhaps the most we can hope for, and perhaps the very least that we ought to demand from our system of judge-made law.⁵⁴⁶

⁵⁴⁵ Joseph Heller, *Catch-22* (London: Cape, 1962) (A conundrum wherein the solution simply begets the problem.).

⁵⁴⁶ Oliver Wendell Holmes, “The Path of the Law” (1897) 10:8 *Harvard Law Review* 457–478 (To Holmes, a prediction is what law was, and there some utilitarian value in trying to make it so.).

CHAPTER IV

A NEW MODEL FOR MITIGATION IN CONTRACT

I. Introduction

This chapter will set out my theory of mitigation and explain what the doctrine is, and why, how, and when the doctrine applies. Although the order is interchangeable to a certain extent, the purpose of this sequence of progression is to build toward “when”, which will entail a detailed breakdown of the types of losses stemming from a breach of contract that the law of damages may be called upon to respond to, and an explanation as to how and why equity may be justified in interceding in cases of that kind. Sections on “what”, “why”, and “how” will build towards to this end goal by establishing the character of mitigation as a doctrine that is (at least) effectively equitable. I will demonstrate this equitable character by illustrating how the doctrine acts to relieve a party from obligation by preventing their opposite from insisting on their strict rights in relation to the rules pertaining to the assessment of damages. Before I begin with this task, I will first address an important preliminary matter by recapping the points established in Chapter III that are essential to establishing my framework in this chapter.

II. What did we learn from Chapter III?

In Chapter III, I debunked a series of notions about the nature or scope of Mitigation that effectively define the present understanding of the doctrine. In this chapter, I will use the newly-cleaned slate to map out a new framework for understanding the doctrine and its application. Before doing so, I wish to briefly revisit each of the key inaccurate notions debunked in the previous chapter, as each helps to explain my perspective on what the doctrine really is.

A. Key inaccuracies in the established principle

1. No Right/No Duty

I will begin my brief recap with the nature of the “legal relationship” between plaintiff and defendant under the Mitigation doctrine by returning to Hohfeld’s taxonomy of legal concepts, or schema of “legal relations”, as set out in the tables below:¹

Jural Opposites

Right	Privilege	Power	Immunity
No Right	Duty	Disability	Liability

Jural Correlatives

Right	Privilege	Power	Immunity
Duty	No Right	Liability	Disability

To briefly summarize the meaning of the tables above, the top line of each contains the four distinct senses in which Hohfeld argued the term “right” was used.² These concepts can be described or thought of as the beneficial or positive aspect of a pair. The bottom line of the first table contains the concept regarded by Hohfeld as the opposite position from the term above it.³ By contrast, the bottom line of the second table contains the concept that must necessarily describe the position of some opposite

¹ Wesley Newcomb Hohfeld, *Fundamental legal conceptions, as applied in judicial reasoning*. (New Haven: Yale University Press, 1964) at 36.

² *Ibid* at 35–36.

³ *Ibid* at 35–64.

party (Party B) if Party A is to have the benefit of the concept immediately above it.⁴ For example, if Party A is to have a Privilege to do a certain thing, then some person (i.e., Party B) must have a “No Right” — i.e., have no enforceable “right” to stop Party A from doing it.⁵

Of the relations described above, the jural relationship most commonly and inaccurately ascribed to defendant and plaintiff under the Mitigation doctrine is the first in the table of jural correlatives, i.e., Right and Duty. The “right/duty” paradigm is inapplicable to Mitigation on its face, simply by reason of the fact that the doctrine does not impose any kind of mandatory requirement on the plaintiff.⁶ This means that Mitigation does not impose on the plaintiff an obligation (i.e., a duty) to do, or refrain from doing, any particular “thing” because the plaintiff can never be compelled to do, or to refrain from doing, any “thing”, *including* those things that the doctrine is said to require of him or her.⁷ This is true both literally and in specie because at neither common law nor equity does Mitigation afford a defendant a cause of action leading to either a specific or monetary remedy.⁸ Further, even if Mitigation could be thought of in terms of a right/duty relationship without giving rise to a cause of action, it is clear that Mitigation is still not strict enough to be described as mandatory.

⁴ *Ibid.*

⁵ *Ibid* at 38–39.

⁶ See *Calgary (City) v Costello*, (1997), 152 DLR (4th) 453 (ABCA) Picard JA, (“Strictly speaking, there is no ‘duty’ to mitigate; the victim of a wrong is never subject to an enforceable obligation to take steps to minimize resulting losses.” at para 37); See also *Darbishire v Warran*, [1963] 3 All ER 310 (CA) [*Darbishire*], Pearson LJ (“The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else.” at 315). See also *Driver v War Services Homes Commissioner*, (1923) 44 ALT 130 (VSC) [*Driver*], Irvine CJ (“...This [expression that the plaintiff has a duty to mitigate his loss], I think, does not mean that he is under any duty in the ordinary sense, towards the party breaking the contract, but that he cannot be said to have really incurred any loss which might have been avoided by his taking such steps as a reasonably prudent man in his position would have taken to avoid further loss to himself; and the best test is, what would such a man do to avoid such a further loss to himself, supposing that, from insolvency of the other party, or from some other reason, he could not get any damages.” at 134). See also HG Beale, ed, *Chitty on contracts*, 33rd ed (London: Sweet & Maxwell, 2018) at 26–089.

⁷ SM Waddams, *The law of contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 758.

⁸ See *ibid*; See also Beale, *supra* note 6 at 26–089.

2. Not remotely remoteness

Even if the Mitigation doctrine is described as a series of rules and not a single rule, as I have largely cast it, I am staunchly of the view that Mitigation is not “substantially an aspect of remoteness”.⁹ As discussed in Chapter III, the view of Mitigation as remoteness is principally advanced with respect to the direction from *British Westinghouse* that plaintiffs take all reasonable steps that they would be expected to take in the ordinary course of business to avoid losses that would otherwise arise,¹⁰ the possibility of a plaintiff acting unreasonably being said to be too remote to permit recovery.¹¹ Even in this sense, though, it is apparent that the ordinary tests of remoteness as it applies in contract *or* tort are a poor fit with the case law that the theory of Mitigation as remoteness purports to describe. For instance, take *Esso Petroleum*, in which the plaintiff Marsden doubled down on a failing business venture with the assistance of the defendant, Esso, only to incur further losses leading to his financial ruin.¹² In that case, the plaintiff Marsden’s decision to continue with the failing service station venture was arguably a most unreasonable one, and one that could thus be argued to have been outside of Esso’s reasonable contemplation as at the time the contract was made.¹³ Nonetheless, the English Court of Appeal led by Lord Denning MR came down in Marsden’s favour.¹⁴ The same can also be said of the plaintiff’s behaviour in *Harlow*

⁹ The view is definitely preferred by some; See MP Furmston, *Cheshire, Fifoot and Furmston’s law of contract*, 16th ed (Oxford: Oxford University Press, 2012) at 780; See Stephen A Smith, *Contract theory* (Oxford: Oxford University Press, 2004) at 428.

¹⁰ See e.g. Furmston, *supra* note 9 at 780 (“In relation to the computation of damages, mitigation is substantially an aspect of remoteness, since it is within the contemplation of the parties that the plaintiff will take reasonable steps to mitigate his loss”).

¹¹ See Smith, *supra* note 9 at 428 (“Thus described, the mitigation rule is best explained as one aspect of the general concept of remoteness; the reason plaintiffs cannot recover for losses they could have avoided by acting reasonably is that such losses are too remote. They are too remote because when determining which losses are reasonably foreseeable [or which ‘naturally flow’] as a result of a breach, the background assumption is that the relevant parties will act reasonably.”).

¹² *Esso Petroleum Co v Mardon*, [1976] QB 801 (CA).

¹³ *Ibid* at 810 (It was certainly argued by counsel for Esso.).

¹⁴ *Ibid* at 822, 830, 834.

& *Jones*.¹⁵ What is more, once we leave the “avoidable losses” cases and consider decisions on the allocation of post-breach gains or losses, the connection between remoteness and Mitigation appears weaker still, as *Hussey v. Eels*¹⁶ and *The Sivand*¹⁷ demonstrate.

3. (Be)cause we said so

My analysis of the link between causation and Mitigation in Chapter III led to a fairly damning critique of the way in which the law determines “cause” for the purposes of assigning legal responsibility generally. A general critique of legal causation is beyond the scope of the current chapter, but the point remains that for many intents and purposes, judicial recourse to “cause” is often tantamount to stating a bald conclusion.¹⁸ I admit that this is a bold claim. But I argue that it is undeniable after one considers the Mitigation decisions that ground their conclusions on the footing that responsibility in Mitigation can be determined through an analysis of causation. I would also argue that my analysis of these decisions demonstrates that the attraction of the Mitigation as causation theory *is* in the end only skin-deep. As I noted in Chapter III, the inconsistency of these cases gives the lie to the theory’s underlying premise, which is also the source of its attraction — i.e., that responsibility flows from “cause” as outcomes flow from their causes.¹⁹ These cases demonstrate a surprising inadvertence to the distinction between

¹⁵ *Harlow & Jones, Ltd v Panex (International), Ltd*, [1967] 2 Lloyd’s Rep 509 (QB) at 580 [*Panex*], (The defendants argued that the plaintiff sellers had acted unreasonably when they refused post-breach offers to buy the contracted for steel at a lower price.).

¹⁶ *Hussey v Eels*, [1990] 2 QB 227 (CA) [*Hussey*].

¹⁷ *Humber Oil Terminal Trustee Ltd v Owners of the Sivand*, [1998] CLC 751 (EWCA) [*The Sivand*].

¹⁸ See *National Insurance Co of New Zealand Ltd v Espagne*, (1961) 105 CLR 569 (HCA), Sir Owen Dixon CJ (“[the decision to designate a particular cause as *causa causans* [i.e. ‘the’ cause of an event or outcome] appears]...to simply be the expression of a voluntary preference for one of a [range of] essential factors which must combine in producing the result an to bring it forward at the expense of the other which is correspondingly pushed back.” at 572).

¹⁹ See Chapter III – Section IV.B.2.

responsibility and cause, assuming instead that they are synonymous, but as I will discuss later in this chapter, it is readily apparent that this is not so.

4. Avoiding the obvious

Early in Chapter III, I tackled the notion that Mitigation is principally concerned with loss avoidance in one form or another, and specifically whether a plaintiff *could* have avoided the loss for which they are claiming damages.²⁰ My response was that the leading cases on Mitigation tend to suggest that “whether a loss could have been avoided” is but one of a number of questions that the Mitigation doctrine addresses, and that in many cases, Mitigation is not concerned with “loss” at all.²¹ This is despite the fact that it *does* only arise in connection with the assessment of damages, and thus tangentially in relation to loss.²² Although as I explained, at least in contract, “loss” is not in fact a prerequisite for a cause of action, given that “loss of expectation” does not equate with our general understanding of what it means to “lose” something.²³ Rather, it is more naturally connected to our idea of what it means to “lose out”.²⁴ As such, if the doctrine is in fact unified across the internal boundaries of private law, as the cases say or suggest it is, then “avoidance of loss” cannot be the doctrine’s touchstone. Instead, it is something other or further that must be the doctrine’s unifying ideal, and it is this “other” that I will propose here in Chapter IV.

III. *What* does it apply to, what is it really?

²⁰ See Chapter III – Section II.C.

²¹ *Ibid.*

²² Waddams, *supra* note 7 at para 758 (The description of Mitigation as a duty is said to be inaccurate because the plaintiff is not liable for not mitigating. They simply cannot recover losses that could reasonably have been avoided.).

²³ See Chapter III – Section II.B.1.

²⁴ *Ibid.*

My view of Mitigation is that it ultimately applies in a general sense to “any claim for damages” in private law.²⁵ Although, given the constraints on the scope of this dissertation, I am perhaps forced to admit that my claim can only go so far as contract and tort. Issues as to the juridical origin of a claim aside, though, I should explain more specifically that what I mean is that Mitigation, in my view, has no role to play with respect to claims in the nature of restitution whether they be in kind or in specie. This is generally uncontroversial, of course, with perhaps the exception of *Asamera Oil*, which I argued Mitigation ought not to have applied to in Chapter III, but it is nonetheless essential to clarify that I am not suggesting that Mitigation is applicable to every monetary claim. Another and further clarification that I regard as essential is to dispel any suggestion that the doctrine’s application to “claims for damages” is indicative only of application to the “claim” made, and thus the “claimant”. As I discussed in Chapter III when addressing the nature of the jural relationship between plaintiff and defendant under the Mitigation doctrine, and the received view that Mitigation is a duty, it is altogether apparent from the leading decisions that Mitigation is a two-way street.²⁶ As such, while

²⁵ It clearly applies in contract and tort, and has been applied to claims for compensation under statute. It has also been applied to claims for equitable compensation, but I believe this to be incorrect in principle and object to the reasoning employed in these decisions; See *Steele v Robert George and Co*, [1942] AC 497 (HL NI), Viscount Simon LC (“My Lords, the Workmen’s Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end or be reduced if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity ‘results from the injury’ within the meaning of s. 9 of the Act of 1925, after the time when the rejected remedy might be confidently expected to bring about a cure. As Fletcher Moulton L.J. put it in *Warncken v. R. Moreland & Son, Ltd.*, ‘a workman must behave reasonably, and if the incapacity, or the continuance of the incapacity after a certain time, is due to the fact that he has not behaved reasonably, then the continuing incapacity is not a consequence of the accident, but a consequence of his own unreasonableness.’ This view of the matter has been recognized by this House in *Fife Coal Co., Ltd. v. Cant*, and in *Fyfe v. Fife Coal Co., Ltd.*, as well as in many cases in the Court of Appeal in England and in the Court of Session in Scotland. Andrews C.J., in dealing with the present case in the Court of Appeal in Northern Ireland, admirably stated some of the considerations involved as follows: ‘If he [the workman] refuses to submit to an operation from defect of moral courage or because he is content to put up with the disablement and is willing to live on a pittance under the Workmen’s Compensation Act he is not entitled to compensation. To borrow the language of the Lord Justice Clerk’ (Lord Macdonald in *Donnelly v. Baird & Co., Ltd.*), “the workman should do what a man of ordinary manly character would undergo for his own good, in a case when no question of compensation being due by another existed.” at 499-500); See *Day v Mead*, [1987] NZLR 443 (NZCA), (Mitigation was held to apply to a client’s claim against their solicitor for breach of fiduciary duty. I cannot begin to express how deeply opposed I am to a finding that Mitigation should apply to such a claim.).

²⁶ See Chapter III – Section III.B.1.i.

it is true that Mitigation does (and in my view should) only apply to cases in which damages are sought, it is perhaps most apt to say that, all other things being equal, Mitigation applies not to claims per se, but to the behaviour of the parties that has contributed in some way to the occurrence of the relevant loss (including loss of benefit) or gain.

Given that I have dismissed the jural classification of Mitigation as a “duty”, readers might wonder if there is another Hohfeldian category that does describe Mitigation. Previously, I had thought that it may be possible to describe Mitigation in terms of “immunity/disability”. This follows from the conclusion that Mitigation suspends otherwise strict rights or holds them in abeyance, which appears to subject the party against whom the doctrine acts to a “disability” of a kind, i.e., the “disabled” party loses the ability to strictly plead law that would otherwise apply in their favour. My conclusion now is that such a classification is unworkable. The discretion at the heart of the doctrine, and the fact that either party may invoke it depending on the circumstances, renders it simply too uncertain for Hohfeld’s schema. Mitigation is not alone in this regard, however. I have stated above that I view Mitigation as equitable and I am encouraged in that view by the fact that other equitable doctrines appear similarly unable to fit within Hohfeld’s framework.

Discretion is inimical to Hohfeld’s schema and renders it inapplicable to equitable doctrine for one overriding reason. That reason is that all of the jural relations described by Hohfeld are binary and quite apparently rule-based, and either do or do not exist, and either do or do not apply, with little to no margin of appreciation.²⁷ This is contrary to the fundamental nature of equitable doctrine that takes conscience as its starting point, and uses principles to mould its response to prayers for relief.²⁸ The weight of principles

²⁷ Hohfeld, *supra* note 1 at 35–64 (It does not seem possible for a privilege to exist, for instance, if the party who is alleged to be unable to object to the first party’s behaviour can in fact sometimes object.).

²⁸ John McGhee, *Snell’s equity*, 33rd ed (London: Sweet & Maxwell, 2015) ss 1–031 to 1–033.

varies according to the circumstances.²⁹ The application of rules does not.³⁰ This makes Mitigation and every other equitable doctrine that relieves from strict rights a “square peg” in the proverbial “round hole” when it comes to a framework like Hohfeld’s. But this is not a problem for equitable doctrine. It is in fact the point of their existence. I established in Chapter III that equity is a necessary response to the problems created by a rule-based order. It is evident that it is also a necessary response to the problems created by a right-based order because rights rest on a foundation of rules.³¹ Thus Mitigation, whether it is conceived of as being equitable *de facto* or *de jure*, cannot be a part of a framework of rights. It must be apart and separate from them, because Mitigation and doctrines like it are to the strict rules of contract and private law that give rise to such rights, what a regulator is to those regulated. Of course, in theory the regulator and the regulated can be one and the same. But, as I further explained in Chapter III, there are good reasons as to why equity (as a check on common law excess) exists separately from the common law.³² Moreover, it appears that this is not merely an idiosyncratic quirk of

²⁹ See John Braithwaite, “Rules and Principles: A Theory of Legal Certainty” (2002) 27 *Austl J Leg Phil* 47–82 at 50 (“Ronald Dworkin sees rules as ‘applicable in an all-or-nothing fashion’ when they are crafted to exhaustively include all of their exceptions: ‘If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.’ Dworkin, in contrast, sees legal principles as not setting out legal consequences that follow automatically when the conditions provided are met. A principle states a reason that argues in one direction, but it does not prescribe a particular decision. Because principles have less specificity in this way, unlike rules principles can conflict. Decision makers assign weights to principles to resolve such conflicts: ‘it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.’”).

³⁰ *Ibid.*

³¹ A “sometimes” right or one that is at the discretion of some other party is oxymoronic.

³² See Chapter III – Section III.C.

English law, but an aspect of law finding expression in legal thought going back to Aristotle.³³

There is a further observation I wish to make to build on the metaphor of the regulator and the regulated used above. The management theorist and writer Joseph Stafford Beer has observed in his work that any mechanism used to regulate a system must be capable of existing in as many states as the system regulated, or at least as many states as that system needs to exhibit.³⁴ Mitigation as a mechanism for regulating contract damages achieves this with respect to every aspect of the rules regulating recovery of contract damages. It can address situations in which causation is in question.³⁵ It can redress problems with the under- or over-inclusion of the remoteness rule.³⁶ Further, as I will explain below, it can act when the expectation measure appears to be inappropriate and divert it to other alternatives that are more appropriate in the circumstances.³⁷ And because it can do all of these things, I argue that it must be understood as a regulator for recovery of contract damages and not merely another rule thereof. If one wishes to think of this visually, it is clear that that on a Venn diagram,

³³ See Miklós Könczöl, “Legality and Equity in the Rhetoric: The Smooth Transition” in Liesbeth Huppens-Cluysenaer & Nuno MMS Coelho, eds, *Aristotle and The Philosophy of Law: Theory, Practice and Justice Ius Gentium: Comparative Perspectives on Law and Justice* (Dordrecht: Springer Netherlands, 2013) 163; See René Cassin, Ralph A Newman & Hastings College of the Law, eds, *Equity in the world's legal systems: a comparative study, dedicated to René Cassin*, Studies in jurisprudence 1 (Brussels: Établissements Émile Bruylant, 1973) (Contributors to the comparative study identify equitable elements in systems including Scots law, the law of ancient Israel, and the civilian traditions of the French, Germans, Swiss, Italians, Belgians, Dutch, and Spanish, as well as the more unusual Soviet and Chinese legal systems); See WW Buckland & Arnold Duncan McNair, *Roman law & common law: a comparison in outline*, 2nd ed (Cambridge: Cambridge University Press, 1952) at 1–6 (In Roman law the Praetor performed a function that was equitable in nature.); See Sir Henry Sumner Maine, *Ancient Law - Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London: John Murray, 1920) at 48-79.

³⁴ If a furnace only had an on/off switch it would be much less useful than if it had a thermostat; See Stafford Beer, “The Viable System Model: Its Provenance, Development, Methodology and Pathology” (1984) 35:1 *The Journal of the Operational Research Society* 7–25 at 11 (“Often one hears the optimistic demand: “give me a simple control system; one that cannot go wrong”. This trouble with such “simple” controls is that they have insufficient variety to cope with variety in the environment. Thus, so far from not going wrong, they cannot go right. Only variety in the control system can deal successfully with variety in the system controlled.”).

³⁵ See Chapter III – Section IV.B.2.

³⁶ See Chapter III – Section IV.A.2.

³⁷ See Section IV.A.

Mitigation would be as large a circle as contract damages itself. Mitigation cannot fit within the contract damages circle. It is unlike remoteness, which can fit within the contract damages circle because remoteness can be understood or rationalized as a gloss or a carveout from the general rule that contract damages are to put the plaintiff in as good a position as he would have been in had the contract been performed.³⁸ Mitigation in its effect is quite clearly more than such a simple exception. Mitigation can even tolerate situations in which the plaintiff arguably ends up better off than they would have been had a contract been performed, or a tortious wrong not committed, which takes it beyond the scope of the rules of recovery for either tort or contract.³⁹ In this light, Mitigation's stature is best described as coordinate with the rules of damage recovery, as

³⁸ I note that whether one regards remoteness as a gloss or carve out from the rule in *Robinson v Harman* depends to some extent on what one understands remoteness to be. If one cleaves to the view that remoteness is a rule of law external to the contract whose operation is grounded in contemplation of "likely" consequences, then it clearly appears to be a carve out from consequences that should otherwise fall within the scope of damages recoverable under a given contract. If one prefers an approach premised on "tacit agreement" like Holmes, or "assumption of responsibility" like Hoffman, there is an argument to be made that the restriction does not actually carve out from the damages available under the rule from *Robinson* so much as redefine what it means to be in 'as good a position, as far as money can do it, as one would be if the contract had been performed.' The Hoffman/Holmes approach arguably does this by making the assessment of damages an exercise in quantifying the value of the promisor's undertakings and providing those in specie where they have not been provided in kind. This means that when damages are not payable in respect of a particular consequence of breach it is not because they are being carved out, it is because they are not actually recoverable under the rule from *Robinson* at all. However, I am not aware of that argument having been made, and only point out the possibility for completeness. In general terms, I think it is still correct to describe remoteness as a "restriction" on recovery, and in that sense I believe it is accurate to describe it as a "carve out"; See Beale, *supra* note 6 at 26–117 to 26–141; See also Clayton P Gillette, "Tacit Agreement and Relationship-Specific Investment" (2013) 88:1 NYU L Rev 128–169; See also Lord Hoffman, "The Achilleas: Custom and Practice or Foreseeability" (2010) 14:1 Edinburgh L Rev 47–61; See also Hugh Davis, "The Problems with Amann: Would an Agreement-Centered Approach to Remoteness Benefit Australian Jurisprudence" (2017) 42:2 UW Austl L Rev 1–28.

³⁹ At least where such betterment is unavoidable or incidental; See *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd*, [1970] 1 QB 447 (CA) [*Harbutt's Plasticine*], Lord Denning MR ("The plaintiffs are required to act reasonably and did so act. There is no evidence that the unavoidable rebuilding was extravagant or that the new factory facilitates increased production. It is wrong to ask the court to infer some betterment requiring a reduction in the price of reinstatement when there is no evidence of betterment and the only fact is that the plaintiffs have got a new building for the old one. The case of a factory or buildings is different from that of a car or chattel because one cannot go into the market and buy a second-hand factory. The defendants could have called evidence to support their case of betterment but did not do so. The judge applied the correct measure of damages in the present case." at 459); See also *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd*, [2002] NSWSC 327, aff'd *Tyco Australia Pty Ltd. v. Optus Networks Pty. Ltd.* [2004] NSWCA 333, Hunter J ("The reference to the review of authorities by Samuels JA is a reference to the review of authorities referred to in these reasons and which predicated with the observation that there is no general doctrine of betterment requiring some benefit to be brought to account wherever new replaces old after total loss. It is this concept of a so called doctrine of betterment upon which Tyco has relied in this case, I think, erroneously." at para 1393); See also *Nan v Black Pine Manufacturing Ltd*, (1991) 80 DLR (4th) 153 (BCCA) (No automatic assumption of betterment merely because the plaintiff had a new house to replace one that had been destroyed.).

opposed to subordinate to these rules. I say coordinate because Mitigation does not purport to be superior to them, in much the same way that equity does not purport to be superior to the common law generally. What I am trying to stress is that Mitigation and the rules of damage assessment are simply separate.

I realize that I have not yet made the case for viewing Mitigation as equitable explicitly. As with the conclusion that Mitigation does not fit within the “right/duty” paradigm of Hohfeld’s framework, the classification of Mitigation as equitable follows from the trends apparent in the leading decisions discussed in the prior chapter. I will discuss these trends further in relation to the *when* of Mitigation as I explain when exactly parties can expect Mitigation to intercede on their behalf or that of their opposite. This discussion will also substantiate my premise in relation to Mitigation’s equitable character. To articulate this premise directly, I begin with the observation that if the method of the common law is only to remedy wrongs where it may, by way of damages, vindicate rights,⁴⁰ then a doctrine whose function is, as I will more fully explain, to reduce remedies for claims of right, or to grant them with no corresponding “right” at all, cannot be understood as belonging to the common law corpus. Instead, it is apparent that it first and foremost provides dispensation from the rigour of otherwise applicable rules, and in so doing — and for the reasons that it does so — it is clear that Mitigation ameliorates the harshness of the common law. As such, the inevitable conclusion to be drawn from these points is that if it remains true that “...[e]quity comes in, true to form,

⁴⁰ The common law has never to my knowledge purported to have any power to compel anyone to actually do or refrain from doing anything, which makes damages effectively its only tool; Beale, *supra* note 6 at 26–046, 27–001 (Common law courts do assume the power to order the payment of a debt, or a price, which is particular manifestation of the same once earned, but nothing else.).

to mitigate the rigours of strict law”,⁴¹ then *a fortiori*, a doctrine whose function *is* to mitigate the rigours of strict law must be equitable.

IV. How does it apply?

So far I have considered and attempted to explain the effect of Mitigation and to extrapolate backwards in order to explain what Mitigation can and cannot be in order to have achieved the outcomes reached in the leading cases. What I have thus far not attempted to do is to set out a theoretical explanation as to how exactly Mitigation effects the relations between parties in order to attain these outcomes, or perhaps how it must effect their relations by necessary implication. As I will explain more fully below, my view is that Mitigation intercedes at the point of intersection between the laws of contract and damages, and alters the otherwise (hopefully) predictable interaction of these two when claims are brought forward for adjudication and Mitigation is invoked. I note that I am here focusing upon contract, but in the larger frame I would argue that much the same appears to be true in relation to tort. This tends to support the view that Mitigation is in fact a doctrine of general application in private law, as I have suggested and as the cases

⁴¹ See *Crabb v Arun District Council*, [1976] Ch 179 (CA) at 187, Lord Denning MR; See also *Lord Dudley and Ward, an infant, by the Honourable Thomas Newport v the Lady Dowager Dudley*, (1705) Prec Ch 241 [*Dudley and Ward v. Dudley*], Sir Nathan Wright LK (“Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth ; it does also assist the law .where it is defective and weak in the constitution [which is the life of the law] and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.” at 244); See also Chapter II - Section II.A.

themselves suggest,⁴² because it is only at the point of intersection between rights and remedies that Mitigation becomes active.⁴³ This indicates that Mitigation is in fact removed from any particular source of right or obligation, and instead simply mediates the interaction between a given source of right and the source of remedies. I note that this helps to explain the cross-pollination between Mitigation cases in contract and tort that has occurred to such an extent that there is no longer a meaningful boundary.⁴⁴

⁴² As noted above, it appears to apply in a variety of different circumstances pertaining to a variety of private law matters; *Steele v Robert George and Co*, *supra* note 25 (Mitigation can apply to claims for workmen's compensation under statute.); *Panarctic Oils Ltd v Menasco Manufacturing Company*, [1983] AJ No 889 (ABCA) ("Though *Red Deer College v Michaels* was a case in contract, the rules relating to mitigation of damage are the same in contract and in tort: *The Liverpool [No. 2]*, [1963] P. 64, at 77-78; McGregor on Damages [14th Ed.], para. 230." at para 55); *Owners of Steamship Enterprises of Panama Inc v Owners of SS Ousel (The Liverpool) (No2)*, [1963] P 64 (CA) [*The Liverpool (No.2)*] (CA), Lord Merriman P. ("It has been common ground in this case that the classic statement about mitigation of loss by Viscount Haldane L.C. in his speech in the *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric* although made in an action arising out of a breach of contract, applies equally, *mutatis mutandis*, to tort." at 77-78).

⁴³ Not only does Mitigation remain dormant until there is a breach/wrong, it remains inapplicable until the plaintiff knows about the breach/wrong, and there is strictly speaking no requirement to mitigate in advance even if a breach/wrong appears to be pending; See *Hunt River Camps/Air Northland Ltd v Canamera Geological Ltd*, [1998] NJ No 325 (NFLDCA), Green JA ("For an issue of mitigation to arise, there must be a breach of the contract by the other party which gives rise to a claim for damages. To take account of other revenue generated during the contract period for the purpose of mitigation, the breach must have occurred before that revenue was or could have been generated." at para 53); See *Canadian Western Natural Gas Co v Pathfinder Surveys Ltd*, [1980] AJ No 648 (ABCA), Prowse JA ("A further question arises and that is whether this appeal could be resolved by applying the doctrine of mitigation. In my view the doctrine has only been applied where the evidence makes it clear that the person suffering damages was aware that such damage was being sustained. This question is resolved by applying a subjective test... If the evidence had disclosed that the Gas Company's employees knew that the line was being placed off the right of way a duty to mitigate the consequences of Pathfinder's error would have arisen. The trial judge's finding makes it impossible to hold that such was the case before us. Thus, even though the Gas Company's employees did not have the knowledge required to give rise to a duty to mitigate..." at paras 66-67); See *Shindler v Northern Raincoat Co Ltd*, [1960] 2 All ER 239 (Manchester Assizes), Diplock J (as he then was) ("The position was that, on the correspondence, the defendant company had, by a letter dated 2 September 1958, told the plaintiff that his services with the defendant company would terminate not later than 30 November 1958. That was a wrongful repudiation of contract which the plaintiff had an option either to accept as an anticipatory breach rescinding the contract and thus entitling him to sue for damages forthwith, or to refuse and to continue to treat the contract as subsisting and to continue to serve as managing director. He elected to do the latter and there was, accordingly, no breach of the contract on which he could sue until his office as director was terminated on 21 November and between 2 September and 21 November the defendant company had a locus penitentiae in which it could have changed its mind and decided to go on employing him. It seems to me that, as a matter of law, it cannot be said that there is any duty on the plaintiff to mitigate his damages before there had been any act which is either an actual breach or an act which he has elected to treat as an anticipatory breach." at 249).

⁴⁴ See e.g. *Janiak v Ippolito*, [1985] 1 SCR 146 [*Janiak*] (Cites the courts earlier decision in *Asamera*, despite the fact that *Asamera* was a contract case and *Janiak* involved a personal injury claim in tort.); See also *The Liverpool (No.2)*, *supra* note 43; See also *Hardie Finance Corporation Pty Ltd v Ahern (No3)*, [2010] WASC 403 at para 766 (Cites the High Court of Australia decision in *Burns v MAN Automotive [Aust] Pty Ltd.*, a contract decision, whereas this is a tort case.).

Mitigation cases now, even if it were ever otherwise, are simply that: cases on mitigation. However, I will here use contract as my example for explaining how exactly Mitigation intervenes.

A. How does contract intersect with the law of damages?

Contract is a source of rights and those rights created by way of contract and embodied therein can be described as “primary rights”.⁴⁵ These are the rights to the “things” promised or agreed to by way of contract, whether it be a quantity of steel or the performance of a song, or even the promise to never sing.⁴⁶ In a perfect world, contracts would always be performed and primary rights thus upheld. Of course, that is not our world, and as we know, contracts are routinely broken. Sometimes this occurs intentionally, sometimes inadvertently, sometimes with fault on the part of the delinquent party, and other times not. Whatever the particular circumstances leading to breach, the legal response is usually the same, but for those rare cases in which mandatory relief in

⁴⁵ See *C Czarnikow Ltd v Koufos*, [1966] 2 QB 695 (CA), aff'd [1969] 1 AC 350 (HL (Eng)), Diplock LJ (as he then was) (“When a party enters into a contract with another party the obligations towards the other party which he thereby undertakes to fulfil and the rights against the other party to which he is entitled are those and only those which by his words and conduct at the time of the contract he has reasonably induced the other party to believe that he is accepting a legal obligation to fulfil or asserting a legal right to claim. This is so, not only in respect of what may for convenience be called the primary obligations and rights created by the contract, that is, those which are discharged by performance of the contract...” at 730); See also Brian Coote, *Exception clauses: some aspects of the law relating to exception clauses in contracts for the carriage, bailment, and sale of goods* (London: Sweet & Maxwell, 1964) at 3.

⁴⁶ See *Photo Production Ltd v Securicor Transport Ltd*, [1980] AC 827 (HL (Eng)), Lord Diplock (“My Lords, it is characteristic of commercial contracts, nearly all of which today are entered into not by natural legal persons, but by fictitious ones, i.e., companies, that the parties promise to one another that some thing will be done; for instance, that property and possession of goods will be transferred, that goods will be carried by ship from one port to another, that a building will be constructed in accordance with agreed plans, that services of a particular kind will be provided. Such a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done.” at 848); See also Krish Maharaj, “Limits on the Operation of Exclusion Clauses” (2012) 49:3 *Alta L Rev* 635–654 at 639 (“Primary obligations are literally those things which a contracting party has either undertaken to do or refrain from doing.”).

the form of injunction or specific performance may be obtained.⁴⁷ I leave these to one side. The ordinary case for a claim in contract, though, involves recourse to the law of damages and the substitution of the primary rights promised for secondary rights.⁴⁸ These secondary rights are an entitlement to the monetary equivalent of the primary rights for which they arise to replace.⁴⁹

Secondary rights are said to reflect or mirror the primary rights they replace.⁵⁰ My countryman, Brian Coote, with whom I agree, has persuasively made the argument

⁴⁷ See *Photo Production Ltd v Securicor Transport Ltd*, *supra* note 47, Lord Diplock (“Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligations also arise by implication of law ... The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation [damages] for non-performance of primary obligations I will call the “general secondary obligation.” at 848-849); See also MH Ogilvie, “The Reception of Photo Production Ltd. v. Securicor Transport Ltd on Canada: Nec Tamen Consumeatur” (1981) 27:3 McGill L J 424–452 at 428.

⁴⁸ See *C Czarnikow Ltd v Koufos*, *supra* note 46, Diplock LJ (“...but also in respect of the secondary obligations and rights which arise upon non-performance of his primary obligations by one of the parties to the contract. Of these the most important is the obligation of the non-performer to make to the other party, and the corresponding right of the other party to claim from the non-performer, reparation in money for any loss sustained by the other party which results from the failure of the non-performer to perform his primary obligation.” at 730-731).

⁴⁹ See Coote, *supra* note 46 at 3–4; See also *Lep Air Services Ltd v Rolloswin Investments Ltd*, [1973] AC 331 (HL (Eng)), Lord Diplock (“Generally speaking, the [termination] of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of the [termination]. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces” at 350); See also *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426.

⁵⁰ Maharaj, *supra* note 47 at 639.

that secondary rights define primary rights by definition,⁵¹ but even without his cogent analysis, it would be clear enough from the dicta of Baron Parke in *Robinson v. Harman*, where His Lordship states that "... [t]he rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."⁵² This clearly indicates that the plaintiff is to be left no better nor worse off than they would have been had they received performance, but also that the assessment of a money substitute is not without challenge. Difficulty in assessment is of course no bar to recovery, but it is the entire reason for a law of damages, including the paradigmatic measures of assessment applied to different categories of right (e.g., contractual and tortious), and rules of remoteness such as that coming to us from Alderson B. in *Hadley v. Baxendale*.⁵³ At this point, I would note that these rules relating to the assessment of damage can be as readily described as belonging to the source of primary obligation (i.e., contract) as readily as they can to any "law of damages". I prefer the latter view, however, that the rules pertaining to the assessment of damages are distinct from those governing the creation or recognition of primary rights, given the distinction between their functions.

With the above in mind, I can now explain that contract and damages intersect when an adjudicator is required to transform the incorporeal primary rights created by way of the parties' contract — rights that are unliquidated and effectively only tradable "in kind" — into liquidated rights in specie, and to thereby replace the plaintiff's intangible entitlement, which the plaintiff has given up, with a specific and concrete sum. The act of transformation here is in essence an attempt to express the value of the primary

⁵¹ See Coote, *supra* note 46 at 7 ("If it is true that exception clauses are substantive rather than procedural in their effect, and that it is impossible for parties to create contractual rights if they intend them to be at all times unenforceable, the implications are fairly obvious. In the first place, the function of all exception clauses, being substantive, is to place substantive limitations upon the rights to which they apply, and, accordingly, to help delimit and define those rights. In the second place, an exception clause which made purported contractual rights wholly unenforceable would not have effect merely as a shield to claims for damages. It would in fact, prevent those rights from accruing in the first place."); See also Ogilvie, "The Reception of Photo Production Ltd. v. Securicor Transport Ltd on Canada", *supra* note 48 at 433–435.

⁵² *Robinson v Harman*, [1848] 1 Exch 850 at 855.

⁵³ *Hadley v Baxendale*, (1854) 156 All ER 145.

right misappropriated or foregone, and in that respect, the rules of damage assessment act as the rules of translation as the adjudicator attempts to reduce a right “in kind” to a right “in specie”, or in other words, to find an equivalency between often prima facie incomparable things. One might describe this colloquially as an attempt to set a ratio between apples and oranges.

B. How does Mitigation affect the intersection of contract and damages?

As alluded to at the beginning of the chapter and in the preceding section, Mitigation acts to ameliorate the harshness of strict law by precluding one party or the other from strictly pleading the rules of damage assessment otherwise applicable. In so doing, Mitigation changes the arithmetic of transforming primary rights to secondary, and thereby expands or curtails the scope of recovery in damages. What this means in practice may be somewhat opaque because of the abstract nature of the discussion so far. From here on, the discussion will fortunately shift from the general and the abstract to the specific and the concrete, beginning first with how exactly Mitigation can or might bend the rules either way.

1. The first rule of damages in contract

The first and most important rule of assessment of damage in contract is the basic contract measure, which comes from the speech of Baron Parke in the seminal case of *Robinson v. Harman*, and bears repeating once more:⁵⁴

“The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

⁵⁴ *Robinson v Harman*, *supra* note 53 at 855.

The most important point from the exposition above is that it confirms the expectation measure of damages as the paradigmatic norm of contract by stating that damages in contract must look to take the plaintiff forward to the position they ought to have been in had nothing gone awry. In *Robinson v. Harman* itself, this required damages to compensate Robinson for the loss of a lease that Harman could not provide for want of a good title to the land.⁵⁵ Readers may recall from Chapter III that such loss can be thought of as “direct” in the sense that one can infer the “loss” from the circumstances without more, and it is this kind of loss that the rule from *Robinson* most readily addresses. The loss in *Robinson* was the difference between the contract price for the lease and its market value of £200, because if the contract had been performed, Robinson would have had either a leasehold and a surplus leftover, or presumably a profit equal to £200 if he had sublet the property. Robinson’s loss was direct because we do not need to know anything in particular about Robinson to understand the loss. We need only be aware of the contract, the market, and the fact of breach, because the loss coincides with the breach completely and does not arise later as a result of it.

a. Expectation or overcompensation

The reasons for which expectation damages may not be awarded in line with Baron Parke’s direction can be many and various, but one most relevant, and somewhat overlooked, is simply that nothing may be needed in order to move the plaintiff to the position which they expected to occupy. By this I mean that in the relevant respect, financial or otherwise, the plaintiff may already have become as “better off” as they had expected to be by reason of events between breach and trial, and in these circumstances, a difference of opinion can arise in the application of the rule from *Robinson*. The disagreement, in short, is whether to “...place the plaintiff in the same situation, with respect to damages, as if the contract had been performed”⁵⁶ means simply to give the

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

plaintiff the value of what they had expected to get but did not (the “Expectation Measure”), or only so much as the difference between their situation post-breach and their expected position when their post-breach situation is better than expected (the “Necessary Minimum Measure”). I note, though, that of the two, it is the Expectation Measure that is seen as paradigmatic in contract and assumed *prima facie* applicable.⁵⁷ Furthermore, given that the Expectation Measure can frequently concur with the Necessary Minimum Measure, it is likely that both the distinction between the Expectation Measure and what I have here described as the Necessary Minimum Measure, and their potential conflict with one another, are obscured from view. Nonetheless, cases of conflict where the two differ do arise as suggested above, and in such cases the answer as to which interpretation of the rule from *Robinson* ought to apply is, unfortunately, that *it depends*. For present purposes, it suffices to say that the Necessary Minimum Measure is the lesser of the two, and if it is to apply, it is generally through the intervention of Mitigation. How Mitigation intervenes, and the difference between these two ways of applying the rule in *Robinson*, will be explained below by way of an example.

An apt illustration of the potential effect of Mitigation on the rule from *Robinson* comes from the long-standing Supreme Court of Canada decision in *Cockburn v. Guarantee Trust Co.*⁵⁸ I will not repeat what has already been said about the decision’s facts at length in Chapter III.⁵⁹ For present purposes, it suffices to note only that *Cockburn* arose as an action brought by Cockburn on a guarantee for the \$9,000 remainder of his salary owing under the unexpired portion of his contract of employment with the Dominion Linen Manufacturing Company, which company had gone into receivership, and whose assets Cockburn had bought and sold at a profit of \$11,000.⁶⁰ In

⁵⁷ See Smith, *supra* note 9 at 410; See also LL Fuller & William R Jr Perdue, “The Reliance Interest in Contract Damages: 1” (1936) 46:1 Yale L J 52–96 at 410; See also James Edelman, *McGregor on damages*, 20th ed (London: Sweet & Maxwell, 2018) at 24–003.

⁵⁸ *Cockburn v Trusts and Guarantee Co*, (1917), 55 SCR 264 [*Cockburn*].

⁵⁹ See Chapter III – Section II.C.2.

⁶⁰ *Cockburn*, *supra* note 59 at 265.

the circumstances, the pressing legal question raised by the defendant, and that which ultimately reached the Supreme Court, was whether or not Cockburn's profit ought to be held to have mitigated the loss of his remaining salary.⁶¹ In the circumstances, their Lordships held that Cockburn's profit *had* been made in mitigation of his loss⁶² and, in so doing, shifted the application of the rule in *Robinson* from the Expectation Measure to the Necessary Minimum Measure, and an award of damages that was nominal or nil.⁶³ The difference between the two courses here is that if the Court had not held Cockburn's profit to have been made in mitigation, and had thus applied the Expectation Measure without regard to it, Cockburn's damages would have been the \$9,000 he had expected to receive. By contrast, when the Necessary Minimum Measure applies, and an "act of mitigation" like Cockburn's is taken into account, damages awarded will only reflect the difference between the plaintiff's actual post-breach position and the plaintiff's expected position. As such, despite the fact that Cockburn had not received the remaining \$9,000 salary, only nil or nominal damages could be awarded, as mentioned, because Cockburn's profit of \$11,000 left him effectively \$2,000 "up" in his post-breach position as compared with his expected position of \$9,000 (i.e., \$11,000 – \$9,000 = \$2,000). The important upshot of the decision to assess Cockburn's loss in this way is that it effectively denied Cockburn the right to plead his damages strictly according to the ordinary Expectation Measure of damages in contract.

b. Expectation without foundation

A further related reason for departure from the rule in *Robinson* is the objection that the value of the Expectation Measure may be excessive when compared to the amount that would have been necessary to move the plaintiff to the position in which they had expected to be post-breach *if* the plaintiff had taken reasonable steps to stem

⁶¹ *Ibid.*

⁶² *Ibid* at 264–271.

⁶³ *Ibid* at 271, Anglin J.

their “loss”, i.e., if the plaintiff had mitigated. Here again we see a disagreement between the Expectation Measure and a lower “necessary minimum”. Although here, the lower measure is based upon a hypothetical assumption as to what the plaintiff’s post-breach position *should* have been, and as such, I will describe it as the “Hypothetical Minimum Measure”. The disagreement also differs from that described in section a above in the sense that it does not appear to be a question of how to apply *Robinson*’s rule so much as it is apparently a question of whether to apply it at all. However, the Hypothetical Minimum Measure is also explicable in line with Parke B’s direction, if we remember that a plaintiff’s “primary right” and a defendant’s “primary duty” must be coextensive, and that it must thus be equally valid to assess the same from the perspective of the defendant which, as I will explain below, supports recourse to the lower Hypothetical Minimum Measure.⁶⁴ That being said, I should note that it is still highly arguable that not only the Hypothetical Minimum Measure, but *both* “necessary measures” are effectively alternatives to the rule in *Robinson* rather than other ways of seeing it, given the paradigmatic quality of the Expectation Measure in contract under *Robinson*. Regardless of which view is preferred, as with the Necessary Minimum Measure, the important point is that any diversion from the Expectation Measure to the Hypothetical Minimum Measure is most likely a consequence of Mitigation. Indeed, it is precisely this type of change in the otherwise orderly application of the rules of damage assessment that is

⁶⁴ This is supported by analogy with the scope of duty principle from the House of Lord’s well-known decision in *South Australian Asset Management Co v. York Montague* and its subsequent decision in *The Achilles*. I.e. to consider the primary right as a question of what the defendant promised to do; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, [1997] AC 191 (HL (Eng)), (SAAMCO proceedings were amalgamated with others raising the same issues, and the case bears the name of these other litigants. The case is still more commonly referred to as SAAMCO though); *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*, [2009] AC 61 (HL (Eng)) [*The Achilles*]. Also, the doctrine of frustration given that a defendant can plead “*non haec in foedera veni*” in sufficiently dire circumstances; See *Davis Contractors Ltd v Fareham Urban District Council*, [1956] AC 696 (HL (Eng)), Lord Radcliffe (“... frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.” at 729).

most closely associated with the Mitigation doctrine, as per the well-known and frequently quoted passage from Viscount Haldane's speech in *British Westinghouse*.⁶⁵

An example of Mitigation interceding between contract and the law of damages in order to shift the assessment of loss from the Expectation Measure to the Hypothetical Minimum Measure is the notably Germanic *Kaines (UK) v. Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH*.⁶⁶ The decision herein considered is from the English Court of Appeal, and the pen of Lord Justice Bingham (as he was then), but the conclusions reached about the case would be much the same even if one considered the trial decision handed down by Mr. Justice Steyn (as he was then).⁶⁷ The basic facts of *Kaines* are fairly simple and involved a straightforward contract for the purchase and sale of 600,000 barrels of Brent Crude by Kaines from Oesterreichische for the purposes of resale.⁶⁸ The parties' contract was entered into on June 3, 1987, with delivery due in September.⁶⁹ Matters went awry, of course, and on June 18, Oesterreichische repudiated the contract, which Kaines accepted.⁷⁰ The contract price was \$18.48, but by June 18 and 19, the market price of Brent Crude had risen to \$18.72 and \$18.74 respectively, and by June 29, when Kaines finally bought into the market, the market had risen further still to \$19.23,⁷¹ although Kaines' contract price as of that date was even higher at \$19.30.⁷²

⁶⁵ *British Westinghouse Co v Underground Ry*, [1912] AC 673 (HL (Eng)) [*British Westinghouse*], Viscount Haldane ("The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." at 689).

⁶⁶ I note of course that for all the authority of *British Westinghouse* on this point, it is not in fact a case on point; *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH*, [1993] 2 Lloyd's Rep 1 (CA).

⁶⁷ *Ibid* at 8, 11, 13.

⁶⁸ *Ibid* at 2–3.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at 9.

⁷¹ *Ibid*.

⁷² *Ibid*.

As expected, Kaines claimed damages from Oesterreichische for the increased cost of the Brent Crude it was obliged to source elsewhere, and while liability was beyond contest, quantum was of course in question.⁷³ Kaines, for its part, claimed, first, the full difference between the price of its replacement contract on June 29 of \$11,580,000 (\$19.30 x 600,000) and its original contract with Oesterreichische of \$11,088,000 (\$18.48 x 600,000), which amounted to a difference of \$492,000.⁷⁴ Oesterreichische, for its part, claimed that Kaines ought to have bought into the market on June 25, when the market price had dropped to \$18.38, which would have eliminated Kaines' loss entirely.⁷⁵ Unfortunately for both, neither Mr. Justice Steyn nor Lord Justice Bingham accepted either argument.⁷⁶ Instead, each preferred an alternative claim, assessed according to the established rule in sale cases as per the *The Elena d'Amico*⁷⁷ and *Jamal v. Moolla Dawood, Sons & Co*,⁷⁸ to the effect that the time at which the plaintiff should act is the time of breach, or as soon thereafter as is practicable.⁷⁹ This led to the alternative damage sum assessed as of June 19 of \$156,000 (((\$18.74 – \$18.48) x 600,000)).⁸⁰

The basis for the rule in sale cases referred to above and applied here is the notion that a reasonable actor in the market would act promptly rather than wait and risk further market fluctuation that may deepen their immediate loss, i.e., they would mitigate by drawing a line under any further potential loss by buying into the market and crystallizing

⁷³ *Ibid* at 9–10.

⁷⁴ *Ibid* at 9.

⁷⁵ *Ibid* at 8.

⁷⁶ *Ibid* at 8, 11.

⁷⁷ *Koch Marine Inc v dAmica Societa di Navigazione arl (The Elena dAmico)*, [1980] 1 Lloyd's Rep 75 (QB).

⁷⁸ *Jamal v Moolla Dawood, Sons & Co*, [1916] 1 AC 175 (PC Lower Burma) [*Jamal v Moolla*].

⁷⁹ *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH*, *supra* note 67 at 8, 11.

⁸⁰ *Ibid* at 8.

their position/loss, if in fact there was a loss.⁸¹ This involves treating the plaintiff as if they had mitigated, or put another way, assessing their damages on the basis of deemed Mitigation, and it thus amounts to replacing the Expectation Measure with the Hypothetical Minimum Measure discussed above.⁸² I note that the rule in sale cases requiring immediate action has certain consequences peculiar to the law of sale, and is perhaps best understood as a corollary of the “breach date rule”.⁸³ Nonetheless, even though it dictates what is reasonable and thus what would be required in order to satisfy the requirements of Mitigation, or rather, satisfy the court if Mitigation were invoked by the defendant in response to a claim, the application of the rule here demonstrates the effect of Mitigation on the assessment of damage when a court is satisfied (or, as per the sale rule, bound to find) that the plaintiff could have reasonably done more to reduce or

⁸¹ See Edelman, *supra* note 58 at 25–018; See also *Kaines (UK) v Oesterreichische Warenhandels-gesellschaft Austrowaren GmbH*, *supra* note 67; See also *Jamal v Moolla*, *supra* note 79.

⁸² The same approach is typically taken in the market for tonnage where there is an available market, although the approach has limits; See *Glory Wealth Shipping Pte Ltd v Korea Line Corpn*, [2011] EWHC 1819 (Comm), Blair J (“It has been pointed out that part of the *The Elena D’Amico* process of reasoning is that damages for breach of contract such as a contract for sale are normally to be assessed as at the date of breach [see *Norden v. Andre & Cie S.A.* [2003] 1 Lloyd’s Rep. 287 at [43], Toulson J]. A well known example from the financial field is found in *Jamal v Moolla Dawood, Sons & Co* [1916] AC 175. In that case, the buyer had defaulted on a contract to take delivery of shares on a particular date at a particular price. By the delivery date, the shares had fallen in value. The Privy Council held that the measure of damages for breach by a buyer of a contract for the sale of shares is the difference between the contract price and the market price at the date of breach. At page 179, Lord Wrenbury explained the reason for the rule, saying that, “If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises ... In cases where a repudiatory breach has been accepted bringing such a charterparty to an end, *The Elena D’Amico* principle has been explained in causation terms. The ‘rationale is that in such a situation that measure represents the loss which may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things, from the breach of contract’ [*Norden v. Andre*, *ibid*, at [42]]. It has further been explained as deemed mitigation...” at paras 17-18); See also *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd*, [2010] EWHC 903 (Comm), David Steel J (“The fact that a term market thereafter emerges for the [yet shorter] outstanding balance of the charter period does not in my judgment import with it the proposition that a decision not to take advantage of that market at that later stage becomes a business decision independent of the wrongful termination. The rationale is that acceptance of the market rate at the date of breach is deemed to constitute reasonable mitigation...” at para 65); Cf *Redpath Industries Ltd v Cisco (The)*, [1994] 2 FC 279 (FCA) at para 71 [*Redpath*] (Like Mustill LJ in *Hussey v. Eels*, *Létourneau JA* does not accept that loss always crystallizes at the date of the breach.).

⁸³ See Michael G Bridge, “Mitigation of damages in contract and the meaning of avoidable loss” 105(Jul) LQR 398–423 at 409–411.

prevent their loss.⁸⁴ The effect of this is that the plaintiff is, again, effectively denied the right to plead the value of their loss in full.

As an aside, with respect to the potential validity of the Hypothetical Minimum Measure interpretation of the rule from *Robinson* as an alternative to the Expectation Measure discussed above, I also wish to point out that sales cases such as *Kaines* demonstrate what I mean above with respect to assessing damage from the defendant's point of view. By this I mean that if we think of translating Oesterreichische's duty to provide 600,000 barrels of Brent Crude into damages, instead of translating Kaine's right to said crude, it seems obvious that Oesterreichische's obligation ought to be assessed as of the date it fell due, as argued by Oesterreichische. The reason for this is that, if time is of the essence in commodity sales and futures contracts, which it generally is,⁸⁵ and contracts function to allocate risk as well as reward, which they do,⁸⁶ then to assess the value of the promised crude as at a different date is to assess the value of something other than and different from what Oesterreichische promised. Knowing how the market can fluctuate, it is quite readily apparent that June 29 oil is simply not June 18 oil. Of course, one may then ask how we are to accommodate a buyer who, without fault, cannot buy into the market at that time and suffers a greater loss, and the answer would be to plead Mitigation. The only difference would be that the onus would shift to the plaintiff rather than the defendant to establish what is or would have been a reasonable date by which to have acquired substitute performance, but Mitigation would otherwise operate in the exact same way by preventing strict reliance on the rule where it is unmeritorious. For instance, if *Kaines* had bought into the market on June 19, the last reasonable date, Mitigation under this vision of the rule from *Robinson* would prevent Oesterreichische from denying liability for the incrementally greater loss after June 18, on the basis that it

⁸⁴ See Andrew Dyson & Adam Kramer, "There is no 'breach date rule': mitigation, difference in value and date of assessment" (2014) 130 LQR 259–281 at 271–273.

⁸⁵ See Beale, *supra* note 6 at 21–013; See also GHL Fridman, *The law of contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 534–538.

⁸⁶ Maharaj, *supra* note 47 at 646; Jeffrey L Harrison, *Law and economics in a nutshell*, 6th ed, Nutshell series (St. Paul, MN: West Academic Publishing, 2016) at 117.

ought not lie in their mouth to insist on a perfect response to a challenge they created.⁸⁷ I should reiterate, though, that this interpretation of the rule from *Robinson* is not canon and that the supremacy of the Expectation Measure focused on the plaintiff's perspective is effectively unquestioned.⁸⁸ I will however revisit the distinction between the Expectation Measure and the two "necessary measures" in Section VI, where I will explain *when* it is that Mitigation will in fact shift the assessment of damage/loss to one of these latter two.

2. The second most important rule in contract

After *Robinson* and the basic contract measure of damage (i.e., the Expectation Measure) the next most significant rule of damage assessment in contract is of course the rule of remoteness that began with Baron Alderson in *Hadley v. Baxendale*.⁸⁹ As the reader knows, the rule of remoteness has undergone change since then and has been redeveloped and redefined in successive cases, including *Victoria Laundry*,⁹⁰ *The Heron*

⁸⁷ *Banco de Portugal v Waterlow & Sons*, [1932] AC 452 (HL (Eng) [*Banco de Portugal*], Lord MacMillan ("I confess I am not disposed to regard with much sympathy the criticism which [the defendants] have directed at the Bank's action. Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. at 506); See *Johnson v Agnew*, [1980] AC 367 (HL (Eng)), Lord Wilberforce ("The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach — a principle recognised and embodied in section 51 of the *Sale of Goods Act 1893*. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances." at 400-401); See also *Kemp v Lee*, [1983] BCJ No 1571 (BCSC) at para 64; See also Beale, *supra* note 6 at 26-095 to 26-096 (Whatever date of assessment might presumptively apply can shift if necessary in order to avoid injustice to the parties. Note, this is intimately tied to mitigation.).

⁸⁸ The expectation measure's only real rival, the reliance measure, has been unquestionably dispatched; See Chapter I – Section III.B; See also *C & P Haulage (a firm) v Middleton*, [1983] 1 WLR 1461 (CA) at 1468-1469; See also *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd (The Mamola Challenger)*, [2010] EWHC 2026 (QB) [*The Mamola Challenger*]; See also *Bowlay Logging Limited v Domtar Limited*, (1978) 87 DLR (3d) 325 (BCSC), *aff'd* (1982) 135 D.L.R. (3d) 179 (BCCA).

⁸⁹ *Hadley v. Baxendale*, *supra* note 54.

⁹⁰ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*, [1949] 2 KB 528 (CA).

II,⁹¹ and potentially *The Achilleas*.⁹² The rule, sometimes called the reasonable contemplation test, is generally accepted as having two limbs.⁹³ Beyond this, precision and agreement are somewhat difficult to obtain. I am, for instance, unsure as to whether we all agree as to what the two limbs actually are. I am sure, however, that propounding a universally accepted definition of the rule is unnecessary, and somewhat beside the point. My concern with remoteness is, after all, with what it does in substance, or would do if not for the intervention of Mitigation, and *why* — not the formal nomenclature surrounding *how* it is to be applied. That in itself is perhaps a topic fit for an entirely new and other dissertation. As such, I am content to offer only the following general explanation of remoteness to be used as a means for explaining the effect of Mitigation upon it.

In short, remoteness controls the scope of recovery for consequential loss by determining whether a given loss is “too remote” and thus unrecoverable, or “not too remote” (for lack of a better phrase, and hereafter “Unremote”) and thus recoverable.⁹⁴ There are two factors controlling the determination of remoteness, the first of which is

⁹¹ *C Czarnikow Ltd v Koufos (The Heron II)*, [1969] 1 AC 350 (HL (Eng)) [*The Heron II*].

⁹² *The Achilleas*, *supra* note 65.

⁹³ See Waddams, *supra* note 7 at paras 739–741.

⁹⁴ See *ibid*; Note, historically, direct loss was said to be that which fit within the first limb of *Hadley*, and consequential loss was said to be that which fit within the second limb. In recent years this means of categorizing loss in contract has come in for criticism, and it appears that a distinction between them that is grounded on the difference between the first and second limb of *Hadley* is increasingly unpersuasive; See *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7)*, [2012] SASC 49; *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd*, [2013] WASC 356; *Transocean Drilling UK Ltd v Providence Resources Plc*, [2016] EWCA Civ 372, Moore-Bick LJ (“The expression ‘consequential loss’ has caused a certain amount of difficulty for English lawyers, mainly as a result of attempts to define its meaning in the interests of commercial certainty: see the line of cases that includes *Saint Line v Richardsons Westgarth & Co Ltd* [1940] 2 K.B. 99, *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 8 B.L.R. 20 and *Deepak Fertilisers Ltd v ICI Chemicals and Polymers Ltd* [1999] Lloyd’s Rep. 387. It is questionable whether some of those cases would be decided in the same way today ...”); For this reason, I have preferred to define direct and consequential loss in terms that better reflect the effect they have on judicial decision making with respect to Mitigation. To reiterate that definition from Chapter IV, I describe direct loss as effectively any loss that one can infer from the specifics of the contract and the breach without other or further knowledge of the background circumstances of the parties or the transaction. This fits most readily with Baron Park’s direction in *Robinson v Harman* that the plaintiff is to be put, as far as money can do it, in as good a position as if the contract had been performed because one typically need only know what was promised and not performed in order to know what must be awarded in order for this to be done. By contrast, I define consequential loss as any loss flowing from a breach of contract that is peculiar to the particular plaintiff in the sense that one must know something of the plaintiff and the background to the transaction to understand the loss that has arisen; See Chapter III - Section II.B.2.

the knowledge of the defendant with respect to the risk of the consequential loss, both imputed and actual, as at the time the contract was made (the “Knowledge Requirement”).⁹⁵ The second factor is the likelihood of the particular consequential loss eventuating, based on what the defendant knew or can be held to know.⁹⁶ The standard of probability applicable is: likely to occur in “...more than a minority of cases” (the “Probability Requirement”).⁹⁷ Again, this is imprecise, but thankfully also somewhat beside the point. What is relevant is that a given consequential loss will be Unremote, if both the Knowledge Requirement *and* the Probability Requirement are satisfied, and too remote if either requirement is *not* met.⁹⁸

Before turning to examples of Mitigation’s effect on remoteness, I should first reiterate what has been said above with respect to the intersection of contract law and the law of damages, and explain the role of remoteness therein. Readers will recall from the prior section that I have described the intersection of contract law and the law of damages as a process of translation, as primary rights are transformed into equivalent secondary rights — rights that replace the primary rights the plaintiff has lost. The role of remoteness in this equation is simply to expand or curtail the value of the replacement secondary rights conferred by way of expanding or curtailing damages for consequential loss (i.e., a subset or aspect of secondary rights), in order to ensure as much equivalency as possible between “in kind” primary rights and “in specie” secondary rights, where the monetary value of the primary right is not obvious. Such uncertainty arises most frequently with respect to consequential loss as opposed to direct loss for reasons that may be obvious to readers familiar with the challenges posed by determining both states of knowledge, imputed and actual, and levels of probability. Suffice to say for the present moment that irrespective of the challenges inherent in the application of remoteness, the effect of Mitigation’s intervention on the application of remoteness is to

⁹⁵ See Beale, *supra* note 6 at 26–123, 26–130.

⁹⁶ See *ibid* at 26–123, 26–128.

⁹⁷ See *ibid*.

⁹⁸ See Waddams, *supra* note 7 at paras 739–741.

prevent the expansion or contraction of secondary rights/damages and in so doing, deny one party or the other the benefit of the remoteness rule, or in other words, the right to plead that the remoteness rule should apply strictly according to its terms. As always, though, I imagine that this will be clearer if explained by way of examples.

a. Remote, but right anyway

The best and clearest example of Mitigation's effect on remoteness that I am aware of is the English Court of Appeal decision in *Humber Oil v. The Owners of The Sivand*.⁹⁹ Readers will likely remember the decision from discussion of the connection between remoteness and Mitigation in Chapter III. I will briefly note its salient aspects before explaining how Mitigation affected remoteness in this case.

I should first note that *The Sivand* was in fact a tort decision, and thus subject to the rule of remoteness in tort as opposed to contract. Given, as I have said above, that I am principally concerned with the "what" and "why" of remoteness, rather than the particulars of "how", I am of the view that the significance of the differences between the applicable rules in terms of how they are defined is much diminished for present purposes, given the overlap in the underlying rationale for why they exist. This rationale is, in my view, to maintain some sense of proportion between the scale of the breach/wrong and the scope of recovery in order to ensure that the defendant is not abused nor the plaintiff under-compensated. As such, I will proceed with the analysis herein (as I did in Chapter III) on the footing that a case such as *The Sivand* may be drawn upon as an authority on mitigation generally, even though the cause of action in said case (i.e., tort) differs in nature from those with which I am principally concerned (i.e., contract). Now, to leave classification to one side, what is most factually important about *The Sivand* is that it involved two successive maritime accidents¹⁰⁰ — the first of which was the fault of the Sivand's owners ("The Owners") and occurred when the

⁹⁹ *The Sivand*, *supra* note 17.

¹⁰⁰ *Ibid* at 763.

Sivand collided with Humber's oil terminal at Immingham in the Humber estuary;¹⁰¹ and the second of which occurred when a contractor hired by Humber was carrying out repairs to said oil terminal.¹⁰² The second accident was by far more interesting, and the source of the controversy in the case, because in the circumstances, it arose from a freak occurrence that was notably not only unforeseen, but practically unforeseeable.¹⁰³ This occurrence was the localized collapse of the seabed beneath one of the legs of a jack-up barge then in use by the contractor to carry out the repairs.¹⁰⁴ As we recall, the collapse of the seabed caused the barge to capsize, leading to its total loss and an increase in repair costs of £178,350 (the "Barge Costs").¹⁰⁵ These costs were passed on to Humber under the industry standard agreement between them and the contractor, and were successfully sought as damages from The Owners by Humber.¹⁰⁶

Turning now to the legal aspects of the decision, The Owners appealed Humber's damage award for the Barge Costs, as opposed to the other costs of repair, to the English Court of Appeal on the basis that, *inter alia*, said costs were too remote to recover.¹⁰⁷ Of the three sitting members of the Court, Lord Justices Evans and Pill explicitly disagreed with The Owners and held that the Barge Costs were Unremote, while Lord Justice Hobhouse decided on the basis of Mitigation and dismissed the argument as irrelevant.¹⁰⁸ As between these two approaches, I have already criticized the approach of Evans and Pill LJJ at length in Chapter III, and indicated that the reasons of Hobhouse LJ are to be much preferred. I will not repeat my argument with respect to the reasons of Lord Justices Evans and Pill, but I will reiterate that it strains credulity to hold that a hole

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid* at 762, 766–767.

¹⁰⁴ *Ibid* at 763.

¹⁰⁵ *Ibid* at 763–764.

¹⁰⁶ *Ibid* at 763, 765, 767.

¹⁰⁷ *Ibid* at 752.

¹⁰⁸ *Ibid* at 752–763, 765, 765–766, Evans, Hobhouse & Pill LJJ.

opening *unexpectedly* and practically *unforeseeably* is nonetheless legally foreseeable, when by a contrast, an earthquake for instance would not be¹⁰⁹. As such, for the purposes of the present discussion (and generally), I take the position that the barge collapse and thus the Barge Costs were *prima facie* too remote to recover. However, that of course does not mean that they should not have been recoverable, which brings us to how it is that Mitigation overcomes this issue.

As mentioned above, Hobhouse LJ treated the foreseeability, and thus remoteness, of the barge collapse as neither here nor there once Mitigation was identified as applicable.¹¹⁰ In my view, this is correct for the reason that remoteness cannot sensibly apply to post-breach or post-wrong costs or further loss, although that is largely a matter for section V to follow. Suffice to say for the present moment that there would be a marked disincentive to mitigate if a plaintiff's claim for the costs thereof were subject not only to a test of reasonableness, but also foreseeability/contemplation (i.e., remoteness), because it would raise the prospect of finding out-of-pocket expenditures incurred to mitigate accrued loss (i.e., unrealized loss) unrecoverable, *despite* it being reasonable. As such, Mitigation intercedes not to expand or curtail rules of remoteness, as it does with the rule in *Robinson*, but instead displaces them entirely because they are inconsistent with the rule that calls for the act of mitigation in the first place. Thus, like Hobhouse LJ, one simply need not contend with the remoteness of costs rightly claimed in Mitigation. As here, even if they are remote, Mitigation ensures that they are recoverable if they are rightly claimed.

¹⁰⁹ *The Sivand*, *supra* note 17, Pill LJ ("It was the defendants' misfortune that the damage their vessel caused was caused to a structure located at a point above the seabed where a combination of difficult ground conditions was liable to and did occur. The liability of the defendants is founded on one aspect of the principle that a tortfeasor takes his victim as he finds him. The conditions encountered cannot in my judgment be equated with an earthquake or freak storm." at 767).

¹¹⁰ *Ibid*, Hobhouse LJ ("In my judgment this case involves a simple application of the doctrine of the mitigation of loss. The complications sought to be introduced by the defendants are both inappropriate and mistaken." at 765).

b. Unremote, but not right

Earlier in Chapter III, I raised a hypothetical scenario pertaining to a constant and, unfortunately, notoriously obstinate gardener.¹¹¹ We will recall that the gardener, who was Party B in that scenario, was an award-winning amateur who stood to win a prize yet again from the prestigious Gnome & Garden Magazine but for a disagreement with Party A over a garden hose. The hose in question was the subject of a contract between Party B and Party A, who operated a garden supply store, said hose having been ordered specifically for Party B at his request. Unfortunately, that of course did not go as planned, and the special hose remained out of stock and undelivered for some time. Party B would not take such disappointment lying down though, and insisted on performance despite the delay. Party B remained constant in his insistence that he would buy no other hose, even when his existing hose was destroyed, and the heat of August threatened to, and did, destroy his garden and his hopes of winning the \$5,000 prize.

The consequential loss of the garden and the prize referred to in the bizarre scenario above were used in Chapter III to demonstrate that one could not equate Mitigation with remoteness, if the reasonable contemplation test would point to recovery where Mitigation clearly could not.¹¹² Here, I make mention of the example for the purpose of demonstrating how Mitigation ought to respond to the issue of an Unremote but unreasonable loss. What Mitigation ought to do in such a scenario, if pled by the defendant, Party A, is intercede to deny the strict application of the remoteness rule, or in other words deny Party B's right to plead the rule's strict (if bizarre) application and thus recover damages for the consequential loss of the garden and the prize. The effect of such intervention would obviously be to curtail the scope of recovery in contrast with the effect of Mitigation in *The Sivand* discussed above, in which Mitigation acted to expand the scope of damages awarded by displacing the remoteness rule that would have

¹¹¹ See Chapter III – Section IV.A.2.

¹¹² One could argue that Party B had a legitimate interest in performance, but at the end of the day, a special garden hose, is still just a garden hose.

otherwise prevented it. In both cases, it is fair to say that the claim allowed or denied relates to losses that did in fact occur and, in so far as it means anything, losses that were *caused* by the breach/wrong in question. As the next section will finally explain, though, they attract differing applications of Mitigation in light of the underlying reason for Mitigation to apply at all — that is, the “why” to the “what” and “how” we have already canvassed so far in this chapter.

V. Why does it apply?

Earlier, when describing *what* Mitigation is, I stated my view that the concatenation of the leading decisions reviewed in Chapter III led to the conclusion that Mitigation is best explained as equitable in nature. If this view is correct, it follows, I argue, that Mitigation’s function is to ameliorate the harshness of strict law by preventing unmeritorious insistence on strict rights. This does not explain *why* Mitigation intervenes as it does, though, because it does not explain what “unmeritorious” means in this context. The equitable characterization does, however, suggest a definition when thought of in light of what it means to have “merit” and equity’s preference for substance over form. In short, one can infer that “merit” here is the quality of action in keeping with purpose, or more precisely, the exercise of rights in keeping with the spirit of the rules that gave rise to them rather than merely in keeping with the letter of said rules in a formal/technical sense. As such, the “why” of Mitigation must be said to depend on the nature of the rights in question and the reason for their recognition, as it is the *fulfillment* of those rights and the law from which they come that calls for equity’s assistance, if equity does in fact come “...to fulfill the common law...”¹¹³

¹¹³ See *Crabb v Arun District Council*, *supra* note 42 at 187, Lord Denning MR; See also *Dudley and Ward v Dudley*, *supra* note 42, Sir Nathan Wright LK (“Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law .where it is defective and weak in the constitution [which is the life of the law] and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.” at 244); See also Chapter II - Section II.A.

In relation to contract as a legal setting for Mitigation's intervention, I have already argued the case in Chapter I for regarding contract as a facilitative institution whose *raison d'être* is the realization of surpluses from trade. Accordingly, I argue that the appropriate rationale to accord to Mitigation when it intervenes in contractual claims, or perhaps rather when equity intervenes through it, is the protection of contract's institutional function. To put it another way, I argue that Mitigation's purpose in contract is to pursue the fuller realization of the reason for recognizing rights in contract at all, and in that sense, Mitigation is not in fact unique among equitable doctrines, as there are arguably at least four others that pursue much the same end. In this section, I will briefly canvass each of these four examples to highlight the similarity in purpose and function between them and Mitigation, and thereby further substantiate the case for regarding Mitigation as one among them despite Mitigation's historic connection to the common law.

A. Relief from penalties

The jurisdiction to relieve a party from a "penalty" is undeniably ancient and, consequently, the subject of some disagreement and debate.¹¹⁴ These points of

¹¹⁴ See McGhee, *supra* note 28 ss 13–006 ("It has been said that the equitable jurisdiction can be traced back at least to Sir Thomas More's chancellorship: courts of equity intervened to relieve against penalties by cutting down the amount which the innocent party was entitled to recover to the amount of the actual damage which he or she had sustained."); Note, there is significant disagreement between Australia and the UK as to whether the penalty doctrine exists at common law or equity; See *Cavendish Square Holdings BV v Makdessi*, [2016] AC 1172 (HL (Eng)), Lord Neuberger and Lord Sumption ("[The High Court of Australia in the *Andrews* case] engaged in a detailed historical examination of the equitable origin of the rule and concluded that there subsisted, independently of the common law rule, an equitable jurisdiction to relieve against any sufficiently onerous provision which was conditional upon a failure to observe some other provision, whether or not that failure was a breach of contract... Any decision of the High Court of Australia has strong persuasive force in this court. But we cannot accept that English law should take the same path, quite apart from its inconsistency with established and unchallenged House of Lords authority. In the first place, although the reasoning in *Andrews* was entirely historical, it is not in fact consistent with the equitable rule as it developed historically. The equitable jurisdiction to relieve from penalties arose wholly in the context of bonds defeasible in the event of the performance of a contractual obligation. It necessarily posited a breach of that obligation. Secondly, if there is a distinct and still subsisting equitable jurisdiction to relieve against penalties which is wider than the common law jurisdiction, with three possible exceptions it appears to have left no trace in the authorities since the fusion of law and equity in 1873." at paras 41-42); See *Andrews v Australia and New Zealand Banking Group Ltd*, (2012) 247 CLR 205 (HCA).

disagreement are presently between the United Kingdom and the High Court of Australia, and relate to matters that are somewhat outside the scope of the discussion herein, especially as compared with the central matter on which they *do* agree.¹¹⁵ The central tenet in question is the touchstone test of application for the penalty doctrine, which appears now, and in my opinion quite rightly, to be the legitimacy of the promisee's interest in the enforcement of the allegedly penal provision.¹¹⁶

The focus on legitimacy of interest in the enforcement of an allegedly penal provision will likely remind readers of the House of Lords' decision in *White & Carter (Councils) Ltd.*, which in point of fact was the UK Supreme Court's inspiration for the formulation.¹¹⁷ The connection is more than a skin-deep resemblance in terms of terminology, though, and it is apt to say that in respect of ascertaining the legitimacy of a refusal to mitigate, or the enforcement of a "penalty", the question is whether the interest sought to be vindicated, or protected, is more than simply the plaintiff's interest in

¹¹⁵ The primary aspects of disagreement are the need for a "breach" of contract in order for the doctrine to be engaged, and its classification as common law or equitable; See McGhee, *supra* note 28 ss 13–006 to 13–015; See JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow and Lehane's equity: doctrines and remedies*, 5th ed (Chatswood, NSW: LexisNexis Butterworths, 2015) ss 18–025 to 18–055.

¹¹⁶ See *Cavendish Square Holdings BV v Makdessi*, *supra* note 116, Lord Neuberger and Lord Sumption ("A damages clause may properly be justified by some other consideration than the desire to recover compensation for a breach. This must depend on whether the innocent party has a legitimate interest in performance extending beyond the prospect of pecuniary compensation flowing directly from the breach in question." at para 28); See McGhee, *supra* note 28 ss 13–016 ("Whilst the common law nature of the rule against penalties was emphasised in *Cavendish*, it is worth noting that the test is also consistent with the different view, noted at para. 13-002, of the rule as an equitable doctrine, designed to prevent A's taking unconscionable advantage of a term designed to secure a particular outcome. If the term is not predominantly designed to secure B's performance but rather serves a different purpose, then that form of unconscionability does not arise. It is therefore relatively unsurprising that whilst the High Court of Australia had instead preferred an equitable explanation of the rule, the test it applies at this second stage of the inquiry seems in practice to be very similar to that applied in England."); See *127 Hobson Street Limited and Anor v Honey Bees Preschool Limited and Anor*, 2020 NZSC 53, Winkelmann CJ ("We are satisfied that the Court of Appeal was correct in the essential question it posed for itself in this case, drawing as it did on the decisions of the Supreme Court of the United Kingdom and the High Court of Australia. The test to be applied is as follows. A clause stipulating a consequence for breach of a term of the contract will be an unenforceable penalty if the consequence is out of all proportion to the legitimate interests of the innocent party in performance of the primary obligation. When we refer in this judgment to legitimate interests in performance, that includes an interest in enforcing performance or some appropriate alternative to performance. A consequence will be out of all proportion if the consequence can fairly be described as exorbitant when compared with those legitimate interests." at para 56).

¹¹⁷ See *White and Carter (Councils) Ltd v McGregor*, [1962] AC 413 (HL (Scot)); See *Cavendish Square Holdings BV v Makdessi*, *supra* note 116 at para 29.

“having the money”.¹¹⁸ In *White & Carter*, this was discussed in terms of interests arising under, or spoken to by, the contract,¹¹⁹ although the discussion of commercial or other wider interests in respect of validity of alleged penalties in the United Kingdom Supreme Court’s (UKSC) decision in *Cavendish Square Holdings BV v. Makdessi* is much the same.¹²⁰ The function or effect of the penalty doctrine in designating some clauses permissible and others penal on the basis of this notion of legitimacy is thus again similar, in that it stands as a bulwark against the extraction of economic “rent”, i.e., some undeserved advantage or benefit that would not have been obtained or maintained, even if the contract were performed perfectly, from their opposite contracting party or some third party indirectly.¹²¹ In this respect, it is not unlike those cases on Mitigation in which the costs of mitigation sought are disproportionate to what was needed to put matters right and, in that connection, the purpose of the penalty doctrine is also on all fours with Mitigation.¹²² The substance of both doctrines is to protect the purpose of contracts, and thus the purpose and justification for enforcing contracts, which, as discussed in Chapter I, is ultimately to promote mutual gain, not unilateral extraction or exploitation.¹²³

I note that my explanation of the penalty doctrine above is consistent with equity’s ethos of “fulfillment” with respect to its intervention in common law matters, and thus consistent with my explanation of Mitigation’s character as equitable. It is worth pointing out, though, that not everyone agrees that the jurisdiction to provide relief

¹¹⁸ *White and Carter (Councils) Ltd v McGregor*, *supra* note 119 at 431.

¹¹⁹ *Ibid.*

¹²⁰ *Cavendish Square Holdings BV v Makdessi*, *supra* note 116 at paras 145–146.

¹²¹ See Joseph F Brodley & Ching-to Albert Ma, “Contract Penalties, Monopolizing Strategies, and Antitrust Policy” (1993) 45:5 *Stanford Law Review* 1161–1213 at 1170 (“If the incumbent monopolist offers customers a long-term contract requiring customers who switch to a rival supplier to pay stipulated damages greater than the incumbent’s lost profit, a more efficient entrant is now disadvantaged despite its lower costs. Depending upon its costs, the entrant either loses much, if not all, of its expected profit or is excluded from the market altogether.”).

¹²² See e.g. *Darbishire*, *supra* note 6; See also *Ossory Canada Inc v Wendy’s Restaurants of Canada*, [1997] 36 OR (3d) 483 (ONCA).

¹²³ See Chapter I – Sections III.-IV.

from penalties is in fact equitable in character,¹²⁴ although all parties to the debate acknowledge the doctrine's equitable origin.¹²⁵ Australia unsurprisingly cleaves to the view that the jurisdiction to relieve from penal clauses is as equitable now as when it first arose,¹²⁶ whereas the UK has come down in favour of regarding the jurisdiction as having been absorbed into the common law.¹²⁷ Which of either of these is right based on the "correct" reading of English legal history is of course difficult to say, and on that point I venture no opinion. All that I can and will say is that as the law stands now, with the doctrine able to look through form to substance and relieve responsibilities arguably agreed freely in a procedural sense, gives the penalty doctrine a character and profile that is markedly more one than the other. As such, I am tempted to simply call a spade a spade.

B. Unconscientious bargains

Unconscionability, like fraud and impeachment, is a term of art in equity that appears to defy precise definition. Perhaps it is even fair to say that "unconscionable" amounts to little more than a pejorative.¹²⁸ For all of its inexactitude, though, it appears that courts are content to call unconscionability when they see it — albeit with varying

¹²⁴ See *Cavendish Square Holdings BV v Makdessi*, *supra* note 116 at para 42; See McGhee, *supra* note 28 ss 13–007 (The UKSC has held that the penalty doctrine has been subsumed into the common law, whereas the HCA has explicitly rejected this notion.); See *Andrews v Australia and New Zealand Banking Group Ltd*, *supra* note 116.

¹²⁵ See *Cavendish Square Holdings BV v Makdessi*, *supra* note 116 at para 4; *Andrews v Australia and New Zealand Banking Group Ltd*, *supra* note 116 at para 14.

¹²⁶ See *Andrews v Australia and New Zealand Banking Group Ltd*, *supra* note 116 ("There remains for consideration the further proposition in *Interstar* which, rather than acknowledging the concurrent administration in New South Wales [as elsewhere] of law and equity, appears to treat the penalty doctrine as having disappeared from equity by absorption into the common law action of *assumpsit*. This proposition should be rejected." at para 52).

¹²⁷ *Cavendish Square Holdings BV v Makdessi*, *supra* note 116 at para 42.

¹²⁸ See Paul Bennett Marrow, "Squeezing Subjectivity from the Doctrine of Unconscionability" (2005) 53:2 *Clev St L Rev* 187–224 at 188; See also Arthur Allen Leff, "Unconscionability and the Code. The Emperor's New Clause" (1967) 115:4 *University of Pennsylvania Law Review* 485–559 at 487 (Even codification in the Uniform Commercial Code appears to have been unable to rid the doctrine of its uncertainty.).

degrees of enthusiasm from jurisdiction to jurisdiction.¹²⁹ As such, I see unconscionability as a fact of legal life worth noting, since none of us has much choice but to contend with it from time-to-time, but I will not attempt to clarify what it means. Instead, I will simply make observations as to what it does — at least, that is, with respect to contracts, and in so doing, demonstrate that the function I ascribe to Mitigation is not so radical a reimagining at all.

Unlike the jurisdiction to provide relief from penalties, the jurisdiction to relieve parties from the consequences of unconscionable bargains is comparatively modern,¹³⁰ perhaps reflecting the relative novelty of promissory liability achieved by way of executory contracts in the context of English legal history.¹³¹ Far from England, the best statement of the doctrine — one that has been cited with approval in both Australia and New Zealand — appears to be the following passage from the opinion of Mr. Justice Davey in the British Columbia Court of Appeal’s 1965 decision in *Morrison v. Coast Finance Ltd.*:¹³²

“The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question

¹²⁹ See Heydon, Leeming & Turner, *supra* note 117 ss 16–015 (“There is a well-developed jurisdiction in equity, independent of the principles as to undue influence, to set aside catching and unconscientious bargains. The English cases are centred in the nineteenth century and impose thresholds to relief markedly higher than do the Australian decisions. But in Australia the jurisdiction still flourishes; as Lord Walker observed with reference to the fourth edition of this, the doctrine is ‘particularly vigorous in Australian jurisprudence’.”); See Marrow, *supra* note 130 at 187–188 (“Different results from different judges are what can reasonably be expected absent an agreed upon definition.” The issue takes on the character of the debate some decades ago around defining pornography. Recall the famous statement by Mr. Justice Stewart who acknowledged defeat in arriving at an actual definition of pornography but who nevertheless declared categorically: “I could never succeed intelligibly in doing so. But I know it when I see it.””).

¹³⁰ Whereas the penalty doctrine can be traced back as far as the reign of Henry VIII, the authorities underpinning the leading modern decision on unconscionability are comparatively more recent; See McGhee, *supra* note 28 ss 13–006 (“It has been said that the equitable jurisdiction can be traced back at least to Sir Thomas More’s chancellorship...); See *Morrison v Coast Finance Ltd*, (1965) 55 DLR (2d) 710 (BCCA) (The leading modern case on the unconscionability doctrine.); See *Earl of Aylesford v Morris*, (1873) LR 8 Ch 484 (CA); See *Fry v Lane*, (1888) 40 Ch D 312.

¹³¹ See Theodore Frank Thomas Plucknett, *A concise history of the common law*, 5th ed (London: Butterworth & Co, 1956) at 627–656 (It must be remarked that the development of a law permitting and enforcing executory contracts has come about only slow in the place we would today call England.).

¹³² *Morrison v. Coast Finance Ltd.*, *supra* note 132 at 713.

whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; **a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger.** On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. 484, per Lord Selborne, L.C., at p. 491.” [Emphasis added]

The statement above, though seminal, is, as already alluded to at the beginning of this section, somewhat opaque. We are left somewhat unsure, for instance, as to what makes the use of power unconscientious. For surely, not every act by the “big concern” ought to be held to be exploitative of the “little man”, otherwise any concern of any size beyond the mom-and-pop shop would surely have to be told that its business must stop.¹³³ Yet somehow, the doctrine persists, and rightly so, because there are inevitably instances in which a vulgar act of power by the “big man” cannot be allowed to stand, as in *Morrison* itself, where the defendant finance company knowingly accepted a mortgage from an unsophisticated pensioner as security for lending to a third-party acquaintance barely known by her.¹³⁴ To do otherwise would inarguably call the very enforcement of

¹³³ The nature of the problem is well illustrated by the comparably vexed issue of regulating the operation of exclusion clauses, which judges detest, but cannot do away with; See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*, [1983] QB 284 (CA), Lord Denning MR (“None of you nowadays will remember the trouble we had — when I was called to the Bar — with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of ‘freedom of contract.’ But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, ‘Take it or leave it.’ The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, ‘You must put it in clear words,’ the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.” at 298-297); See Maharaj, *supra* note 47 at 635–636 (“Exclusion or exception clauses are a fact of not only modern contract law, they are a fact of life generally. They are to be found in contracts ranging from simple bailments to the most sophisticated technical and scientific endeavours. In the absence of an alternative they are simply indispensable. The potential cost of providing some of the most basic of services on a commercial scale would be grossly prohibitive without them. Yet among common commercial terms, they are among those subject to the most scrutiny and opprobrium.”).

¹³⁴ *Morrison v. Coast Finance Ltd.*, *supra* note 132 at 712–714.

contracts into question, and thus the doctrine serves as a divider between exchange and stark exploitation although, admittedly, an imperfect one.¹³⁵ The doctrine thus promotes the purposes of contract identified in Chapter I in much the same way that I argue that Mitigation does, which merely goes to show that recognizing a similar role for Mitigation would not be all that new.

C. Set-off

Set-off has a fairly complex history involving statutory reform at common law beginning during the reign of George II, and prior and parallel development in Chancery.¹³⁶ There are said to be four categories of set-off in equity stemming from the latter set of developments,¹³⁷ but of these, only that which the learned authors of Meagher, Gummion & Lehane term the fourth category — that is, “true equitable set-off” — is relevant here.¹³⁸ The other categories of set-off in equity are to some greater or lesser extent parallel developments mirroring the availability of set-off under the

¹³⁵ See *Blomley v Ryan*, (1956) 99 CLR 362 (HCA), Fullagar J (“To the common law the transaction in question might be void or voidable, but the primary question was as to the reality of the assent of the person resisting enforcement of the contract. Equity traditionally looked at the matter rather from the point of view of the party seeking to enforce the contract and was minded to inquire whether, having regard to all the circumstances, it was consistent with equity and good conscience that he should be allowed to enforce it.” at 401-402).

¹³⁶ See *Ex parte Stephens*, (1805) 11 Ves 24 (Ch), Lord Eldon LC (“As to the doctrine of set-off, it is not necessary to say much. This Court was in possession of it, as grounded upon principles of equity, long before the law interfered. It is true, where the Court does not find a natural equity, going beyond the statute the construction of the law is the same in equity as at law. [Stat. 2 Geo. II. c. 22; 8 Geo. II. c. 24. As to Bankrupts, stat. 6 Geo. IV. c. 16, s. 50.] But that does not affect the general doctrine upon natural equity.” at 27); See Heydon, Leeming & Turner, *supra* note 117 ss 39–030 to 39–045 (Lord Eldon’s opinion notwithstanding, evidence of an equitable jurisdiction to grant set-off prior to the Georgian statute of 1728 is hard to find, and what evidence there is, is thin. Nonetheless, an independent equitable jurisdiction to grant set-off is accepted.).

¹³⁷ See Heydon, Leeming & Turner, *supra* note 117 ss 39–050.

¹³⁸ See *Rawson v Samuel*, (1841) Cr & Ph 161 (Ch), Lord Cottenham LC (“We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary’s demand...” at 178); See also Heydon, Leeming & Turner, *supra* note 117 ss 39–050 to 39–055 (“The fourth kind of equitable set-off is the kind which equity recognized wherever ‘the party seeking the benefit of it can show some equitable ground for being protected against his adversary’s demand’. This is the true equitable set-off, the most interesting, and the most distinctively equitable of all branches of the doctrine.”).

Georgian statutes and their successors, but are only justified and available accordingly and not according to principles of equity per se.¹³⁹

In contrast to set-off under statute and its equitable analogues, true equitable set-off is said to arise, as per Lord Cottenham LC, quite simply wherever “...the party seeking the benefit of it can show some equitable ground for being protected from his adversaries’ demand.”¹⁴⁰ The truth is somewhat more complicated than the classic statement from the Lord Chancellor would suggest, however, despite the fact that true equitable set-off is free of the technical requirements applicable to set-off at common law.¹⁴¹ The principle cause of the doctrine’s complexity in equity is that the standard to be met for an alleged ground to raise “an equity” in the defendant’s favour (i.e., give rise to the claimed set-off) is both exacting and ill-defined.¹⁴² What is said to be required is that the defendant’s cross-claim must go to the root or “impeach” the title of the plaintiff

¹³⁹ See Heydon, Leeming & Turner, *supra* note 117 ss 39–050.

¹⁴⁰ *Rawson v Samuel*, *supra* note 140 at 178; See also Heydon, Leeming & Turner, *supra* note 117 ss 39–060.

¹⁴¹ See *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc*, [1978] QB 927 (CA), *aff’d* [1979] AC 757 (HL (Eng)), Lord Denning MR (“In making the distinction between set off and cross-claim, the courts of common law had their own special rules. For instance in a series of cases they formulated rules saying when there could be an abatement of rent or an abatement of the sums due for work and labour done, or an abatement of the price of goods sold and delivered. So that the defendant could make deductions accordingly. But the courts of equity, as was their wont, came in to mitigate the technicalities of the common law. They allowed deductions — by way of equitable set off — whenever there were good equitable grounds for directly impeaching the demand which p the creditor was seeking to enforce: see *Rawson v Samuel* [1841] Cr. & Ph. 161, 178–179, per Lord Cottenham L.C. These grounds were never precisely formulated before the Judicature Act 1873. It is now far too late to search through the old books and dig them out.” at 974); See also *Coba Industries Ltd v Millie’s Holdings (Canada) Ltd*, (1985 20 DLR (4th) 689 (BCCA).

¹⁴² See Heydon, Leeming & Turner, *supra* note 117 ss 39-060(g).

to their claim.¹⁴³ The term “impeach” in particular has received much criticism as a term of art,¹⁴⁴ but appears to remain in use, and in my view rightly so.¹⁴⁵

Given that the defendant’s cross-claim need not be liquidated, already litigated, nor even be against the plaintiff directly, the necessity of some threshold restriction to ensure that any set-off raised is appropriate is readily apparent. In that light, the virtue of impeachment — particularly as it pertains to any attempt to raise set-off in answer to a claim in contract — is that it confines equity’s intervention to those cases in which the “claim of right” made by the plaintiff is in some sense illusory.¹⁴⁶ That is to say the claim may have form but lacks in substance, and thus lacks merit, particularly if it sounds in contract. The best example of this for readers is most probably *Piggott v. Williams*,

¹⁴³ See *ibid* (“One ingredient of set-off in equity is that the defendant’s cross-claim must actually go to the root of, or be essentially bond up with, or ‘impeach’, the title of the plaintiff...”); See also *Home Hardware Stores Limited v R Home Supply Centre Ltd*, 2015 BCCA 500, Newbury JA (“As we have seen, however, the question of equitable set-off depends not only on the raising of a triable issue, but also on whether the claims advanced by the defendant go to the ‘root’ of the foreclosure action.” at para 16); See also *Property Ventures Investments Ltd v Regalwood Holdings Ltd*, [2010] NZSC 47, Blanchard, McGrath and Wilson JJ (“In *Grant v NZMC Ltd*, Somers J, for the New Zealand Court of Appeal, concluded an account of equitable set-off which acknowledged Australian criticism of the approach taken in English cases since *Hanak v Green*, by stating the following test: ‘The principle is, we think, clear. The defendant may set-off a cross-claim which so affects the plaintiff’s claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant’s claim calls into question or impeaches the plaintiff’s demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract.’” at para 68).

¹⁴⁴ See Heydon, Leeming & Turner, *supra* note 117 ss 39–075 (“The third occurrence has been the formulation of new tests nude of the impeachment requirement... These discretionary tests are said to have to forebears, Lord Denning MR’s judgment in the *Molena Alpha* case being one. However, it is far from clear that even Lord Denning MR would have favoured either of these new sorts of test.”).

¹⁴⁵ See *ibid* (“Lord Denning MR said that claim and counterclaim must arise out of the same transaction if there is to be an equitable set-off; the cross-claim had to ‘impeach the plaintiff’s demands’. Lord denning MR also spoke of the search for manifest injustice as necessary to warrant the application of equitable set-off; but he saw this manifest injustice as a modern rewording of the impeachment requirement. Whatever the remaining difficulties in Lord Denning MR’s formulation and others which have to contributed to this third occurrence, it is submitted that none of the cases claimed to support these new tests passes scrutiny.”).

¹⁴⁶ See e.g. *Morgan & Son Ltd v Martin Johnson & Co Ltd*, [1949] 1 KB 107 (CA) (The plaintiff brought a claim against the defendant for unpaid storage charges due for the storage of certain vehicles. The defendant was permitted to set-off damage for loss sustained by reason of the plaintiff’s breach of duty as a bailee or breach of contract which resulted in the theft of one of the vehicles stored.); But see Heydon, Leeming & Turner, *supra* note 117 ss 39–070 (The learned authors criticize the holding in *Martin* on the basis that the plaintiff’s breach of duty or contract only impeached the plaintiff’s claim for storage of the vehicle that was stolen, not all of the vehicles. This appears correct in principle given that it is not enough that the parties respective claims merely arise from the same contract, as per Lord Cottenham LC in *Rawson v Samuel*. However, whether set-off is permitted against the entire claim for storage charges, or only the storage charges for the stolen vehicle, the point remains that equity will not permit of the claim where the thing that supposedly must be paid for was not in fact provided.).

wherein a defendant sued by his solicitor for unpaid fees was permitted to set off the value of said fees because they would never have been incurred but for the prior negligence of the plaintiff's solicitor.¹⁴⁷ To clarify how it is that the solicitor's prior negligence satisfies the requirement, and how impeachment justifies set-off, it can be said that the impeachment requirement bears analogy to the maxim that "no action arises from a dishonourable cause",¹⁴⁸ if, that is, I was correct in Chapter I to conclude that the ultimate purpose of contract is to promote the welfare of society. For if no contract for the procurement of a crime can be enforceable on the assumption that all illegality is contrary to the public good,¹⁴⁹ then *a fortiori*, there is no public interest in permitting the plaintiff's claim without credit to the defendant for the plaintiff's breach of duty, as society presumably will not be enriched by vindication of a claim that is intrinsically

¹⁴⁷ *Piggott v Williams*, (1821) 6 Madd 95 (KB).

¹⁴⁸ Beale, *supra* note 6 at 16–041 (The maxim *ex turpi causa non oritur actio* forbids claims in contract that are founded in compacts that contravene the public interest. Its application is restrictive, and it is generally only applicable to matters that are prohibited by the public law of the state [i.e. the criminal law] and a small number of non-criminal acts that engage the public interest in the same way. Dishonesty, and corruption are examples of this latter category.).

¹⁴⁹ See *Holman v Johnson*, (1775) 1 Cowp 341 (KB), Lord Mansfield ("The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." at 343); But see Waddams, *supra* note 7 at para 577 (Note, modern attitudes have shied away from finding every agreement that contravenes some statute automatically invalid. But, this is simply a reflection of the fact that the statute books have expanded enormously since Mansfield's day, and that the maxim may now be far too over inclusive if allowed to apply literally to every inadvertent infraction.); See also *Hall v Hebert*, [1993] 2 SCR 159, McLachlin J (as she then was) ("My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand. It follows from this that, as a general rule, the *ex turpi causa* principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation, and will not seek damages as profit for illegal or immoral acts. As to the form the power should take, I see little utility and considerable difficulty in saying that the issue must be dealt with as part of the duty of care. Finally, I see no harm in using the traditional label of *ex turpi causa non oritur actio*, so long as the conditions that govern its use are made clear." at 169-170).

tainted. At least that is up to the extent to which the plaintiff's claim is tainted by said breach, if no credit is granted to the defendant.¹⁵⁰

If the above is correct, the function and purpose of equitable set-off vis-à-vis contract is (much like the prohibition on penalties or unconscionable bargains) to prevent unmeritorious insistence on strict contractual rights — rights whose enforcement would be in substance inconsistent with the larger justification for enforcing contracts at all, at least to the extent of the defendant's cross-claim. An apt example of set-off operating in this way with respect to a concurrent, as opposed to antecedent, breach of duty is the 1970 decision of the Alberta Supreme Court Appellate Division (as it was then) in *Kaps Transport Ltd. v. McGregor Telephone & Power Construction Co Ltd.*¹⁵¹ In *Kaps*, the Appellate Division held that the defendant was entitled to set off damage allegedly done to its goods by the plaintiff carrier against the haulage fees sued for by the plaintiff.¹⁵²

I note that the authors of Meagher, Gummow & Lehane question the correctness of the decision in *Kaps*,¹⁵³ but in my view, even if the parties' primary rights under the contract were independent, and the plaintiff's right to payment was not conditional upon **satisfactory** performance, the plaintiff's title is nonetheless impeached because the plaintiff's title would not have ripened into an enforceable claim¹⁵⁴ but for performance,

¹⁵⁰ See Heydon, Leeming & Turner, *supra* note 117 ss 39–070 (The learned authors note *Morgan & Son Ltd. v. Martin* for its correct statement of principle, but inaccurate application because the Court of Appeal allowed the defendant in a claim for storage charges to set-off the damage from the loss of the one the vehicles against the storage charges owing for all of the vehicles. The learned authors are of the view, as am I, that only the storage charges for the vehicle stolen were liable to have the damages for the loss set off against them.); See *Morgan & Son Ltd v Martin Johnson & Co Ltd*, *supra* note 148.

¹⁵¹ *Kaps Transport Ltd v McGregor Telephone & Power Construction Company*, (1970) 13 DLR (3d) 732 (ABCA) [*Kaps Transport*].

¹⁵² *Ibid* at 736.

¹⁵³ Heydon, Leeming & Turner, *supra* note 117 ss 39–055 (I note that the learned authors contrast *Kaps* with *Ping v Pearce Paradise Pty Ltd*, [1982] 2 BPR 9419 in which the defendant purchaser was permitted to set-off against the purchase price damage incurred because of the vendor's breach of their obligation to keep the property in a reasonable state of preservation between contract and completion. The only difference between the two that comes to mind is that the plaintiff vendor in *Ping* appears to have had a specific obligation to preserve property, whereas the same is perhaps only implicit in a contract of carriage. If this is in fact the distinction, I am not sure if it is one with a difference.).

¹⁵⁴ Had *Kaps* failed to perform, a failure of consideration would justify rescission; See *Cole v Pope*, (1898) 29 SCR 291; See also *Guinness Mahon & Co Ltd v Council of Royal Borough of Kensington & Chelsea*, [1999] QB 215 (CA).

which performance in this case coincided with the breach of duty that damaged the defendant company's goods. Further, it would be inconsistent with the purposes of contract already discussed for defective performance to nonetheless result in full payment unless, and only if, the risk of said defective performance and damage had been excluded by the contract, as well as inconsistent with equity's preference for substance over form — the independence of the payment and performance obligations being somewhat in the nature of a technicality in the circumstances. As such, I argue that such applications of equitable set-off demonstrate similar qualities to those that I argue are exhibited by Mitigation, particularly with respect to technical objections, and thus demonstrates the general consistency of my proposed equitable approach for Mitigation with other equitable interventions in contract.

D. Equitable Estoppel

Equitable estoppel may be a somewhat vexed example for the purposes of proving my point, given the divergence of opinion between the poles of the common law world with respect to its standing as either sword or shield.¹⁵⁵ For present purposes, I think it is sufficient to make my point, even if one accepts only the lower watermark for the doctrine's significance and regards it as a purely "defensive" doctrine. Mitigation itself,

¹⁵⁵ Australia has pioneered the development of promissory estoppel (now equitable estoppel) as an independent cause of action, whereas the UK has demurred on the development of estoppel as a sword, and Canada appears uncertain; See McGhee, *supra* note 28 ss 12–026; See Heydon, Leeming & Turner, *supra* note 117 ss 17–270 to 17–275 (The learned authors appear to prefer the view that the availability of promissory estoppel as a sword in Australia is ultimately consistent with the view propounded by Lord Denning MR in *Texas Commercial*. That is to say that promissory estoppel may supply ingredients missing from a cause of action, such as a claim in contract ala *Waltons Stores*, but it is not a cause of action in itself. If this is correct, then, to use the *Waltons Stores* example, whatever rights arise for the party invoking the estoppel arise from the putative contract, and not the estoppel per se. Though the authors are of great authority, it appears that they are in the minority on this point, as the authorities they discuss demonstrate. Further, the learned authors' view is difficult to reconcile with the measure of relief provided for equitable estoppel, which starts with the value of the "promise" but will adapt according to the minimum equity required if these two are significantly out of line. It is not clear how the doctrine could have its own measure of relief, as distinct from that applicable in contract for instance, if the estoppel is not the source of the parties "right" in the case.); See Krish Maharaj, "An Action on the Equities: Re-Characterizing Bhasin as Equitable Estoppel" (2017) 55:1 *Alta L Rev* 199–224 (Maharaj provides an account of the difference between estoppel in Australia and Canada, and the operation of estoppel as sword and not shield.); See *Bhasin v Hrynew*, [2014] SCC 71 at para 88 (Whether promissory estoppel is available as a cause of action in Canada remains uncertain.).

after all, affords no cause of action either.¹⁵⁶ Likewise, the ultimate purpose of better fulfilling the function of contract is also common to both. Although, in light of the markedly different function of equitable estoppel, further exposition below is likely necessary in order to explain how this is so.

Depending on one's view of Lord Denning's work in promoting the doctrine, the modern genesis of the doctrine can be traced to either *Hughes v. Metropolitan Railway*¹⁵⁷ or His Lordship's decision as Denning J in *Central London Property Trust v. High Trees*.¹⁵⁸ Either way, the effect of the doctrine as originally conceived is captured well in the following passage from the latter case:¹⁵⁹

“There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases of promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the courts have said these promises must be honoured... Although said by the learned judges who decided them to be cases of estoppel, all these cases are not estoppel in the strict sense. **They are cases of promises which were intended to be binding, which the parties making them knew would be acted on and which the parties to whom they were made did act on ...** In each case the court held the promise to be binding on the party making it, **even though under the old common law it might be said to be difficult to find any consideration for it.** The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases of *Hughes v Metropolitan Ry Co* (1877) (2 App Cas 439), *Birmingham & District Land Co v London & North Western Ry Co* (1888) (40 Ch D 268), and *Salisbury v Gilmore* ([1942] 1 All ER 457), **afford a sufficient basis for saying that a party will not be allowed in equity to go back on such a promise.**”

¹⁵⁶ Waddams, *supra* note 7 at para 758.

¹⁵⁷ *Hughes v Metropolitan Railway Co*, (1877), 2 App Cas 439 (HL (Eng)).

¹⁵⁸ *Central London Property Trust Ltd v High Trees House Ltd*, [1947] KB 130 [*High Trees*].

¹⁵⁹ *Ibid* at 134–135.

On one reading, the foregoing passage could be said to be inconsistent with the substance of contract given that it is contrary to the spirit of free exchange underpinning contract as an institution to give effect to promises that are unsupported by consideration. That much certainly is made clear by the majority of their Lordships in *Jorden v. Money*, who had concluded authoritatively, prior to *Hughes* itself, that in English law, enforceable promises must be contracts or nothing.¹⁶⁰ This is perhaps why the effect or function of the doctrine was not framed in this way by earlier decisions, including *Hughes*, but the correctness of the passage quoted above is hard to deny. However, what is not correct, in my view, is the suggestion that such enforcement is in fact contrary to the substance and spirit of contract.¹⁶¹ On the contrary, if one considers the underlying purpose of consideration merely as a means for determining which promises are *meant* to be enforced, and thus *ought* to be enforced, it is consistent with the spirit of the rule to enforce promises that were *meant* to be relied on, irrespective of whether technical compliance with the consideration doctrine indicates that it ought to be.¹⁶² After all, consideration is not an *end* as far as contract law is concerned but is only a means, and with this in mind, promissory estoppel — even in its most limited form — appears to be

¹⁶⁰ *Jorden v Money*, (1854) 5 HLC 185 (HL (Eng)).

¹⁶¹ *Ibid* at 223–224.

¹⁶² See Smith, *supra* note 9 at 216–217 (“Consideration is normally established not by actually doing something [i.e., by relying], but rather by merely promising to do something. Nor, finally, can the consideration rule be explained on the grounds of fairness. The rule is satisfied regardless of the values of what is exchanged—the promise of a mere peppercorn is sufficient. Furthermore, assuming that a gratuitous promise is freely and seriously made, there is nothing unfair in permitting a promisee to sue upon such a promise. The promisor is being asked to do no more than what she promised to do.... The best known justification for the consideration rule supposes that the rule has an essentially formal function. In this view, the rule is justified on similar grounds to those that justify writing requirements and other form requirements. Specifically, the consideration rule serves the same cautionary and channelling functions that [as we saw above] formalities often serve.”); See also Harrison, *supra* note 87 at 129–133 (The peppercorn theory of consideration, which indicates that the court is not concerned with adequacy of consideration, suggests that consideration is really only important as evidence of consent to the transaction.).

no more than an alternative for the fulfilment of that same end.¹⁶³ As such, at least in its defensive guise, promissory estoppel — like the prohibition on penalties and other doctrines discussed above — can be understood as facilitating by its function the ultimate purpose of contract.

E. Conclusion on equitable doctrines

What the foregoing discussion of the four equitable doctrines herein considered demonstrates is that there is no meaningful novelty in the suggestion that equity comes to fulfill the common law of contract, particularly when contracts are sought to be enforced, except perhaps in my explanation of them as doing so. Likewise, I do not see my explanation of Mitigation in these terms as radical in substance, since I am only describing what Mitigation already does. Indeed, the novelty herein is only the form of the narrative that I prescribe to bridge the gap between the facts of the Mitigation cases that I have considered and their outcomes. Further, it is perhaps novel to have described Mitigation as explicitly equitable given its accepted common law character, but it is by no means without support from those who ascribe an equitable character to its foundations, of which the Supreme Court of Canada is one.¹⁶⁴ As such, my innovation if anything is

¹⁶³ If it were otherwise the law would take some interest in adequacy of consideration, but it clearly does not; See Waddams, *supra* note 7 at para 122; See also Harrison, *supra* note 87 at 130, 170 (“The baseline rule is that, as long as there is consideration, the matter of ‘adequacy’ of consideration is not at issue. This is the so-called ‘peppercorn’ theory of consideration. The explanation for this, in economic terms, is that an assessment of relative amounts of consideration involves making an ‘interpersonal comparison of utility.’ In effect, to intervene when consideration appears to be lopsided amounts to an effort to compare the increase in utility experienced by one party with the increase in utility experienced by the other party. Such comparisons cannot be made... As noted earlier, the consideration requirement itself lowers the costs of determining whether parties did agree to an exchange. In the 20th Century courts increasingly enforced gratuitous promises. In other words, the consideration requirement was put aside in some cases. There are solid economic arguments in favor of this trend.”).

¹⁶⁴ See *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, La Forest J (“I have no doubt that policies underlying concepts like remoteness and mitigation might have developed from an equitable perspective.” at 580); See also James M Fischer, “Does an Insured Have a Duty to Mitigate Damages When the Insurer Breaches” (2013) 20:1 Conn Ins LJ 89–118 at 89, n 1 (“Sutherland identified the origins of the mitigation principle as being equitable in nature, although it is not clear whether the reference was to equity jurisprudence or to general concerns for fairness. 1J.G. SUTHERLAND, THE LAW OF DAMAGES §149 [3d ed. 1903]”); See also Larry A DiMatteo, “Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law” (1998) 33:2 New Eng L Rev 265–364 at 307 (“The mitigation principle can be viewed as foundational to an equitable conception of contract.”).

to provide a superior explanation of what Mitigation is and does, and thus, most importantly in light of law's character as a prediction,¹⁶⁵ what it *ought* to do. This brings us finally to the apotheosis of my adventure, which is to draw together all that has been said up until now and to explain *when* Mitigation should/will act.

VI. When does it apply?

Separating what, how, why, and when from each other for the purposes of the discussion in this chapter has been somewhat difficult at times. It is likely evident, for instance, that to explain what Mitigation “is” raises by necessary implication what it “does”, which raises how it “does it”, which in turn raises *when* exactly it does anything. Nonetheless, I have hitherto kept these questions distinct in order to focus as clearly as I can on each particular point. Here, though, we have reached the denouement of the chapter, where I will draw together the many threads of thought and observation present in this chapter and the one preceding it to spell out an explicit framework for predicting and understanding the appropriate application of Mitigation in any given case.

Before leaping into the proposed framework, a few foundational propositions must be reiterated or made plain. The first is that Mitigation is effectively equitable as a consequence of its effect in operation, and for the purposes of my work herein, I explicitly treat it as such. The second, which flows from the first, is that while Mitigation operates as an immunity in some respects, and while any party may plead it in reply in the appropriate circumstances, relief is discretionary and thus decided on a case-by-case basis according to the equities as between the parties and the other maxims of equity applicable. Together, these lead to the conclusion that “when” Mitigation will intervene is the most complicated and fact-dependent of the four aforementioned questions I have set out to address in this chapter, which is why I have chosen to address it last and why I

¹⁶⁵ Oliver Wendell Holmes Jr. was the first to describe the law as a prediction of what a court will do in any given case, and in so far as contract is concerned, this is a compelling description; See Oliver Wendell Holmes, “The Path of the Law” (1897) 10:8 Harvard Law Review 457–478 at 458 (“I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law...”).

will address it on the basis of the cascading factual questions that will determine the doctrine's application in any given case. I would stress, as I have said before, that despite the real and apparent fact-dependency of Mitigation, overall at its core, Mitigation is a question of allocation. Whether the *res* in question is loss or gain, it is important to remember that whatever has happened *has happened*, and that some party or the other must be the bearer or beneficiary thereof. In this picture, Mitigation's role is to challenge and change the allocation that would otherwise arise at common law at the point of intersection between contract and damages, where or when the equities demand as much, but we should remember that, much as in tort, all losses must ultimately be borne by the public, and that little will be gained for the commonweal if we unbearably add to the cost and uncertainty of process by treating equitable jurisdiction as an entreaty to intervention according to our whims.

A. What is the nature of the loss sued for?

As discussed in Chapter III, there are broadly speaking two overarching kinds of loss that a court may have to grapple with when considering claims for breach of contract. These are accrued on one hand and realized on the other.¹⁶⁶ Accrued losses, we will recall, are those that at least in theory arise as consequence of the breach, but have not yet been suffered as an out-of-pocket cost. As such, they are recognized as having occurred, but may have not yet crystallized or caused any diminution in the plaintiff's dominium, i.e., may not have actually left the plaintiff tangibly "worse off". In contrast, realized losses are those that have been suffered as out-of-pocket expenses, including costs of substitute performance or remediation for harm caused. Mitigation's response to incurred or accrued losses may in some circumstances be similar, but given that the reasonable responses that may be expected where losses differ in character, it is important to distinguish between them, and so this juncture is the first split, as it were, in the decision tree.

¹⁶⁶ See Chapter III – Section II.B.3.

1. Loss is accrued or accruing, but not yet realized

Above, I referred to the distinction between accrued and realized losses as the first major split in the “decision tree” when considering the application of Mitigation. The second is the distinction between claims for damages that are direct or compensatory, and those that are consequential. I note that at first blush, the significance of the distinction between the two may not be obvious, especially since the present case law has often been inadvertent as to the significance of any such difference. Given the way that I have framed and explained the doctrine’s nature as equitable, though, the distinction becomes conspicuous because if Mitigation is to grant a party relief, it must exempt the relevant party from the applicable rule of recovery, and do so on the basis of an unmeritorious insistence on said rule. What is more, as I have already discussed above, is given that the definition of unmeritorious insistence depends upon the underpinnings of any given rule, any alleged unmeritorious insistence must by necessity be considered in light of the spirit of the rule invoked. As such, given the difference in purpose between the rule in *Robinson* on the one hand, and that in *Hadley* and its successors on the other, it is valuable in my view to again split the inquiry one level further.

a. Accrued compensatory loss/damage

Earlier in section IV, I discussed how Mitigation accomplishes its ends, and explained my theory that it works by way of expanding or curtailing the rules of damages that govern the translation of primary rights in contract (i.e., rights to actual things or performance) into secondary rights (i.e., damages in lieu of the primary right foregone). Of these rules, the first is of course the rule from *Robinson* which provides that following a breach of contract, the plaintiff is to be put “... so far as money can do it ... in the same situation, with respect to damages, as if the contract had been performed.”¹⁶⁷ As

¹⁶⁷ *Robinson v. Harman*, *supra* note 53 at 855.

discussed, there is arguably more than one way to interpret this statement, but of the interpretations possible, it is the measure of the plaintiff's expectation (i.e., the value of the benefit promised), called the "Expectation Measure", that has come to be considered canon and the most apt economic expression of Parke B's dicta.¹⁶⁸ As also explained above in section IV.B, there are circumstances in which Mitigation will shift the application of the rule from *Robinson* away from the Expectation Measure towards one of the two alternative measures discussed; namely, the Necessary Minimum Measure and the Hypothetical Minimum Measure. Above, I explained *how* exactly Mitigation does this. Below, I will explain *when* it will do so with respect to each. In short, as we will see, the shift toward one of these two alternative measures occurs, and is right to occur, in circumstances where to apply or insist upon the Expectation Measure would be to interpret the rule from *Robinson* literally according to its letter, but not in accordance with its spirit.

- i. Has the plaintiff acted, or have they been bettered by subsequent events?

In circumstances where a plaintiff has entered into a subsequent transaction in relation to the subject matter of the contract following the breach, taken other post-breach steps in relation to the same, or has perhaps simply gotten on with life, where the acts in question have bettered the plaintiff's position, it will or should be asked whether these acts have in any way mitigated the plaintiff's loss. By now it should be clear that this is not the straightforward factual enquiry that it is presented as, nor indeed as the way the question itself, read literally, would tend to imply, given that "mitigation" is also understood as an act, and that actions are generally understood as being objectively

¹⁶⁸ See Smith, *supra* note 9 at 410; See also Fuller & Perdue, "Reliance Interest in Contract Damages", *supra* note 58 at 410; See also Edelman, *supra* note 58 at 24–003.

ascertainable as having or having not happened.¹⁶⁹ This does explain, however, how there can be a distinction between subsequent actions/transactions in relation to the same matter as the original contract that are treated as accountable in mitigation (i.e., consequent) and those that are not (i.e., collateral). Only a consideration of the cases themselves can help to explain the basis for such a distinction.

Before delving into the decisions themselves, I would note that the defining features of decisions in which courts have concluded that subsequent actions/transactions were consequent, and thus accountable as acts of mitigation, or collateral and thus not, have changed over time and are sometimes unclear, but in my view become more apparent if we bear in mind what I have already said with respect to Mitigation being fundamentally a question of allocation. In this sense, we can understand that what is to be decided by the relevant decision-maker is not whether an act of Mitigation has occurred, but instead whether what has occurred *ought* to be seen as mitigation. If this is kept in mind, then many of the challenges associated with a mechanistic approach to responsibility and the inevitable misadventures this leads to with respect to determining “cause” can be avoided. Instead, all we need to concern ourselves with, as the cases generally appear to, if one peeks behind Mitigation’s current juristic curtain, is whose claim to the relevant gain or betterment is the stronger.

To determine the relative strength of the parties’ competing claims to whatever betterment or gain has arisen, the leading decisions tend to indicate that the enquiry begins and ends with the author of the actions giving rise to the gain, i.e., the plaintiff. Two apt examples of what I mean are provided by the English Court of Appeal decision in *Hussey v. Eels*¹⁷⁰ and the decision of the Canadian Federal Court – Appellate Division in *Redpath Industries Ltd. v. Cisco (The)*.¹⁷¹ The facts of *Hussey* have already been

¹⁶⁹ JA Simpson & ESC Weiner, *Oxford English Dictionary*, (Oxford: Oxford University Press, 2000) sub verbo “mitigation” (“The action of mitigating or moderating; the fact or condition of being mitigated; an instance of this; spec. abatement or relaxation of the severity or rigour of a law, penalty, etc.; extenuation or palliation of an offence, fault, etc.; abatement or minimization of the loss or damage resulting from a wrongful act.”).

¹⁷⁰ *Hussey*, *supra* note 16.

¹⁷¹ *Redpath*, *supra* note 83.

canvassed in great depth in Chapter III, but I will recap each case below before drawing out the relevant themes evident in each.

As readers will recall, the Husseys were a couple who purchased a home from their then-friends, the Eels, only to later find that the Eels has misrepresented the state of the property by failing to disclose the existence of subsidence in the foundation of the house.¹⁷² Following that discovery, the Husseys commenced an action seeking damages for negligent misrepresentation,¹⁷³ but also took steps to address the problem that they otherwise could not afford to fix¹⁷⁴ by first building a new dwelling in the then-garden,¹⁷⁵ and obtaining planning permission for a further building on the site before selling the property to a developer.¹⁷⁶ At trial, the Husseys' redevelopment and sale of the property predictably raised the question as to whether the resale of the property in question, at a profit in excess of their assessed loss, had effectively mitigated their loss arising from the Eels' negligence.¹⁷⁷ The court at first instance concluded that it had,¹⁷⁸ but as we will recall, Lord Justice Mustill (as he then was) for the Court of Appeal held that the Husseys' subsequent transaction was collateral rather than consequent.¹⁷⁹

Mustill LJ's articulate major premise in reaching his conclusion was that the Husseys' actions following discovery of the subsidence did not form part of a "continuing" transaction beginning with (or including) the breach, and that the Husseys had not unlocked the development value of the land for the Eels' benefit.¹⁸⁰ With respect

¹⁷² *Hussey*, *supra* note 16 at 227, 230.

¹⁷³ *Ibid* at 230.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid*.

¹⁷⁶ *Ibid*.

¹⁷⁷ *Ibid* at 231–232.

¹⁷⁸ *Ibid* at 231.

¹⁷⁹ *Ibid* at 241.

¹⁸⁰ *Ibid*, Mustill LJ ("It seems to me that when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception." at 241).

to the continuity of the Husseys' actions, it is true that the redevelopment efforts did not begin immediately, and that the Husseys did in fact live in the original dwelling house on the land for a period of time before taking any steps.¹⁸¹ Further, it is also true that the Husseys' loss was arguably fully accrued, and bore some similarity to that of the plaintiff in *Jamal v. Moolla Dawood, Sons & Co*, wherein the Privy Council had held that in sale cases, a line must be drawn after the breach, after which further gains or losses will not be accountable with respect to claims for direct loss.¹⁸² However, as I have already discussed, these premises are somewhat problematic.¹⁸³ First, the resale at a relatively higher value arguably had the effect of preventing the accrued but unrealized loss from ever actually occurring; and second, intent to benefit the defendant is likely to almost always be absent, but Mitigation has always operated irrespective of such intentions. As such, I argue that the reasons given in *Hussey* cannot be taken as indicative of its true ratio.

Redpath, which coincidentally cited *Hussey* on the subject of accrued versus accruing losses, was a decision on materially different facts, with one prominent similarity:¹⁸⁴ namely, that the loss claimed for arguably accrued all at once and was then settled, if unrealized. The loss in question arose in relation to a cargo of sugar that had been damaged by the ingress of seawater while in transit from Guyana to Toronto after having been purchased by Redpath, a refiner of sugar, on CIF terms.¹⁸⁵ Redpath was obviously unable to pursue a claim against the sellers as per the terms of a standard CIF sale, but could and did pursue a claim for damages against the carriers, i.e., the owners of

¹⁸¹ *Ibid.*

¹⁸² *Jamal v Moolla, supra* note 79, Lord Wrenbury ("It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it." at 179).

¹⁸³ See Chapter III – Section II.C.2.

¹⁸⁴ *Redpath, supra* note 83.

¹⁸⁵ *Ibid* at para 2.

the Cisco (“The Owners”), which was the substance of the *lis* here.¹⁸⁶ The Owners’ liability was found at first instance in the Trial Division, and uncontested in the Appellate Division, but as is most common in Mitigation decisions, the question of quantum and accounting was much in dispute.¹⁸⁷

The dispute over quantum generally, as between Redpath and The Owners, pertained to the correct value to assign to the sugar as it arrived (i.e., the arrived damaged market value (“ADMV”)), which would be deducted from the arrived sound market value of \$279,660.62 (“ASMV”) in order to quantify the loss to the consignee of such cargo.¹⁸⁸ The relevant aspect of this dispute for present purposes was the relevance or recognition of Redpath’s successful post-breach attempt to refine the damaged sugar along with uncontaminated product in order to make it fit for sale.¹⁸⁹ Redpath, for its part, claimed that its effort was irrelevant and that the ADMV was equal to the value the damaged goods would have fetched from their only potential buyer (i.e., manufacturers of animal feed) of \$53,332.78.¹⁹⁰ The trial judge agreed with this contention in part, but The Owners argued that the ADMV could not be so low if, and given that, Redpath had been able to successfully adapt the damaged product to its use — albeit at some greater expense given the greater effort and cost required for processing impure inputs.¹⁹¹ The Appellate Division agreed.¹⁹²

¹⁸⁶ *Ibid* at para 4.

¹⁸⁷ *Ibid* at paras 5–6.

¹⁸⁸ *Ibid* at paras 8, 13.

¹⁸⁹ *Ibid* at paras 16–17.

¹⁹⁰ *Ibid* at paras 7, 17.

¹⁹¹ *Ibid* at para 16.

¹⁹² *Ibid* at paras 24, 53–56, 78–81.

The members of the Appellate Division sitting — Desjardins,¹⁹³ Décary,¹⁹⁴ and Létourneau JJA¹⁹⁵ — differed somewhat in their reasoning when reaching their conclusion on the Mitigation point. However, they appear generally to have been of one mind with the respect to the view that having happened, Redpath’s effort and arguably resulting loss reduction could not be ignored.¹⁹⁶ For myself, I disagree with this premise, which in many respects harkens back to decisions such as *Cockburn*,¹⁹⁷ which I have criticized in Chapter III, as well as decisions relying upon Viscount Haldane’s direction in *British Westinghouse*¹⁹⁸ to the effect that even acts outside of the ordinary course of

¹⁹³ *Redpath*, *supra* note 83, Desjardins JA (“I do not find it necessary to decide whether the respondent had “a duty”¹⁶ to mitigate its loss the way it did or to discourse on the scope of this duty.¹⁷ The respondent decided to use the damaged raw sugar in the ordinary course of its business. And after being processed, the sugar became part of its regular product. The respondent cannot therefore be indemnified for more than its loss.” at para 24).

¹⁹⁴ *Ibid*, Décary JA (“In these circumstances I am prepared to recognize that the respondent has met part of its burden and to award some damages. I have just enough evidence to guide me in the guessing game I would rather not have been forced to play. The figure of \$50,000 adopted by my colleague Létourneau J.A., which corresponds more or less to one third of the amount the respondent has claimed for extra production costs and which is significantly higher than that estimated by Mr. Calder on the sole basis of the loss of polarity, seems to me most reasonable.” at para 53).

¹⁹⁵ *Ibid*, Létourneau JA (“The question then becomes: what is reasonable for the plaintiff to do in the circumstances? In the present case, what was reasonable for the respondent to do or, to put it another way, what were the reasonable steps that the respondent ought to have taken in the circumstances? In view of the limited damage to the raw sugar and of the fact that the sugar was recoverable, only one answer could be given: blend it with sound sugar and refine it as originally planned. That was the duty of the respondent in the circumstances of this case as the risks were minimal and manageable.” at para 79).

¹⁹⁶ *Ibid* at paras 24, 53–56, 78–81.

¹⁹⁷ *Cockburn*, *supra* note 59.

¹⁹⁸ *British Westinghouse*, *supra* note 66.

business must be brought to account.¹⁹⁹ I do, however, concur with the conclusion in these circumstances, and the observation made that the peculiar characteristics of the claimant can be considered with respect to the scope of Mitigation, even where these may be said to be irrelevant to the question of quantum itself.²⁰⁰

Having now set out the basic facts of both *Hussey* and *Redpath*, I will expound upon what I argue we can learn from these cases, and others besides, on the question raised above with respect to when Mitigation will act to curtail recovery under the rule from *Robinson*, and when it will not. As discussed above, the proposition from which I start is that a reduction in damages recoverable under the rubric of Mitigation entails by necessary implication a departure from the Expectation Measure of damages otherwise applicable. Further, as I have also explained, any such departure from the norm on this basis is justifiable only insofar as the adoption of an alternative measure (either the Necessary Minimum Measure or Hypothetical Necessary Minimum Measure) is

¹⁹⁹ See *Karas et al v Rowlett*, [1944] SCR 1, Rand J (“Under the [rule from *British Westinghouse*] so enunciated, the steps which ought to be taken by an injured party must arise out of the consequences of the default and be within the scope of what would be considered reasonable and prudent action. There are obviously limitations to the class of venture, for instance, in respect of which the duty would arise, but, where there has been an actual performance within those consequences, whether or not within the duty, the benefit derived may be taken into account. When, however, it is a question of future action, we must keep in mind the limitation to be put upon that duty towards undertakings involving more than ordinary risks and have regard to the fact that losses might be suffered which could not be added to the burden of the wrongdoer.” at 8); See also *Toronto Housing Co Ltd et al v Postal Promotions Ltd*, [1982] OJ No 3553 (ONCA) [*Toronto Housing*], Lacourciere JA (“We do not have to decide in the present case whether the landlord was under an obligation or a duty to mitigate . . . In my view, the *Highway Properties* case at p. 576 specifically preserves for the parties to a commercial lease the ‘full armoury of remedies ordinarily available to redress repudiation of covenants’ and thus the measure of the appellant’s damage is not limited by his election of remedy. The damages include the present value of unpaid future rent for the unexpired period of the lease and should be decreased by the actual rental value for the same period, whether or not there was a duty on the appellant to mitigate. In my opinion the *Highway Properties* case is the complete answer. It needs to be expanded only to the extent of giving the tenant the same access as was given to the landlord to the full range of contractual remedies and defences. Once it is established that the subsequent transaction -- the new lease -- arises out of the consequences of the breach in the ordinary course of business, the landlord’s abandonment of a claim for prospective rent should not have the effect of limiting the common law defences based on the fact of mitigation whereby any loss has been successfully avoided.” at paras 6-7).

²⁰⁰ *Redpath*, *supra* note 83, Létourneau JA (“Counsel for the respondent submitted that, in fixing the damages, characteristics that are peculiar to the plaintiff ought not to be taken into account. I agree. For example, it is irrelevant in determining the extent of the damages that a plaintiff had a resale contract with a third party and made a profit in reselling the damaged goods. The damages and their quantum exist irrespective of the special or peculiar characteristics of a plaintiff. However, this rule applies to the determination of the damages, not to the scope of the duty to mitigate them. When it comes to the duty to mitigate, it is worth remembering that the duty is on the plaintiff, not on some fanciful and abstract personage.” at para 79).

necessary in the circumstances in order to accord more fully with the rule's substance, i.e., to fulfill the underlying purposes of both the rule and the institution of contract as a whole. What *Hussey* and *Redpath* demonstrate in this respect is when Mitigation will, or should, shift the application of the rule from *Robinson* from the Expectation Measure to the Necessary Minimum Measure with respect to an accrued loss in light of a post-breach transaction.

In short, *Hussey* and *Redpath* demonstrate that the Necessary Minimum Measure is justified when a substitute for the benefit of the primary obligations promised under the original contract, or some part thereof, has been obtained by way of an "effort or cost" comparable to that originally required. Likewise, they make clear that the Necessary Minimum Measure is inappropriate when the "effort or cost" required to realize the relevant gain is incommensurately greater or, as will be discussed, effectively unconnected and thus an "opportunity cost" if the transaction is deemed to be in mitigation. The key here is the commensurability of the "effort or cost" involved in the original contract and the subsequent transaction alleged to have been made in mitigation. By effort or cost, I mean in the broadest sense the deployment of time, capital, effort, and

the acceptance of risk,²⁰¹ and with respect to transactions, I mean not only discrete contracts or dealings but also in a broad sense any series of connected acts that have led to some gain or betterment in the plaintiff's circumstances.

The circumstances in *Hussey* that illustrate the above are the fact that in *Hussey*, the plaintiffs' actions were quite apparently not in their "ordinary course of business" given that they were not ordinarily involved in the development or sale of land, and thus entailed for them a cost in time and effort that was incommensurate with their burdens under their purchase contract with the Eels.²⁰² Whereas in contrast, the effort required for Redpath to refine the damaged sugar delivered was incrementally greater, but in the end all in a day's work,²⁰³ and importantly, compensable quite simply by way of an allowance

²⁰¹ A plaintiff need not "risk" his money or reputation etc, and cases sometime mention allowances; See *Lesters Leather and Skin Co v Home and Overseas Brokers*, (1948), 64 TLR 569 (CA) (A plaintiff need not incur great expense or inconvenience in an attempt to stem the flow of losses, such as by "hunting around the globe to find a suitable substitute" to paraphrase Lord Goddard CJ); See *Pilkington v Wood*, [1953] Ch 770 (The plaintiff need not incur unreasonable risk, nor embark on a speculative venture in order to mitigate); See *Cockburn*, *supra* note 59, Duff J ("I have not felt it necessary to pass upon the question whether or not, consistently with this view, some allowance could properly be made to the appellant as compensation for the use of his capital and for the risk. I find it unnecessary to do so because the argument of Sir George Gibbons convinces me that any reasonable allowance on that footing would be overtopped by the allowance which *strictissimo jure* should be made to the respondents in respect of probable gains by way of salary, the opportunity for earning which the appellant deliberately decided to forego." at 268); *Finlay (James) & Co Ltd v N V Kwik Hoo Tong Handel Maatschappij*, [1929] 1 KB 400 (CA) Sankey LJ ("In this case I do not think that it would be reasonable to ask the respondents to sue their sub-purchasers and to insist upon the conclusive evidence clause when by the hypothesis they had learned that the bill of lading was in fact untruly dated. The damage might have been minimized to this extent, that the Indian sub-purchasers would have had no defence; but a person is not obliged to minimize damages on behalf of another who has broken his contract, if by doing so he would, as I think might have happened here, have injured his commercial reputation by getting a bad name in the trade. In my opinion Wright J.'s decision was correct, and the appeal therefore must be dismissed." at 418); See also *Calgary (City) v Costello*, *supra* note 6, Picard JA ("The duty to mitigate does not invariably require action to be taken immediately upon breach ... The plaintiff need not incur great expense or inconvenience in an attempt to stem the flow of losses ... Nor need the plaintiff incur an unreasonable risk, or embark upon a speculative venture, in an attempt to mitigate her losses" at paras 71 – 73); See also *Marsan v Trunk Pacific Railway Co*, (1912) 20 WLR 161 (ABQB), Stuart J ("If other suitable premises were in fact available for him for his purpose I think it was incumbent upon the defendants to show that these could have been secured without unreasonable expense or trouble." at 695).

²⁰² *Hussey*, *supra* note 16 at 230–231 (The Eels had two planning permission applications refused before eventually getting permission to erect a new bungalow on the land, which indicates that they were likely to be novices.).

²⁰³ *Redpath*, *supra* note 83, Létourneau JA ("The blending of the damaged sugar with sound sugar and its subsequent refining were reasonable steps to take in the circumstances to mitigate the losses. These steps were even more reasonable for the respondent who, as a refiner, had the necessary expertise and machinery to do so." at para 78).

for the extra cost (i.e., the cost of mitigating), which Redpath was allowed to recover.²⁰⁴ Of course, none of the above explains why such a difference is or ought to be material to Mitigation's application, and in that sense, it is only positive rather than normative, but as they say, "that's not all."

The normative argument in favour of the distinction drawn above appears to readily tie into the rule from *Robinson* and the purposes of contract, though, if we recall and accept two key aspects of the same. The first is the centrality of surplus creation to contract and what surpluses are; and the second is that to be in "as good a position with respect to damages as if the contract had been performed" is to attempt to put the plaintiff, as far as money can do it, in the same surplus position as they had expected to be in, but not better or worse. With this in mind, the normative argument in favour of the outcome in each of the above two cases, and the selection of distinction I have highlighted between them, can be justified as follows.

Beginning with *Redpath*, it pays to remember that the notion of a "surplus of utility" (or simply surplus for short) is beset by the epistemological problem that it can only be investigated inferentially.²⁰⁵ Thus, we are limited to being certain only when facts that align with fundamental assumptions are in play.²⁰⁶ For example, if we assume that people are rational and self-interested, we can be certain that each party will gain, and that a net surplus from an exchange will arise, when the party's agreement is free, and vice versa.²⁰⁷ Thus, we can infer, and courts quite apparently do infer, that a party who has obtained the benefit they bargained for, with at most only an incrementally greater degree of cost to themselves (i.e., when the basic facts of their original bargain

²⁰⁴ *Ibid* at para 28.

²⁰⁵ See Chapter I – Section II.C.; Richard A Posner, "Utilitarianism, Economics, and Legal Theory" (1979) 8:1 *The Journal of Legal Studies* 103–140 (Personal evaluations of utility can be revealed through transaction decisions, but ultimately utility is no more susceptible to direct measurement by economists than happiness is or was for utilitarians.).

²⁰⁶ See Chapter I – Section II.C.

²⁰⁷ See Chapter I – Section II.C.; See Richard A Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication Symposium on Efficiency as a Legal Concern" (1979) 8:3 *Hofstra L Rev* 487–508 at 489; See Thomas J Miceli, *Economics of the law: torts, contracts, property, litigation* (New York: Oxford University Press, 1997) at 94 (Consent is a key assumption of efficient contracting.).

hold), has achieved their expected surplus, or at least said surplus less any incremental cost of mitigation.²⁰⁸ When this is true, it is apparent that damages under the rule from *Robinson* do not need to equal the full value of the plaintiff's promised benefit in order to put the plaintiff in the position they would have been in had the contract been performed. Instead, as was done in *Redpath*, a Necessary Minimum Measure can and should be preferred and applied in lieu of the full Expectation Measure, and only any difference as between the achieved benefit and the expected benefit need be compensated for, or if there is no difference, merely the plaintiff's cost of mitigating.²⁰⁹ To do otherwise and award full damages under the Expectation Measure would be to assign a windfall gain to the plaintiff and place them in a better position than they would have been in, and this overcompensation, if we are serious about the realization of net surpluses from exchange, ought to be as unacceptable as the opposite. The reason for this is that such insistence on the orthodox application of the rule from *Robinson*, and such tacit refusal of gain allocation, would be tantamount to loss creation in the defendant where no loss to the plaintiff ever did arise²¹⁰, and thus a potential loss of utility to the defendant that is in excess of the plaintiff's surplus that may lead to a net loss for society overall.²¹¹

Turning now to *Hussey*, we can see the significance of the plaintiff's post-breach effort being other and different in kind rather than degree, and thus the normative reason for distinguishing between plaintiffs such as the Husseys and *Redpath*, and declining to hold any post-breach gain to the defendant's credit in cases like *Hussey*. The gist of it is that when the cost of the post-breach transaction leading to the relevant gain is different

²⁰⁸ As I say, such an inference appears possible when certain key facts remain relating to the plaintiff's burdens remain the same. However, courts should be willing to abandon any such inference when facts/burdens have materially changed for much the same reasons that some challenge the efficient breach doctrine; See Jeffrey L Harrison, "A Nihilistic View of the Efficient Breach" (2013) 2013:1 Mich St L Rev 167–210.

²⁰⁹ *Redpath*, *supra* note 83 at para 28.

²¹⁰ If an accrued loss is never realized, it is arguable that it never really happened.

²¹¹ The existence of a net surplus is generally not in question where the defendant is asked to bear the cost of a risk that they accepted. Where the risk was not accepted, as is probably the case with respect to the risk that plaintiff would not take reasonable steps in the ordinary course of their business to obtain readily available substitute performance or a substitute for the benefit lost, to impose that cost on the defendant would be a forced transfer whose overall effect on utility cannot be judged according to the background assumptions of self-interest and consent; See Chapter I – Section II.C.

in kind rather than degree, the basic facts of the original contract no longer hold true, and thus any inference with respect to the plaintiff's gain in utility are no longer possible.²¹² Put another way, we can simply no longer be sure that the plaintiff's post-breach position is as good as it should have been had the contract been performed, subject only to adjustment for the cost of mitigating, because in giving something more or other to obtain part or all of the same end result, the plaintiff has changed the equation by paying "more".²¹³ This potential "extra" payment raises the possibility that the plaintiff has a smaller surplus than they should have had, or perhaps only a smaller net loss than if they had not acted. Thus, if a gain such as the Husseys' were to be held to the credit of a defendant such as the Eels with only an allowance for the greater cost, there is a risk of under-compensation and surplus elimination, as the plaintiff may end up with less than what they bargained for.²¹⁴ It is also evident that the defendant may receive more than they bargained for if they received credit for such a gain, because to allocate the gain to the defendant in such circumstances would be to give the defendant credit for the plaintiff's efforts in a windfall that is no less dubious than that described in the last paragraph.

Taken together, the two normative arguments above in favour of inclusion, on the one hand, and exclusion on the other, can be understood as simply two sides of the same coin. Each is justifiable only in so far as it is necessary in order to maintain the balance

²¹² A key assumption underpinning the presumed efficiency of contractual exchanges is that they are voluntary. Ergo, if the parameters of the exchange no longer line up with what was initially agreed, it cannot be presumed to be efficient because it is no longer the exchange that the parties voluntarily entered into; See Harrison, *supra* note 87 at 115–119.

²¹³ See *ibid*; See also Harrison, *supra* note 210.

²¹⁴ The best evidence we have that a given contract is an efficient exchange that would benefit both parties (and thereby society) is the fact that the parties (hopefully) freely made it. As such, the further we get from the initial contract, the harder it is to know whether the exchange is efficient because we cannot assume with any certainty that the parties' own evaluations of utility would favour the new arrangement; See Harrison, *supra* note 87 at 130 ("The baseline rule is that, as long as there is consideration, the matter of 'adequacy' of consideration is not at issue. This is the so-called 'peppercorn' theory of consideration. The explanation for this, in economic terms, is that an assessment of relative amounts of consideration involves making an 'interpersonal comparison of utility.' In effect, to intervene when consideration appears to be lopsided amounts to an effort to compare the increase in utility experienced by one party with the increase in utility experienced by the other party. Such comparisons cannot be made. Consequently, once there is consent as signified by offer, acceptance and some kind of exchange, it makes no economic sense to attempt further inquiry. This particular view is consistent with viewing contract law as having the primary function of supporting Pareto superior exchanges.").

reflected in the parties' bargain, and thus ensure that neither party is bettered at the expense of the other. This is the general touchstone I subscribe to and will return to in explaining when Mitigation ought to apply in the other varieties of case I have identified in the following sections. A few further remarks are in order, however, before I depart from the present class of case. The first is that this expression of principle does not accord with all cases, and that there is a disjuncture between my view, and cases which agree, and those espoused in older decisions. *Hussey*, for instance must be contrasted with *Cockburn*, in which a gain that was produced by an effort that was manifestly different in kind from that called for in the original contract, was nonetheless held accountable.²¹⁵ Overtime though, the bent of decisions on point has appeared to bend further away from the Court's view in *Cockburn*, and within Canada itself, *Cockburn* would now have to be compared with *Nova Scotia v. Adams*, in which a gain was excluded on the basis that the risk taken would have undoubtedly been disavowed by the defendant had the plaintiff's subsequent efforts not borne fruit.²¹⁶ The second is that even identical, subsequent transactions may not be accountable, despite their similarity to the original contract, and should not be if they are genuinely collateral as indicated by the Supreme Court's decision in *Apeco*.²¹⁷ The obvious explanation for this is that if the second transaction would have happened despite the breach of the earlier contract, then to

²¹⁵ The Court in *Cockburn* openly acknowledged the additional risk and expenditure required in order for him to make his profit, despite holding that he had to account for it, whereas the Court in *Hussey* held that such efforts going over and above simply can't be to the defendant's credit; *Cockburn*, *supra* note 59, Anglin J ("The \$11,000 profit which he made, although the making of it required some assumption of risk and responsibility and also an expenditure clearly beyond anything involved in his engagement by his former employers, and likewise beyond anything which it was his duty to them, or to the respondent, to undertake, is within the rule of accountability stated by Lord Haldane." at 270); *Hussey*, *supra* note 16, Mustill LJ ("It is true that in one sense there was a causal link between the inducement of the purchase by misrepresentation and the sale 2½ years later, for the sale represented a choice of one of the options with which the plaintiffs had been presented by the defendants' wrongful act. But only in that sense. To my mind the reality of the situation is that the plaintiffs bought the house to live in, and did live in it for a substantial period. It was only after two years that the possibility of selling the land and moving elsewhere was explored, and six months later still that this possibility came to fruition. It seems to me that when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception." at 241)".

²¹⁶ *1874000 Nova Scotia Ltd v Adams*, [1997] NSJ No 172 (NSCA), Chipman JA ("Had [The Plaintiff] gone on to incur more extensive losses in his attempt to turn the company around ... [the defendant] could probably be heard to say that he should have cut his losses when he saw the situation shortly after October 31, 1989." at para 92).

²¹⁷ *Apeco of Canada Ltd v Windmill Place*, [1978] 2 SCR 385.

hold the subsequent transaction to the defendant's credit would be to better the defendant at the plaintiff's expense and thus leave the plaintiff in a worse position.²¹⁸ Put another way, when such a subsequent transaction would or could have happened in any event, it is not a true substitute for the earlier, and there is no reason for it to be held to be.²¹⁹ Although, as per *Pagnan*, if the transaction is for the same goods and is with the same party, it may be hard for it not to be.²²⁰ In the end, though, it all returns to the touchstone.

- ii. Has the plaintiff's inaction allowed greater loss to accrue than might have otherwise been the case?

Earlier in section IV.B.1.b, I explained that in certain circumstances, Mitigation will effectively shift the application of the rule from *Robinson* from the Expectation Measure to a measure based on the minimum amount that might have been necessary (the "Hypothetical Minimum Measure") had the plaintiff taken certain steps after the breach. As with subsequent transactions discussed above, the question as to when Mitigation will

²¹⁸ See *Vic Mill Ltd, Re*, [1913] 1 Ch 465 (CA), Hamilton JA ("The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders, and both profits. In fact, what they did, acting reasonably, and I think very likely more than reasonably in the interests of the Vic Mill, was to content themselves with earning the profit on the second contract at the cost of adapting the machines, which has been taken at 5 pounds sterling; but they are still losers of the profit which they would have made on the Vic Mill contract, because they could, if they had been minded, have performed both the contracts, and have made the profit on both the contracts but for the breach by the Vic Mill Company of their contract." at 473); See also *Karas et al v Rowlett*, *supra* note 201, Rand J ("It is settled, also, 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 ... Applying those considerations to the case in hand, the question is whether or not the business commenced in October can be looked upon as incompatible with that closed by the fraud: or, in the other sense, whether the capacity to be released to the respondent by the result of the fraud was necessary to the continuance of the business so commenced. The unquestioned facts do not admit of any such conclusion." at 8).

²¹⁹ See *Dawson v Helicopter Exploration Co Ltd*, (1958), 12 DLR (2d) 1 (SCC), Rand J ("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 the account; if it could have been acquired consistently with his performance of the contract, it is not available as mitigation." at 10); See also *McKenna's Express Ltd v Air Canada*, [1993] PEIJ No 85 (PEISCTD) at para 12.

²²⁰ See *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltda*, [1970] 1 WLR 1306 (CA) (Same goods purchased by same plaintiff buyer after successful termination of original contract for late shipment.).

intervene to shift the assessment of damage to the lower measure is not a pure question of fact or circumstance. By this I mean that Mitigation's application does not depend merely on whether the plaintiff failed to take available steps or even strictly the potential efficacy of such potential steps, but instead whether such failure should be *deemed* to have been a failure to mitigate. As I have said before, we must remember that by the time of adjudication, it is safe to say that what has happened has happened, and that we are concerned not with the "determination" of cause but instead, the allocation of consequences.²²¹

As I have done above and generally throughout the chapter, I will demonstrate how distinctions may be drawn as between cases in which allocation of loss to the plaintiff has been deemed appropriate, and those in which it has not, and thus when Mitigation can and should intervene to shift the application of the rule from *Robinson* from the Expectation Measure to the Hypothetical Minimum Measure. The cases I will use for this purpose will already be largely familiar to readers from their earlier examination in Chapter III, wherein I considered the somewhat fractious family of cases on the subject of post-breach negotiation, and what these cases mean for the nature of Mitigation. Here the enquiry is obviously more pragmatic, as a question of "when", than the earlier question of jural nature or paradigm, being more in the nature of "what" and "why", but I will start again at the same beginning and fortuitously demonstrate the significance of "what" and "why" to "when" before I am done.

Any discussion of post-breach negotiation and its relevance to Mitigation must begin where the modern case law appears to have begun, namely the seminal English Court of Appeal decision in *Payzu v. Saunders*, or perhaps more precisely the leading judgment of Lord Justice Scrutton therein.²²² As readers will recall, the dispute at the heart of *Payzu* related to the repudiation of a contract for the supply of silk on credit

²²¹ As discussed in Chapter III, it is arguable, if not evident, that the determination of cause is effectively an exercise in the assignment or selection of cause according to the preference of the adjudicator, and in that sense allocation and determination can be said to amount to the same thing. My preference however, is for the more open and intellectually honest approach and as such I will continue to prefer the language of allocation over the pseudo-scientific jargon associated with cause; See Chapter III – Section IV.B.2.

²²² *Payzu Ltd v Saunders*, [1919] 2 KB 581 (CA).

terms by Saunders to Payzu, following an unfortunate series of events in which Payzu's payment to Saunders on their account was lost and then delayed.²²³ The facts for which the case is memorable did not arise before the repudiation, however, but arose following the repudiation in a manner of speaking, when Saunders offered to continue supplying silk to Payzu but only on cash as opposed to credit terms, which Payzu refused.²²⁴ The fact of refusal was of course the key point of contention in the later litigation, wherein Saunders' counsel alleged in reply to Payzu's claim for breach that Payzu had acted unreasonably in its refusal, and had thereby failed to mitigate after the fact of the repudiation, i.e., breach.²²⁵

As we know, Saunders' contention with respect to Payzu's failure to mitigate, although somewhat forward for the party in breach, fell on sympathetic ears with both Mr. Justice McCardie at first instance,²²⁶ and the Court of Appeal, finding favour with the argument.²²⁷ The opinions of their Lordships in the latter are brief, as judgments often were in earlier times, but the observations of Lord Justice Scrutton bear repetition:²²⁸

“Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.” [Emphasis added]

Perhaps the most important line from the passage above is Scrutton LJ's observation that “... in commercial contracts it is generally reasonable to accept an offer

²²³ *Ibid* at 581–582.

²²⁴ *Ibid* at 582.

²²⁵ *Ibid*.

²²⁶ *Ibid* at 585–586.

²²⁷ *Ibid* at 589.

²²⁸ *Ibid*.

from the party in default.”²²⁹ If or when this general proposition is correct in the specific circumstances of any given case, it is appropriate, as the Court did here, to treat the plaintiff’s refusal of the defendant’s offer as a failure to mitigate and to thus deduct from the plaintiff’s loss any amount that might have been saved had the plaintiff accepted the defendant’s offer. To put it another way, as explained above, it is appropriate to apply the Hypothetical Minimum Measure in lieu of the Expectation Measure, and to thus assess the plaintiff’s loss as though they *had done* what they had *unreasonably refused to do*. Where the loss sued for is an accrued loss of benefit, and the offer from the defendant for the same benefit as what was originally sought, the arithmetic required for the assessment may in many circumstances be a relatively simple matter of comparing the original contract to the terms of the later offer. What is less straightforward, though, is answering the “when” question that their Lordships, and many later courts with one notable exception, have neglected to directly address — i.e., when will a defendant’s offer be unreasonable and when will it not be?

Having said that their Lordships in *Payzu* failed to provide any direction on the question posed above, I should hasten to point out that their Lordships did at least address the point obliquely. They did so by way of the example of an employee publicly accused of theft and dismissed by their employer, but later offered reinstatement of their position.²³⁰ Such an employee plaintiff, it was said, could rightly refuse such an offer in light of the injury done to him by his employer’s treatment but, as we can see from the

²²⁹ *Ibid.*

²³⁰ *Ibid* at 588–589.

passage quoted above from Lord Justice Scrutton’s judgment, we are not told why.²³¹ Thus, I would argue that we are left none the wiser about the true distinction between cases such as *Payzu* and the hypothetical situation referred to therein. This is certainly not helped by the fact that employment decisions on questions of Mitigation are now somewhat *sui generis*, given the unique character that has been ascribed to contracts of service.²³² Two possible answers come to mind as most likely to apply, though, and these are either that an offer will be unreasonable where the defendant “asks too much”, or they simply have no standing to “ask”.

Of the two potential bases mooted above for an offer to be unreasonable, it is only the former that one could argue to be applicable, albeit unsuccessfully. The latter explanation that the defendant did not have the “standing” to make the relevant offer is *prima facie* the most applicable to the hypothetical employment scenario offered by their Lordships, but I will leave my explanation of it to my discussion of *Panex* below.²³³ In the meantime, I will turn back to what I regard as the primary difference between

²³¹ *Payzu Ltd v Saunders*, *supra* note 224, Scrutton LJ (“It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal.” at 588-589); See also *Evans v Teamsters Local Union No 31*, [2008] 1 SCR 661 [Evans] Bastarache J (“The critical element is that an employee ‘not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation’ [Farquhar, at p. 94], and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee’s position would have accepted the employer’s offer [Reibl v. Hughes, [1980] 2 S.C.R. 880], it is extremely important that the non-tangible elements of the situation -- including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements -- be included in the evaluation.” at para 30).

²³² See *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, Dickson CJ (“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.” at 368); See also *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, Iacobucci J (“I would [add to the observations of Dickson CJ in Reference Re Public Service] that not only is work fundamental to an individual’s identity, but also that the manner in which employment can be terminated is equally important.” at 1002); See also Brian Etherington, “Supreme Court of Canada Decisions and the Common Law of Employment in the 1990’s: Shifting the Balance between Rights and Efficiency Concerns” (1999) 78:Issues 1-2 Can B Rev 200–219.

²³³ *Panex*, *supra* note 15.

reasonable and unreasonable offers which, much like the litmus test for distinguishing between collateral and consequent transactions discussed in section VI.A.1.a.i, ties in to the fundamental basis for the enforcement of contracts, and contract as an institution as a whole. To explain in brief, what I mean by “asked too much” is that the new consideration requested by the defendant in their offer is not merely more, but so much so, or so “other” as to be different not merely as a matter of degree but as a matter of kind. When the defendant’s offer calls for such consideration, it ought to be evident, as I have discussed above, that we can no longer be sure that the plaintiff would derive a surplus from the exchange, because the new facts take us too far from the scenario in which the plaintiff’s assent could provide an assurance that the transaction is of benefit to the plaintiff, meaning that we cannot be sure, even accounting for the difference in cost, that the replacement transaction offered by the defendant would have actually mitigated their loss of surplus at all. Put simply, if the plaintiff is offered an apple instead of an orange, we can have no idea as to whether all or any of their accrued loss of expected benefit (i.e., surplus) would be satisfied by the alternative offer,²³⁴ and thus it simply does not appear reasonable in light of the purpose of contract to hold that a plaintiff ought to accept it. This was perhaps the best argument available to Payzu with respect to the change in terms and price from credit to cash on delivery, but from the decision of McCardie J and the judgements of their Lordships on appeal, it appears that the difference was simply too incremental to qualify as a difference in “kind”. We will see what is perhaps the quintessential example of an offer that asks too much below, however, with the recent British Columbia Court of Appeal decision in *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, or *Fido* for short.²³⁵

For readers unfamiliar with telecommunications in Canada, Fido is a cellular carrier that offers voice and data plans to consumers both directly and through a network of third-party dealers, of which Cellular Baby (hereafter “Baby”) was one.²³⁶ The

²³⁴ See generally Harrison, *supra* note 87 at 109–115.

²³⁵ *Cellular Baby Cell Phones Accessories Specialist Ltd v Fido Solutions Inc*, [2017] BCCA 50 [*Fido*].

²³⁶ *Ibid* at paras 5–9.

relationship between Fido and Baby was established and regulated by a standard form dealership agreement entered into between the parties in 2008 (the “Agreement”).²³⁷ The Agreement was relatively lengthy at 88 pages and provided, inter alia, that Fido could unilaterally set quarterly performance targets in relation to a number of things, including new voice activations and data plans.²³⁸ Further, pursuant to s. 11.2(c) of the Agreement, if a dealer failed to meet performance criteria for three consecutive quarters or three quarters in any calendar year, Fido could immediately terminate the Agreement.²³⁹

Readers familiar with North American idioms will know that the term “fido” is a common colloquialism for mans’ most faithful and stalwart of companions: dogs. The term is derived probably and quite appropriately from the Latin *fidelis*, meaning faithful.²⁴⁰ Unfortunately for Baby though, with respect to Fido’s discretion to set quotas and exercise its discretion to terminate under s.11. 2(c), faithful Fido was not.²⁴¹ Instead, it seems that in 2010, after many years of consistently excellent results from Baby, Fido misused its discretion to set individual dealer quotas in an attempt to paint Baby into a corner.²⁴² Said attempt came in the form of the manipulation of Baby’s quota in Q4 2010 to increase it while providing a corresponding decrease in the quota assigned to one of Baby’s large dealer competitors.²⁴³ The intentional and considerable elevation in Baby’s Q4 quota was significant for the reason that, for the first time in its history as a Fido dealer, Baby had missed quota in not one, but two earlier quarters that year; Q1 and Q2 specifically.²⁴⁴ This unprecedented drop in Baby’s sale performance was of course cause for concern to Baby in and of itself, but the failure to meet its artificially high quota in Q4

²³⁷ *Ibid* at para 7.

²³⁸ *Ibid* at paras 7–8.

²³⁹ *Ibid* at para 8.

²⁴⁰ James Morwood ed, *Pocket Oxford Latin Dictionary: Latin-English*, 3rd ed (Oxford: Oxford University Press, 2005) sub verbo “*fidēlis*”.

²⁴¹ *Fido*, *supra* note 237 at para 32.

²⁴² *Ibid* at paras 32–33.

²⁴³ *Ibid* at para 32.

²⁴⁴ *Ibid* at para 11.

was a more serious matter altogether because, as per s.11.2(c) of the Agreement, the failure to meet quota in any three quarters of the calendar year triggered Fido's right to unilaterally terminate the Agreement.²⁴⁵

Surprisingly, despite apparently having set Baby's quota in such a way as to increase the likelihood of default on Baby's part in Q4, Fido did not act immediately once s.11.2(c) was triggered.²⁴⁶ Instead, Fido wrote only perfunctorily to remind Baby of its obligations, with no reference to termination, and allowed business to carry on until late September 2011, i.e., the end of Q3.²⁴⁷ Happily for Baby, the 2011 year presaged a return to form for their operations with quota met in Q1, narrowly missed in Q2, and operations on track to meet quota in Q3, when matters took an unhappy turn, and Fido purported to terminate the Agreement under s.11.2(c) on the alleged but untrue basis of a continuing failure to meet the quotas it had set.²⁴⁸ Whether termination or repudiation, thus began the period of post-breach negotiation of concern to us for its significance to the application of Mitigation.

Fido's initial post-breach overtures to Baby were to provide payouts ("Residual Payments") that would have otherwise been available following the ordinary expiration of the Agreement in exchange for the assignment of Baby's leases; a non-competition agreement; and importantly, a release from any claims Baby may have had against Fido.²⁴⁹ These offers were roundly rejected, and the sale of Baby's business to another Fido dealer with Fido's encouragement was pursued instead.²⁵⁰ The result of these efforts was that two offers from competitors were discussed or made, but neither led to a sale.²⁵¹ Although the value of the initial offer was subject to dispute, the first such offer from a

²⁴⁵ *Ibid* at para 8.

²⁴⁶ *Ibid* at para 12.

²⁴⁷ *Ibid* at para 11,13.

²⁴⁸ *Ibid* at paras 13–15.

²⁴⁹ *Ibid* at paras 17–19.

²⁵⁰ *Ibid* at paras 23–24.

²⁵¹ *Ibid* at paras 24–29.

competitor named “Yappy” was alleged by Baby to be approximately \$2 million.²⁵² The Yappy offer was scuppered by Fido though, as they had insisted, inter alia, that any sale of Baby’s business was subject to its approval and that Fido would not accept Yappy as a purchaser.²⁵³ The second offer from Baby’s competitor, “Pepper”, though lower, was accepted by the trial judge as firm, and amounted to \$1.6 million.²⁵⁴ However this Baby would not accept on the basis that it was simply too low.²⁵⁵ Baby’s only alternative after this too fell through was to continue business as a dealer for a competing mobile network, which it did, though apparently not as lucratively as before.²⁵⁶

Turning finally to the question of Mitigation, at trial of the action brought by Baby against Fido for breach of the Agreement, Baby succeeded on liability on the basis that Fido was not right to terminate when it did, some nine months after Q4 2010 and in light of their manipulation of Baby’s quota for that quarter, but failed on quantum.²⁵⁷ The trial judge found Baby had suffered \$1,222,000 in losses as a consequence of Fido’s breach, but this amount was not reflected in the trial judge’s final award of damages. The trial judge instead made an award for Baby’s loss that was reduced to the nominal amount of \$500. The reason for this was the trial judge’s finding that Baby’s refusal of Pepper’s \$1.6 million offer constituted an unreasonable failure to mitigate.²⁵⁸ Said finding was of course in question in the Court of Appeal, and in fact ultimately overturned.²⁵⁹

The reason for the Court of Appeal’s disagreement with the trial judge on the Mitigation point was a difference of opinion with respect to the significance of Pepper’s offer in light of the other preconditions imposed by Fido before it would grant its

²⁵² *Ibid* at para 24.

²⁵³ *Ibid* at para 25.

²⁵⁴ *Ibid* at para 27.

²⁵⁵ *Ibid* at para 28.

²⁵⁶ *Ibid* at paras 29, 36.

²⁵⁷ *Ibid* at paras 32–43.

²⁵⁸ *Ibid* at paras 42–43.

²⁵⁹ *Ibid* at paras 44, 84.

approval of any sale.²⁶⁰ As mentioned above, Fido reserved the right to approve any buyer, but as with its earlier offers to Baby to pay out the Residual Payments that would have been owing to it at the end of the Agreement, Fido required that Baby release it from any claims it may have had against Fido as a precondition for approval of any deal.²⁶¹ In the Court of Appeal’s view, it seems, this requirement rendered the offer from Pepper not only unreasonable in the circumstances, but unreasonable by definition.²⁶² Practically speaking, the implication of this view is that post-breach offers that are contingent upon a general release or the compromise of an action will be irrelevant to the assessment of the plaintiff’s efforts in mitigation post-breach, irrespective of the other qualities of the offer.²⁶³ I note that one might find this in one sense surprising, but it seems that the position taken here by the Court of Appeal is well-settled, with support for the proposition going at least as far back as 1922.²⁶⁴ Nonetheless, one might be tempted to ask how it can be that a plaintiff may uncritically reject any offer contingent upon a compromise as a rule, when by contrast they generally cannot, as a rule, choose to be so uncompromising as to refuse to treat. As I alluded to above, the answer, in my view, is that requiring a release of liability can be described as *prima facie* unreasonable on the basis that it asks too much of the plaintiff by definition. By this I mean that any offer that requires the plaintiff to sacrifice their right to be placed, as far as money can do it, in the same position with respect to damages as if the contract had been performed, in order to

²⁶⁰ *Ibid* at paras 79–80.

²⁶¹ *Ibid* at para 77.

²⁶² *Fido*, *supra* note 237, Goepel JA (“The duty to mitigate does not require a party to release claims it may have against a wrongdoer. If Cellular Baby had sold its business to Pepper it would have lost its right to pursue Fido for its other losses. It would not be in as good a position as if Fido had properly performed... While Cellular Baby had an obligation to take reasonable steps to attempt to mitigate its damages, the duty to mitigate does not require it to release Fido from potential damage claims. To do so would not be fair, just or reasonable.” at paras 80-81).

²⁶³ *Ibid*, Goepel JA (“The requirement of the general release is fatal to the trial judge’s mitigation finding. In the circumstances the trial judge’s mitigation finding cannot stand. If the sale to Pepper had not been conditional on the release of Fido, different considerations might apply.” at para 82).

²⁶⁴ A plaintiff will not generally be expected to destroy their own “property” to reduce their loss and thus the liability of the wrongdoer; See e.g. *Elliott Steam Tug Co Ltd v Shipping Controller*, [1922] 1 KB 127 (CA) [*Elliott Steam Tug*], Scrutton LJ (“...at common law the owner of a ship while under a duty to act reasonably to reduce damages is under no obligation to destroy his own property to reduce the damages payable by the wrongdoer.” at 141).

be taken only part of the way to that position, will by definition require greater consideration from the plaintiff than that which the post-breach offer would provide them. Put simply, such an offer asks the plaintiff to give more than they are getting, which effectively causes a diminution in the dominium of the plaintiff (i.e., actually makes the plaintiff worse off), and thus cannot in any meaningful sense mitigate their loss.²⁶⁵

Offers contingent upon the provision of a release are, of course, not the only post-breach overtures that can or should be held unreasonable for asking too much of a plaintiff. Instead, other instances of offers unreasonable may, by contrast, be less obviously one-sided. I would however suggest that they may be readily identified, in much the same way that subsequent transactions can be identified as collateral which, as I explained above, may be done by assessing whether the cost to the plaintiff is merely incrementally greater in *quantum* or whether it is in fact different in *kind*. This distinction is significant for the reason that while the former permits ready comparison to the original transaction, and some degree of confidence in the assessment of a putative

²⁶⁵ Imagine the example of a furnace worth \$2000 that is sold for \$1000. If the defendant seller refuses to deliver the furnace on the delivery date and instead insists on a price of \$1500 AND a release of liability, the defendant's offer is basically to sell the buyer the furnace for \$2,000 because they will receive the original price of \$1,000 in cash plus the buyers vested interest in \$1,000 of expectation damages. \$500 of which the seller is getting in cash (i.e. the \$500 over the \$1,000 price), and the remaining \$500 of which it is receiving in the form of \$500 of its \$1,000 liability in expectation damages under the contract being extinguished. Of course, the outcome would be effectively the same from the buyers perspective on an accrual basis if the seller simply offered the furnace post-breach at \$2,000 because in either case the plaintiff has given up ALL of the value it stood to gain under the original contract (i.e. the gain of \$1,000 (gain = market price – contract price). In either case though, if the release is to be of any value to the defendant it must permit the capture of the remaining surplus of value that otherwise would have gone to the plaintiff under the original contract, or, in addition or substitution to this, in a more disastrous scenario, some value that the plaintiff has been deprived of because the defendant's breach has not simply left them no better off than they should have been BUT actually worse off I.e. the breach has caused some diminution in the plaintiff's dominium, say for instance because a cold snap has caused pipes in the relevant building to burst when the installation and operation of the furnace would have prevented this. This being the case, one can clearly understand why post-breach offers including a release are presumptively unreasonable because in order to have any effect, they must effectively entrench and internalize the plaintiff's loss, which in principle simply cannot find favour with any current view of Mitigation, and especially not with the one that I propose because the equity necessary to require the allocation of the plaintiff's loss to the plaintiff in this way is almost unimaginable. For completeness I note that there is one scenario in which a release would be apparently unobjectionable, and this is where the post-breach offer is tantamount to reinstatement of the original offer and there has been no diminution in the plaintiff's dominium as a consequence of the original breach. In such a scenario though, the release is hardly necessary and there is no obvious reason to require it. As such, I would argue that any requirement for a release should be viewed with suspicion, and as a rule be held to be unreasonable; the convenience of certainty over discretion when such a scenario seems on its face improbable hopefully being evident.

benefit to the plaintiff or some confidence that a benefit would exist, the latter defies comparison and defies any attempt to determine whether it would ameliorate the plaintiff's loss, because it is equally possible that it may well exacerbate it. Of course, to distinguish between post-breach offers that entail costs that are different in kind rather than degree is not necessarily straightforward, because not every difference will be of equal significance. Even differences as to price may at times amount to differences in kind where what is asked is of an order of magnitude more than originally promised, or at least in a range which now would permit no margin for the plaintiff, whether buyer or seller. The essential point, though, is to consider the value to the plaintiff inherent in the transaction, and indeed their characteristics and position. An offer to sell damaged sugar to the plaintiffs in *Redpath* is, for instance, a proposition different from the same offer made to a party without the means with which to process such sugar, and thus any ability to realize any surplus from such a transaction. Where a plaintiff could, though, it would not be unreasonable to expect them to do so, because with the necessary allowance for cost, the balance of interests reflected in the bargain struck could be maintained, which as I have stated above, is ultimately the touchstone to which the application of Mitigation does and ought return in any instance where reasonableness of action is in question.

Moving on to the second basis for holding a post-breach offer unreasonable, the decision that comes most readily to mind is the 1967 Queen's Bench decision in *Harlow & Jones v. Panex*.²⁶⁶ Readers will recall that the decision was considered in some depth in Chapter III in relation to the Court's exercise of discretion and its ability to consider the behaviour of the defendant, as well as the plaintiff.²⁶⁷ Of the two, it is in the latter connection that the decision is most relevant, because as we will recall, it was somewhat implicit, if not explicit, in Mr. Justice Roskill's decision that His Lordship did not regard Panex's post-breach overtures as substantial enough to sustain a plea of failure to mitigate in defence of Harlow & Jones' claim.²⁶⁸ To explain why His Lordship reached this

²⁶⁶ *Panex*, *supra* note 15.

²⁶⁷ See Chapter III – Section III.A.3.

²⁶⁸ *Panex*, *supra* note 15 at 531.

conclusion, and how it demonstrates that a defendants' lack of merit, as opposed to a deficiency in the offer itself, may undermine their standing to plead mitigation in reply, we must reacquaint ourselves with the salient facts.

As with many of the post-breach negotiation cases, *Panex* was a decision on a matter of sale. In this case, the commodity in question was 10,000 metric tons of Soviet steel that had been purchased by Harlow & Jones from a Russian export agency, and then resold by Harlow & Jones to Panex in May 1966 at \$62.25 per ton, FOB Ventspils, August/September 1966 at supplier's option.²⁶⁹ Unfortunately for Panex, and ultimately Harlow & Jones, between the spring and fall of 1966, the bottom fell out of the market for steel, and the parties' deal effectively fell through.²⁷⁰ Of course, for a buyer to attempt to renege on a falling market is nothing new. What sets *Panex* apart for present purposes is the way in which the alleged breach and termination came about.

As one might infer from the basic contractual terms stated in the preceding paragraph, the primary obligation of Harlow & Jones was to deliver steel matching the contract specification for loading in a single hull at the Soviet port specified.²⁷¹ Through correspondence in June and July 1966, *Panex* requested that delivery be made by way of two shipments of 5,000 metric tons instead of the mandated loading of 10,000 metric tons in a single hull.²⁷² Harlow & Jones, for their part, acquiesced to the request for variation without complaint, nor unfortunately any request for further formalities.²⁷³ The misfortune that befell Harlow & Jones as a result of being so accommodating was that later on August 11, Panex resorted to the strict contractual position, demanding loading of all 10,000 metric tons in a single hull at short notice.²⁷⁴ Harlow & Jones, for their part, advised Panex that this could not be done in the time frame requested, given that all

²⁶⁹ *Ibid* at 510–511.

²⁷⁰ *Ibid* at 514.

²⁷¹ *Ibid* at 520.

²⁷² *Ibid*.

²⁷³ *Ibid* at 523, 529.

²⁷⁴ *Ibid* at 523.

arrangements had been made on the alternative footing of two smaller shipments,²⁷⁵ but Panex purported to treat Harlow & Jones' inability to revert to the original delivery format as repudiation and purported to cancel the contract.²⁷⁶ This rather surprising turn of events, which plaintiffs' counsel persuasively argued Panex had connived to contrive, left Harlow & Jones with 8,500 metric tons of steel²⁷⁷ at a foreign port, in a falling market, and unsurprisingly at a very significant loss.²⁷⁸ I note that Harlow & Jones' global loss was made up of two distinct items of different kinds, the first being the loss of profit recoverable under the rule from *Robinson*, and the latter the consequential loss incurred in the form of storage charges while the steel lay unsold in Ventspils, recoverable under *Hadley*. Here I will contend myself with the first of these two, but the latter will be addressed below when I consider Mitigation's application to the rule of remoteness and consequential losses.

Staying for the moment with Harlow & Jones' accrued expectation loss, and Panex's defence to Harlow & Jones' claim, two key facts must be emphasized. The first is that the market for steel was virtually non-existent from the end of September 1966 (the last possible time Panex could have nominated a vessel for loading) through to the beginning of January 1967, when the remaining 8,500 metric tons were finally sold at \$56 per metric ton, FOB Ventspils to buyers in West Germany.²⁷⁹ The second is that following Panex's purported rightful termination for breach by Harlow & Jones on August 22, Panex made post-breach²⁸⁰ offers on August 22 and 25 to purchase the steel at \$59.25 per metric ton, FOB Ventspils, both of which were rejected. With these facts in

²⁷⁵ *Ibid* at 524.

²⁷⁶ *Ibid* at 524–525, 529.

²⁷⁷ *Ibid* at 529–530 (The plaintiffs were left with 8,500 tons of steel to deal with instead of 10,000 because the Russian sellers had kindly agreed to retake 1,500 tons at cost).

²⁷⁸ *Ibid* at 522, 529–530, Roskill J (“This, Mr. Hirst submitted, I the first of a number of documents which the defendants put forward with a view to provoking a breach on the part of the plaintiffs upon which the defendants could subsequently rely for the purpose of escaping the contract with the plaintiffs... I ought to mention that I have no hesitation in accepting the evidence of the plaintiffs' witnesses...” at 522).

²⁷⁹ *Ibid* at 530.

²⁸⁰ The “breach” being Panex's wrongful termination or repudiation on August 22 for Harlow & Jones alleged breach/failure to load as per the contract.

mind, the parameters of the claim and defence should be fairly clear. For their part, Harlow & Jones claimed damages for the accrued direct loss it had suffered with respect to the profit lost on the sale of the 10,000 metric tons. This loss was assessed as the difference between the original price of \$62.25 and the prices at which the steel had subsequently disposed of, i.e., \$56 per metric ton for the 8,500 sold to the West Germans, and the original cost of the 1,500 returned to the Russian sellers.²⁸¹ Panex, for its part, defended this aspect of Harlow & Jones' claim, inter alia, on the basis that the refusal of the offers above constituted a failure to mitigate.²⁸²

As readers may recall, Mr. Justice Roskill, with whom I agree, dismissed Panex's plea on the Mitigation point, but did not explicitly hold as to why.²⁸³ In the circumstances of the decision, two possible bases can be offered to substantiate the decision. The former is technical and, strictly speaking, "quasi-jurisdictional" and separate from the two bases I have identified above for finding that a plaintiffs' refusal of a post-breach offer would not constitute a failure to mitigate, and that Mitigation should

²⁸¹ *Panex*, *supra* note 15 at 530.

²⁸² *Ibid* at 529–530, 531 (Note, in addition to the two offers made directly by Panex, there was also a supposed offer from defendant's agent Mr. Mundy to sell \$64 per ton CIF Bilbao, equivalent of \$57 or \$58 FOB, but Mr. Justice Roskill did not find it to be substantiated, and an offer from the Russian sellers themselves in November at \$55 per metric ton, FOB Ventpils. Both offers are somewhat irrelevant though because the former was not found to have been firm, and the second was below the subsequent price of \$56 per metric ton obtained from the West Germans and would have thus exacerbated Harlow & Jones accrued direct loss of profit. The \$55 FOB price per metric ton may have been relevant to the 1,500 metric tons repurchased by the Russian sellers at cost, but it seems that the 1,500 metric tons had already been repurchased by November, and that \$55 per metric ton may have been below the original cost of the steel under the first contract between the Russian sellers and Harlow & Jones. Unfortunately, this is unclear because we are not told the cost per metric ton under the first contract in Mr. Justice Roskill's judgment. However, it may be fair to assume that Harlow & Jones would have been amenable to an offer at or above cost, given that they accepted such an offer with respect to the 1,500 metric tons, and thus that the \$55 FOB per metric ton offer must have been below cost if Harlow & Jones declined it; especially in light of the collapse in the market and mounting storage charges. In any event, to be clear I leave both such offers to one side and do not consider them material.)

²⁸³ It is fair to say that Mr. Justice Roskill very clearly condemns the behaviour of the defendants though, whatever his reasons; See *Panex*, *supra* note 15, Roskill J ("As a matter of arithmetic those figures are correct, but the point is this. The defendants broke this contract. It is they who put the plaintiffs in this difficulty. Of course, a plaintiff has always to do what is reasonable to mitigate his damages. But he is not bound to nurse the interests of the contract breaker, and so long as acts reasonably at the time it ill lies in the mount of the contract breaker to turn round afterwards and complain, in order to reduce his own liability to a plaintiff, that the plaintiff failed to do what he might have been wiser to do. I have already said there was no market at any material time. I think the plaintiffs were in great difficulty, and I think the difficulties were entirely of the defendants' making." at 530).

thus *not* apply to deflect the ordinary assessment of loss and damage from the Expectation Measure to the lower Hypothetical Minimum Measure. It is also not the explanation that I prefer, for reasons that I will explain, but the possibility bears consideration nonetheless and can be understood as follows.

One should begin by noting that although the applicability of Mitigation is assumed, it is arguable that Mitigation could not yet have applied at the time of Panex's offers. The reason for this is that Panex's purported rightful termination on August 22 was in fact wrongful, and thus actually a repudiation, and therefore not capable of ending the contract unless accepted by Harlow & Jones, which they did not, or at least not on August 22, and possibly not by the time of the second offer on August 25, either.²⁸⁴ If this is correct, there were arguably no "post-breach" offers made by *Panex*, because there was arguably, as yet, no breach, and where there is no breach, there is nothing to which Mitigation can apply.²⁸⁵ Of course, it is true that Panex's repudiation on August 22 can be described as anticipatory breach, but given the time remaining for Panex to perform, and the impotence of unaccepted repudiation, it appears clear that in law, Panex's repudiation could at that time amount to no more than an attempt at renegotiation which, like an unaccepted offer, is merely a thing writ in water and of no effect on the parties'

²⁸⁴ See *Howard v Pickford Tool Co Ltd*, [1951] 1 KB 417 (CA), Lord Evershed MR ("It is quite plain [and I refer, if it be necessary to quote authority, to the speech of Lord Simon, L.C., in *Heyman v Darwins Ltd*], that if the conduct of one party to a contract amounts to a repudiation, and the other party does not accept it as such but goes on performing his part of the contract and affirms the contract, the alleged act of repudiation is wholly nugatory and ineffective in law." at 420-421), See Beale, *supra* note 6 at 24-001 (Note, the innocent party's right to elect is not without qualifications, but even in the context of employment with wrongful repudiation by the employer, repudiation is almost always ineffective until accepted.); See Fridman, *supra* note 86 at 599.

²⁸⁵ See *Shindler v Northern Raincoat Co Ltd*, *supra* note 44, Diplock J (as he then was) ("The position was that, on the correspondence, the defendant company had, by a letter dated 2 September 1958, told the plaintiff that his services with the defendant company would terminate not later than 30 November 1958. That was a wrongful repudiation of contract which the plaintiff had an option either to accept as an anticipatory breach rescinding the contract and thus entitling him to sue for damages forthwith, or to refuse and to continue to treat the contract as subsisting and to continue to serve as managing director. He elected to do the latter and there was, accordingly, no breach of the contract on which he could sue until his office as director was terminated on 21 November and between 2 September and 21 November the defendant company had a *locus penitentiae* in which it could have changed its mind and decided to go on employing him. It seems to me that, as a matter of law, it cannot be said that there is any duty on the plaintiff to mitigate his damages before there had been any act which is either an actual breach or an act which he has elected to treat as an anticipatory breach." at 249); See *Hunt River Camps/Air Northland Ltd v Canamera Geological Ltd*, *supra* note 44, Green JA ("For an issue of mitigation to arise, there must be a breach of the contract by the other party which gives rise to a claim for damages." at para 53).

legal situation.²⁸⁶ Quite simply, the contract remained to be performed, and until that performance had been actionably withheld, or rendered defectively, Harlow & Jones were within their legal rights to refuse Panex's repudiation with no thought given to Mitigation, because Panex had not yet actually, or actionably, failed to *do* anything — i.e., there was no failure to meet a contractual obligation, merely the “threat” of one.²⁸⁷ As such, from that perspective, Harlow & Jones' refusal of the “post-breach” offers could not amount to a failure to mitigate a loss, because there strictly speaking was none *at that time*.²⁸⁸ Of course, I would only say arguably, because another view is possible.

The reply I suggest that one could make to the paragraph above, as per *White and Carter (Councils)*, is that where the contract cannot be unilaterally performed by the innocent party, the innocent party cannot refuse to accept the delinquent party's repudiation, which makes the distinction between breaches anticipated and actual

²⁸⁶ See *Howard v Pickford Tool Co Ltd*, *supra* note 286, Asquith LJ (“An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind. Therefore a declaration that the defendants had repudiated their contract with the plaintiff would be entirely valueless to the plaintiff if it appeared at the same time, as it must appear in this case, that it was not accepted.” at 421); See *Chapman et al v Ginter*, [1968] SCR 560; See Fridman, *supra* note 86 at 599; See Beale, *supra* note 6 at 24–001.

²⁸⁷ See *Martin v Stout*, [1925] AC 359 (PC Egypt), Lord Atkinson (“Many other authorities might be cited in support of this well-established principle of English law, that where a contract is to be performed on a future day or is dependent on a contingency, and one of the parties to the contract repudiates it and shows by word or act that he does not intend to perform it, the other party is entitled to sue him for breach of the contract without waiting for the arrival of the time fixed for performance, or the happening of the contingency on which the contract is dependent, and is himself absolved from the further performance of his part of the contract. If he elects to do this the contract is completely at an end, and the party in default is not entitled to an opportunity to change his mind. But the repudiation of a contract by one of the parties to it does not of itself discharge the contract. It only gives to the other party the option of either treating the contract as at an end, or of waiting until the stipulated time has arrived or the contingency upon which the performance of the contract was dependent has happened.” at 364); See *White and Carter (Councils) Ltd. v McGregor*, *supra* note 119, Lord Reid (“The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect.” at 427). See Fridman, *supra* note 86 at 599.

²⁸⁸ See *Hunt River Camps/Air Northland Ltd v Canamera Geological Ltd*, *supra* note 44, Green JA (“For an issue of mitigation to arise, there must be a breach of the contract by the other party which gives rise to a claim for damages.” at para 53).

effectively academic.²⁸⁹ Although, that position may be subject to the qualification that the innocent party may refuse the repudiation and insist on keeping the contract on foot at least until the due date for performance.²⁹⁰ Here, that would have included the entire loading period until the last available day for a vessel to be tendered for loading, which day was September 30, 1966, more than a month after Panex's second offer at \$59.25 FOB per metric ton.²⁹¹ However, it would be startling to suggest, in light of everything that I have already said, that substance would readily give in to form in every case solely on the basis of timing, and that any offer must be excluded from consideration until or unless the alleged breach is actual or has become so. The merit of the technical legal argument is of course little in doubt, but as I have already said, the point of equity's intervention here is the better fulfilment of that law in spirit, which at times requires departure from its letter, as indicated by the fact that Mitigation exists at all. Instead, I would suggest that irrespective of the time left available to the defendant to perform their obligations, it is the legitimacy of the plaintiff's interest in keeping a contract on foot that ought to dictate the applicability of Mitigation to any choice made to reject an alternative offered by a would-be defendant. Although, this is really to say no more than *White & Carter*, with only a slightly different question in mind. Nonetheless, I think it makes the point clear that the first and technical basis for Mr. Justice Roskill's decision on point does not succeed in substance. However, there still remains the second of the two true

²⁸⁹ See *White and Carter (Councils) Ltd v McGregor*, *supra* note 119, Lord Reid ("Of course, if it had been necessary for the defender to do or accept anything before the contract could be completed by the pursuers, the pursuers could not and the court would not have compelled the defender to act, the contract would not have been completed and the pursuers' only remedy would have been damages." at 429); See also *Finelli et al v Dee et al*, (1968) 67 DLR (2d) 393 (ONCA) at 395 (Laskin JA disagrees with the majority judgment in *White & Carter*, but clearly agrees that a plaintiff that could not have performed the contract without the cooperation of the defendant effectively cannot refuse the repudiation. Laskin JA's point disagreement with the the majority in *White & Carter* is that even a plaintiff who can perform unilaterally should not be allowed to refuse the defendant's repudiation either.).

²⁹⁰ See *White and Carter (Councils) Ltd. v. McGregor*, *supra* note 119, Lord Reid ("The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect." at 427); See *Fridman*, *supra* note 86 at 599.

²⁹¹ *Panex*, *supra* note 15 at 530.

bases for finding a refusal not unreasonable, and this I will canvass in the paragraph to follow.

Readers will recall that the second basis suggested for a plaintiff's decision to refuse an offer made in post-breach negotiation is not, strictly speaking, concerned with the terms of the offer itself, as the first basis was when we asked whether the defendant asked too much, but is instead concerned with whether the defendant is right to "ask" at all. I will now turn to what this means, and in short, it reflects not the legal aspect of surplus creation inherent in Mitigation's operation, but instead Mitigation's nature as an aspect of the Court's equitable jurisdiction, and Chancery's concern to always ensure that those it helps have themselves acted equitably.²⁹² A number of potential objections can be made to the actions of a party seeking equity's assistance, all of which are likely familiar. Laches, acquiescence, estoppel, and clean hands are prominent examples, and in *Panex*, I think it is clear from the remarks of Mr. Justice Roskill that the last of these was actively in play, as the following passage indicates:²⁹³

"As a matter of arithmetic those [figures calculated by the defence to show that Harlow & Jones could have limited their losses by selling earlier] are correct, but the point is this. **The defendants broke this contract. It is they who put the plaintiffs in this difficulty.** Of course, a plaintiff has always to act reasonably, and of course he has to do what is reasonable to mitigate his damages. But he is not bound to nurse the interests of the contract breaker, and so long as he acts reasonably at the time **it ill lies in the mouth of the contract breaker to turn round afterwards and complain**, in order to reduce his own liability to a plaintiff, that the plaintiff failed to do that which perhaps with hindsight he might have been wiser to do. I have already said there was no market at any material time. **I think the plaintiffs were in great difficulty, and I think the difficulties were entirely of the defendants' making.**" [Emphasis added]

²⁹² Equity generally requires that those "...that come into equity come with clean hands", although the requirement has limits; See Heydon, Leeming & Turner, *supra* note 117 ss 3–090; See McGhee, *supra* note 28 ss 5–010; See *Loughran v Loughran*, (1934) 292 US 216, Brandeis J ("Equity does not demand that its suitors shall have led blameless lives." at 229).

²⁹³ *Panex*, *supra* note 15 at 530.

Of course, one can read the above, as I have earlier noted in Chapter III, as authority for the simpler proposition that the defendant simply cannot expect perfection. One can also note, as I also did, that there is tension between the view expressed above and that expressed by Lord Justice Harman in *Darbishire*, where his Lordship stated that “...[t]he true question was whether the plaintiff acted reasonably as between himself *and* the defendant in view of his duty to mitigate the damages”.²⁹⁴ Not to mention the fact that to question the plaintiff’s actions after the fact with the benefit of hindsight is to some extent *the understood point of Mitigation*.²⁹⁵ These disagreements, though seemingly diametric, are not insurmountable. Instead, as I explained in Chapter III, the difference does seem to dissolve if we remember that even though each judge and each case purports to be speaking to the same matter, in reality each is speaking to very different parties and very different facts. Mr. Justice Roskill’s dicta above does not immediately admit to any such distinction, preferring instead to adopt a tone of neutrality that speaks to the position of all plaintiffs and defendants, and not merely those before him with their merits and relative lack. However, it is clear from the following remarks made earlier in his judgment with respect to Panex’s principle, Mr. Colonna, that the defendants were not ordinary parties, and though His Lordship is purporting to apply the “rule” more generally in the passage immediately above, these are supplicants from whom he thought assistance should be held back:²⁹⁶

“Mr. Dunn, for the defendants, has strongly pressed me that any apparent lack of merit in the defendants’ case is wholly irrelevant. So it is. **The fact that yesterday Mr. Colonna, under a devastating cross-examination (as I would describe it) by Mr. David Hirst was shown to have lied again and again in the course of his transactions with the plaintiffs, and to have shown himself – I say this with regret but it would be wrong for me not to express a view – as a man to whom, in relation to business transactions, truth is a stranger,** is of no real relevance to the determination of the central issue in this case....

²⁹⁴ *Darbishire*, *supra* note 6 at 313, Harman LJ.

²⁹⁵ Why else ask if the plaintiff acted reasonably?

²⁹⁶ *Panex*, *supra* note 15 at 514–515, 530.

In considering who is right on the central issue I have therefore put right out of my mind – and I accept Mr. Dunn’s submission that I should put right out of my mind – any apparent lack of merit in the defendants’ case, **any consideration of the fact that it seems that from an early stage, when the market began to fall, they were determined, if they could, to get out of their obligations to the plaintiffs, and any adverse impression which Mr. Colonna’s untruthfulness in correspondence or conduct in the witness-box may have made upon me.** I leave these matters to one side. I deal with the central issue in this case as one of the construction of contract and therefore of law.

...

That decision to buy having been made by the defendants, the contracts between the defendants and the plaintiffs and the plaintiffs and the Russian sellers were made. The market then went against the defendants. The plaintiffs did everything that they could, and the Russian sellers did everything they could, to meet the requirements of the defendants. The defendants extricated themselves in the manner to which I have already referred from one half of the contract with the plaintiffs.²⁹⁷ They then proceeded to set about extricating themselves from the other half of that contract. I hesitate to say anything harsh but I saw Mr. Colonna in the witness-box and I saw him cross-examined. **He is a ruthless man and he is commercially unscrupulous. He will say anything which he thinks will service his immediate purpose of either making money or avoiding losing money. That was what happened here. Although he denied it, he is a man who, I am afraid, takes the view that the end justifies the means.** In my judgment the defendants have no defence in this case, notwithstanding the skill with which the arguments on their behalf have been advanced by Mr. Dunn.”

From the foregoing, I would suggest that one can infer that despite Mr. Justice Roskill’s insistence on the importance of equanimity and impartiality in the resolution of the central controversy of the case, His Lordship had little doubt as to which parties’ moral standing was stronger. One can also say that he was correct to assert the irrelevance of Panex’s improbity to determining whether Panex could, as a matter of construction, in fact revert to the original contractual position requiring shipment of all 10,000 metric tons in a single hull after encouraging Harlow & Jones and the Russian

²⁹⁷ *Ibid* at 510 (Note, the contract for 10,000 metric tons was, as mentioned, a variation of an earlier contract. That earlier contract was for the larger amount of 20,000 metric tons, half of which quantity was avoided in the renegotiation leading to the 10,000 metric ton contract though, as Mr. Justice Roskill notes here.).

sellers to arrange loading on the basis of two. Further, one can understand that His Lordship would not aver directly to his disapproval of Panex's actions in support of his conclusion on the Mitigation point for two reasons in particular. The first is the just mentioned amoral approach he has had to adopt in relation to the question of breach. And the second is the understanding of Mitigation prevailing then and now that views Mitigation in some sense as perhaps a "quasi-obligation" incumbent on the plaintiff, and if not an obligation, then at least a question concerned with the acts of the plaintiff, and quite apparently no one else. Nonetheless, given the depths of the defendants' duplicity in attempting to force a pretext for lawful cancellation, it appears to me much more likely that Mr. Justice Roskill's decision to deny Panex's plea in Mitigation depended much more heavily, if not exclusively, on his judgment of Panex's deceit than it did on his articulate major premise.²⁹⁸

If I am correct above in surmising that Mr. Justice Roskill's rejection of Panex's mitigation argument is effectively an equitable response to manifestly inequitable behaviour, I should hasten to reiterate that this response is not rooted in the underlying cause for contracts in the same way as those decisions made by courts on the basis of the plaintiff's efforts or lack thereof. As such, although I have discussed this case in the context of claims for accrued loss under the rule from *Robinson*, it is quite apparently the case that equitable arguments against the application of Mitigation to relieve one party or the other of a burden that would otherwise fall upon them ought to be as equally available elsewhere. For instance, with respect to consequential loss under the rule of remoteness, we will also see this demonstrated by *Panex* with respect to the second half of Harlow & Jones' claim as discussed below. First, though, I will turn to consider the particular intersection of remoteness and Mitigation when equity may act to relieve parties from the strict application of this rule.

²⁹⁸ This is hardly uncommon, and unsurprising in many cases; See Oliver Wendell Holmes, *The Common Law* (Cambridge, Mass: Harvard University Press, 2009) at 34 ("Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions...").

b. Accrued consequential loss/damage

As mentioned above and discussed in Chapter III, there is at times a certain non-advertence or perhaps inadvertence in the present case law as to the distinction between direct and consequential loss.²⁹⁹ Although, as also explained, it has to be said in fairness that the distinction between them in principle can at times be a difficult line to draw. After all, a plaintiff seller's claim for the difference between a contract price and a market price is no more or less a claim for lost profit than a plaintiff launderer's claim for profits lost as a consequence of a purchased boiler being delivered late.³⁰⁰ Nonetheless, difficult or otherwise, a distinction does appear in our attitudes to one or the other, as reflected by the fact that there is a more onerous standard to be met in order for consequential loss to be recovered which, as we know, pertains to the defendant's contemplation of the relevant risk manifesting a loss as being not unlikely to arise.³⁰¹ This of course stands in stark contrast to direct losses which, unlikely or not, are recoverable short of being "frustratingly" unforeseeable.³⁰² Of course, one might ask what the foundation for such a distinction is given the fine degree of difference that may inhere in some cases, as just pointed out. However, if difference there is, the distinction is explicable if one considers that the cost of liability for consequential loss *must* effectively form part and parcel of the consideration provided by a given party, simply by virtue of the fact that it is required of them, because secondary liability in contract is justifiable only where the monetary liability imposed mirrors the allocation of primary rights and responsibilities voluntarily agreed to (i.e., the mutual exchange of consideration), and agreement to liability for any risk/loss that is not obvious from the terms of the contract itself (i.e., not a direct loss) can thus quite apparently only be justifiable if the risk in question can be plausibly said to

²⁹⁹ See Chapter III – Section II.B.2.

³⁰⁰ The question of remoteness is never raised when it comes to sale contracts involving a contract price and a market price; See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*, *supra* note 91; See e.g. *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH*, *supra* note 67; See e.g. *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd et al*, [1968] AC 1130 (HL (Eng)).

³⁰¹ See Beale, *supra* note 6 at 26–123, 26–130; Fridman, *supra* note 86 at 678–683.

³⁰² I.e. if the contract is "frustrated" in some way.

have been within the general or specific contemplation of the defendant at the time of contracting.³⁰³ The only apparent alternative, if liability is to be imposed irrespective of the defendant's reasonable contemplation, is to implausibly infer agreement to responsibility for risk or risks that never even ostensibly crossed the defendant's mind. If this is correct, then the difference in treatment between consequential and direct loss is both sustainable in principle and quite obviously necessary. Likewise, a difference in the application of Mitigation to claims for loss governed by the rule of remoteness appears necessary also.

Before moving on to consider the particular application of Mitigation to consequential loss, I should amplify what I said above in case the underlying point is not obvious, which is that to impose liability for risks outside of the defendant's reasonable contemplation is to impose liability without consent, which violates the underlying assumption of self-interest inherent in our understanding of contract's creation of surpluses from trade.³⁰⁴ I should also point out the corollary, though, which is that to inappropriately absolve a party from liability for consequential loss arising from a risk *properly assumed* by the defendant violates the assumption of self-interest on the part of the plaintiff, who is consequently being given less than what they bargained for.³⁰⁵ This being said, hopefully it will be clear that Mitigation's role with respect to intervention in the operation of the rule of remoteness is to ensure that neither the plaintiff receive more, nor the defendant pay more, than they had bargained for in substance, by intervening to expand or curtail the scope of recovery where the application of the rule according to its letter would be in conflict with the substance identified above. The parameters of what it means to do this are, of course, a matter that varies according to context, and as such, consideration of the cases below will likely help to further clarify what is meant.

³⁰³ Or perhaps within the "scope of the duty"; *The Achilles*, *supra* note 65.

³⁰⁴ See Chapter I – Section II.C.

³⁰⁵ This follows from contract's role in risk allocation, which permits parties to price and transfer risk, and effectively makes the assumption of a risk by one party or the other part of their consideration for entry into the contract; Maharaj, *supra* note 47 at 646.

i. Has the plaintiff acted?

As we will see from the decisions discussed below, subsequent action by a plaintiff has the potential to better or worsen a plaintiff's position, but whether the result is good or ill, the same overarching question of allocation referred to above arises with respect to who between the plaintiff and the defendant must be the beneficiary or bearer thereof. Of course, the question of allocation is not answered in such general terms, but instead entails consideration as to whether what has been done ought to be seen or *regarded as done* in actual or attempted mitigation of the plaintiff's "loss" arising from the breach/wrong. As noted above, this is a question of determining what significance to attach to acts or events that have occurred, not whether acts or events (i.e., acts of mitigation) have "occurred at all". It bears reiterating that generally speaking, by the time a matter is ripe for adjudication, what has happened has happened, and what is left to be determined is whether a given plea will or will not be sustained. With respect to consequential loss and its intersection with mitigation, the plea to be answered is whether the opposite party ought to be allowed to plead the strict application of the remoteness rule in the circumstances. Doubtless, this sounds somewhat abstract and arcane, but as I have done above, I will explain the bases upon which Mitigation may intervene by reference to decided cases.

a. Has the plaintiff's action made matters worse?

In much the same way that the considerations informing the application of Mitigation differ according to whether the plaintiff has acted or been idle following the breach/wrong, so too do they differ according to whether any action taken by the plaintiff has bettered or worsened their situation. As such, I will explain the effect of Mitigation on remoteness in circumstances where the plaintiff's post-breach/wrong actions have worsened or bettered their position separately, beginning with the situation where a plaintiff's actions form part of a chain of events that have consequently led to greater loss

accruing. The decisions I will canvass for the purpose of demonstrating what the operative considerations are in such circumstances are *Marigold Holdings Ltd. V. Norem*;³⁰⁶ *Viper Concrete v. Agon Construction Ltd.*;³⁰⁷ *Costello v. Cormier Enterprises Ltd.*;³⁰⁸ and *Esso Petroleum v. Mardon*.³⁰⁹

Marigold Holdings Ltd. v. Norem Construction Ltd. is a 1988 decision of Madame Justice Conrad (as she was then) sitting in the Alberta Court of Queen’s Bench, involving a dispute over the defective construction of an apartment building on the banks of the “Bow” River in Calgary.³¹⁰ The parties to the dispute included the members of a limited partnership as plaintiffs, three defendants, and numerous third parties.³¹¹ For present purposes, little turns on the web of relationships between parties and only the actions of four actors need to be considered in particular in order to understand the facts pertinent to the application of Mitigation on the case. These four are Marigold as owner/developer, Norem as the general contractor responsible for overall delivery, and Barry Pendergast and Ming Chen (the “Architects”) responsible for design and oversight.³¹² To understand the behaviour and respective failings of all four, a few words must be said about the details of the particular project.

The apartment building in question, known as Riverview Place, consisted of three interconnected wooden structures containing 66 apartments erected upon the concrete roof slab of a connected underground parking structure.³¹³ Importantly, the footprint of the concrete roof extended well beyond the footprint of the building, and the first level of apartments (the basement apartments), while above the slab, were technically below

³⁰⁶ *Marigold Holdings Ltd v Norem Construction Ltd*, [1988] 5 WWR 710 (ABQB) [*Marigold*].

³⁰⁷ *Viper Concrete 2000 Inc v Agon Developments Ltd*, [2009] ABQB 91.

³⁰⁸ *Costello v Cormier Enterprises Ltd*, (1979), 28 NBR (2d) 398 (NBCA).

³⁰⁹ *Esso Petroleum Co v Mardon*, *supra* note 12.

³¹⁰ *Marigold*, *supra* note 308 at paras 1–3.

³¹¹ *Ibid* at paras 3–4.

³¹² *Ibid* at paras 1–2, 19.

³¹³ *Ibid* at paras 1, 9.

ground on account of the berming of earth against the sides of the building as part of the extensive landscaping of the area above the slab that was not covered by the building itself.³¹⁴ This particular arrangement created a risk of leakage into the building from precipitation entering the earth surrounding the building on account of the fact that water above the slab would be unable to drain vertically and could thus pool and potentially migrate into the building itself unless precautions were taken with respect to drainage and protection of the building envelope from the ingress of said water.³¹⁵ As one might surmise, the substance of the *lis* in this case was responsibility for damage resulting from the ingress of water into the building that occurred after said precautions were omitted or only poorly implemented.³¹⁶

The particular precautions that were included in the contract between Marigold and Norem, agreed between Marigold and Norem by May 28, 1981, included the following:³¹⁷ first, the installation of a 2% concrete topping to go above the slab, sloped to drain water away from the building; and second, a continuous waterproof membrane to surround the building where the vertical walls met the slab, and which would extend out onto the slab and, critically, up the vertical wall to a height sufficient to protect against water that may have pooled next to the building.³¹⁸ Responsibility for ensuring that these precautions were implemented were shared between the Architects and Norem.³¹⁹ Unfortunately, as it turned out, the waterproof membrane was installed up to an insufficient height in places and with “breaks” that would permit the entry of water, and

³¹⁴ *Ibid* at paras 9–10.

³¹⁵ *Ibid* at para 12.

³¹⁶ *Ibid* at paras 77–87.

³¹⁷ *Ibid* at para 33.

³¹⁸ *Ibid* at para 12.

³¹⁹ *Ibid* at para 85 (“I am satisfied that the architect and the contractor are jointly and severally liable for the damage. In my opinion this is a case of concurrent wrongdoing and, that being so, they are liable in full for the damage done by all, whether they acted in concert or not, with the exception of that portion of the damage attributable to the design of the balconies for which the architect is solely liable. Their acts produced the single damage and they are each responsible in full for it.”).

the 2% concrete topping was not installed at all.³²⁰ These failures were the fault of Norem, on the one hand, for failing to carry out the work or to carry it out up to the required standard, and the Architects who had supervisory responsibilities in relation to ensuring that said work was correctly carried out.³²¹

Defects notwithstanding, the building was certified as substantially complete by May 28, 1982.³²² Leaking was evident even before this, though, in April 1982, and appears to have occurred again in August 1982.³²³ The cause and severity thereof was perhaps not fully apparent immediately, as Madame Justice Conrad appears to have accepted, but Her Ladyship did find that by the spring of 1983, the seriousness of the problem was known.³²⁴ Furthermore, Her Ladyship was of the view that it was clear following receipt of a report from an independent architect in June of 1983 that extensive repairs were definitely needed, including specifically the replacement of the waterproof membrane that was broken in places and which did not reach the required height around the building envelope.³²⁵ Thus, it was from this point at the latest that Mitigation arose in issue. Unfortunately, Marigold's response was less than ideal.

Instead of heeding the advice of the independent architect mentioned above, Marigold's response was to retain another construction firm, Lennary Contracting, to carry out necessary remedial work and to instruct them to correct the leaks on a "piecemeal or experimental basis".³²⁶ It is worth noting that in so doing, Marigold ignored Lennary's own apparently independent recommendation that the entire waterproof membrane be replaced.³²⁷ Unsurprisingly, the piecemeal approach did not

³²⁰ *Ibid* at para 77.

³²¹ *Ibid* at paras 85–109.

³²² *Ibid* at para 61.

³²³ *Ibid* at para 65.

³²⁴ *Ibid* at para 70.

³²⁵ *Ibid* at paras 200–204.

³²⁶ *Ibid* at para 200.

³²⁷ *Ibid*.

work, and instead only had the effect of worsening Marigold’s position by way of running up fruitless costs and delaying the time at which the necessary repair work could begin, leading to cost inflation, further loss of rent from rebates, loss of tenants from affected suites, and likely further water damage to the interior of the building as the leaking continued.³²⁸ Perhaps also unsurprisingly, Madame Justice Conrad readily held Marigold’s decision to pursue the “piecemeal” course as unreasonable in the circumstances and held that Marigold could only recover for lost rent and costs, and the cost of the necessary full repairs, up to/as at December 1983.³²⁹ December 1983 was the time by which Her Ladyship held that full repairs should have been completed, based on what Marigold knew of the problem.³³⁰

What *Marigold* demonstrates with respect to the effect of Mitigation on a claim for consequential loss following from an unsuccessful attempt to mitigate is that, depending on the choices available in the circumstances, Mitigation may debar the plaintiff from relying on the remoteness rule to bring such further consequential loss within the scope of recovery.³³¹ In so doing, Mitigation is acting as I have described it — i.e., as a defence to the opposite party’s strict insistence on the terms of the remoteness rule — thereby displacing it. As to what justifies the displacement in the circumstances of *Marigold*, it may suffice to say that the plaintiff Marigold’s choice was simply unreasonable and that this justifies the allocation of such further consequential loss to

³²⁸ *Ibid* at paras 200–202.

³²⁹ *Ibid* at paras 204–214.

³³⁰ *Ibid* at para 204.

³³¹ This conclusion appears to follow if one compares *Marigold* with *Costello*. Both cases clearly involved additional consequential loss arising after discovery of a building defect, but only the Costellos (whose actions were deemed reasonable) were permitted to recover further consequential loss without reduction, whereas the plaintiffs in *Marigold* (whose actions were deemed unreasonable) were not; See *Costello v. Cormier Enterprises Ltd.*, *supra* note 310 at paras 15–16; See *Marigold*, *supra* note 308, Conrad J (“Thus I believe the cost of repair to Riverview and expenses and loss of rent to the date when they should have mitigated would be the appropriate measure of damages for Riverview.” at para 209).

them.³³² That, however, would only be to state a conclusion at best rather than to provide an explanation. A full explanation of the reason for such an allocation of loss, though, depends on an understanding of *Marigold* in contradistinction to *Viper Concrete*, *Costello*, and *Esso Petroleum*. As such, I will proceed to elaborate on the facts of *Viper Concrete* before turning to *Costello*, finally touching on *Esso Petroleum* before then elaborating on what it is these decisions have to tell us in concert.

Viper Concrete v. Agon is a decision of Mr. Justice N.C. Wittman, Associate Chief Justice of the Alberta Court of Queen’s Bench.³³³ It is more comparatively recent than *Marigold*, but likewise involves construction.³³⁴ The important aspect of the *lis* for present purposes is that it involved a dispute between the plaintiff by counterclaim, Agon, and the defendant by counterclaim, Viper Concrete, over defective work that Viper had done as a subcontractor for Agon.³³⁵ The work in question involved provision of labour and materials to install a sidewalk, stairs, patio, and a front landing, all to be made of exposed aggregate concrete at a residential property that appears to have been in Calgary (the “Concrete Work”) for a price of \$12,875 + GST.³³⁶ Defects with Viper’s work were numerous, but to explain, a few words must be said about concrete.

In general, concrete is a mixture of two main components:³³⁷ the first is cement, and the second is aggregate, which consists of small stones.³³⁸ The aggregate component of concrete is not typically visible when concrete is set, and is instead generally

³³² *Marigold*, *supra* note 308, Conrad J (“They obtained a report and certainly that is a proper expense. Lenarry recommended replacing the membrane. They did not follow his advice. They did not take the proposed experimental steps of Lenarry back to the architect to see if he thought that might work. I am satisfied they would have been told not only would it not work but it could add to the problem. They did not remember the bond and call in the surety. They did not talk to Pendergast and get his views. They simply went in and experimented. In view of the advice they had, I do not think this action was reasonable and I do not think they can recover the Lenarry expense.” at para 23).

³³³ *Viper Concrete 2000 Inc v Agon Developments Ltd*, *supra* note 309.

³³⁴ *Ibid* at para 1.

³³⁵ *Ibid* at paras 1–2.

³³⁶ *Ibid* at paras 8, 11.

³³⁷ *Ibid* at para 9.

³³⁸ *Ibid*.

concealed beneath a uniform (typically grey) surface layer.³³⁹ Exposed aggregate concrete, by contrast, is concrete that has had water, or another medium, applied to remove the uniform surface layer in order to reveal the aggregate within the concrete.³⁴⁰ The purpose of doing so is generally to improve the aesthetic quality of the concrete by softening grey concrete's otherwise harsh appearance.³⁴¹ Because of the additional work required to remove the top layer of concrete, exposed aggregate concrete is more expensive and labour-intensive than regular grade concrete.³⁴² Its appearance is also assessed somewhat differently and can be graded as being up to one of three different standards according to the quality of the finish achieved.³⁴³ The standards in ascending order are: "do-it-yourself"; the "labourer" or "middle" standard; and "professional or artisan" standard.³⁴⁴

A contract between Agon and Viper for the Concrete Work was entered into in June 2003, and the work itself carried out shortly after in July 2003.³⁴⁵ Unfortunately, the work done by Viper had numerous defects, including cracking, inconsistent stair elevation, poor joint detail, pooling, and under- or over-exposure of the aggregate in the concrete, the last of which gave the work a pronounced uneven appearance.³⁴⁶ Remedial efforts were made by Viper in 2003 and 2004, which rendered the pooling issue manageable (the "Remedial Work").³⁴⁷ Many of the other deficiencies remained, however.³⁴⁸ As a result, a third-party expert named Meltzer was retained by Agon in

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid* at para 16.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid* at paras 11–12.

³⁴⁶ *Ibid* at para 15.

³⁴⁷ *Ibid* at paras 12–13.

³⁴⁸ *Ibid* at para 13.

2005 to assess the work and to advise on remediation.³⁴⁹ Meltzer’s conclusion was that the work was functionally “sound”, but only reached the “do-it-yourself” grade in terms of finish and was thus aesthetically unacceptable from an architectural perspective.³⁵⁰ Meltzer’s conclusion on remediation was thus that the only remedy was to remove and redo the Concrete Work entirely.³⁵¹ Meltzer’s estimate of the likely cost of removal and replacement was \$45,300 + GST.³⁵² Agon thereafter acted on Meltzer’s advice and had the removal and replacement work (the “New Work”) carried out by a new contractor between August and October 2006, i.e., when weather was again consistently warm enough for the New Work to occur, given the 10 degree Celsius requirement for concrete installation.³⁵³ The final cost of the removal and replacement work amounted to \$58,802.78, including a \$6,034.75 general contractor fee for Agon and \$3,922.50 in internal labour costs and disbursements.³⁵⁴ Importantly, the New Work appeared to have been up to standard and satisfied the owners of the property.³⁵⁵

Other than liability, which was resolved without great controversy, the issue arising from the above facts that required attention from the Court was the recoverability of the cost incurred in carrying out the New Work.³⁵⁶ This depended on both the appropriateness of “cost of cure” and on the reasonableness of Agon’s actions in terms of Mitigation.³⁵⁷ For present purposes, little turns on the cost of cure question, and it suffices to say that the cost of cure, including full removal and replacement of The Work,

³⁴⁹ *Ibid* at para 14.

³⁵⁰ *Ibid* at para 16.

³⁵¹ *Ibid* at para 18.

³⁵² *Ibid*.

³⁵³ *Ibid* at paras 19, 88.

³⁵⁴ *Ibid* at para 19.

³⁵⁵ *Ibid* at para 20.

³⁵⁶ *Ibid* at paras 22, 25–48.

³⁵⁷ *Ibid* at para 49.

was found appropriate.³⁵⁸ What was in issue for our purposes, though, was the increase in cost for full removal and replacement between 2004 and 2006, and whether the difference ought to be recoverable, which in turn depended on the reasonableness of the delay.³⁵⁹ In the circumstances, the Court concluded that a period of up to a year was reasonable for the purposes of obtaining an expert report, as was implicitly found even in *Marigold*, and that the time between receipt of the report and completion of the New Work was likewise reasonable, even though it was completed much later than the Court in *Marigold* was prepared to accept in that case.³⁶⁰

As with *Marigold* above, the significance of *Viper Concrete* is best understood by way of contrast with the other decisions herein considered. Although it is perhaps evident by this point that the ultimate thrust of the decisions, and the argument I will be making, pertains to what it means for loss to “accrue”, and what it means to act reasonably in circumstances of accruing loss. In that connection it is apposite to note that the next case canvassed, *Costello v. Cormier Enterprises Ltd.*, sits somewhere between the preceding two in terms of the circumstances of the loss arising and the seriousness of the issues leading to said loss. As we will see, the contrast enables appreciation of distinctions not addressed explicitly, but which I will aver actually underpin not only difference in the result of these cases, but also a not inconsiderable difference of approach as between the application of Mitigation to direct and consequential loss.

³⁵⁸ *Ibid* at paras 65–71.

³⁵⁹ *Ibid* at para 85.

³⁶⁰ *Viper Concrete 2000 Inc v Agon Developments Ltd*, *supra* note 309, Wittman ACJ (“Implicit in the courts’ decisions in *Marigold Holdings* and *Mundell*, was that it is reasonable to obtain an expert opinion one year after discovering serious problems potentially impacting structural integrity, and four years after discovering a less serious problem. I find the problems with the Remedial Concrete Work more analogous to the situation in *Mundell*, and thus find Agon’s decision to obtain Meltzer’s opinion one year after the Remedial Concrete Work was complete, to be reasonable. As such, I find that, similar to the reasoning in *Marigold Holdings*, *Condominium Plan* and *Mundell*, the reasonable time for replacement began to run when Meltzer’s opinion was obtained in late September 2005... Since Agon did not know the New Work was required until it obtained Meltzer’s recommendation in late September and construction work could not be done past October, I do not find it unreasonable that Agon waited until the following year to complete the New Work.” at paras 85-88”).

Moving on now to *Costello v. Cormier Enterprises Ltd.*, it is worth noting that, like the preceding two cases, this 1979 decision of the New Brunswick Court of Appeal involves construction and, as mentioned above, falls somewhere between them in terms of the severity of the defects involved.³⁶¹ The story behind the decision began with the inspection of an as-yet incomplete dwelling house at 461 Varrily Street in Bathurst, NB, by the plaintiffs, Louis and Bernice Costello (“the Costellos”), in mid-February 1974.³⁶² Said house was offered for sale by its builders, Cormier Enterprises Ltd. (“Cormier”).³⁶³ During the inspection, the Costellos noticed a visible crack in the foundation wall and water in a corner of the basement. These Cormier offered to fix, as well as advising that the workmanship in the house was guaranteed for a year from purchase.³⁶⁴ This appears to have satisfied the Costellos, and the parties proceeded with an agreement for the sale and purchase of the house on February 19, 1974, with the transaction closing and the Costellos taking possession shortly afterward in mid-March.³⁶⁵

Unfortunately, as it turned out, the visible defects noticed by the Costellos during the inspection in February were only minor symptoms of more serious underlying problems.³⁶⁶ Those issues were the improper installation of the drainage tiles around perimeter of the basement, cracks in the basement slab itself, and the footings of certain “wing walls” being too shallow and thus allowing for water and frost underneath the walls to force them upward.³⁶⁷ As time went on, these underlying problems led to further cracking and deterioration in the foundation walls, substantial leaking, and the twisting of the house (as the northeast corner was pushed up) to such an extent so as to make it

³⁶¹ *Costello v Cormier Enterprises Ltd.*, (1979), 25 NBR (2d) 8 (NBQB), aff’d *Costello v Cormier Enterprises Ltd.*, (1979), 28 NBR (2d) 398 (NBCA).

³⁶² *Ibid* at paras 1, 4.

³⁶³ *Ibid* at para 2.

³⁶⁴ *Ibid* at para 4.

³⁶⁵ *Ibid* at para 3.

³⁶⁶ *Ibid* at paras 7–9.

³⁶⁷ *Ibid* at para 10.

impossible to open the front door or lock the house's side door.³⁶⁸ As to the time at which these problems began to manifest, which is important, it appears that serious cracking of the foundation and significant leaking leading to the persistent presence of as much as two inches of water in the Costellos' basement had occurred by as early as April of 1974, i.e., within a month of possession.³⁶⁹ Prompt complaint appears to have been made to Cormier in relation to these problems at that time and repairs attempted on several occasions, but to no avail, leaving the cracking and leaking issue to continue and worsen.³⁷⁰

It appears that after the ineffective repairs, Cormier gave the Costellos the impression that it would replace their basement, but matters continued to drag on fitfully until August 1975, when Cormier offered the less exacting option of building a retaining wall next to the east foundation.³⁷¹ Given that the ground sloped steeply from east to west, it would seem that this was intended to block the flow of any water draining onto the property from reaching the foundations. There was no guarantee that such a solution would work, however, and Cormier explicitly refused to give one.³⁷² Cormier also offered to buy the property back for what the Costellos had paid for it.³⁷³ Both offers were refused, and proceedings subsequently commenced.³⁷⁴ Thereafter, matters dragged on again, as litigation is wont to do, until trial in early 1979, by which time the Costellos had obtained an expert report and confirmed that nothing short of full replacement of the basement would do.³⁷⁵ The cost of doing so at the time of the report in 1978 was

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid* at para 7.

³⁷⁰ *Ibid.*

³⁷¹ *Ibid* at para 11.

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid* at para 12.

\$14,000.³⁷⁶ At trial, Mr. Justice Stratton found for the Costellos on liability and accepted the cost of cure as correct, but preferred to award the lower cost to remediate of \$10,000 as at 1975, i.e., when the “legal” dispute began.³⁷⁷ The Court’s correctness in doing so was of course in issue on appeal and in the result was sustained, which now brings us to *Costellos* significance for present purposes.³⁷⁸

To explain the significance of the difference of opinion between the trial court and the appellate, and *Costello*’s significance as a decision in the context of the discussion in this section generally, a few observations must first be made about the nature of the question in the case. At first blush, the difference of opinion referred to with respect to the timing of the assessment of damage would seem to be a question of when it would have been reasonable for the Costellos to act. In my view, however, the difference between the two courts is less a question of when the Costellos ought to have acted, and more directly relates to whether one thinks they acted at all, or more accurately, accepts or regards their acts as having been in mitigation. To explain what I mean, I would draw the reader’s attention back to the events following April 1974, when the seriousness of the leaking and cracking issue first became apparent.³⁷⁹ At first, the Costellos looked to Cormier to remediate the problem and waited for Cormier to do so through a number of unsuccessful attempts until mid-1975, when Cormier declined full replacement of the basement and instead offered only a likely ineffective final solution, i.e., the retaining wall.³⁸⁰ It is clear that at this point, Cormier repudiated its responsibility for full removal and replacement under the express or implied warranty in their contract, and it also became clear that the Costellos themselves would have to act. Obviously, the Costellos abstained from taking steps to have the removal and replacement of the basement and foundations done at that time, but did commence the proceedings in order to confirm

³⁷⁶ *Ibid* at para 14.

³⁷⁷ *Ibid* at paras 21–22.

³⁷⁸ *Costello v Cormier Enterprises Ltd*, *supra* note 310 at para 13.

³⁷⁹ *Costello v Cormier Enterprises Ltd*, *supra* note 363 at para 7.

³⁸⁰ *Ibid* at para 11.

their legal and financial position.³⁸¹ “Taking the time” to pursue litigation is described in the decision itself as delay, even by the Court of Appeal.³⁸² One must ask, though, whether the Court of Appeal would have accepted a three- to four-year delay as reasonable, and thus held the \$4,000 greater cost recoverable, if the Costellos had simply waited until 1979 before having the work done, without having commenced proceedings or having taken any other steps beforehand. I would hazard the opinion that it would not have, and would not have sustained the Costellos’ appeal on the damages point and varied the award to include the additional \$4,000 in damages.³⁸³ Thus, the pursuit of litigation must itself be regarded as being of some significance to the application of Mitigation, and thus an act in mitigation, if it is the basis for the recovery of costs/damages that are greater than they otherwise would have been.

Having now established that the act of litigating was itself an “act in mitigation” in the circumstances of the case, one can now ask why such an act was worthy of being deemed as such. One can of course respond, as the Court of Appeal itself did, by describing the action as reasonable.³⁸⁴ This, however, is tantamount to stating a conclusion, and more must be said in relation to *Costello*’s facts in contrast to those of other decisions in order to explain why. One final decision must be revisited, though, before an analysis of Mitigation’s intervention in not only this case, but also *Marigold* and *Viper Concrete* above, can be meaningfully done.

³⁸¹ *Ibid.*

³⁸² *Ibid* at para 21; *Costello v Cormier Enterprises Ltd*, *supra* note 310, Richard JA (“Even if one applied this principle, can it be said that the three or four years delay, which is the time that it generally takes to have a matter tried and finally disposed of in certain cases, be termed unreasonable? Likewise, can it be said to be an unreasonable delay where that delay is caused by the necessity or desire of a plaintiff to ascertain his final legal position before deciding on the extent of the corrective measures that he is willing to take? ... In the overall circumstances of this case, taking into consideration the period during which certain negotiations and attempts at correcting the defects took place, I do not find that the delay in bringing the action and trying the case was an unreasonable one...” at para 15).

³⁸³ *Costello v Cormier Enterprises Ltd*, *supra* note 310 at para 15.

³⁸⁴ *Ibid.*

Readers are already likely familiar with the fourth and final case from its extensive discussion in Chapter III,³⁸⁵ but I will revisit the salient aspects in brief. We will recall that the parties in *Esso* were linked by an agreement entered into in April 1963 that granted Mardon a three-year lease over the Esso petrol station site at Euston Road in Southport and obliged him to carry on the business of a petrol station there (the “1963 Lease”).³⁸⁶ Mardon entered the agreement on the strength of a throughput projection provided by Esso that estimated a trade of 200,000 gallons a year.³⁸⁷ As we know, Esso’s projection was between 130,000 and 140,000 gallons too high,³⁸⁸ which led to financial calamity for Mardon, who quickly found that the site’s actual trade was much too low to carry its expenses.³⁸⁹ Mardon spent the first year of operations valiantly attempting to lift the site’s trade to a sustainable level but to no avail, and instead succeeded only in burning through his capital and ultimately going into debt.³⁹⁰ And so, it was thus how matters stood (i.e., as an “unmitigated” financial disaster) at the most important time for our present purposes, which was July 1964, when Mardon gave Esso notice of his intention to quit the site and business.³⁹¹

As we remember, Esso was anxious to keep the site open and to retain Mardon and offered a revised lease on more favourable terms in order to encourage Mardon to stay.³⁹² Mardon, for his part, likely wished to have nothing more to do with the site or the business, but quite apparently had few options in light of his dire financial situation.³⁹³

³⁸⁵ See Chapter III – III.A.3.

³⁸⁶ *Esso Petroleum Co v Mardon*, *supra* note 12 at 804–806.

³⁸⁷ *Ibid* at 804–806, 814.

³⁸⁸ *Ibid* at 814–816.

³⁸⁹ *Ibid* at 816.

³⁹⁰ *Ibid*.

³⁹¹ *Ibid*.

³⁹² *Ibid*.

³⁹³ *Ibid* at 821, 833, Ormrod LJ (“It was in these circumstances that Mr. Mardon attempted to carry on with the business. Was this an unreasonable decision? In my judgment he had scarcely an option to do otherwise. He was trapped, as he said, by his losses and his only hope was to carry on in the hope of recovering his position if he could.” at 829).

And so, as we know, Mardon agreed to Esso's proposal of a revised lease in September 1964 (the "1964 Lease") in the hopes that more favourable terms would allow him to trade out of his dire straits.³⁹⁴ Of course, we recall that despite his best efforts, Mardon was nonetheless unsuccessful in his mission and succeeded only in deepening his financial deficit.³⁹⁵ What makes Mardon's decision of 1964 important for our purposes, however, is its significance to his subsequent counterclaim against Esso (after they had sued for recovery of the site) and Mitigation's application in circumstances where Mardon had to some extent chosen to double-down on his decision to operate, even though he now knew the truth of its actual volume of trade; a matter that had initially only been in Esso's hands.³⁹⁶

As readers will likely know, *Esso Petroleum* is best or better known for the application of negligent misrepresentation to Mardon's counterclaim against Esso, as opposed to its findings in relation to contract. As I have discussed before, the overlap between the jurisprudence in tort and contract, and other areas of private law beside, with respect to Mitigation's application tends to suggest that it is one doctrine applying across many contexts, and that lessons can be readily drawn and applied across such lines.³⁹⁷ That is, of course, not to understate the importance of context, especially given

³⁹⁴ *Ibid* at 821, 829, Shaw LJ ("The second agreement was thus in a practical sense an extension of the first, for it was the best means that offered a prospect of salvaging something from the wreck for both sides. Esso cannot claim to be exonerated from liability as from September 1, 1964. The judge's conclusion that they could so claim erred in law." at 833).

³⁹⁵ *Ibid* at 828.

³⁹⁶ *Ibid*, Ormrod LJ ("The judge held that the losses after [September 1964] were irrecoverable because Mr. Mardon was not induced by the plaintiffs' breach of duty to enter into the new agreement in September 1964, the rental surcharge arrangement. He therefore took September 1964 as the 'cut-off point.' With the greatest respect I do not think that this is the right way of approaching the problem. By September 1964, the breach of contract or of duty was clear to all concerned. The question then was what could be done about it." at 829)".

³⁹⁷ See the beginning of section IV above; See *Steele v Robert George and Co*, *supra* note 25 (Mitigation can apply to claims for workmen's compensation under statute.); See *Panarctic Oils Ltd v Menasco Manufacturing Company*, *supra* note 43 ("Though *Red Deer College v. Michaels* was a case in contract, the rules relating to mitigation of damage are the same in contract and in tort: *The Liverpool* [No. 2], [1963] P. 64, at 77-78; McGregor on Damages [14th Ed.], para. 230." at para 55); See *The Liverpool (No.2)*, *supra* note 43, Lord Merriman P. ("It has been common ground in this case that the classic statement about mitigation of loss by Viscount Haldane L.C. in his speech in the *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric* although made in an action arising out of a breach of contract, applies equally, *mutatis mutandis*, to tort.") at 77-78).

Mitigation's fact-dependence, and the differences between rights arising in different jurisprudential contexts — not to mention the significance I have attached to the nature of contractual rights and the underlying function and nature of contract in shaping the application of Mitigation or how it should be applied. However, where the jurisprudential origin or classification of the rights in question, or the cause of action through which they are sought to be vindicated, does not materially or otherwise change the effect of Mitigation in the particular case from that which it should have in a contract claim, I argue that there is no disadvantage to drawing upon it. Also, what is more is that in the particular case, it does not appear as though the relevant conclusions on Mitigation would have differed if Mardon's claim had been accepted only on the basis of breach of warranty, because all three members of the Court of Appeal did explicitly find that a collateral warranty had been made out,³⁹⁸ as well as the claim in negligent misrepresentation,³⁹⁹ but made no distinction as to how Mitigation should apply despite the differences between the two bases for Mardon's claim.⁴⁰⁰ As such, I regard it as reasonable to look to *Esso Petroleum* to better understand when and how Mitigation will apply in circumstances where a plaintiff has acted, but arguably only made matters worse, as it is to have looked to the preceding three decisions discussed before this one.

Turning now finally to the actual application of Mitigation in *Esso Petroleum*, one must remember that the most important moment in the timeline of events was Mardon's decision to enter the 1964 Lease. The reason for this is that entry into the 1964 Lease arguably represented a break in continuity in some sense between the facts that led to Mardon's financial hardship and the hardship he continued to suffer,⁴⁰¹ at least until

³⁹⁸ Note Lord Denning disagreed with the trial judge, Lawson J, on this point, but left the finding undisturbed and grounded his conclusion on negligent misrepresentation. Shaw and Ormrod LJ appear by contrast to have been willing to overturn this aspect of Lawson J's decision; See *Esso Petroleum Co v Mardon*, *supra* note 12 at 827, 832–833, Lord Denning MR (“In the present case it seems to me that there was a warranty that the forecast was sound, that is, Esso made it with reasonable care and skill. That warranty was broken. Most negligently Esso made a ‘fatal error’ in the forecast they stated to Mr. Mardon, and on which he took the tenancy. For this they are liable in damages. The judge, however, declined to find a warranty. So I must go further.” at 818).

³⁹⁹ *Ibid* at 820, 828, 833.

⁴⁰⁰ *Ibid* at 821, 829, 833.

⁴⁰¹ *Ibid* at 828.

operations at the Euston Road site were brought to a close by Esso cutting off supplies of petrol.⁴⁰² It is arguable, because it would have to be said that by at least July 1964, when Mardon gave notice of his intention to quit the Euston Road site and the business, the effect of Esso's misrepresentation must have been spent in so far as Mardon could no longer have been under any illusion that Esso's initial throughput estimate was correct.⁴⁰³ The potential upshot of this is that Mardon's decision to enter the 1964 Lease was an independent one not caught up in the causality of the earlier misrepresentation or breach of warranty⁴⁰⁴ and, according to counsel for Esso, in the circumstances, an obviously unreasonable one given Mardon's knowledge.⁴⁰⁵ This is important for our purposes, because it raised the question as to whether such further losses suffered by Mardon from September 1964 until the site closed were recoverable as incurred in the course of mitigation, or ought to be disallowed as a consequence of having failed to mitigate at all.

What is immediately clear in considering the question above is that neither the causation or remoteness approaches to Mitigation provide easy answers to such a problem. If one wishes to speak in terms of cause, for instance, one may struggle to justify the selection of the misleading throughput estimate as the proximate cause of Mardon's post-September 1964 losses. The fact is that it is at least as true to say that Mardon's entry into the 1964 Lease was as much a product of his own informed choice as

⁴⁰² *Ibid* at 816–817.

⁴⁰³ *Ibid* at 829.

⁴⁰⁴ This appears to have been the view of Lawson J in the court below; See *Esso Petroleum Co v Mardon*, *supra* note 12, Shaw LJ (“Before considering how those damages are to be computed, it is necessary to consider the ‘cut-off’ of the incidence of damage at September 1, 1964, as found by the judge. He took the view that the new agreement then made between Mr. Mardon and Esso, having been entered into voluntarily by Mr. Mardon, had no relation to the first agreement and its consequences. Accordingly, so the judge held, any loss suffered by Mr. Mardon while the second agreement was in operation and thereafter was unrelated to the negligent misrepresentation and to the breach of any warranty. It would follow, as the judge held, that such late loss was not to be taken into account in assessing the compensation to which Mr. Mardon was entitled.” at 833).

⁴⁰⁵ *Ibid* at 810–811 (“Colin Ross-Munro Q.C. and John Peppitt for [Esso]... It is accepted that the defendant was a good tenant; but in considering his counterclaim for damages in the light of what he in fact did, the question is whether he acted reasonably; and to take on the second tenancy when his losses were over £5,000 and he had no faith that he would save the station and to go on until 1965 was not acting reasonably. He hoped for a ‘cream site’ to recoup his losses; but Esso’s attitude was that they could not give him preference over others already in the queue. It would be quite unreasonable if Esso because of a negligent misstatement made honestly in 1961 should be held liable for the defendant’s losses up to 1969.”).

it was the earlier misrepresentation that led him to contract with Esso in the first place, and thus to the point of the renegotiation of September 1964. Likewise, it is perhaps difficult to fit Mardon's choice within the test of reasonable contemplation as at the time of contracting, given that Esso's error was *so* drastic that they themselves would not have acquired the site at all if they had realized their mistake. What is also clear, though, is that their Lordships did not struggle to conclude that Mardon's entry into the 1964 Lease and attempt to trade out of his dire circumstances were conclusively reasonable, and thus acts in mitigation,⁴⁰⁶ even though there was a serious risk that they would only further compound his losses, which they most certainly did.⁴⁰⁷ As to why these were and should be deemed to have been in mitigation, that too can be clearly stated now that we are in a position to synthesize the foregoing four decisions and to answer finally when exactly mitigation will intervene, even if the plaintiff has acted to their own detriment.

Having finally canvassed the cases identified at the outset of this section, it is now possible to synthesize a conclusion in response to the question posed at the start — i.e., when, if at all, will Mitigation intervene to readjust the allocation of loss in circumstances where further loss has accrued as a consequence of the plaintiff's response? My conclusion of course stems from my general positive observation and normative prescription that Mitigation intervenes (and ought to) where the allocation of loss that would otherwise arise under the orthodox rules is out of line with the respective assumption of rights and responsibilities made by parties to the contract. As the cases above demonstrate, this *may* be necessary in situations of accruing loss that have been worsened or exacerbated in some sense by the plaintiff's own actions. Although, in some

⁴⁰⁶ *Ibid*, Lord Denning MR ("I am afraid I take a different view. It seems to me that from September 1, 1964, Mr. Mardon acted most reasonably. He was doing what he could to retrieve the position, not only in his own interest, but also in the interest of Esso. It was Esso who were anxious for him to stay on. They had no other suitable tenant to replace him. They needed him to keep the station as a going concern and sell their petrol. It is true that by this time the truth was known - that the throughput was very far short of 200,000 gallons - but nevertheless, the effect of the original misstatement was still there. It laid a heavy hand on all that followed. The new agreement was an attempt to mitigate the effect." at 821).

⁴⁰⁷ *Ibid*, Ormrod LJ ("It was very much in their interest to keep this service station open and selling their petrol. It was in these circumstances that Mr. Mardon attempted to carry on with the business. Was this an unreasonable decision? In my judgment he had scarcely an option to do otherwise. He was trapped, as he said, by his losses and his only hope was to carry on in the hope of recovering his position if he could. The third phase followed as the trading position failed to improve." at 829).

instances, such as in *Viper Concrete*, the outcome under the orthodox rules does not appear to be in need of adjustment, even though certain costs may (and perhaps should) be described as “costs of mitigation”.⁴⁰⁸ And further, although such reallocation may most commonly happen in favour of the plaintiff, in some instances, depending on one’s view of remoteness or causation in a given case, such as *Marigold*, it may well be that Mitigation acts to allocate loss to the plaintiff and away from the defendant. All of this, of course, is only to re-emphasize general observations already made above, but having reiterated the point, more specific observations as to when such reallocations will or will not be seen as necessary can now be made.

In light of the foregoing, one can say that the question to be asked when considering who must bear responsibility for further loss that has been caused or suffered as a consequence of the plaintiff’s actions is whether the plaintiff has acted reasonably in the circumstances, and this is so irrespective of whether the orthodox rules of assessment, and causation too it seems, presumptively allocate it to the defendant or the plaintiff. This is likely far from controversial, given that it is the question the courts have literally themselves asked. What is less patently addressed, and which must be asked, is what do we mean by reasonable? The answer, of course, if we harken back the discussion of its general place in Mitigation, is that it means what the adjudicator thinks is reasonable. However, as also noted, it is clear that such discretion as courts and adjudicators enjoy on this point is bounded and not unfettered, and in the present context, it appears clear that

⁴⁰⁸ It is not unusual for commonly expected steps in mitigation to be thought of as within reasonable contemplation or foreseeable for the purposes of remoteness, and recoverable as a consequential loss consequently. It must be remembered though, that a cost of mitigation is not recoverable because it is “unremote”, it is recoverable if it was reasonable; See *Fox v Wood*, (1981) 148 CLR 438 (HCA), Gibbs CJ (“Where the plaintiff is able to take steps to restore his regular receipt of income and thereby to avoid further loss, and where he incurs costs in doing so, the costs may be recoverable from the defendant. In principle, a tortfeasor’s liability for the cost of mitigation of damage is not to be tested in the same way as his liability for an item of damage which is said to have been caused by the tort. Where particular steps in mitigation are a commonplace, it is natural to think of their costs as items of damage which are foreseeable by the tortfeasor and not too remote to be excluded from the items for which he is liable: for example, the cost of a surgical operation to ameliorate personal injury [cf. *McGregor on Damages*, 14th ed. (1980), p. 174, par. 242]. But foreseeability and remoteness are not the criteria of a tortfeasor defendant’s liability for a cost incurred by the plaintiff in mitigating or attempting to mitigate damage for which the defendant is liable or for which he would have been liable but for the plaintiff’s ability to avoid the damage by taking a step in mitigation. The criterion is whether the plaintiff has reasonably incurred the costs in mitigating or in reasonably attempting to mitigate that damage and it is a question of fact whether the plaintiff has acted reasonably...” at 446-447).

there are identifiable fetters that shape any given conclusion. The most obvious of these constraints is that any analysis must be contextual, weighing costs and benefits, the interests of the plaintiff and defendant, and importantly, the *available* alternatives. This, however, could be equally said in circumstances of direct loss without any of the complications present in the cases considered here and, indeed, I would point out that I am not suggesting that there is a *de jure* difference between Mitigation's application to different categories of loss, but instead that there is a frequent *de facto* difference between direct and consequential loss according to the challenges they raise for an adjudicator's consideration. The two of these that I have identified both pertain to what it means for options to be *available*, as I will explain below.

The first frequently occurring difference between direct and consequential loss that influences the availability of options to mitigate these pertains to the obstacles to full awareness of the latter. By this I mean that given that consequential loss will almost by definition involve facts outside of the four corners of the contract, in contrast to the nature and extent of direct loss which will often be known or knowable without knowing more than the fact of breach, it is evident that there are often likely to be greater obstacles to full appreciation of the nature and extent of a consequential loss than a direct one, and what is more, greater obstacles to overcome in order to determine what the plaintiff's available options are.⁴⁰⁹ Although, where a direct loss poses similar challenges, the following reasoning should be equally applicable, all other things being equal.⁴¹⁰ Taking the construction decisions above as an overarching example, it is (ironically) clear that reasonable responses to latent problems may include some measure of self-help, recourse to experts for advice, and even litigation in order to determine whether the plaintiff can

⁴⁰⁹ An approach that takes knowledge and one's ability to know into account is not unusual for Mitigation; See *Canadian Western Natural Gas Co v Pathfinder Surveys Ltd.*, *supra* note 44 (The plaintiff's failure to act when a natural gas pipeline was situated in the wrong place was not deemed a failure to mitigate in the circumstances because the plaintiff was ignorant of the mistake.).

⁴¹⁰ If the "obligation" to mitigate is only triggered by subjective knowledge, then it should not make a difference that the loss is direct if it is still nonetheless unknown by the plaintiff; See *Malton v Attia*, 2015 ABQB 135, AB Moen J ("The third rule is that mitigation is required once the injured party becomes aware of that injury:... The duty arises immediately [when] a plaintiff realises that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant." at para 175).

act in mitigation, even though the pursuit of these may only allow further “loss” to accrue, whether in the form of cost inflation for the necessary work or the occurrence of actual and further harm. The reason for this apparent leniency is that for any action or option to be available to a plaintiff, and to thus perhaps be the yardstick against which other options or actions are judged as reasonable or unreasonable, it must be the case that the plaintiff knows, or ought to have found out based on what they do know, that it is an option *and* whether or not they can in fact do it, as in *Costello*.⁴¹¹ For it seems plain from the construction decisions that an option cannot be meaningfully “available” until or unless it, its necessity, and indeed its accessibility, are known or knowable, which means that a plaintiff will not be judged to have acted unreasonably simply by virtue of the fact that their action in lieu of the “best option” (i.e., the necessary repair or replacement) has led to the accrual of greater loss than would have been the case if they had taken the “best option” sooner.

To flesh out the above in more concrete terms, one can contrast *Marigold* with *Costello*, as the Court in *Viper Concrete* had to do. As readers will recall, in *Marigold*, a year was accepted as a reasonable time frame in which to have obtained the necessary expert report while otherwise taking no helpful action in the meantime, and six months as a reasonable period of time in which to have taken the action recommended by the expert advice. After said time, though, such actions as *Marigold* continued to take, including the piecemeal repair attempts, or even — one would think— the pursuit of litigation, could not have been reasonable alternatives to the removal and replacement of the waterproof

⁴¹¹ Mere negligence in failing to discover a breach of contract did not change the effect of Mitigation in *Canadian Pathfinders*; See *Canadian Western Natural Gas Co v Pathfinder Surveys Ltd*, *supra* note 44, Prowse JA (“If the evidence had disclosed that the Gas Company’s employees knew that the line was being placed off the right of way a duty to mitigate the consequences of Pathfinder’s error would have arisen. The trial judge’s finding makes it impossible to hold that such was the case before us. Thus, even though the Gas Company’s employees did not have the knowledge required to give rise to a duty to mitigate I am of the view that when the evidence is viewed objectively it supports the conclusion that they were guilty of contributory negligence.” at para 67).

membrane around the base of the building, and were not accepted as such.⁴¹² By contrast, in *Costello*, even though it would have been apparent by mid-July 1975 that the Costellos' home needed the full removal and replacement of the foundations and the basement, it was accepted that the Costellos' pursuit of litigation to determine their legal position and the availability of financial resources was a reasonable alternative to taking the steps ultimately necessary to correct the situation.⁴¹³ The reason for the difference, or at least one potential explanation among a number of factors, is that Marigold could not have been in any real doubt as to its ability to undertake the work given its significant financial resources, whereas the Costellos were, it appears, legitimately unsure as to whether the repairs were an option practically available to them in light of the cost.⁴¹⁴

The second difference between cases of direct and consequential loss is the not-infrequent inability of parties who suffer significant consequential loss following a breach to take necessary steps even where these are known. This, I note, is an alternative explanation for the distinction between *Marigold* and *Costello*, and a clear rationale for the Court's finding on Mitigation in *Esso*, given that Mardon's disastrous choice was arguably unavoidable on account of his inability to meaningfully make a better one.⁴¹⁵ I also note that while the practical inability to respond may be more common when dealing with more disastrous circumstances, such as those found in cases involving defective

⁴¹² *Marigold*, *supra* note 308, Conrad J ("They obtained a report and certainly that is a proper expense. Lenarry recommended replacing the membrane. They did not follow his advice. They did not take the proposed experimental steps of Lenarry back to the architect to see if he thought that might work. I am satisfied they would have been told not only would it not work but it could add to the problem. They did not remember the bond and call in the surety. They did not talk to Pendergast and get his views. They simply went in and experimented. In view of the advice they had, I do not think this action was reasonable and I do not think they can recover the Lenarry expense." at para 203).

⁴¹³ *Costello v. Cormier Enterprises Ltd.*, *supra* note 310, Richard JA ("Likewise, can it be said to be an unreasonable delay where that delay is caused by the necessity or desire of a plaintiff to ascertain his final legal position before deciding on the extent of the corrective measures that he is willing to take? ... In the overall circumstances of this case, taking into consideration the period during which certain negotiations and attempts at correcting the defects took place, I do not find that the delay in bringing the action and trying the case was an unreasonable one and I believe that the 1978 estimate should govern." at para 15).

⁴¹⁴ *Ibid* at para 15.

⁴¹⁵ *Esso Petroleum Co v Mardon*, *supra* note 12, Ormrod LJ ("It was in these circumstances that Mr. Mardon attempted to carry on with the business. Was this an unreasonable decision? In my judgment he had scarcely an option to do otherwise. He was trapped, as he said, by his losses and his only hope was to carry on in the hope of recovering his position if he could." at 829).

buildings or failed business ventures, it is of course not unheard of in situations of direct loss.⁴¹⁶ It is also clear, however, that a number of prominent categories of contract possess rules peculiar to the assessment of direct loss that do not permit any consideration of the plaintiff's circumstances at the time when they could have been expected to act.⁴¹⁷ Sale and the market for tonnage, for instance, appear generally unmoved by such concerns.⁴¹⁸ As such, although it is not a de jure rule across the board, I take the view that it is appropriate to acknowledge at least a de facto difference in Mitigation's approach to consequential loss in this respect. I must also note that such a position is not without some controversy, because up until fairly recently, it was ostensibly clear that Mitigation could not take such limitations into account, or at least could not do so with those of the kind impeding the Costellos, i.e., it could not generally "excuse" inaction by

⁴¹⁶ See e.g. *Lesters Leather and Skin Co v Home and Overseas Brokers*, *supra* note 203 (There was no local market for skins of the type sought by Lesters.); See e.g. *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The New Flamenco)*, [2017] 1 WLR 2581 (UKSC (Eng)) [*The New Flamenco*] (There was no chartering market for the plaintiff owner's vessel at the relevant time.); See e.g. *Viper Concrete 2000 Inc v Agon Developments Ltd*, *supra* note 309 at para 88 (Defective concrete could not be replaced until the season changed and temperatures rose because concrete installation is difficult below 10 degrees Celsius.).

⁴¹⁷ Such contracts have "conventional measures of loss" that frequently incorporate certain "mitigatory assumptions" premised on what a reasonable participant in the relevant market ought to have done; See Wayne Courtney, "Contract Damages and the Promisee's Role in Its Own Loss" (2018) 42:2 *Melb U L Rev* 406–454 at 416.

⁴¹⁸ See *Glory Wealth Shipping Pte Ltd v Korea Line Corpn*, *supra* note 83, Blair J ("It has been pointed out that part of the *The Elena D'Amico* process of reasoning is that damages for breach of contract such as a contract for sale are normally to be assessed as at the date of breach [see *Norden v. Andre & Cie S.A.* [2003] 1 Lloyd's Rep. 287 at [43], Toulson J]. A well known example from the financial field is found in *Jamal v Moolla Dawood, Sons & Co* [1916] AC 175. In that case, the buyer had defaulted on a contract to take delivery of shares on a particular date at a particular price. By the delivery date, the shares had fallen in value. The Privy Council held that the measure of damages for breach by a buyer of a contract for the sale of shares is the difference between the contract price and the market price at the date of breach. At page 179, Lord Wrenbury explained the reason for the rule, saying that, "If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises ... In cases where a repudiatory breach has been accepted bringing such a charterparty to an end, The *Elena D'Amico* principle has been explained in causation terms. The 'rationale is that in such a situation that measure represents the loss which may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things, from the breach of contract' [*Norden v. Andre, ibid.*, at [42]]. It has further been explained as deemed mitigation..." at paras 17-18); See also *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd*, *supra* note 83, David Steel J ("The fact that a term market thereafter emerges for the [yet shorter] outstanding balance of the charter period does not in my judgment import with it the proposition that a decision not to take advantage of that market at that later stage becomes a business decision independent of the wrongful termination. The rationale is that acceptance of the market rate at the date of breach is deemed to constitute reasonable mitigation..." at para 65); Cf *Redpath*, *supra* note 83 at para 71 (Like Mustill LJ in *Hussey v Eels*, Létourneau JA does not accept that loss always crystallizes at the date of the breach.).

reason of impecuniosity, as per *The Liesbosch*.⁴¹⁹ However, as we are aware, *The Liesbosch* may be on its last legs, having now been overturned by the UKSC in *Lagden v O'Connor*, and is presumably on the way out in the rest of the Commonwealth as well.⁴²⁰

To sum up briefly, the gist of the analysis above is that Mitigation will not act for a defendant as a defence to a claim for consequential loss in circumstances where the plaintiff's actions have somehow exacerbated their loss, unless whatever better course of action is alleged was both known/knowable to the plaintiff and practically open to them for all intents and purposes. Further, the inverse is true where it is not the defendant that must invoke Mitigation per se, but the plaintiff in light of a loss or cost of mitigation that might be otherwise unrecoverable according to the orthodox rules of damage assessment, where said loss/cost was suffered while taking the best option open to them. Examples of such an intervention include quite possibly *Esso*, and as discussed at length in Chapter III, *The Sivand*, which quite apparently permitted the recovery of a cost that can only sensibly be described as having been suffered because of an unforeseeable freak accident.⁴²¹ All of this being said, we may now at last move on to consider the other side of the coin, when a plaintiff has benefited from their action or been somehow otherwise bettered by subsequent events.

⁴¹⁹ *Owners of Dredger Liesbosch v Owners of Steamship Edison*, [1933] AC 449 (HL (Eng)) [*The Liesbosch*].

⁴²⁰ *Lagden v O'Connor*, [2003] UKHL 64 [*Lagden*]; Canadian courts have long restricted the application of the *Liesbosch* to damages exacerbated by impecuniosity that appeared to fail the applicable test of remoteness, whether in contract or in tort. With the *Liesbosch* no longer good law in the UK, it may only be a matter of time until Canada follows suit; See SM Waddams, *The law of damages*, 5th ed (Toronto: Canada Law Book, 2012) at paras 15.330-15.380; See also *Freedhoff v Pomalift Industries Ltd et al*, (1970) 13 DLR (3d) 523 (ONSC), var'd (1971) 19 DLR (3d) 153 (ONCA); See *Tyco Australia Pty Ltd v Optus Networks Pty Ltd & Ors*, [2004] NSWCA 333, Handley JA (“[The *Liesbosch*] was effectively overruled in *Lagden v O'Connor* [2003] EWCA Civ 927; [2004] 1 AC 1067. As a result it is now clear that an injured party that can afford to take steps to mitigate its damage because it has business interruption insurance will recover less than an uninsured party in the same position who cannot afford to take such steps. Insurance has now become indirectly relevant where it facilitates mitigation.” at para 192).

⁴²¹ *The Sivand*, *supra* note 17.

b. *Has the plaintiff benefited from their action, or have they been bettered by subsequent events?*

The other side of the proverbial coin from cases like those considered in the last section are those cases in which the plaintiff has found a happier ending one way or another by virtue of having successfully acted to better their situation, or simply by virtue of a fortuitous change in circumstances. In such cases, it is clear that a question for Mitigation's consideration arises, and it is the same as the one we considered in section VI.A.1.a.i with respect to similar changes occurring after a breach/wrong leading to direct loss, said question being: whose claim to the relevant gain or betterment is the stronger? Of course, as we recall, the cases do not address themselves to this question directly, but as explained in the aforementioned section, there is ample reason to see that this really is the ultimate question behind the established case law's adventures into questions of cause, and its attempts to distinguish between consequent and collateral "transactions". Given the absence of explicit recognition, only a review of pertinent decisions can help to explain what exactly determines the answer in any given case. The answer is, of course, similar to that in relation to direct loss, but as we will see, certain complications in assessment arise when the actions taken by a plaintiff, or the subsequent change in circumstances, are not as easily understood as the situation where the plaintiff has arguably ameliorated a direct loss by entering into a readily comparable substitute transaction.

The first case I wish to consider is one that we have already canvassed in Chapter III for the purposes of debunking the logic of "cause" used to explain many of the decisions on Mitigation's application to post-breach/wrong gains, namely *Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain v Fulton Shipping Inc of Panama* ("The New Flamenco").⁴²² The facts of the case and its history moving up through the court hierarchy on its way to the UK Supreme Court have of course already been considered in some depth, but for present purposes, the essential elements bear

⁴²² *The New Flamenco*, *supra* note 418.

restatement. In brief, the case involved a dispute between, Fulton, the owners of a small cruise ship named The New Flamenco, and the charterers, Globalia, over the renewal of a written charter party that was set to expire in October 2007 (the “First Charter”).⁴²³ The renewal was oral and agreed for a further two years to November 2009 (the “Second Charter”).⁴²⁴ The dispute arose when Globalia subsequently denied the renewal, effectively repudiating it, which Fulton accepted before then taking redelivery of The New Flamenco in October 2007 as per the First Charter.⁴²⁵

Following termination of the Second Charter, Fulton appears to have attempted to re-fix the vessel, but found that there was no available market for chartering such a ship.⁴²⁶ This left Fulton with little choice but to sell, which they ultimately did for \$23,765,000 USD.⁴²⁷ As luck would have it, this sale price was \$16,765,000 USD higher than what the market price would have been in November 2009, i.e., the time at which the Second Charter would have ended had it not been terminated early.⁴²⁸ In addition to selling The New Flamenco, Fulton also brought a claim against Globalia in arbitration for the net profit of €7,558,375 it would have earned from the Second Charter after accounting for operating costs.⁴²⁹ Globalia defended the claim on the basis that the \$16,765,000 USD premium realized from the New Flamenco’s early sale, equivalent to €11,251,677, was a benefit arising from a step taken in mitigation that more than offset the claimed loss of profits.⁴³⁰ The adjudicatory response to this argument, as we know, flipped back-and-forth at each of the four stages,⁴³¹ beginning with a finding for Globalia

⁴²³ *Ibid* at paras 1–3.

⁴²⁴ *Ibid* at para 3.

⁴²⁵ *Ibid*.

⁴²⁶ *Ibid* at para 34.

⁴²⁷ *Ibid* at paras 3, 6–7.

⁴²⁸ *Ibid* at paras 6–7.

⁴²⁹ *Ibid* at paras 4–5.

⁴³⁰ *Ibid* at paras 6–7.

⁴³¹ *Ibid* at paras 9–28.

by the arbitrator⁴³² and culminating in a finding for Fulton by the UKSC.⁴³³ The merits of these decisions or the lack thereof is worthy of comment, particularly in light of the stark split of opinion among the adjudicators involved. Given that I have already carried out such a critique in the earlier chapter,⁴³⁴ it seems unnecessary to reread the reasons for disregarding the avowed rationale of any of the four, including the UKSC. As such, having now set out the material facts in play in the dispute, I will explain why the UKSC was correct in result regardless of its ratio and thereafter, what this tells us as to when Mitigation will or will not act when invoked in similar circumstances.

To understand the most reasonable rationale for this decision, one must harken back to an earlier discussion of the fundamentals of damages in contract and the overarching paradigm of assessment. That paradigm, as we know, is the Expectation Measure, which prescribes the measure of relief according to the notion that a party is to be put, as far as money can do it, in as good a position as they would have been had the contract been performed; or in other words, given the monetary equivalent of their sought-after surplus as a substitute for the performance promised but denied. In some respects, this may appear to be less relevant to questions of consequential rather than direct, given that compensating for direct loss is more often a question of replacing the benefit the injured party expected to have, and that consequential loss is more often concerned with undoing deleterious consequences of breach that the plaintiff had not “expected” to suffer. However, it is clear from *Bowlay Logging Ltd. v. Domtar Ltd.* and *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd.* that contract permits no damages for bad bargains,⁴³⁵ and thus that losses that would have been suffered in any event cannot be compensated for in contract, because to do so would place a plaintiff in a better position than that which they would have been in, even if performance had been

⁴³² *Ibid* at paras 9–14.

⁴³³ *Ibid* at paras 33, 36.

⁴³⁴ See Chapter III – Section IV.B.2.

⁴³⁵ *Bowlay Logging Limited v Domtar Limited*, *supra* note 89; *The Mamola Challenger*, *supra* note 89; See also *Commonwealth of Australia v Amann Aviation Pty Ltd*, (1991) 174 CLR 64 (HCA); *L Albert & Son v Armstrong Rubber Co*, 178 F (2d) 182 (2nd Cir 1949).

perfect.⁴³⁶ Thus, it seems apt to say that even damages for consequential loss must be framed so as to take the plaintiff forward to a world that should have been but for the breach, but not further. As such, the same concern as was discussed in section VI.A.1.a.i in to relation post-breach gains in cases of direct loss must arise here, which is that we must ask whether damages are truly necessary in order to take the plaintiff forward to the place they should have been, or whether (through the concatenation of their own efforts and/or fortuitous circumstances) they are already there, or somewhat closer than the Expectation Measure assumes. If such a question is answered “yes”, then it is clear that it must lead to either the claim for damages being obviated or else at least the need for another measure to apply. As I have already explained, such a measure can be described as the “Necessary Minimum Measure”, and it is or should be framed to only go so far as is necessary to bridge the gap between the plaintiff’s better-than-expected post-breach/wrong circumstances and the circumstances that should have been. Of course, *a priori*, we must first determine whether or not any difference in method is actually needed, and when this would be the case (i.e., when must Mitigation intervene to deflect the

⁴³⁶ See *Bowlay Logging Limited v Domtar Limited*, *supra* note 89, Berger J (“The law of contract compensates a plaintiff for damages resulting from the defendant’s breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant’s breach. In these circumstances, the true consequence of the defendant’s breach is that the plaintiff is released from his obligation to complete the contract — or in other words, he is saved from incurring further losses.” at 334-335); See also *The Mamola Challenger*, *supra* note 89, Teare J (“... Lord Evershed MR did not address the question whether damages in the amount of wasted expenditure could be awarded where to do so would put the claimant in a better position than he would have been in had the contract been performed. That question was addressed by the Court of Appeal in *C&P Haulage v Middleton* in which case Ackner LJ expressly held that the court could not put a plaintiff in a better financial position than he would have been in had the contract been performed. at para 37); See also *Commonwealth of Australia v Amann Aviation Pty Ltd*, *supra* note 437, Brennan J (“The task of the court remains one of placing the plaintiff, so far as can be done by an award of damages, in the position he would have been had the contract been performed. The plaintiff cannot be put in a better position than he would have been if the contract had been performed; the defendant is not an insurer of the venture on which the plaintiff embarked. It follows that, if the plaintiff would not have recouped his outlay in any event, he is not entitled to reliance damages.” at 136); See also *L Albert & Son v Armstrong Rubber Co*, *supra* note 437, L Hand Chief Judge (“In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee’s outlay, such a result imposes the risk of the promisee’s contract upon the promisor. We cannot agree that the promisor’s default in performance should under this guise make him an insurer of the promisee’s venture...” at 189); See also Fuller & Perdue, “Reliance Interest in Contract Damages”, *supra* note 58 at 79 (“We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed.”).

assessment of damage under the remoteness rule to the lower measure) is what I will now move forward to explain.

As readers will recall from the earlier discussion in section VI.A.1.a.i, the need for Mitigation to shift the assessment of loss/damage from the Expectation Measure toward the Necessary Minimum Measure arises where an award on the Expectation Measure would be inconsistent with the underlying purposes of contract in the circumstances — said purpose being the promotion of the commonweal by way of generating net surpluses from trade,⁴³⁷ and an award of damages being potentially inconsistent with that purpose where it is more than necessary to bring the plaintiff to the surplus position in which they expected to be, as this may well lead to an impoverishment and loss of utility for the defendant that outweighs the plaintiff’s gain in utility from the windfall. Thus, Mitigation should intervene when the post-breach gain renders a full award on the Expectation Measure excessive, but as *The New Flamenco* demonstrates, when this will be so is not nearly as obvious as the fact of the gain itself.⁴³⁸ What the ultimate outcome of *The New Flamenco* does demonstrate, though, if we divorce its outcome from the Court’s expression of its ratio, is that the “quality” of the gain must be weighed as well as its quantum. By quality, I mean its nature or makeup, which is determined by that which went into making it in terms of the “effort and cost” that were required to realize the gain. Where the quality of the gain is commensurate with the gain that the plaintiff had expected, one can readily conclude that either through their own effort or fortuitous happenstance, the plaintiff has found a substitute “transaction” and arrived (or at least gotten relatively closer to) where they ought to have been had the contract been performed, and that anything more than necessary to bridge any remaining pecuniary gap (if any) would thus be excessive, meaning that the lower Necessary Minimum Measure should apply if damages are to be awarded at all.⁴³⁹ By contrast,

⁴³⁷ See Chapter I – Section IV.

⁴³⁸ Very senior judges and adjudicators reached very different conclusions at all stages of the litigation; *The New Flamenco*, *supra* note 418 at paras 9–28.

⁴³⁹ See for instance *Redpath*, *supra* note 83; See also discussion section VI.A.1.a.i.

where the effort and cost required to realize the post-breach gain compared to the expected gain shade into the incomparable, in the sense of being other or further in relation to the deployment of time, capital, effort, and the acceptance of risk, it is clear that although the plaintiff's position has changed, they may nonetheless be no closer to where they were meant to be, because the "transaction" giving rise to said gain is not in any way sensibly interchangeable with the contract transaction it may be argued to have replaced.⁴⁴⁰ True enough that the plaintiff may be elsewhere, but that in and of itself affords no basis for assessing the actual surplus position of a plaintiff like Fulton relative to what it should have been, and thus no reason for the ordinary assessment of damages to deflect or change. We see this reflected here in the UKSC's conclusion that the €11,251,677 gain on early sale was not made in mitigation of Fulton's loss of profit of €7,558,375 under the Second Charter because, even though it is evident that Fulton would have had less monetary "value" in hand had the charter been carried out, it is also evident that they more than likely would have still had the ship.⁴⁴¹ Thus, no sensible comparison can be made between the post-breach world that was and the world that should have been, because the "loss" of the vessel makes it a different world altogether.

In contrast with *The New Flamenco*, the second case I wish to consider involves a more comparable post-breach course of action, and thus a more comparable gain. The case in question is *Schluessel v. Maier*, a 2001 decision of the Supreme Court of British Columbia.⁴⁴² *Schluessel* involved a dispute over a defunct land development agreement entered into on June 10, 1995, between Schluessel and a number of others named as defendants in the action (the "1995 Agreement").⁴⁴³ Under the 1995 Agreement, Schluessel (through a corporate persona) was to act as developer and pursue development of a 42-acre parcel of then-agricultural land in Richmond, BC, on behalf of the contracting parties in exchange for a share in the profits from sale of land in the

⁴⁴⁰ See for instance *Hussey*, *supra* note 16; See also discussion section VI.A.1.a.i.

⁴⁴¹ *The New Flamenco*, *supra* note 418 at para 33.

⁴⁴² *Schluessel et al v Maier et al*, 2001 BCSC 60.

⁴⁴³ *Ibid* at para 3.

parcel.⁴⁴⁴ As it turned out, Schluessel's efforts were frustrated by the defendants, and the assessed profit of \$445,134 he could have realized, lost.⁴⁴⁵

Schluessel did not remain idle following the break down in the parties' relationship and termination of the 1995 Agreement, and went on instead to relocate and pursue even more profitable development opportunities in Alberta, earning between \$750,000 and \$1,000,000 a year for several years.⁴⁴⁶ These developments were doubtless fortuitous for Schluessel, but in the context of the litigation raised questions as to how Schluessel's activities and thus his profits over the relevant period should be categorized, and whether they should have been deemed to have been made in mitigation of his loss or not.⁴⁴⁷ The Court's conclusion was that Schluessel's damages should be reduced by 10% to account for the profits he made from the subsequent projects in Alberta.⁴⁴⁸ How exactly 10% of his expected profit from the 1995 Agreement was determined to be the appropriate amount is unclear, but for present purposes, it suffices to say that the Court concluded that some amount of proration was necessary,⁴⁴⁹ and I for one agree. Although, in light of my explanation above as to when Mitigation must intervene or abstain in situations of post-breach gain, this conclusion bears some explanation to sustain.

Transactions of the kind that Schluessel engaged in following the termination of the 1995 Agreement raise an apparent problem when considered through the lens of comparability, because even though such transactions appear readily interchangeable with the 1995 Agreement in terms of the requisite effort and cost, it is evident that present authorities would not treat these as having been made in mitigation, or at least not in their

⁴⁴⁴ *Ibid* at paras 15–25, 38–39.

⁴⁴⁵ *Ibid* at paras 135–160.

⁴⁴⁶ *Ibid* at para 171.

⁴⁴⁷ *Ibid* at para 172.

⁴⁴⁸ *Ibid* at para 180.

⁴⁴⁹ *Ibid*.

entirety as the Court here concluded.⁴⁵⁰ On its face, this leads either to the conclusion that I am wrong to suggest that subsequent transactions and gains arising can be categorized as either “consequent” or “collateral” according to the degree to which they are or are not comparable to the original contract/expected gain, or that case law going back at least as far as the Supreme Court of Canada’s decision in *Karas v. Rowlett* is incorrect for suggesting otherwise.⁴⁵¹ Thankfully, however, the inconsistency between my explanation/exhortation, and this prominent feature of the case law that treats many comparable transactions as collateral, is more apparent than real. As pointed out in section VI.A.1.a.i, the point of assessing comparability between the original contract/transaction and the subsequent transaction or change in circumstances is to determine whether it has replaced the promised/expected utility that was not provided under the original contract, and thus whether the subsequent transaction is a substitute for the original contract. The significance of a subsequent transaction being a substitute is that it *if* it is a true substitute, it obviates the need (to some extent) for the provision of “substitute performance” by way of damages from the defendant. However, where the subsequent transaction or gain would have happened in any event irrespective of the breach of the earlier contract, it is clear that even if the subsequent transaction/gain is *identical*, it is not a *true* substitute because it does not replace the unprovided utility from the first contract, and to hold that it does and to reduce the plaintiff’s damages accordingly would in fact leave the plaintiff short of the position in which they should have been, i.e., worse off. Thus, accounting for only so much of Schluessel’s post-breach projects and profits as he could not have earned while also fulfilling the 1995 Agreement (which it appears the Court attempted to do here)⁴⁵² is correct in principle, according to the explanation I have provided in relation to when and how far Mitigation should intervene to alter the assessment of damage and reallocate post-breach gains.

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Karas et al v Rowlett, supra* note 201.

⁴⁵² *Schluessel et al v Maier et al, supra* note 444 at para 180.

Taken together, along with *Hussey* and *Redpath* canvassed in VI.A.1.a.i, *The New Flamenco* and *Schluessel* demonstrate that in a “positive” sense, the comparability of subsequent transactions/gains to the original contract/expected benefits is an apt litmus test for determining Mitigation’s application/non-application to post-breach gains. What is more, the distinction is substantially more normatively compelling than present theory, which categorizes post-breach transactions/gains as collateral or consequent without any obvious connection to underlying purposes of contracting and often little clarity in terms of reasons, as demonstrated by *The New Flamenco*.⁴⁵³ Of course, there is a point about these decisions and the theory advanced that must be considered before concluding that the observations in this section are exhaustive. This point is that the decisions canvassed in this section have borne a marked similarity to those considered in VI.A.1.a.i because both *Schluessel* and *The New Flamenco* entailed consequential loss that amounted to the loss of betterment or benefits that the plaintiffs had expected to receive as a consequence of the contract being performed, and not consequential loss that involved the plaintiffs being made worse off or suffering some form of “disbenefit”. However, although I am unaware of any case in which post-breach gain has been argued to have mitigated such loss, I would argue that the same approach can successfully apply as demonstrated by a hypothetical below.

Imagine a scenario in which the plaintiff owner of a four-story commercial building contracts with a defendant for the installation of a new energy efficient lighting system throughout. Imagine also that, owing to defective installation in breach of the parties’ contract, the lighting causes a fire that does not destroy the building, but causes substantial aesthetic damage to many of the internal spaces that is compounded by water damage from the sprinkler system. Such damage would clearly render a building unfit for most commercial use, and if our plaintiff were a landlord, it would certainly render it unfit for almost any possible tenant. With the building left unfit to let, the plaintiff would clearly suffer a consequential loss of rental income, which would not be a loss of benefit

⁴⁵³ *The New Flamenco*, *supra* note 418 (All of Lord Clarke’s talk of cause or occasion do nothing to demystify how events that would not have happened but before some antecedent are not connected to that antecedent event.).

expected as a consequence of the contract, but a loss that has actually made the plaintiff worse off than they would have been had not contracted at all. Left in such circumstances, many plaintiffs would conclude there is nothing to do except wait and remediate. Imagine, however, that our plaintiff is somewhat more enterprising. If the plaintiff were to conclude that a burned-out but structurally sound building is somewhat “creepy” and potentially ideal for the provision of live action entertainment experiences wherein patrons attempt to navigate such environments to “escape” from or “hunt” zombies or monsters played by employees in costumes (a “Survival Horror Experience”), and to start such a business in the space, they may be left with a gain in their hands that the defendant firm could argue counts towards mitigation. Determining whether the defendant is right, and whether they should be able to claim any portion of the plaintiff’s gain, is clearly difficult under the current conventional analysis adjudicators have attempted to apply in decisions like *The New Flamenco* or *The World Beauty*, but arguably easier under the rubric I have suggested.

If one begins to analyze the issue of Mitigation’s application by simply comparing the cost and effort involved (in both kind and degree) in commercial leasing with those involved in designing, launching, and running an entirely new and unconnected business, it is fairly clear that there is little overlap and little reason to see the defendant as having a meritorious claim. If, however, this appears ambiguous or intuitively obvious, one must only remember that the question is ultimately one of allocation, and that we are attempting to discern whether a reallocation of the plaintiff’s gain in favour of the defendant is necessary according to the underlying purposes of contract. Such reallocation is necessary where it is possible to say with some degree of confidence that a full award of damages would be a windfall to the plaintiff because they have replaced their lost utility/benefit to some extent, but only possible when the costs of transactions are materially similar, because only then can we conclude with any certainty that the lost utility/benefit has in fact been replaced. Thus, where the transactions are as dissimilar as they are here (i.e., when comparing commercial leasing to running a Survival Horror Experience), it should be straightforward to reach a conclusion in favour of the plaintiff

and against allocating any portion of the plaintiff's gain to the defendant by way of reducing the plaintiff's damage claim. Likewise, it would be relatively easy to conclude that a gain should be held to mitigate the plaintiff's loss if they were merely leasing the building to a third-party carrying out said business rather than conducting it themselves.

- ii. Has the plaintiff's inaction allowed greater loss to accrue than might have otherwise been the case?

Circumstances in which a plaintiff's failure to act following a breach of contract has led to the accrual of greater consequential loss raise thorny questions of allocation, in light of the potential for an inappropriate allocation of loss to undermine the surplus creation function of contract, and to unjustifiably impoverish one party or the other. This is of course true of all of the circumstances considered above, but the problem is undeniably more acute when we are made to consider circumstances in which the consequential loss in question is a loss of "betterment" or expected benefit that was to have flowed from the contract as opposed to a loss that is tantamount to an actual worsening in the plaintiff's circumstances.⁴⁵⁴ The reason for this, as explained in Chapter III, is that to award damages for the latter is a matter of reallocating a loss that has been made manifest, and which must diminish the dominium of one party or the other, even if the adjudicator does nothing (i.e., does not award damages), whereas to award damages for the latter is to manifest a loss that otherwise had not been felt by either party as a "worsening" of their circumstances by subtracting it from the defendant's dominium.⁴⁵⁵ Damages for the latter must still be assessed and awarded, though, where it is in keeping with the purposes of the remoteness rule, which, as we know, effectively establishes and restricts recovery of consequential loss. Of course, the importance of acting within the scope of that purpose elevates the importance of Mitigation in such circumstances,

⁴⁵⁴ With respect to consequential loss in the nature of actual diminution in the plaintiff's dominium, I note that the considerations applicable are on all fours with those discussed in section VI.A.1.b.i.b.

⁴⁵⁵ See Chapter III – Section II.B.1.

because it allows for intervention and should prompt intervention where deviation from the strict application of the remoteness rule is necessary in order to promote its substance over its form. To understand circumstances in which such intervention is necessary, which is of course the important point, I will canvass decisions that demonstrate when it is that Mitigation should and should not intervene, as I have done throughout this part of the chapter. The decisions I will consider include first, *The Elena D'Amico*,⁴⁵⁶ followed by *Lesters Leathers*.⁴⁵⁷

Koch Marine Inc v. d'Amica Societa di Navigazione arl, better known as *The Elena dAmico*, is a decision of Mr. Justice Robert Goff (as he was then) on appeal from a decision of the arbitrator, C.S. Staughton Q.C. (as he was then).⁴⁵⁸ Koch, the appellants, were the charterers of the Italian flagged titular vessel, *The Elena D'Amico*, under a three-year time charter with the owners, d'Amica Societa, that began on January 10, 1972.⁴⁵⁹ The relevant dispute arose between the parties partway through the charter in early March 1973, when d'Amica withdrew the *Elena* from service on account of her needing serious repairs in order to remain operational;⁴⁶⁰ repairs that the owners were not prepared to make.⁴⁶¹ Koch accepted the withdrawal as repudiation of the time charter shortly thereafter on March 30, 1973.⁴⁶²

After the charter was terminated, Koch decided not to replace her with a substitute vessel, or to accept the owners' offer of a replacement vessel.⁴⁶³ Unfortunately for Koch, there was subsequently a substantial spike in the market rate for Italian-flagged vessels,

⁴⁵⁶ *Koch Marine Inc v dAmica Societa di Navigazione arl (The Elena dAmico)*, *supra* note 78.

⁴⁵⁷ *Lesters Leather and Skin Co v Home and Overseas Brokers*, *supra* note 203.

⁴⁵⁸ *Koch Marine Inc v dAmica Societa di Navigazione arl (The Elena dAmico)*, *supra* note 78 at 83.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *Ibid* at 85.

such as the *Elena*, between early 1973 and late 1974.⁴⁶⁴ The reason for the spike was in part because only Italian-flagged vessels were permitted to engage in the shipping trade along the Italian coast, which meant that such vessels could become especially valuable depending on the peculiarities of demand in Italy.⁴⁶⁵

The arbitration proceedings mentioned above began after these events, with Koch seeking damages for consequential loss of profit.⁴⁶⁶ Koch's claim was for the profits they alleged they could have made by employing the *Elena* in the Italian coastal trade during three distinct periods within the charter.⁴⁶⁷ The first period was between August and December 1973.⁴⁶⁸ The second, between January and April 1974.⁴⁶⁹ And the third, between August to December 1974.⁴⁷⁰ Note that the arbitrator did not find it proved that the Italian profits would have been earned in the first and third periods, and we are here only concerned with the Italian profits that Koch claimed could have been made in the second period, i.e., from January to April 1974. *d'Amica* defended Koch's claim on the basis that damages for termination of a charter party ought to be confined to only the difference between the market rate and the contract rate for the unexpired balance of the charter following termination.⁴⁷¹ In the result, His Lordship found for *d'Amica* and held

⁴⁶⁴ *Ibid* at 85–86.

⁴⁶⁵ *Ibid* at 84.

⁴⁶⁶ *Ibid* at 83–86.

⁴⁶⁷ *Ibid* at 85.

⁴⁶⁸ *Ibid*.

⁴⁶⁹ *Ibid*.

⁴⁷⁰ *Ibid*.

⁴⁷¹ *Ibid* at 86.

that the while consequential loss could be claimed for breach of a charter party,⁴⁷² the claim ultimately came undone by reason of Koch's lack of mitigation.⁴⁷³

In reaching his conclusion, it is notable that Robert Goff J referred to the prevailing rule in sale cases, as per *Jamal v. Moolla Dawood Sons & Co*,⁴⁷⁴ and causation as bases for finding that any consequential loss following Koch's decision not to charter in a substitute vessel could not be claimed.⁴⁷⁵ Each of these is ultimately irrelevant to my own reasoning on the issue, given that a *sui generis de jure* rule says nothing about how Mitigation ought to apply generally, and that I have thoroughly rejected causation as an explanation for the application of mitigation in any given situation. My own conclusion is that the decision is correct in the result with respect to mitigation, even if my reasons differ from those given by Robert Goff J, but I will defer explanation until after canvassing the facts of *Lesters Leathers* below.

Lesters Leathers & Skin Co. v. Home and Overseas Brokers is an appellate case on sale decided by Lord Goddard CJ.⁴⁷⁶ The contract of sale in question was for the sale of 10,000 articles of snakeskin by Home and Overseas to Lesters on CIF terms, any UK port.⁴⁷⁷ Cash was paid against document as required but the goods were subsequently rejected by Lesters after arrival and inspection.⁴⁷⁸ Lesters subsequently brought suit for damages, but notably sought lost profit on the use or resale of the snakeskin rather than

⁴⁷² *Ibid* at 87.

⁴⁷³ *Koch Marine Inc v dAmica Societa di Navigazione arl (The Elena dAmico)*, *supra* note 78, Robert Goff J ("Now, first of all, on the findings of fact in this case there was, at the date of termination of the charter-party at the of march, 1973, an available market to charter in a substitute; see par. 12 of the award. We know from par. 22 of the award that the decision of the charterers not to charter in an Italian ship was a judgment made in their own business interests. But in my judgment, on the findings of fact in this case, this was an independent decision of the charterers... The case is therefore no different from the case of a buyer claiming damages for non-delivery of goods who, although there is an available market for buying substitute goods who, although there is an available market for buying in substitute goods, decides not to take advantage of that available market on the date when the goods ought to have been delivered. In such a case the consequences of the inaction of the innocent party cannot be visited upon the wrongdoer..." at 90).

⁴⁷⁴ *Jamal v Moolla*, *supra* note 79.

⁴⁷⁵ *Koch Marine Inc v dAmica Societa di Navigazione arl (The Elena dAmico)*, *supra* note 78 at 87–90.

⁴⁷⁶ *Lesters Leather and Skin Co v Home and Overseas Brokers*, *supra* note 203.

⁴⁷⁷ *Ibid* at 569.

⁴⁷⁸ *Lesters Leather and Skin Co v Home and Overseas Brokers*, *supra* note 203.

damages according to the difference between contract price and market price, because there was no market for such skins in England at that time.⁴⁷⁹ Damages were awarded to Lesters for the loss of profit at trial, and the appeal herein discussed was brought solely on quantum and the question as to whether Lesters had failed to mitigate by not attempting to source replacement skins directly from India itself.⁴⁸⁰

Lord Goddard's decision on point was to the effect that a plaintiff in Lesters' position was not obliged to take undue risk or unusual steps in order to mitigate their loss, which in this case would have meant contracting with unknown sellers in a remote location for delivery many months hence.⁴⁸¹ As such, a failure to mitigate quite simply could not be found given that what was alleged to have been necessary by Home and Overseas was above and beyond reasonable, although an allowance was made for the possibility that it could have been done.⁴⁸² This £700 allowance appears somewhat strange in light of Lord Goddard and Lord Justice Singleton's remarks in the case, but the impression overall is that substantial damages of £2,000 net of the reduction were justified because of the attendant risk and inconvenience involved in buying into a distant

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid* (Note Mr. Justice Sellers did grant the sellers a reduction of 700 l. in the award for loss of profits on the basis that it was possible for the buyers to have bought in from the Indian market, although he also appears to have held that the buyers were not actually under any obligation to do that.).

⁴⁸¹ *Ibid*, Lord Goddard CJ ("After all, these matters always come down to whether the party aggrieved has acted reasonably in mitigating the damages. I cannot say that the buyers are bound to go hunting the globe to find out where they can get skins and then have them shipped so that they will arrive here months after the original contract time." at 569).

⁴⁸² *Ibid*, Singleton LJ ("I very much doubt whether in the circumstances there was any duty on the buyers to seek to buy in or from India or to enter into a contract with someone in India, at the time when the defendant sellers' breach occurred. The Judge has given the sellers some benefit, because, on the evidence before him they might have bought in India. That is certainly all that the sellers could expect." at 570).

market in the circumstances. That a plaintiff need not take undue risk in mitigating is also quite clearly the proposition the decision is most frequently cited for.⁴⁸³

The conclusion from both of the decisions above is that Mitigation ought to, and appears to, intervene to obviate a claim for damage or to reduce it in line with the Hypothetical Minimum Measure discussed above, when the effort and cost of obtaining substitute performance is comparable to that of the original contract as a matter of degree. In contrast, where effort and cost are not comparable, as was the case in *Lesters Leathers*, it is apparent that Mitigation should not intervene. The rationale for restraint is that the plaintiff's entry into an incomparable transaction provides no basis for assuming that they have obtained some or all of the surplus they sought under the original contract, and thus no basis for effectively requiring that plaintiffs take such steps. I note that this approach commends itself on the basis of fairness to the defendant as well as the plaintiff, because as pointed out in section IV.B.1.b, the corollary of the plaintiff's right to the benefit promised is the defendant's duty to provide it, and in undertaking that duty, the defendant assumes the risk that they will be called upon to provide substitute performance where they cannot or do not perform their primary obligations. Mitigation, of course, alleviates this burden where it appears that substitute performance was readily otherwise available to the plaintiff, such as when there is a ready market for the benefit sought, but again, as in *Lesters Leathers*, when alternatives are lacking there is no obvious reason to object to damages being required.⁴⁸⁴

⁴⁸³ *Calgary (City) v. Costello*, *supra* note 6, Picard J (“The plaintiff need not incur great expense or inconvenience in an attempt to stem the flow of losses resulting from the defendant’s breach. Thus, Lord Goddard observed that a prospective purchaser is not ‘bound to hunting around the globe’ to find a suitable substitute for the goods that he expected to receive under a contract: *Lesters Leathers & Skins Co. v. Home & Overseas Buyers Brokers* [1948], 64 T.L.R. 569 at 569” at para 42); See also Beale, *supra* note 6 at 26–090 (“But the claimant need not take risks with his money.”); See *Asamera Oil Corp v Sea Oil and General Corp*, [1979] 1 SCR 633 [*Asamera*], Estey J (“The first of these has its foundations in the established principle that a plaintiff need not put his money to an unreasonable risk including a risk not present in the initial transaction in endeavouring to mitigate his losses. This principle was demonstrated in *Lesters Leather and Skin Co. v. Home and Overseas Brokers...*” at 649).

⁴⁸⁴ Certainly, one must bear in mind that in *Lesters* the whole point of Lesters original contract with Home and Overseas was, in all likelihood, to avoid the risks and costs of attempting to source such goods directly.

2. Loss is incurred or realized

As mentioned above in section VI.A, Mitigation's response varies widely according to circumstance, one aspect of which is the character of the loss claimed in terms of whether it has been manifest and felt in financial terms, or whether it remains accrued and unrealized. There are, of course, limitations in the use of this particular dichotomy given that not all losses are felt in the same way by all plaintiffs. Harm to real property held as investment is, for instance, different from harm to one's home, and it is perhaps less apt to describe the latter as unrealized even if it has yet to be felt in the plaintiff's pocketbook. Nonetheless, there appears to be a difference in Mitigation's application in circumstances when loss is crystallized because a plaintiff has acted or attempted action versus circumstances in which they have not or have yet to take steps and loss may thus remain accruing or accrued. There is also a notable difference when what is up for consideration are losses consisting of incurred costs required to remediate actual "harm" to the plaintiff's dominium, or other costs incurred by necessity to address difficulties imposed by the breach, versus a loss of benefit(s) or betterment to the plaintiff's dominium expected under the contract. As such, I will split the analysis of Mitigation's intervention in relation to incurred loss on this basis, beginning with loss incurred to remediate harm or address difficult circumstances.

a. Loss or cost incurred to remediate

Perhaps the most influential statement on Mitigation's attitude towards cost or loss incurred to address the exigencies brought about by breach is the following passage from Lord MacMillan's speech in *Banco de Portugal*:⁴⁸⁵

“Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measure which he may be

⁴⁸⁵ *Banco de Portugal*, *supra* note 88 at 506.

driven to adopt in order to extricate himself **ought not to be weighed in nice scales at the incidence of the party whose breach of contract has the difficulty**. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and **he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.**" [Emphasis added]

Readers will likely remember that the substance of the *lis* in *Banco de Portugal* was a claim brought by Portugal's reserve bank against a firm of English printers (Waterlow & Sons) responsible for the printing of Portuguese currency, who had been duped by a criminal gang into printing a large duplicate run of 500 escudo notes⁴⁸⁶ bearing the likeness of Vasco da Gama, i.e., duped into counterfeiting.⁴⁸⁷ To the credit of Waterlow & Sons, the gang in question appears to have been a sophisticated outfit, since it included the Portuguese Minister at the Hague at the time, and since it managed to open a bank ("Banco Angola e Metropole") to launder the counterfeit notes.⁴⁸⁸ Unfortunately for the gang, the fraud was uncovered before it could complete its operation. This discovery led to the plaintiff reserve bank deciding to, or having to, remove the counterfeit notes from circulation at significant cost.⁴⁸⁹ The steps taken to achieve this were to replace the entire issue⁴⁹⁰ of such 500 escudo Vasco da Gama notes (upon presentation to the bank) with notes of a new design, and to cancel the notes taken in.⁴⁹¹

⁴⁸⁶ In breach of its contract with the bank; *Banco de Portugal*, *supra* note 88, Viscount Sankey LC ("In the course of 1925 Messrs. Waterlow, as it has been found by the Courts below, and as they admitted on appeal, were guilty of a breach of an absolute duty to the Bank under the contracts referred to, because, without authority from or the knowledge of the Bank, they printed and delivered to one Marang van Ysselvere 580,000 notes of 500 escudos of the Vasco da Gama type." at 461).

⁴⁸⁷ *Ibid* at 460–461.

⁴⁸⁸ *Ibid* at 461.

⁴⁸⁹ *Ibid* at 463–466.

⁴⁹⁰ *Ibid* at 464 (That is all notes of this design whether counterfeit or genuine.).

⁴⁹¹ *Ibid* at 463–464.

The printer's criticism of the bank was that it had acted precipitately by beginning to accept and withdraw notes immediately before it had acquired the means to discriminate between genuine and fraudulent notes, leading to it honouring fraudulent notes at a cost to itself, or that even if the bank had to act as quickly as it did, it could have ceased to honour fraudulent notes after it had acquired the means to detect them and avoided the ongoing cost of honouring such notes.⁴⁹² As one can surmise from the passage cited above, it is clear that these arguments failed to sway a majority of the Lords, and that any additional cost caused by the decision to accept all notes tendered was not denied.⁴⁹³

Although not necessarily evident in *Banco* itself, the upshot of Lord MacMillan's observation is that even if another step or steps would have been less costly, there is no scope for Mitigation to deny even the incrementally greater cost of the step(s) taken, so long as these were reasonable in the circumstances. Why this is significant, is that if one contrasts the standard to which a plaintiff is held where they have not acted, and not incurred any cost in the process, the standard to which they will be held is likely to be higher. That is to say that the step that will be used as the comparator for determining how much of the plaintiff's loss ought to be excluded for a failure to mitigate will generally be a more effective or less costly step than a plaintiff would be able to claim the

⁴⁹² *Banco de Portugal*, *supra* note 88, Lord MacMillan ("That the withdrawal of the whole issue was a reasonable and indeed the only practicable step for the Bank to take in order to remedy the situation which had arisen was hardly contested by Messrs. Waterlow They directed their criticism rather to the way in which the Bank carried out its policy. In the first place they argued that the Bank acted precipitately, and that if it had delayed the announcement of the withdrawal of the notes for a short time the means of discriminating between the spurious and the genuine notes, which admittedly the Bank did not at first possess, would have been available to it and it could have refused to honour the notes ascertained to be spurious. In the next place they argued that if the Bank had at first no alternative but to honour spurious and genuine notes alike by reason of its inability to distinguish between them it should have ceased to honour the spurious notes whenever it had acquired or could have acquired the means of discrimination." at 505).

⁴⁹³ *Ibid* at 470–471, 478, Lord MacMillan ("It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. On this part of the case I find myself in agreement with the reasoning of Scrutton L.J. In my opinion the action of the Bank in honouring all notes of the type in question, genuine and spurious alike, between December 7 and December 26, 1925, was reasonable and justifiable in the circumstances, and Messrs. Waterlow ought to be held responsible for whatever loss was occasioned to the Bank by the adoption of that policy." at 506).

cost of if they did in fact act. I note that this may be clear enough from *Banco* itself. I will, however, review one further decision below in order to help reinforce the point.

The further case that I wish to consider is the decision of the Alberta Court of Appeal in *Tangye v. Calmonton Investments*, which concerned an action for the enforcement of a lease guarantee.⁴⁹⁴ The essential facts of *Tangye* are that Calmonton Investments, the lessor and plaintiff, leased certain premises in Calgary to a company that used them to run a racquetball and squash business.⁴⁹⁵ Hugh Tangye guaranteed the lease for this first tenant. Unfortunately, the first tenant did a poor business running the racquetball and squash operation at the leased site and subsequently assigned the lease to another company that attempted to do better.⁴⁹⁶ This second tenant failed too, however, and wound up going out of business and defaulting on the lease.⁴⁹⁷ The default left Calmonton in an unsurprisingly difficult position owing to a slump in the rental market for commercial premises in Calgary, and led it to the somewhat surprising decision to operate the racquetball and squash business itself in an attempt to stem its loss arising from the second tenant's default on the lease.⁴⁹⁸ As one might expect, Calmonton too ran the racquetball and squash business at a loss, which appears to have only further deepened its loss arising from the default on the lease.⁴⁹⁹

Tangye, for his part, defended the claim under the guarantee on the basis, inter alia, that Calmonton had failed to mitigate its loss by choosing to run the racquetball and squash business itself at a loss, rather than re-letting the premises at the low commercial

⁴⁹⁴ *Tangye v Calmonton Investments Ltd*, 1998 ABCA 206.

⁴⁹⁵ *Ibid* at para 2.

⁴⁹⁶ *Ibid*.

⁴⁹⁷ *Ibid*.

⁴⁹⁸ *Ibid* at para 18.

⁴⁹⁹ *Ibid* at paras 2, 18.

rates then-prevailing.⁵⁰⁰ The Court’s response is, in my opinion, conventional, but bears repetition for its clarity:⁵⁰¹

“... the law does not exact perfection or hindsight by the creditor (landlord). His test is relatively lax: whether a reasonable but conservative person in his shoes, knowing only the facts then known, might have made the same choice.”

As one might surmise, the Court found no failure to mitigate by Calmonton.⁵⁰² Although, it must be said that both evidence and argument advanced by Tangye’s counsel appear to have been thin.⁵⁰³ Nonetheless, it appears that such loss as was incurred in the course of running the racquetball and squash business was regarded as a recoverable cost in Mitigation, even though re-letting at a low rent appears to be the obvious and less costly step that Calmonton may have been expected to take had they not acted at all.⁵⁰⁴ To put it another way, had Calmonton not acted, it appears unlikely that a court would accept in argument that its losses would have been worse if it had chosen to operate the racquetball and squash business itself, and that Calmonton should face no reduction in its claim for damages to account for any portion of its loss that could have been saved by taking a better step.

Having now considered both cases, the following conclusion on when it is Mitigation will or ought to intervene with respect to “costs” incurred in the attempt to respond to exigencies created by the breach can now be offered. In short, whether it is to deny a defendant’s plea that the relevant costs or loss could have been avoided, or allow a

⁵⁰⁰ *Ibid* at para 18.

⁵⁰¹ *Ibid* at para 24.

⁵⁰² *Ibid* at para 29.

⁵⁰³ *Tangye v Calmonton Investments Ltd*, *supra* note 496, Cote J (“Therefore, even if failure to mitigate were in issue at trial, there is no evidence of such failure and indeed some evidence of the reasonableness of the landlord’s steps. The Supreme Court commented in *Keneric v. Langilie*, *supra*, [at para. 35]: ‘The difficulty I have with this argument is that no evidence was led at trial concerning the economics of reletting. In the absence of such evidence it is impossible to say whether reletting would have been preferable to resale or not. Obviously the burden of proof here is of critical importance.’ I echo those comments here.” at para 29).

⁵⁰⁴ *Ibid* at paras 18–26.

plaintiff's plea that certain loss or cost ought to be allowed even if it would struggle to fit within the rules of recovery (i.e., *Robinson* or *Hadley*), Mitigation will permit recovery where the steps chosen were explicable in the circumstances — even if it is in hindsight a poor choice from the alternatives that were available, and even though such leniency cannot plausibly be expected in circumstances where the plaintiff did not act.

b. Loss or cost incurred to replace benefit lost

Where breach has deprived the plaintiff of expected benefits, the natural and expected step will be for a plaintiff to seek out a substitute. Doing so clearly entails cost, but not all costs incurred to obtain substitute performance are recoverable. Nor should they be, even though they may appear to fit well within the parameters of recovery for direct or consequential loss. When it is that Mitigation will act to permit or deny recovery is, of course, open to dispute in any given case. However, it is apparent that the general positive and normative theory that I have used throughout to explain Mitigation's intervention in other circumstances likewise applies to explain how and when Mitigation will intervene here, too. To explain in concrete terms, I will, as I have done throughout, demonstrate by way of reference to decided cases. The first and perhaps most fitting, given it is regarded as the point at which much of the modern law of Mitigation began, is *British Westinghouse*,⁵⁰⁵ and the second being the most recent significant word from the Lords on costs of mitigating or Mitigation generally, namely *Lagden v. O'Connor*.⁵⁰⁶

Readers will no doubt be to some extent familiar with the facts of *British Westinghouse* as much as they are the substance of their Lordships' speeches on the point. To demonstrate how exactly it demonstrates my point, though, some repetition of the material facts is in order. In short, the case pertained to a dispute arising from a contract entered into between British Westinghouse (supplier) and Underground Electric Railways (customer) in 1902 for the supply and installation of eight 5,500kw steam turbines for

⁵⁰⁵ *British Westinghouse*, *supra* note 66.

⁵⁰⁶ *Lagden*, *supra* note 422.

£250,000 payable in instalments.⁵⁰⁷ The reason for the dispute was that the turbines supplied both produced less power and consumed more coal than had been promised⁵⁰⁸ and, that as of 1908, Underground had left unpaid a balance owing under the contract of £83,293.⁵⁰⁹ It is also notable that by 1908, Underground had given up on British Westinghouse's machines and replaced them with eight 6,000kw turbines from the firm of Parsons purchased for £78,167.⁵¹⁰

The history of the litigation between the parties began with an arbitration claim by British Westinghouse for the unpaid balance owing for its machines,⁵¹¹ to which Underground responded with a counterclaim in the alternative for either the £280,987 estimated cost of excess coal that the British Westinghouse turbines would have consumed over their estimated 20-year useful life,⁵¹² or the £78,167 cost of the Parsons machines and additional £42,000 for the estimated cost of excess coal actually consumed during the years in which Underground did use the defective British Westinghouse turbines.⁵¹³ Only the latter alternative was seriously pressed in the litigation, and in the result, the only real question of any controversy — and that which ultimately reached their Lordships' house on appeal — was whether or not the cost of the Parsons machines could be recovered as a cost of mitigation.⁵¹⁴

It is worth noting that the issue of the recoverability reached the Lords as questions of law upon a special case stated by the arbitrator, because the conclusion reached by Viscount Haldane is couched in the abstract and led only to a declaration on

⁵⁰⁷ *British Westinghouse*, *supra* note 66 at 682.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid* at 675.

⁵¹⁰ *Ibid* at 683.

⁵¹¹ *Ibid.*

⁵¹² *Ibid* at 682–683.

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid* at 684–685.

the questions raised and remittance to the arbitrator for a final decision on the facts.⁵¹⁵ Nonetheless, the answers given are instructive, although the questions must be stated to understand them. The essential contention of British Westinghouse, the correctness of which was in question, was that the cost of the Parsons machines should not be recoverable as a cost of mitigation because they should have been purchased in any event, even if British Westinghouse's machines had not been defective, given that Parsons' superiority in power output and energy efficiency had effectively ended the "commercial life" of the British Westinghouse machines as soon as the former became available.⁵¹⁶ Viscount Haldane's conclusion on this contention was that it was in fact correct, which negated Underground Electric's contention that the cost of replacement machines ought to have been allowed as a necessary cost to address the defect in the machines originally purchased.⁵¹⁷ In reaching this conclusion, His Lordship canvassed decisions going back to *Staniforth v. Lyall*,⁵¹⁸ where Mitigation appears to have begun, and observed that it was right for the arbitrator to have done as they had in balancing Underground Electric's loss and gain.⁵¹⁹ Meaning presumably, that it was correct to account for the improvement had from machines that had not only replaced those purchased, but had substantially bettered them by lowering input cost while improving output.

⁵¹⁵ *Ibid* at 685, 692.

⁵¹⁶ *British Westinghouse*, *supra* note 66, Viscount Haldane LC ("Having found these facts, [the arbitrator] set out the contentions of the parties. The case of [Westinghouse] was in substance that on the facts as stated he was entitled to draw the inference that the 'commercial life' of these machines had expired at the date of the purchase by the respondents of Parsons machines, that these facts were therefore relevant to the question of the amount of damages recoverable on the counter-claim, and that accordingly no further damages of any kind were recoverable by the respondents after the date when they could procure Parsons machines, and, further, that the cost of procuring and installing Parsons machines was not recoverable by the respondents." at page 684).

⁵¹⁷ *Ibid*, Viscount Haldane LC ("I think the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain. The transaction was not *res inter alios acta*, but one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach. Apart from the breach of contract, the lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines." at 691)".

⁵¹⁸ *Ibid* at 689.

⁵¹⁹ *Ibid* at 691.

In one sense, the accounting referred to above is simple enough on its face. To balance all losses and gains following a breach undoubtedly admits to some evidentiary challenge in the attempt to count them all, but the apparent simplicity is superficial at best because it is clear that not everything that “counts” matters in determining the extent to which Mitigation should extend or curtail claims for loss or “cost”. In that connection, Viscount Haldane refers to questions of cause affecting the inclusion or exclusion of post-breach events from assessment, but as we know, questions of cause pose something of an epistemological conundrum when considering the behaviour of individuals with agency.⁵²⁰ As such, the seemingly simple exercise of accounting appears not to be simple at all once we are forced to consider *what* to count. Having said this, however, my conclusion on the facts of this case are that the Viscount Haldane’s assessment in the circumstances is correct, and thus explicable in terms of the theory I have posited so far in the chapter. An explanation of my conclusion will likely be aided by consideration of the contrasting example afforded by *Lagden v. O’Connor*, however, and I will therefore examine it first before concluding this part.⁵²¹

In factual terms, *Lagden v. O’Connor* is an altogether straightforward case. In short, O’Connor crashed into Lagden’s car while it was parked.⁵²² The car was damaged but capable of economic repair.⁵²³ O’Connor was clearly at fault in the circumstances, and liability effectively a non-issue.⁵²⁴ Where and when controversy arose was during the 17-day period following the crash when Lagden’s car was in for repair.⁵²⁵ Lagden needed a replacement car for the period in which it was in the shop but, owing to poverty and very poor health, could not afford to rent one in the normal way.⁵²⁶ Thus, Lagden

⁵²⁰ See Chapter III – Section IV.B.3.

⁵²¹ *Lagden*, *supra* note 422.

⁵²² *Ibid* at para 17.

⁵²³ *Ibid*.

⁵²⁴ *Ibid* (It does not appear that Mr. Lagden’s car was parked anywhere it should not have been when Ms. O’Connor crashed into it.).

⁵²⁵ *Ibid* at paras 64–66, 76.

⁵²⁶ *Ibid* at para 17.

was driven into the arms of an “accident hire” or “credit hire” firm named Helpshire, whose business was to rent vehicles to people in exactly Lagden’s circumstances, i.e., liability is clearly established, but the hiree cannot afford to shoulder the expense of renting the replacement car before getting damages.⁵²⁷ Helpshire’s business model was to charge an additional premium for letting the car to the plaintiff on credit for a set period, and to pursue the claim for special damages (the cost of hireage) against the defendant (realistically their insurer) on the hiree/plaintiff’s behalf.⁵²⁸

The complication that justified the appeal all the way up to the Lords, despite the case’s relative factual simplicity, was the recoverability of the additional premium charged by Helpshire for provision of its services and the vehicle on credit that exceeded the cost of hiring an equivalent car on the spot market directly.⁵²⁹ The objection to such additional cost being recovered was that the additional “service” purchased represented an additional benefit that went further than restoring the plaintiff’s situation, and instead “bettered” it.⁵³⁰ Such betterment was arguably analogous or equivalent to, for instance, a decision to hire a better class of car than the one damaged, and thus arguably a gain that ought to be held to the defendant’s account in reduction of damages claimed for the cost of mitigating.⁵³¹ Said reduction in amount was equal to the cost of the additional benefit over and above the cost of mitigation without it.⁵³² Of course, I say “arguably” because not all such “benefits” or “betterment” are or have been deemed accountable in this way, even following *British Westinghouse*, with exclusions made commonly where such

⁵²⁷ *Ibid* at paras 17–18.

⁵²⁸ *Ibid* at paras 64–67.

⁵²⁹ *Ibid* at paras 15–16.

⁵³⁰ *Ibid* at paras 19–22.

⁵³¹ *Ibid* at para 27.

⁵³² *Lagden*, *supra* note 422, Lord Hope (“If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle. If the defendant can show that the cost that was incurred was more than was reasonable--if, for example, a larger or more powerful car was hired although vehicles equivalent to the damaged car were reasonably available at less cost--the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent.” at para 27).

betterment is necessary or merely incidental.⁵³³ Thus, the question in issue was whether the cost of Helpshire’s service ought to be categorized as a cost of mitigating loss and thus allocated to the defendant to bear, or expenditure in excess of mitigation that ought to be allocated to the plaintiff’s pocketbook.⁵³⁴

In the circumstances of the particular case, a majority of the Lords found for Lagden,⁵³⁵ and in the leading majority speech of Lord Hope, His Lordship effectively concluded that the additional expense, necessary as it was for a plaintiff in Lagden’s shoes to act, was recoverable as a cost of mitigation.⁵³⁶ It is noteworthy that in reaching this conclusion, the majority was forced to contend with both *The Liesbosch*,⁵³⁷ and its own earlier decision in *Dimond v. Lovell*,⁵³⁸ which case had considered similar facts

⁵³³ See e.g. *The Gazelle*, (1844) 2 W Robinson 279, Dr Lushington (“The right against the wrongdoer is for a restitutio in integrum, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty [and in those cases difficulties must and will frequently occur], the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.” at 281); See *James Street Hardware and Furniture Co v Spizziri (CA)*, (1987) 62 OR (2d) 385 (ONCA), (“We appreciate the logic of the reasoning in *Harbutt’s ‘Plasticine’* and of the statement of Dr. Lushington in *The ‘Gazelle’* [1844], 2 W. Rob. 279, 166 E.R. 759, which is contained in one of the passages from McGregor that we have quoted. Quite simply, if a plaintiff, who is entitled to be compensated on the basis of the cost of replacement, is obliged to submit to a deduction from that compensation for incidental and unavoidable enhancement, he or she will not be fully compensated for the loss suffered. The plaintiff will be obliged, if the difference is paid for out of his or her own pocket, whether borrowed or already possessed, to submit to ‘some loss or burden’, to quote from Dr. Lushington. Widgery L.J. in *Harbutt’s ‘Plasticine’* called it ‘forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them’. These considerations, however, do not necessarily mean that in cases of this kind the plaintiff is entitled to damages which include the element of betterment... As Waddams suggests, the answer lies in compensating the plaintiff for the loss imposed upon him or her in being forced to spend money he or she would not otherwise have spent...” at paras 62-63).

⁵³⁴ *Lagden*, *supra* note 422 at paras 34–35.

⁵³⁵ *Ibid* at paras 9, 13, 62.

⁵³⁶ *Lagden*, *supra* note 422, Lord Hope (“It is for the defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost... Applying those principles to the present case, I would hold that Ms Connor’s insurers have not made out a case for the deduction which they seek. The evidence showed that Mr Lagden had no choice but to use the services of the credit hire company and that, if he was to make use of these services, he had no way of avoiding the additional benefits that were provided to him.” at paras 34-35).

⁵³⁷ *The Liesbosch*, *supra* note 421.

⁵³⁸ *Dimond v Lovell*, [2002] 1 AC 384 (HL (Eng)).

without impecuniosity on the part of the plaintiff.⁵³⁹ In overcoming each as an obstacle, Lord Hope emphasized the rule of remoteness as a distinguishing factor.⁵⁴⁰ *The Liesbosch*, as we know, was decided on the basis of the old law requiring direct causation of consequential loss rather than reasonable foreseeability as per *Overseas Tankship v. Morts Dock*,⁵⁴¹ and on that basis was finally disapproved, if not strictly overruled.⁵⁴² *Dimond*, by contrast, was distinguished, but not necessarily diminished, by emphasis on the reasonable foreseeability of an impecunious plaintiff such as Lagden requiring the assistance of a credit hire firm where the same was not true of the well-to-do Mrs. Dimond.⁵⁴³ As reasons go, the argument premised upon foreseeability is, in my opinion, not inaccurate as it pertains to *Dimond*, and an apt reason to largely lay *The Liesbosch* to rest, given that it appears to have been decided on the issue of remoteness rather than Mitigation.⁵⁴⁴ However, as I have already argued, it is incorrect in my view to perceive Mitigation as constrained by remoteness rather than the other way around. Further, there is in Lord Hope's speech a better reason for understanding both the decision in the instant case and the distinction from *Dimond*. Namely, that to deny recovery for the extra cost to a plaintiff with little choice but to incur it risks making them worse off than they were before the wrong occurred, which runs contrary the reason for a remedy being provided at all. This of course aligns with my own understanding of Mitigation's role and more naturally ties in to the theory I have proposed, and having reached this point, I will now

⁵³⁹ *Lagden*, *supra* note 422 at para 5.

⁵⁴⁰ *Ibid* at paras 52–54.

⁵⁴¹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)*, [1961] AC 388 (PC NSW) [*The Wagon Mound*].

⁵⁴² *Lagden*, *supra* note 422 at para 61.

⁵⁴³ *Ibid* at paras 4–7, Lord Nicholls.

⁵⁴⁴ *Lagden*, *supra* note 422, Lord Hope (“The [*Liesbosch*] has frequently been criticised: ... Salmond and Heuston on the Law of Torts [21st edn, 1996] p 515 state that it is hard to reconcile with the principle that it is the claimant's duty to mitigate his loss, which should allow him to borrow money to do so; and Winfield and Jolowicz on Tort [16th edn, 2002] p 238 do not find it possible to give any logical reason for regarding the claimant's impecuniosity as extrinsic but taking into account his physical disability. It has been doubted whether Lord Wright was laying down a rule of law or was simply saying that the loss claimed was too remote in that case.” at para 52).

move to explain both *Lagden* and *British Westinghouse*, and what it is they demonstrate in terms of my framework, below.

Before concluding, I should point out that *Lagden*'s character as a tort decision as opposed to a case in contract is of interest, but ultimately not important for present purposes. Although the majority decision itself places some emphasis on the remoteness rule in tort and makes reference to the principle that the tortfeasor must take his victim as he finds them, it is evident to my mind that the outcome ought not be any different if we were instead considering a case involving a mechanic who deprives a customer of their vehicle in breach of contract. It is clear that the relevant loss is the same, and that the individual characteristics of the plaintiff are apt to be considered with respect to their actions post-breach (i.e., Mitigation), even if the same are not relevant to the question of remoteness pre-breach.⁵⁴⁵ As such, I conclude as a preliminary matter that *Lagden* is in fact instructive for present purposes, even though it is not a decision in contract.

Turning now finally to the question of when it is that Mitigation will or will not intervene, or perhaps how it will treat "betterment" acquired in the course of mitigating, the following observation can be made. Fundamentally, decisions such as *British Westinghouse*, *Lagden*, and even *Dimond v. Lovell*, demonstrate that the accounting exercise that must be done by necessity is essentially an exercise in "balancing the books". Whether the court is concerned to return a plaintiff to the position they were supposed to be in, or carrying them forward to the position in which they should have been, the court must aim to do no more and no less. Thus, when a plaintiff would have incurred expenditure in any event irrespective of the breach, as in *Westinghouse*, it is evident that recompense for that expenditure would not merely take them forward, but take them *further*, and this is ample reason to take the "betterment" into account and

⁵⁴⁵ Individual characteristics have been said to be irrelevant to the assessment of quantum generally; See *Redpath*, *supra* note 83, Létourneau JA ("Counsel for the respondent submitted that, in fixing the damages, characteristics that are peculiar to the plaintiff ought not to be taken into account. I agree. For example, it is irrelevant in determining the extent of the damages that a plaintiff had a resale contract with a third party and made a profit in reselling the damaged goods. The damages and their quantum exist irrespective of the special or peculiar characteristics of a plaintiff. However, this rule applies to the determination of the damages, not to the scope of the duty to mitigate them. When it comes to the duty to mitigate, it is worth remembering that the duty is on the plaintiff, not on some fanciful and abstract personage." at para 79).

diminish whatever award in damages is made accordingly, even if the amount claimed is explicable in its own right without justification as a cost of mitigation, i.e., even if it can be claimed naturally as direct or consequential loss, which replacement machines clearly would. By contrast, apparent “betterment” that is unavoidable if the *particular* plaintiff is to be restored to their past (or expected) position, and which yields no greater benefit to a plaintiff, ought to be excluded from account and Mitigation should ensure that the plaintiff *is* allowed to recover for any cost without any reduction.⁵⁴⁶

VII. Overview

The preceding chapter has been a grand tour of the various aspects of Mitigation that I believe one must understand in order to understand the doctrine. To sum up such an extensive survey briefly, I will recap my answer to each of the questions about the doctrine’s operation that I set out at the outset of the chapter.

With respect to “what” the doctrine is, I have made the case that it is effectively an equitable doctrine that intercedes at the point of intersection between contract and the law of damages. I have argued that it is equitable, because I believe that “equity is as equity does”, and that the label thus applies because the doctrine effects equitable outcomes — i.e., it intercedes to ameliorate harsh outcomes that would otherwise result from the strict application of common law rules. I note that some may object because the doctrine’s history does not bear out any clear suggestion that it arose from courts of equitable jurisdiction. I, of course, accept that the historical record is what it is. However, I do not believe equity ossified after the *Judicature Act* amendments of the 19th

⁵⁴⁶ *Harbutt’s Plasticine*, *supra* note 39, Lord Denning MR (“The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit [for which they would be able to charge the defendants]. They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case. I think the judge was right on this point.” at 468).

century. And, I do believe that a characterization that more accurately reflects function will do more good than harm.

In relation to “how” the doctrine achieves its ends, I have explained that Mitigation intercedes at the point of intersection between contract and the law of damages. The significance of this point of intersection is that it is here that primary rights are transformed or translated into secondary rights or rights in specie. In other words, it is the place at which literal obligations are transformed into, or replaced with, a monetary equivalent in the form of damages. Mitigation intercedes in this process of translation by altering the arithmetic to increase or decrease the size of the secondary right that replaces the defendant’s primary obligation. It does this by either curtailing or expanding the scope of the rules of damage assessment that would otherwise apply, e.g., remoteness and causation among others.

Why Mitigation performs this function is suggested by the responses to “what” and “how”. If it is an equitable doctrine that intercedes to ameliorate the rigour of strict law, and it applies to the assessment of damages, then its reason for interceding ought to be to bring damage assessment into line with the underlying purpose for awarding said damages in the first place. That is the overall function of equity. Not to interfere or supplant, but to fulfill.

To summarize when exactly Mitigation will intercede is challenging. This final question takes up the majority of the chapter on its own. In brief, though, one can say that Mitigation intercedes when it is necessary in order to ensure that the remedy provided in response to the defendant’s breach reflects the equilibrium of the parties’ bargain. This is necessary in certain circumstances, because the rules of damage assessment that are supposed to achieve this end on their own are liable to be either over- or under-inclusive in certain circumstances. For example, if remoteness would prima facie deny recovery for losses sustained in the course of mitigating, Mitigation must displace remoteness in order to ensure that the plaintiff is not penalized for having taken reasonable steps to right the defendant’s wrong. Other examples abound, but it is best to

refer to the relevant part of the chapter rather than to attempt to recapitulate the greater part of that discussion here.

CONCLUSION

The goal of dissertation has been to establish a new framework for Mitigation in contract that explains *when* it will apply and what effect it will have on the assessment of damages in contract depending on the circumstances pre and post-breach. This goal has been reached in the fourth and final chapter of the dissertation. The path to reach this objective has been long and winding, and a number of other questions going to the heart of the doctrine, and the legal system as a whole, have had to be answered along the way. A brief recount of these questions and my answers, as well as my answer to the ultimate question at the heart of the dissertation, is as follows.

My analysis of Mitigations starts from a teleological perspective that posits that the content and function of law must conform to its underlying purpose. This leads to the further observation that one must know what the purpose of a particular body of law is in order to understand how its constituent components (i.e. particular rules and principles) must be framed if they are to be efficacious in helping to obtain the end sought by the particular body of law as a whole. In relation to Mitigation I have taken the position that Mitigation assists contract but is not strictly speaking a part of contract. Nonetheless, its supporting role requires that we understand the purpose of contract law, or the institution of contract which contract law makes possible, in order to understand what Mitigation ought to do. Put another way, a teleological perspective requires us to understand what contracts are for and why we enforce them at all as a prerequisite to developing or framing doctrine. I have answered this question of contract's ultimate purpose in Chapter I by deducing that the long-term philosophical and doctrinal direction of contract is consistent with only one of the many theories that vie for supremacy as *the* explanation for our system of contract. This theory is the theory of economic efficiency. As such, and as further explained in Chapter I, it is clear then that the purpose of contract is to promote the common weal by promoting the creation of surpluses from trade.

With the purpose of contract established in Chapter I, the next question addressed was the taxonomical classification of Mitigation. My hypothesis at the outset of the dissertation

was that Mitigation is effectively equitable, despite its common law ancestry. Many would question why exactly the issue of classification matters, and whether equity has any further role to play in our system of private law. In Chapter II I demonstrated that despite the arguably moribund state of its jurisprudence in Canada, equity retains a central role in the Anglo-Canadian legal system, and that it or something like it must inevitably exist in a rules-based legal order. This aforementioned role is to act as a relief valve to prevent the rules-based system, that is the common law, from being undermined by the inevitable under or over-inclusion of its rules. Thus, as I go on to explain in Chapter IV, the role of Mitigation is to act as similar release to prevent the ordinary rules of damage assessment in contract from undermining the purpose and function of contract itself.

The penultimate Chapter of the dissertation addressed a rather different set of concerns from those considered in Chapters I and II. Unlike those earlier chapters, Chapter III set out to explain what Mitigation is not and does not do. The reason for making such a significant detour on the path to my ultimate conclusion is the apparent necessity of addressing the established understanding of Mitigation reflected in caselaw and academic commentary, or the established “misunderstanding” as I have described it. In the chapter a number of points are addressed and established, but perhaps the most important two are that Mitigation is neither a mere aspect of remoteness, nor is it an aspect of causation. These are the two most frequently advanced explanations for the doctrine as it stands today, but as I have established in the chapter, neither is accurate and each only obscures the reality of what the doctrine really does. With this and other points established or refuted, I have cleared the board in a sense and opened up the possibility of erecting the new framework I sought to establish at the outset.

In the final chapter I have directly taken on the what, how, why, and when questions of Mitigation and provided an overall explanation of the doctrine. This explanation, in short, is that Mitigation is a doctrine that is (at least effectively) equitable and that intervenes at the point of intersection between contract and damages in order to ensure that the application of the ordinary rules of damage assessment do not undermine the purposes of contracting by moving the parties away from the equilibrium position they were supposed to inhabit

pursuant to the bargain struck. Put another way, Mitigation intercedes in order to ameliorate the rigour or harshness of the rules of damage assessment at common law by expanding or curtailing their operation when it would be unmeritorious for a given party to insist on the strict application of these rules. The question of merit is, of course, tied to the purposes of contracting, and again reflects whether the application of a rule would disturb the equilibrium that damages in contract are supposed to promote or protect. As a final observation, I note that my insistence that the doctrine be designated as equitable in contradistinction from common law, and that efficiency is the best explanation for contract now and in the future given contract's apparent long-term direction, may cause some to protest. But with the greatest respect, the point is this: That framework is best that best predicts what the law is or ought to do in any given situation. And in that regard, there can be little doubt that my prescription provides the most exhaustive treatment of the subject to date and the clearest direction as to how any adjudicator ought to resolve any question governed by the doctrine consistent with clear principles and the caselaw that I purport to explain.

BIBLIOGRAPHY

JURISPRUDENCE

Australian Jurisprudence

Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7), [2012] SASC 49.

Andrews v Australia and New Zealand Banking Group Ltd, (2012) 247 CLR 205 (HCA).

Blomley v Ryan, (1956) 99 CLR 362 (HCA).

Burns v MAN Automotive (Aust) Pty Ltd, (1986) 161 CLR 653 (HCA).

Chand v Commonwealth Bank of Australia, [2015] NSWCA 181.

Commonwealth of Australia v Amann Aviation Pty Ltd, (1991) 174 CLR 64 (HCA).

Driver v War Services Homes Commissioner, (1923) 44 ALT 130 (VSC).

Fox v Wood, (1981) 148 CLR 438 (HCA).

Haines v Bendall, (1991) 172 CLR 60 (HCA).

Hardie Finance Corporation Pty Ltd v Ahern (No3), [2010] WASC 403.

Karacominakis v Big Country Developments Pty Ltd & Big Country Developments Pty Ltd v Chadlace Pty Ltd & Ors J W Wall Investment Co Pty Ltd & Ors v Big Country Developments Pty Ltd & Ors Hollingsworth & v Big Country Developments Pty Ltd & Ors, [2000] NSWCA 313.

Murphy v Mitrovski, [2012] SASC 158.

National Insurance Co of New Zealand Ltd v Espagne, (1961) 105 CLR 569 (HCA).

Northern Sydney Local Health District v Amaca Pty Ltd (under NSW administered winding up), [2017] NSWCA 251.

Optus Networks Pty Ltd v Leighton Contractors Pty Ltd, [2002] NSWSC 327.

Regional Power Corporation v Pacific Hydro Group Two Pty Ltd, [2013] WASC 356.

Whittaker v Unisys Australia Pty Ltd, [2010] VSC 9.

Canadian Jurisprudence

1874000 Nova Scotia Ltd v Adams, [1997] NSJ No 172 (NSCA).

2438667 Manitoba Ltd v Husky Oil Ltd (cob Husky Oil Marketing Comp), [2007] MJ No 233 (MBCA).

514953 BC Ltd dba Gold Key Construction and Chiu v Leung, [2007] BCCA 114.

AJ Hustins Enterprises Ltd v Byrne Architects Inc, [2000] 29 CLR (3d) 9 (NSSC).

Apeco of Canada Ltd v Windmill Place, [1978] 2 SCR 385.

Asamera Oil Corp v Sea Oil and General Corp, [1979] 1 SCR 633.

Bank of America Canada v Mutual Trust Co, [2002] 2 SCR 60.

Bhasin v Hrynew, [2014] SCC 71.

Bowlay Logging Limited v Domtar Limited, (1978) 87 DLR (3d) 325 (BCSC).

British Columbia v Canadian Forest Products Ltd, [2004] SCJ No 33 (SCC).

Calgary (City) v Costello, (1997), 152 DLR (4th) 453 (ABCA).

Canadian Flexible Skate Co Ltd v Monarch Brass Mfg Co Ltd, [1924] 2 DLR 387 (ONCA).

Canadian Western Natural Gas Co v Pathfinder Surveys Ltd, [1980] AJ No 648 (ABCA).

Canson Enterprises Ltd v Boughton & Co, [1991] 3 SCR 534.

Cellular Baby Cell Phones Accessories Specialist Ltd v Fido Solutions Inc, [2017] BCCA 50.

Chapman et al v Ginter, [1968] SCR 560.

Coba Industries Ltd v Millie's Holdings (Canada) Ltd, (1985) 20 DLR (4th) 689 (BCCA).

Cockburn v Trusts and Guarantee Co, (1917), 55 SCR 264.

Cole v Pope, (1898) 29 SCR 291.

Copperview Haven Ltd v Waverly Park Estates Ltd, [1984] 4 WWR 673 (BCCA).

Costello v Cormier Enterprises Ltd, (1979), 25 NBR (2d) 8 (NBQB).

Costello v Cormier Enterprises Ltd, (1979), 28 NBR (2d) 398 (NBCA).

Dawson v Helicopter Exploration Co Ltd, (1958), 12 DLR (2d) 1 (SCC).

Evans v Teamsters Local Union No 31, [2008] 1 SCR 661.

Farish v National Trust Company, [1974] 54 DLR (3d) 426 (BCSC).

Finelli et al v Dee et al, (1968) 67 DLR (2d) 393 (ONCA).

Freedhoff v Pomalift Industries Ltd et al, (1970) 13 DLR (3d) 523 (ONSC).

Garrett v Quality Engineered Homes Ltd, [2006] OJ No 588 (ONSC).

Hall v Hebert, [1993] 2 SCR 159.

Hodgkinson v Simms, [1994] 3 SCR 377.

Home Hardware Stores Limited v R Home Supply Centre Ltd, 2015 BCCA 500.

Hunt River Camps/Air Northland Ltd v Canamera Geological Ltd, [1998] NJ No 325 (NFLDCA).

Hunter Engineering Co v Syncrude Canada Ltd, [1989] 1 SCR 426.

James Street Hardware and Furniture Co v Spizziri (CA), (1987) 62 OR (2d) 385 (ONCA).

Janiak v Ippolito, [1985] 1 SCR 146.

Kaps Transport Ltd v McGregor Telephone & Power Construction Company, (1970) 13 DLR (3d) 732 (ABCA).

Karas et al v Rowlett, [1944] SCR 1.

Kemp v Lee, [1983] BCJ No 1571 (BCSC).

Machtinger v HOJ Industries Ltd, [1992] 1 SCR 986.

Malton v Attia, 2015 ABQB 135.

Marigold Holdings Ltd v Norem Construction Ltd, [1988] 5 WWR 710 (ABQB).

Marsan v Trunk Pacific Railway Co, (1912) 20 WLR 161 (ABQB).

McKenna's Express Ltd v Air Canada, [1993] PEIJ No 85 (PEISCTD).

Morrison v Coast Finance Ltd, (1965) 55 DLR (2d) 710 (BCCA).

Nan v Black Pine Manufacturing Ltd, (1991) 80 DLR (4th) 153 (BCCA).

Ossory Canada Inc v Wendy's Restaurants of Canada, [1997] 36 OR (3d) 483 (ONCA).

Owen Sound Public Library Board v Mial Developments Ltd et al, (1979) 26 OR (2d) 459 (ONCA).

Panarctic Oils Ltd v Menasco Manufacturing Company, [1983] AJ No 889 (ABCA).

Redpath Industries Ltd v Cisco (The), [1994] 2 FC 279 (FCA).

Reference Re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313.

Rochweg v Truster, [2002] OJ No 1230.

Schluessel et al v Maier et al, 2001 BCSC 60.

Smith v Tamblyn (Alberta) Limited, (1979) 23 AR 53 (Alta SCTD).

Southcott Estates Inc v Toronto Catholic District School Board, [2012] 2 SCR 675.

Tangye v Calmonton Investments Ltd, 1998 ABCA 206.

Tercon Contractors Ltd v British Columbia (Transportation and Highways), [2010] 1 SCR 69.

Toronto Housing Co Ltd et al v Postal Promotions Ltd, [1982] OJ No 3553 (ONCA).

Viper Concrete 2000 Inc v Agon Developments Ltd, [2009] ABQB 91.

Walker v Sharpe, (1920) 56 DLR 668 (SKCA).

Wertheim v Chicoutimi Pulp Co, [1911] AC 301 (PC (Can)).

Westland Investment Corp v Carswell Collins Ltd, [1996] AJ No 21 (ABQB).

New Zealand Jurisprudence

127 Hobson Street Limited and Anor v Honey Bees Preschool Limited and Anor, 2020 NZSC 53.

Apatu v Peach Prescott & Jamieson, [1985] 1 NZLR 50.

Day v Mead, [1987] NZLR 443 (NZCA).

Feeney v Gulley, [2016] NZHC 2062.

Property Ventures Investments Ltd v Regalwood Holdings Ltd, [2010] NZSC 47.

Wu v Body Corporate 366611, [2014] NZSC 137.

United Kingdom Jurisprudence

AB Corporation v CD Co (The Sine Nomine), [2002] 1 Lloyd's rep 805.

Anglia Television Ltd v Reed, [1972] 1 QB 60 (CA).

Baker v Dalgleish Steam Shipping Co, [1922] 1 KB 361 (CA).

Banco de Portugal v Waterlow & Sons, [1932] AC 452 (HL (Eng)).

Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd, [1997] AC 191 (HL (Eng)).

Baumgartner v Remus, [1997] 116 Man R (2d) 274 (MBQB).

Bellingham v Dhillon, [1973] QB 304.

Bradburn v Great Western Railway Co, (1874) LR 10 Ex 1.

British Westinghouse Co v Underground Ry, [1912] AC 673 (HL (Eng)).

C & P Haulage (a firm) v Middleton, [1983] 1 WLR 1461 (CA).

C Czarnikow Ltd v Koufos (The Heron II), [1969] 1 AC 350 (HL (Eng)).

C Czarnikow Ltd v Koufos, [1966] 2 QB 695 (CA).

Cavendish Square Holdings BV v Makdessi, [2016] AC 1172 (HL (Eng)).

Central London Property Trust Ltd v High Trees House Ltd, [1947] KB 130.

Crabb v Arun District Council, [1976] Ch 179 (CA).

Darbishire v Warran, [1963] 3 All ER 310 (CA).

Davis Contractors Ltd v Fareham Urban District Council, [1956] AC 696 (HL (Eng)).

Dawson v Helicopter Exploration Co Ltd, (1958), 12 DLR (2d) 1 (SCC).

Dimond v Lovell, [2002] 1 AC 384 (HL (Eng)).

Dunkirk Colliery Co v Lever, (1878) 9 ChD 20 (CA).

Earl of Aylesford v Morris, (1873) LR 8 Ch 484 (CA).

Earl of Oxford's Case, [1615] 1 Ch Rep 5.

Edgington v Fitzmaurice, (1885) 29 ChD 459 (CA).

Elliott Steam Tug Co Ltd v Shipping Controller, [1922] 1 KB 127 (CA).

Erie County Natural Gas and Fuel Co v Carroll, [1911] AC 105 (PC).

Esso Petroleum Co v Mardon, [1976] QB 801 (CA).

Ex parte Stephens, (1805) 11 Ves 24 (Ch).

Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The "Fanis"), [1994] 1 Lloyd's Rep 633 (QB).

Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, [1978] QB 927 (CA).

Finlay (James) & Co Ltd v N V Kwik Hoo Tong Handel Maatschappij, [1929] 1 KB 400 (CA).

Forgie v Henderson, (1818) 1 Murray 410.

Fox v Wood, [1981] 148 CLR 438 (HCA).

Freedhoff v Pomalift Industries Ltd et al, (1970) 13 DLR (3d) 523 (ONSC).

Fry v Lane, (1888) 40 Ch D 312.

Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The New Flamenco), [2014] EWHC 1547 (QB).

Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The New Flamenco), [2017] 1 WLR 2581 (UKSC (Eng)).

Garnac Grain Co Inc v HMF Faure & Fairclough Ltd et al, [1968] AC 1130 (HL (Eng)).

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd, [1983] QB 284 (CA).

Glory Wealth Shipping Pte Ltd v Korea Line Corpn, [2011] EWHC 1819 (Comm).

Grant v Owners of SS Egyptian Respondents The Egyptian, [1910] AC 400 (HL (Eng)).

Guinness Mahon & Co Ltd v Council of Royal Borough of Kensington & Chelsea, [1999] QB 215 (CA).

Hadley v Baxendale, (1854) 156 All ER 145.

Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd, [1970] 1 QB 447 (CA).

Harlow & Jones, Ltd v Panex (International), Ltd, [1967] 2 Lloyd's Rep 509 (QB).

Heaven & Kesterton Ltd v Etablissements Francois Albiac & Cie, [1956] 2 Lloyd's Rep 316 (QB).

Holman v Johnson, (1775) 1 Cowp 341 (KB).

Homburg Houtimport BV v Agrosin Private Ltd, [2003] 1 AC 715 (HL (Eng)).

Houndsditch Warehouse Ltd v Waltex Ltd, [1944] 1 KB 579.

Howard v Pickford Tool Co Ltd, [1951] 1 KB 417 (CA).

Hughes v Metropolitan Railway Co, (1877), 2 App Cas 439 (HL (Eng)).

Humber Oil Terminal Trustee Ltd v Owners of the Sivand, [1998] CLC 751 (EWCA).

Hussey v Eels, [1990] 2 QB 227 (CA).

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd, [1989] QB 433 (CA).

Jamal v Moolla Dawood, Sons & Co, [1916] 1 AC 175 (PC Lower Burma).

Jewelowski v Propp, [1944] KB 510.

Johnson v Agnew, [1980] AC 367 (HL (Eng)).

Jorden v Money, (1854) 5 HLC 185 (HL (Eng)).

Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH, [1993] 2 Lloyd's Rep 1 (CA).

Koch Marine Inc v dAmica Societa di Navigazione arl (The Elena dAmico), [1980] 1 Lloyd's Rep 75 (QB).

L'Estrange v F Graucob Ltd, [1934] 2 KB 394.

Lagden v O'Connor, [2003] UKHL 64.

Lep Air Services Ltd v Rolloswin Investments Ltd, [1973] AC 331 (HL (Eng)).

Lesters Leather and Skin Co v Home and Overseas Brokers, (1948), 64 TLR 569 (CA).

Lloyd v General Iron Screw Collier Co (Ltd), (1864) 159 ER 284 (Exch).

Lord Dudley and Ward, an infant, by the Honourable Thomas Newport v the Lady Dowager Dudley, (1705) Prec Ch 241.

Maddison v Alderson, [1883] 8 App Cas 467.

Martin v Stout, [1925] AC 359 (PC Egypt).

Monarch SS Co Ltd v Karlshamms Oljefabriker (A/B), [1949] AC 196 (HL (Eng)).

Morgan & Son Ltd v Martin Johnson & Co Ltd, [1949] 1 KB 107 (CA).

Morgan v T Wallis Ltd, [1974] 1 Lloyd's Rep 165.

Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co, [1894] AC 535 (HL (Eng)).

Ocean Tramp Tankers Corporation v v/o Soyfracht (The Eugenia), [1964] 2 QB 226 (CA).

Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd (The Mamola Challenger), [2010] EWHC 2026 (QB).

Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound), [1961] AC 388 (PC NSW).

Owners of Dredger Liesbosch v Owners of Steamship Edison, [1933] AC 449 (HL (Eng)).

Owners of Steamship Enterprises of Panama Inc v Owners of SS Ousel (The Liverpool) (No2), [1963] P 64 (CA).

Parry v Cleaver, [1970] AC 1 (HL (Eng)).

Payne v Railway Executive, [1952] 1 KB 26 (CA).

Payzu Ltd v Saunders, [1919] 2 KB 581 (CA).

Photo Production Ltd v Securicor Transport Ltd, [1980] AC 827 (HL (Eng)).

Piggott v Williams, (1821) 6 Madd 95 (KB).

Pilkington v Wood, [1953] Ch 770.

Polemis & Furness, Withy & Co, In re, [1921] 3 KB 560 (CA).

Printing and Numerical Registering Co v Sampson, (1875) LR 19 Eq 462 (CA).

R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltda, [1970] 1 WLR 1306 (CA).

R v Knuller (Publishing, Printing and Promotions) Ltd, [1973] AC 435 (HL (Eng)).

Radford v De Froberville, [1977] 1 WLR 1262.

Rawson v Samuel, (1841) Cr & Ph 161 (Ch).

Redpath v Belfast and County Down Railway, [1947] NI 167 (NICA).

Robinson v Harman, [1848] 1 Exch 850.

Ruxley Electronics and Construction Ltd v Forsyth, [1996] AC 344 (HL (Eng)).

Shearman v Folland, [1950] 2 KB 43 (CA).

Shindler v Northern Raincoat Co Ltd, [1960] 2 All ER 239 (Manchester Assizes).

Soitros Shipping Inc and AECO Maritime SA v Sameiet Solholt (The "Solholt"), [1983] 1 Lloyd's Rep 605 (CA).

Standard Chartered Bank v Pakistan National Shipping Corp and others, [1999] 1 All ER (Comm) 417.

Staniforth v Lyall, (1830) 7 Bingham 169.

Steele v Robert George and Co, [1942] AC 497 (HL NI).

Strutt v Whitnell, [1975] 1 WLR 870 (CA).

Swynson Ltd v Lowick Rose LLP (In Liquidation) (formerly Hurst Morrison Thomson), [2016] 1 WLR 1045.

Thai Airways International Public Company Ltd v KI Holdings Co Ltd & Anor, [2015] EWHC 1250.

The Chartered Mercantile Bank of India, London, and China v The Netherlands India Steam Navigation Co Ltd, (1883) 10 QBD 521 (CA).

The Edison, [1931] P 230.

The Gazelle, (1844) 2 W Robinson 279.

The World Beauty; Owners of The Steam Tanker Andros Springs v Owners of The Steam Tanker World Beauty, [1969] 3 All ER 158 (CA).

Thom Or Simpson (Pauper) v Sinclair, [1917] AC 127 (HL (Scot)).

Tor Line AB v Alltrans Group of Canada, [1984] 1 WLR 48 (HL (Eng)).

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas), [2009] AC 61 (HL (Eng)).

Transocean Drilling UK Ltd v Providence Resources Plc, [2016] EWCA Civ 372.

United Scientific Holdings Ltd v Burnley Borough Council, [1978] AC 904 (HL (Eng)).

Vic Mill Ltd, Re, [1913] 1 Ch 465 (CA).

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd, [1949] 2 KB 528 (CA).

White and Carter (Councils) Ltd v McGregor, [1962] AC 413 (HL (Scot)).

Wilson v United Counties Bank Ltd, [1920] AC 102 (HL (Eng)).

Yam Seng Pte Ltd v International Trade Corpn Ltd, [2013] EWHC 111.

Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd, [2010] EWHC 903 (Comm).

United States Jurisprudence

L Albert & Son v Armstrong Rubber Co, 178 F (2d) 182 (2nd Cir 1949).

Loughran v Loughran, (1934) 292 US 216.

Riggs v Palmer, [1889] 115 NY 506.

SECONDARY MATERIALS

Books

Aristotle. *Aristotle: with an English translation: the "Art" of rhetoric*, translated by John Henry Freese, Loeb classical library (London: New York: W Heinemann; GP Putnam, 1926).

———. *Aristotle. 19, The Nicomachean ethics*, revised ed, translated by H. Rackham, Loeb classical library 73 (Cambridge Mass: Harvard University Press, 2003).

Atiyah, PS. *Promises, Morals, and Law* (Oxford: Oxford University Press, 1983).

———. *The rise and fall of freedom of contract* (Oxford: Clarendon Press, 1985).

Baker, John H. *An introduction to English legal history*, 5th ed (Oxford: Oxford University Press, 2019).

Beale, HG, ed. *Chitty on contracts*, 33rd ed (London: Sweet & Maxwell, 2018).

Buckland, WW & Arnold Duncan McNair. *Roman law & common law: a comparison in outline*, 2nd ed (Cambridge: Cambridge University Press, 1952).

Carter, AT. *Outlines of English legal history* (London: Butterworth & Co, 1899).

Cassin, René, Ralph A Newman & Hastings College of the Law, eds. *Equity in the world's legal systems: a comparative study, dedicated to René Cassin*, Studies in jurisprudence 1 (Brussels: Établissements Émile Bruylant, 1973).

Coote, Brian. *Exception clauses: some aspects of the law relating to exception clauses in contracts for the carriage, bailment, and sale of goods* (London: Sweet & Maxwell, 1964).

Dworkin, Ronald. *Taking rights seriously* (London: Duckworth, 1978).

Edelman, James. *McGregor on damages*, 20th ed (London: Sweet & Maxwell, 2018).

Fridman, GHL. *The law of contract in Canada*, 6th ed (Toronto: Carswell, 2011).

Fried, Charles. *Contract as Promise*, 2nd ed (Oxford: Oxford University Press, 2015).

Furmston, MP. *Cheshire, Fifoot and Furmston's law of contract*, 16th ed (Oxford: Oxford University Press, 2012).

Harrison, Jeffrey L. *Law and economics in a nutshell*, 6th ed, Nutshell series (St. Paul, MN: West Academic Publishing, 2016).

Hart, HLA. *The concept of law*, Clarendon law series (Oxford: Clarendon Press, 1961).

Heller, Joseph. *Catch-22* (London: Cape, 1962).

Heuston, RFV. *Salmond and Heuston on the law of torts*, 21st ed (London: Sweet & Maxwell, 1996).

Heydon, JD, MJ Leeming & PG Turner. *Meagher, Gummow and Lehane's equity: doctrines and remedies*, 5th ed (Chatswood, NSW: LexisNexis Butterworths, 2015).

Hogg, Martin. *Promises and contract law: comparative perspectives* (Cambridge: Cambridge University Press, 2011).

Hohfeld, Wesley Newcomb. *Fundamental legal conceptions, as applied in judicial reasoning*. (New Haven: Yale University Press, 1964).

Holmes, Oliver Wendell. *The Common Law* (Cambridge, Mass: Harvard University Press, 2009).

Kronman, Anthony T & Richard A Posner. *The Economics of contract law* (Boston: Little, Brown, 1979).

MacMillan, Catharine. *Mistakes in contract law* (Oxford: Hart, 2010).

Maine, Sir Henry Sumner. *Ancient Law - Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London: John Murray, 1920).

Maitland, Frederic William. *Equity, also the forms of action at common law, two courses of lectures* (Littleton, CO: FB Rothman & Co, 1984).

———. *Maitland, selected essays*, Harold D Hazeltine, Gaillard Thomas Lapsley & Percy Henry Winfield, eds. (Cambridge: Cambridge University Press, 1936).

Martin, Jill E. *Hanbury & Martin: Modern Equity*, 19th ed (London: Sweet & Maxwell, 2012).

McGhee, John. *Snell's equity*, 33rd ed (London: Sweet & Maxwell, 2015).

McGregor, Harvey, Martin Spencer & Julian Picton. *McGregor on damages*, 19th ed (London: Sweet & Maxwell, 2014).

McGregor, Harvey. *McGregor on damages*, 17th ed (London: Sweet & Maxwell, 2003).

Meyer, Lukas H, Thomas W Pogge & Stanley L Paulson. *Rights, Culture and the Law* (Oxford: University Press, 2003).

Miceli, Thomas J. *Economics of the law: torts, contracts, property, litigation* (New York: Oxford University Press, 1997).

Milsom, SFC. *Historical foundations of the common law*, 2nd ed (London: Butterworths, 1981).

Oosterhoff, AH, Robert Chambers & Mitchell McInnes. *Oosterhoff on trusts: text, commentary and materials*, 8th ed (Toronto: Carswell, 2014).

Plucknett, Theodore Frank Thomas. *A concise history of the common law*, 5th ed (London: Butterworth & Co, 1956).

Pollock, Sir Fredrick & Frederic William Maitland. *The history of English law before the time of Edward I*, 2nd ed (Cambridge: The University Press, 1898).

Pollock, Sir Fredrick. *The law of torts: a treatise on the principles of obligations arising from civil wrongs in the common law: to which is added the draft of a code of civil wrongs prepared for the government of India*, 9th ed (London: Stevens and sons, 1912).

Pollock, Sir Frederick. *The genius of the common law* (New York: Columbia University Press, 1912).

Raz, Joseph. *The morality of freedom* (Oxford: Clarendon Press, 1986).

Saint Germain, Christopher & William Muchall. *Doctor and Student; or, Dialogues between a Doctor of Divinity and a Student in the Laws of England: Containing the Grounds of Those Laws; Together with Questions and Cases concerning the Equity Thereof*, 17th ed (London: A Strahan and W Woodfall, 1787).

Schauer, Frederick. *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Oxford University Press, 1993).

Selden, John. *The table-talk of John Selden, esq.* (London: W. Pickering, 1847).

Smith, Stephen A. *Contract theory* (Oxford: Oxford University Press, 2004).

Waddams, SM. *The law of contracts*, 7th ed (Toronto: Thomson Reuters, 2017).

———. *The law of damages*, 5th ed (Toronto: Canada Law Book, 2012).

Watt, Gary. *Equity stirring: the story of justice beyond law* (Oxford: Hart, 2009).

Winfield, Percy Henry, WVH Rogers & JA Jolowicz. *Winfield and Jolowicz on tort*, 16th ed (London: Sweet & Maxwell, 2002).

Articles

Atiyah, PS. "The Liberal Theory of Contract" in *Essays on Contract* (Oxford: Oxford University Press, 1990) 121.

Beehler, Rodger. "Legal positivism, social rules, and *Riggs v. Palmer*" (1990) 9:3 *Law and Philosophy* 285–293.

Beer, Stafford. "The Viable System Model: Its Provenance, Development, Methodology and Pathology" (1984) 35:1 *The Journal of the Operational Research Society* 7–25.

Birks, Peter. "Equity in the modern law: an exercise in taxonomy" (1996) 26:1 *U W Austl L Rev* 1–99.

Braithwaite, John. "Rules and Principles: A Theory of Legal Certainty" (2002) 27 *Austl J Leg Phil* 47–82.

Bridge, Michael G. "Mitigation of damages in contract and the meaning of avoidable loss" 105(Jul) *LQR* 398–423.

Brodley, Joseph F & Ching-to Albert Ma. "Contract Penalties, Monopolizing Strategies, and Antitrust Policy" (1993) 45:5 *Stanford Law Review* 1161–1213.

Calabresi, Guido. "The Pointlessness of Pareto: Carrying Coase Further" (1991) 100:5 *The Yale Law Journal* 1211–1237.

Campbell, David. "Good Faith and the Ubiquity of the 'Relational' Contract" (2014) 77:3 *MLR* 475–492.

Cohen, Morris R. "The Basis of Contract" (1933) 46:4 *Harvard Law Review* 553–592.

Colander, David. "Edgeworth's Hedonimeter and the Quest to Measure Utility" (2007) *IDEAS Working Paper Series from RePEc*.

Coote, Brian. "Damages, The Liesbosch, and Impecuniosity" (2001) 60:3 *CLJ* 511–536.

Courtney, Wayne. "Contract Damages and the Promisee's Role in Its Own Loss" (2018) 42:2 *Melb U L Rev* 406–454.

Curtiss, W David. "State of Mind Fact or Fancy" (1947) 33:3 *Cornell L Q* 351–359.

Davis, Hugh. "The Problems with Amann: Would an Agreement-Centered Approach to Remoteness Benefit Australian Jurisprudence" (2017) 42:2 *UW Austl L Rev* 1–28.

DiMatteo, Larry A. "Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law" (1998) 33:2 *New Eng L Rev* 265–364.

Diver, Colin S. “The Optimal Precision of Administrative Rules” (1983) 93:1 Yale LJ 65–110.

Dyson, Andrew & Adam Kramer. “There is no ‘breach date rule’: mitigation, difference in value and date of assessment” (2014) 130 LQR 259–281.

Etherington, Brian. “Supreme Court of Canada Decisions and the Common Law of Employment in the 1990’s: Shifting the Balance between Rights and Efficiency Concerns” (1999) 78:Issues 1-2 Can B Rev 200–219.

Fallon, Richard H Jr. “The Meaning of Legal Meaning and Its Implications for Theories of Legal Interpretation” (2015) 82:3 U Chi L Rev 1235–1308.

Fischer, James M. “Does an Insured Have a Duty to Mitigate Damages When the Insurer Breaches” (2013) 20:1 Conn Ins LJ 89–118.

Fried, Charles. “Review of The Rise and Fall of Freedom of Contract” (1980) 93:8 Harvard Law Review 1858–1868.

Fuller, LL & William R Jr Perdue. “The Reliance Interest in Contract Damages: 1” (1936) 46:1 Yale L J 52–96.

Gardner, John. “The Many Faces of the Reasonable Person” in *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019).

Gillette, Clayton P. “Tacit Agreement and Relationship-Specific Investment” (2013) 88:1 NYU L Rev 128–169.

Hagemann, John F. “Book Review: The rise and fall of freedom of contract” (1981) 26:1 SD L Rev 152–156.

Harrison, Jeffrey L. “A Nihilistic View of the Efficient Breach” (2013) 2013:1 Mich St L Rev 167–210.

Hart, HLA. “Positivism and the Separation of Law and Morals” (1957) 71:4 Harvard Law Review 593–629.

Hoffman, Lord. “The Achilleas: Custom and Practice or Foreseeability” (2010) 14:1 Edinburgh L Rev 47–61.

Holmes, Oliver Wendell. “The Path of the Law” (1897) 10:8 Harvard Law Review 457–478.

Horwitz, Morton J. “The Historical Foundations of Modern Contract Law” (1974) 87:5 Harvard Law Review 917–956.

Könczöl, Miklós. “Legality and Equity in the Rhetoric: The Smooth Transition” in Liesbeth Huppel-Cluysenaer & Nuno MMS Coelho, eds, *Aristotle and The Philosophy of Law: Theory, Practice and Justice Ius Gentium: Comparative Perspectives on Law and Justice* (Dordrecht: Springer Netherlands, 2013) 163.

Leff, Arthur Allen. “Unconscionability and the Code. The Emperor’s New Clause” (1967) 115:4 *University of Pennsylvania Law Review* 485–559.

Lightsey, Wallace K. “A Critique of the Promise Model of Contract” (1984) 26:1 *Wm & Mary L Rev* 45–74.

Maharaj, Krish. “An Action on the Equities: Re-Characterizing Bhasin as Equitable Estoppel” (2017) 55:1 *Alta L Rev* 199–224.

———. “Limits on the Operation of Exclusion Clauses” (2012) 49:3 *Alta L Rev* 635–654.

———. “The Trouble with Tort: Why Deception in Bhasin Cannot Presently Be Deceit” (2019) 1:1 *The Journal of Commonwealth Law* 119–140.

———. “Good for Everyone or Not Good at All: Clarity and Commitment in Contractual Good Faith” (2020) 96 *SCLR* (2d) 107–121.

Marrow, Paul Bennett. “Squeezing Subjectivity from the Doctrine of Unconscionability” (2005) 53:2 *Clev St L Rev* 187–224.

Mason, Anthony. “The place of equity and equitable remedies in the contemporary common law world” (1994) 110 *Law Quarterly Review* 238–259.

Michaud, Anne. “Mitigation of Damage in the Context of Remedies for Breach of Contract Droit Compare” (1984) 15:2 *Rev Gen* 293–340.

Ogilvie, MH. “The Reception of *Photo Production Ltd. v. Securicor Transport Ltd* on Canada: *Nec Tamen Consumebatur*” (1981) 27:3 *McGill L J* 424–452.

Oldham, James C. “Review of The Rise and Fall of Freedom of Contract” (1982) 26:1 *The American Journal of Legal History* 81–83.

Perillo, Joseph M. “Robert J. Pothier’s influence on the common law of contract” (2005) 11:2 *Texas Wesleyan Law Review* 267-.

———. “The origins of the objective theory of contract formation and interpretation” (2000) 69:2 *Fordham Law Review* 427–477.

Fok PJ. “Outraging Public Decency: In Your Face and up Your Skirt - The Dynamism and Limits of the Common Law Lectures” (2017) 47:1 *Hong Kong LJ* 33–54.

Posner, Richard A. “The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication Symposium on Efficiency as a Legal Concern” (1979) 8:3 Hofstra L Rev 487–508.

———. “Utilitarianism, Economics, and Legal Theory” (1979) 8:1 The Journal of Legal Studies 103–140.

Radin, Max. “Contract Obligation and the Human Will” (1943) 43:5 Columbia Law Review 575–585.

Raz, Joseph. “Book Review: Promises in Morality and Law” (1981) 95:4 Harvard Law Review 916–938.

Schabas, Margaret & Carl Wennerlind. “Retrospectives: Hume on Money, Commerce, and the Science of Economics” (2011) 25:3 The Journal of Economic Perspectives 217–230.

Shiffrin, Seana Valentine. “The Divergence of Contract and Promise” (2007) 120:3 Harvard Law Review 708–753.

Shiner, Roger A. “Aristotle’s Theory of Equity” (1993) 27:4 Loy L A L Rev 1245–1264.

Thompson, Robert W, Scott T Jeffers & Codie L Chisholm. “The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions” (2012) 49:3 Alta L Rev 603–634.

Treitel, GH. “Damages for breach of contract in the High Court of Australia” (1992) 108 LQR 226–235.

Vega, Jesús. “Legal Rules and Epieikeia in Aristotle: Post-positivism Rediscovered” in Liesbeth Huppel-Cluysenaer & Nuno MMS Coelho, eds, *Aristotle and The Philosophy of Law: Theory, Practice and Justice* Ius Gentium: Comparative Perspectives on Law and Justice (Dordrecht: Springer Netherlands, 2013) 171.

Waddams, SM. “Book Review: The rise and fall of freedom of contract” (1981) 19:1 U W Ontario L Rev 198–199.

Waldner, Ilmar. “The Empirical Meaningfulness of Interpersonal Utility Comparisons” (1972) 69:4 The Journal of Philosophy 87–103.

Yee, Woo Pei. “Protecting Parties’ Reasonable Expectations: A General Principle of Good Faith” (2001) 1:2 Oxford University Commonwealth Law Journal 195–229.

OTHER MATERIALS

Coombs, Maurice, "Relationship between equity and the common law" (18 February 2020), online: *Halsbury's Laws of Canada* <<https://advance.lexis.com/document/?pdmfid=1505209&crld=11121d73-6a03-4794-a642-e15750fdc882&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials-ca%2Furn%3AcontentItem%3A5F4N-0691-JF75-M0S9-00000-00&pddocid=urn%3AcontentItem%3A5F4N-0691-JF75-M0S9-00000-00&pdcontentcomponentid=361173&pdteaserkey=sr0&pdicsfeatureid=1517129&pditab=allpods&ecomp=s7g3k&earg=sr0&prid=9c568fee-6c63-4450-99e8-8a62210fbbdf>>

Morwood , James ed, *Pocket Oxford Latin Dictionary: Latin-English*, 3rd ed (Oxford: Oxford University Press, 2005).

Simpson, JA & ESC Weiner, *Oxford English Dictionary*, (Oxford: Oxford University Press, 2000)