

# Mitigation of Damage in the Context of Remedies for Breach of Contract

Anne Michaud

Volume 15, numéro 2, 1984

URI : <https://id.erudit.org/iderudit/1059553ar>

DOI : <https://doi.org/10.7202/1059553ar>

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Éditeur(s)

Éditions de l'Université d'Ottawa

ISSN

0035-3086 (imprimé)

2292-2512 (numérique)

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Citer cet article

Michaud, A. (1984). Mitigation of Damage in the Context of Remedies for Breach of Contract. *Revue générale de droit*, 15(2), 293–340. <https://doi.org/10.7202/1059553ar>

## Résumé de l'article

Au départ, cet article avait pour but d'expliquer l'inexistence du concept de minimisation du dommage en droit civil et de comparer cette situation avec celle qui prévaut en *common law*, où le même concept est d'utilisation courante. Or, il m'est bien vite apparu que le concept de minimisation du dommage existe effectivement en droit civil, ce qui m'a alors amenée à comparer la situation de ce concept dans ces deux systèmes de droit.

Cette analyse est centrée sur les liens entre le concept de minimisation et les dommages pécuniaires en cas de responsabilité contractuelle. D'autres questions relatives à la responsabilité délictuelle, aux dommages physiques aux personnes ou aux choses, ou aux réclamations pour dettes ne sont abordées que de manière incidente. Malheureusement, cette manière de procéder laisse sans réponse plusieurs questions intéressantes reliées au concept de minimisation, mais je crois tout de même que les idées exposées ici pourront être utiles dans le cadre de l'étude de ces autres questions.

Cet article se divise en deux parties, chacune étant centrée sur l'une des deux phases de la réparation d'un dommage contractuel. La première phase est celle du choix des préjudices qui seront compensés; on mesure alors l'étendue du dommage de la victime. La seconde phase consiste à déterminer ce que l'auteur du dommage doit faire pour compenser la victime; lorsqu'on opte pour une compensation pécuniaire, il s'agit d'évaluer la valeur pécuniaire du dommage.

La première de ces phases, relative à la mesure du dommage et au choix des préjudices à compenser, est l'objet de la Partie I de cet article; la Partie II a pour objet les liens entre le concept de minimisation et l'évaluation de la valeur pécuniaire du dommage, avec une emphase particulière sur l'influence de l'inflation et d'autres facteurs sur cette valeur.

Finalement, l'un des intérêts majeurs de cette étude d'un point de vue de droit comparé consiste à prendre conscience que le concept de minimisation n'a pas le même statut en droit civil et en *common law*. La conclusion de cet article s'attache à cette proposition et tente d'expliquer, d'un point de vue historique et juridique, comment il se fait que le concept de minimisation a atteint un plus haut niveau de généralité et d'abstraction en *common law* qu'en droit civil.

## Mitigation of damage in the context of remedies for breach of contract\*

ANNE  
MICHAUD\*\*

### ABSTRACT

*When I began this article my main objective was to show why the concept of mitigation of damage, which is so extensively used in common law, was apparently non-existent in civil law. Right from the beginning, however, I found conclusive evidence which proved that the concept of mitigation actually exists in civil law too; my purpose was then transformed into explaining how this concept works in two systems of law that are so different in their approaches and their methodologies.*

*In order to make this study manageable, I have focused on the links between the concept of mitigation and the problem of pecuniary loss following a breach of contract. Consequently, issues*

### RÉSUMÉ

*Au départ, cet article avait pour but d'expliquer l'inexistence du concept de minimisation du dommage en droit civil et de comparer cette situation avec celle qui prévaut en common law, où le même concept est d'utilisation courante. Or, il m'est bien vite apparu que le concept de minimisation du dommage existe effectivement en droit civil, ce qui m'a alors amenée à comparer la situation de ce concept dans ces deux systèmes de droit.*

*Cette analyse est centrée sur les liens entre le concept de minimisation et les dommages pécuniaires en cas de responsabilité contractuelle. D'autres questions relatives à la responsabilité délictuelle, aux*

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\* The author wishes to express her indebtedness to Professors Bernard Rudden (Brasenose College, Oxford), Jean-Louis Baudouin and Ejan Mackaay (Université de Montréal) for their help and encouragements during her graduate studies. This paper is an extract from the thesis which she submitted in fulfillment of the M. Litt. degree in June 1983.

\*\* LL.L., M. Litt. (Oxon). The author is a member of the Québec Bar and a law-clerk for the Supreme Court of Canada.

*pertaining to tort, physical injuries to persons and things, and claims to liquidate sums, as in debt, will be dealt with only incidentally. Regrettably, this course of action will leave open many interesting questions related to mitigation, mainly in tort but also in contract. Nevertheless, I trust that the present study will constitute a useful basis for further analysis on this subject.*

*I have divided this work into two parts, devoted to the two phases of recovery following a breach of contract. The first phase concerns the choice of which losses fall under the protection of the law, among all those claimed by the plaintiff. I propose to call this phase measuring the extent of the loss. The second phase involves the determination of what the defendant will have to do in order to compensate the plaintiff; when this compensation takes a pecuniary form it involves the assessment of the pecuniary value of the loss.*

*The first of these phases primarily concerns the extent of losses and the question of what damage counts for compensation; this particular aspect of the issue of mitigation is the subject of Part I of this article. The connection between mitigation and the pecuniary evaluation of a plaintiff's damages is examined in Part II where I focus on the effects of inflation and other factors that influence the cost of compensation.*

*dommages physiques aux personnes ou aux choses, ou aux réclamations pour dettes ne sont abordées que de manière incidente. Malheureusement, cette manière de procéder laisse sans réponse plusieurs questions intéressantes reliées au concept de minimisation, mais je crois tout de même que les idées exposées ici pourront être utiles dans le cadre de l'étude de ces autres questions.*

*Cet article se divise en deux parties, chacune étant centrée sur l'une des deux phases de la réparation d'un dommage contractuel. La première phase est celle du choix des préjudices qui seront compensés; on mesure alors l'étendue du dommage de la victime. La seconde phase consiste à déterminer ce que l'auteur du dommage doit faire pour compenser la victime; lorsqu'on opte pour une compensation pécuniaire, il s'agit d'évaluer la valeur pécuniaire du dommage.*

*La première de ces phases, relative à la mesure du dommage et au choix des préjudices à compenser, est l'objet de la Partie I de cet article; la Partie II a pour objet les liens entre le concept de minimisation et l'évaluation de la valeur pécuniaire du dommage, avec une emphase particulière sur l'influence de l'inflation et d'autres facteurs sur cette valeur.*

*Finalement, l'un des intérêts majeurs de cette étude d'un point de vue de droit comparé consiste*

*Finally, from a comparative point of view, one of the main interests of the present study lies in observing that the concept of mitigation has achieved a different status in civil law and in common law. The conclusion of this work explores this situation, and aims at explaining the historical and juridical circumstances that may have caused common law to attain higher levels of generality and of abstraction than civil law with regard to the issue of mitigation.*

*à prendre conscience que le concept de minimisation n'a pas le même statut en droit civil et en common law. La conclusion de cet article s'attache à cette proposition et tente d'expliquer, d'un point de vue historique et juridique, comment il se fait que le concept de minimisation a atteint un plus haut niveau de généralité et d'abstraction en common law qu'en droit civil.*

## TABLE OF CONTENTS

I. The Concept of Mitigation and the Extent of the Loss .....	295
1. Common Law .....	295
1.1 Avoidable Losses, Causation and Contributory Negligence .....	297
1.2 Avoidable Losses and Remoteness of Damage .....	301
2. Civil Law .....	309
2.1 Avoidable Losses and the Distinction Between Direct and Indirect Losses .....	311
2.2 Avoidable Losses and « Préjudice Réparable » .....	318
II. The Concept of Mitigation and the Pecuniary Evaluation of the Loss. ....	323
1. Inflation, Mitigation and Assessment of Damages in Common Law and Civil Law .....	324
2. Cases where Assessment is Traditionally Performed Before the Date of Judgment .....	329
2.1 Unreasonable Delay in Legal Proceedings and Refusal of an Offer of Compensation .....	329
2.2 Plaintiff has covered his loss .....	331
3. The Assessment of Damages and the Problem of Market Fluctuations .....	333
Conclusion .....	336

## I. THE CONCEPT OF MITIGATION AND THE EXTENT OF THE LOSS

### 1. Common Law

Mitigation of damage in common law is a concept which came into existence during the eighteenth century, when damages for breach of contract became more strictly controlled by the courts:

as a system of rules controlling the assessment of damages began to be created, the Courts showed an active interest in preventing the plaintiff from saddling on the defendant the consequences of his own stupidity, laxity or inertia. This attitude, however, was for the most part indirectly manifested, and the law of mitigation as we have it to-day is a very recent growth, still in process of adjustment.<sup>1</sup>

The concept of mitigation has developed in two successive stages which now represent its positive and its negative aspects.<sup>2</sup> The *positive aspect* is concerned with cases where an aggrieved party has reacted to a wrong in such a way that his loss has been reduced; the issue is whether this actual reduction of damage ought to be taken into account.<sup>3</sup> The *negative aspect* of mitigation provides that a plaintiff's failure to act when he could have avoided some loss must be taken into account in measuring what damage counts for compensation.<sup>4</sup> Since the eighteenth century this negative aspect of mitigation has gradually taken the lead over the positive aspect; it now constitutes the basic principle of the modern doctrine of mitigation in common law. Thus, the rule on avoidable losses is primary, that on losses avoided is subsidiary.<sup>5</sup>

While the concept of mitigation has been extensively used in cases of torts as well as contract in common law, one issue which remains obscure is that of the relationship between this concept and other legal concepts such as contributory negligence, causation and remoteness.

Like mitigation these other concepts have a role to play in the process of measuring the extent of a loss: they are used to define what damage counts for compensation and what loss must be made good.<sup>6</sup> For this reason, there is necessarily some interaction between them. It has been argued, however, that mitigation is not a concept separate from the others, but rather that it is a particular aspect of causation and remoteness. In the two following chapters, my aim is to demonstrate that this assertion is mistaken and that, while mitigation shares certain similarities with causation, contributory negligence and remoteness, it actually plays a unique and distinct role in the law of remedies for breach of contract.

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1. G. T. WASHINGTON, "Damages in contract at common law", (1932) 48 *L.Q.R.* 90-108, page 106.

2. C. M. SCHMITTHOFF, "The Duty to Mitigate", (1961) *J. Bus. L.* 361-367.

3. See for instance *Staniforth v. Lyall*, (1830) 7 Bing. 169, 131 E.R. 65.

4. See for instance *Gainsford v. Carroll*, (1824) 2 B & C 624, 107 E.R. 516.

5. For this reason, and since my primary concern is the problem of avoidable losses, and not that of losses avoided, I will use the expressions "mitigation" and "concept of mitigation" throughout this work when referring to what is really only the negative aspect of mitigation.

6. A. OGUS, *The Law of Damages*, London, Butterworths, 1973, pp. 60 ff; H. MCGREGOR, *McGregor on Damages*, 14th ed., London, Sweet & Maxwell, 1980, paragraphs 76-77, 86 ff; G. H. TREITEL, *The Law of Contract*, 5th ed., London, Stevens & Sons, 1979, pp. 712 ff; see also M. D. WHITE, "Pre-assessment inflation as a factor in damages", (1979) 48 *U. Cin. L. Rev.* 999-1002.

### 1.1 AVOIDABLE LOSSES, CAUSATION AND CONTRIBUTORY NEGLIGENCE

Causation is a very obscure concept in common law: it involves decisions on the quasi-philosophical and quasi-scientific issues of whether one event, namely a loss suffered, was

the "effect" or the "consequence" or "the result" of another or of some human action.<sup>7</sup>

To resolve this issue is particularly difficult due to the fact that in many cases several factors may have contributed to the occurrence of a loss. The consequences of a wrong may be influenced by several external factors, anterior and posterior to the defendant's wrong, including particularly the acts of third parties or those of the plaintiff himself. For instance, the attitude adopted by the plaintiff after the wrong may affect its consequences; thus the plaintiff may choose to act so as to aggravate the unavoidable consequences of the wrong, or to reduce them; or again, he may try to aggravate or reduce them, but fail to do so, or he may do nothing and let the consequences arise naturally. In other words, his attitude following a wrong affects the causal relation between the wrong and the damage which ensues; consequently, it also affects the defendant's liability for this damage.

Starting from these observations, several jurists have suggested that the common law doctrine of mitigation, and particularly the rule on avoidable losses, exists only as a part of the doctrine of mitigation. Thus M. P. Furmston writes that

the mitigation rule is not a rule *sui generis*, functioning in isolation, but an example of the wider if vaguer doctrine of causation. Alike in contract and in tort a plaintiff may claim compensation only for the loss caused by the defendant's wrongful act: any loss created by his own unreasonable conduct he must bear himself.<sup>8</sup>

In courts' decisions too, mitigation has sometimes been given a causal character: in *Grant v. Owners of the S.S. Egyptian*,<sup>9</sup> a tort case, the victims of a wrong were held responsible for the aggravation of their loss, *i.e.*, the sinking of their ship, on the ground that their failure to mitigate "*led — and causally considered it alone led —*" to this sinking. Another example is *Compañía Naviera Mariopan S/A v. Bowaters*,<sup>10</sup> where

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7. H. L. A. HART and A. M. HONORÉ, *Causation in the Law*, Oxford, Clarendon Press, 1962, p. 8.

8. CHESHIRE and FIFOOT, *Law of contract*, 9th ed., London, Butterworths, 1976, p. 607; see also G. WILLIAMS, *Joint Torts and Contributory Negligence*, London, Stevens & Sons, 1951, p. 283 note 8.

9. [1910] A.C. 400, p. 403.

10. [1952] 2 Q.B. 68.

Hodson L.J. held that whether the defendants were to be relieved of their liability, owing to the plaintiff's failure to mitigate, was an issue of causation.

The question arises as to whether the common law doctrine of causation offers sound legal justification for the rule on avoidable consequences. I suggest that *the rules of mitigation cannot be justified purely on grounds of causation* in common law because they are often incompatible with the existing theory of causation. My arguments on behalf of this statement are twofold: first, the actual theory of causation in common law is not sufficient or appropriate to justify the actual state of the concept of mitigation; secondly, the concept of mitigation must be differentiated from that of contributory negligence, although they share certain characteristics.

*a) The common law theory of causation and mitigation*

The rule on avoidable consequences holds that the injured party must take all reasonable steps to keep the injurious consequences of a breach of contract to a minimum. The plaintiff is not allowed to aggravate these consequences or to let them arise naturally; he must act positively so as to keep them to a reasonable minimum. The consequence of this duty to mitigate is that, if he does not act in accordance with these requirements, the injured party is *completely barred* as regards recovery for the part of his loss which he reasonably ought to have averted.

If this consequence were to be explained on causal grounds, there is only one view of causation that would be logically consistent with it: it would be necessary to hold that a voluntary action, of the nature of a failure to mitigate, which a person executes after a wrong has occurred negatives all previous causal connections, so that this person becomes responsible alone for all the losses following his intervention.

I suggest that such a view of causation has not been adopted in common law.

It is true that, in certain circumstances, although the wrongful act was a necessary condition of the harm, a third factor arising after the wrong may be held to negative the causal connection between this wrong and the harm. This third factor may be an abnormal occurrence or a voluntary human action. Indeed, H.L.A. Hart and A. M. Honoré write that

The general principle of the traditional doctrine is that *the free, deliberate and informed act or omission of a human being, intended to produce the consequence which is in fact produced negatives causal connexion*.<sup>11</sup>

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11. H. L. A. HART and A. M. HONORÉ, *supra* note 7, p. 129.

They then cite several examples, two of them relating to mitigation of damage, which are worth quoting at length here:

Plaintiff's conduct may amount to a voluntary causing of the further damage, as when defendant in breach of contract furnished inferior seed and plaintiff, knowing of the defect, nevertheless planted the seed; here his voluntary conduct is on common-sense principles the "sole" cause of his obtaining an inferior crop (good seed being obtainable elsewhere). Again plaintiff's conduct may amount to so unreasonable a reaction to the injury inflicted on him as, on ordinary causal principles, to negative causal connexion with the original wrong.<sup>12</sup>

Sometimes, however, it appears obvious that there exists a causal relation between the defendant's wrongdoing and the unmitigated loss. Then, the plaintiff's entire responsibility for the avoidable part of the loss cannot be justified purely on grounds of causation.<sup>13</sup> I suggest that in such cases the defendant's wrongdoing and the plaintiff's failure to mitigate are both active and substantial factors in the occurrence of the unmitigated part of the loss: they are both *contributory causes* of this loss.

*b) Failure to mitigate as a contributory cause of the plaintiff's loss*

In common law, when a plaintiff's own negligence is a contributory cause of his loss, the plaintiff is not allowed to recover any damages. However, statutory rules have changed this; for instance the *Law Reform (Contributory Negligence) Act*, 1945, in English law, provides for the apportionment of the loss between the plaintiff and the defendant. Is this rule of apportionment compatible with the principle of mitigation?

There is an ongoing controversy on this subject in common law: on one side, there are those who argue that the rules on avoidable consequences and contributory negligence are concerned with two entirely distinct issues which sometimes produce results that closely resemble each other;<sup>14</sup> on the other side there are those who argue that the law on avoidable consequences is nothing but a particular aspect of the law on contributory negligence, which must govern all instances where a plaintiff causally contributes to his own loss.<sup>15</sup>

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12. *Idem*, p. 212.

13. *Ibid.*

14. D. B. DOBBS, *Handbook on the law of remedies*, St Paul, West Publishing Co., 1973, pp. 187-188; N. E. PALMER and P. J. DAVIES, "Contributory Negligence and breach of contract — English and Australian attitudes compared", (1980) 29 *Int. Comp. L.Q.* p. 451; H. STREET, *Principles of the law of damages*, London, Sweet & Maxwell, 1962, pp. 27, 38; G. H. TREITEL, *supra* note 6, pp. 728-730.

15. G. WILLIAMS, *supra* note 8, pp. 287-294; W. PROSSER, *Handbook of the Law of Torts*, 4th ed., St Paul, West Publishing Co., 1971, pp. 418, 422-424.



I believe that the first theory ought to prevail over the second and that the concepts of mitigation and contributory negligence ought to be carefully differentiated.

*The problem of duty.* If the rule on avoidable consequences and the doctrine of contributory negligence were held to be concerned with a unique issue, they would necessarily be founded on the same legal foundations. This may appear to be the case when one reads certain common law authors on the subject,<sup>16</sup> but a closer investigation shows that the issue of "duty" differentiates them.

While the doctrine of contributory negligence is undoubtedly not founded on the idea that a plaintiff owes a duty to himself or to the defendant, it appears that the rule on avoidable consequences may be so founded. For instance, A. M. Honoré suggests that the most plausible foundation of this rule is that the plaintiff owes a duty to the wrongdoer:

the tortfeasor is in principle liable to pay the additional damages but is entitled to a deduction or set off to the extent to the injured party's breach of his duty towards him.<sup>17</sup>

Professor Honoré adds that the rationale for this view rests on an underlying notion of good faith. This latter opinion is supported by Charles Fried, who writes that the duty to mitigate one's loss is an altruistic duty, directed to the contract breaker. The fact that there is no cost or penalty attached to this duty makes it "a duty that recognizes that contractual liabilities are onerous enough that they should not be needlessly exacerbated."<sup>18</sup>

*The issue of policy.* Owing to the strong influence of the free enterprise philosophy, the common law's remedial response to breach of contract has long been primarily governed by such aims as avoidance of waste, commercial efficacy, maximization of commercial activity and the facilitation of reliance on business agreements<sup>19</sup>. As F. H. Lawson puts

16. See for instance F. H. LAWSON, *Remedies of English Law*, 2nd ed., London, Butterworths, 1980, p. 67; H. BEALE, *Remedies for Breach of Contract*, London, Sweet & Maxwell, 1980, p. 187; *H. and C. Grayson, Ltd v. Ellerman Line, Ltd*, [1920] A.C. 466, p. 477.

17. *International Encyclopedia of Comparative Law*, New York, Oceana, 1971- , volume XI, chapter 7 paragraph 153; see also A. OGUS, *supra* note 6, p. 89.

18. Charles FRIED, *Contract as promise — a theory of contractual obligation*, London, Harvard University Press, 1981, p. 131.

19. A. OGUS, *supra*, note 6, pp. 284-285; R. J. SHARPE, "Specific Relief for Contract Breach", in REITER & SWAN (ed.), *Studies in Contract Law*, Toronto, Butterworths, 1980, p. 139; M. R. COHEN, "The Basis of Contract Law", (1933) 46 *Harv. L. Rev.* pp. 573, 584; L. L. FULLER and W. R. PERDUE, "The Reliance Interest in Contract Damages", (1936-37) 46 *Yale L.J.* pp. 61-62; G. K. GARDNER, "An Inquiry into the Principles of the Law of Contracts", (1932-33) 46 *Harv. L. Rev.* pp. 17, 31-32; R. HARTZLER, "The Business and economic functions of the law of contract damages", (1968) *Am. Bus. L.J.* pp. 387-407.

it, "[the] English law of remedies seems to have been greatly influenced by the need to keep the economic machine running with the least possible disturbance".<sup>20</sup> Not only the wrongdoers but also the victims must contribute to this aim. Consequently, once the victim's interests have been hurt, it is highly undesirable that he be allowed to remain inactive while his losses accumulate. Plaintiffs must be encouraged to contribute to the effort of re-establishment of the original equilibrium disturbed by the breach of contract.

The concept of mitigation is meant to help achieve this objective and it can thus be considered a direct product of the common law concern for efficacy. Indeed, the rule on avoidable losses has been attributed to

a desire on the part of the law to discourage activities which are economically wasteful and encourage the careful husbanding of resources. It is one method of reducing the overall cost to society of legally compensatable injuries.<sup>21</sup>

An enlarged concept of contributory negligence, which would include cases of avoidable consequences, would not produce the same effect because it would not have the same impact on the plaintiff's conduct. The American author Charles McCormick once suggested that what the law is trying to achieve through the rule on avoidable consequences is "*to influence men's conduct toward the avoidance of loss and waste by a carefully devised plan of allocating certain risks to the party wronged if he fails in such a standard of conduct*".<sup>22</sup> If applied to cases of avoidable consequences, the doctrine of contributory negligence would divide the risks between the wrongdoer and the party wronged, with the consequence that the impact on the latter would be reduced, and his incentive to act in accordance with the aims underlined above would also be diminished. Hence, I suggest that a careful analysis of these policy considerations is sufficient to reject the theory that would absorb the rule on avoidable consequences into the doctrine of contributory negligence.

Consequently, I suggest that the rule on avoidable consequences exists by itself, and not only as a reflection of the doctrine of causation. Its foundations lie in the basic policies of the common law, particularly in the objectives of avoidance of waste of human and material resources, commercial efficiency and also fairness to the wrongdoer.

## 1.2 AVOIDABLE LOSSES AND REMOTENESS OF DAMAGE

In a strict sense, when one talks about remoteness of damage in common law reference is made to the requirement of foreseeability. The rule on remoteness is commonly expressed in the following terms:

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20. F. H. LAWSON, *supra* note 16, p. 67.

21. A. OGUS, *supra* note 6, p. 85; W. Z. HIRSCH, *Law and Economics: An Introductory Analysis*, London, Academic Press, 1979, pp. 105-106.

22. C. T. MCCORMICK, *Handbook on the Law of Damages*, St Paul, West Publishing Co., 1935, p. 157.

not all damage resulting from the breach has to be compensated, but only the damage which was likely to result from the breach either in the normal course of things or on account of special circumstances which had been made known to the party guilty of the breach.<sup>23</sup>

In theory, a decision on the issue of the remoteness of a loss following a breach of contract ought to be governed by the judicial perception of the reasonable expectations of the parties at the time of the contract. In practice, however, a mixture of different policy considerations is often hidden behind this rule. In most cases, nothing had been explicitly settled in this respect between the parties when the contract was made; in such circumstances it would be very difficult for a tribunal to come to a purely objective decision. Necessarily, considerations of policy will be taken into account; among them, the tribunal's perception of what would be fair in this case, a concern for avoiding waste and encouraging exchanges and transactions and preventing similar harm in the future. These policy considerations are very similar to those which account for the rules on mitigation as they exist in common law. Indeed, I believe that the doctrines of mitigation and remoteness actually emanate from the same legal foundations: what the tribunals will hold as reasonably foreseeable and reasonably avoidable depends particularly upon their idea of how fairness and efficiency are best to be achieved.

There is certainly a close relationship between the doctrines of remoteness and mitigation, which is not surprising since they are both used for the same purpose, that of ascertaining the limits of the plaintiff's loss that must be made good by the defendant. This relationship is very well exemplified in *Simon v. Pawson & Leafs*,<sup>24</sup> where both doctrines were used alternately to debar a plaintiff from recovering for the loss of future profits.

However certain authors suggest that there is more than mere connexity between the doctrines of remoteness and mitigation. M. P. Furmston, for instance, writes that

[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.<sup>25</sup>

What this proposition implies is that, at the moment the contract was made, the defendant would, or could say to himself (on the ground

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23. René DAVID, *English Law and French Law — a comparison in substance*, London, Stevens & Sons, 1980, p. 129; see also K. SWINTON, "Foreseeability: Where should the award of contract damages cease?", in REITER & SWAN (ed.), *Studies in Contract Law*, Toronto, Butterworths, 1980, pp. 63, 65-67.

24. [1932] 1 All E.R. 72.

25. CHESHIRE and FIFOOT, *Law of Contract*, 10<sup>th</sup> ed., London, Butterworths, 1981, p. 553; see also K SWINTON, *supra* note 23, pp. 77-78; S. STOLJAR, "Normal, elective and preparatory damages in contract", (1975) 91 *L.Q.R.* p. 79.

of general knowledge or because of his awareness of special circumstances) that if he breached the contract, the other party would be likely to suffer a type of loss "X" (eg., loss of user profits), but that if this other party were to take reasonable measures after the breach, the scope of this loss would be reduced in some proportion. Consequently, the loss that would or could have been foreseen is, in the end, the loss as it would stand once mitigated. This loss, and only this loss, would satisfy the requirement of foreseeability. In other words, it results from this proposition that, because the act of mitigation by a plaintiff is foreseeable, the avoidable losses are consequently too remote to justify compensation.

I respectfully suggest that this proposition cannot be accepted, and that the issue of remoteness does not involve any assessment of the foreseeability of the effects of mitigation.

*First argument.* A serious danger could arise because, being in a certain sense subordinate to remoteness, mitigation could become an unspoken consideration in many decisions which would be phrased in terms of remoteness. Therefore, a plaintiff could be denied compensation, not expressly because the loss he claimed was an avoidable consequence of the breach, but rather on the ground that it was too remote a consequence. In many cases this may not make any difference: if the loss was actually an avoidable consequence of the breach it is quite irrelevant whether the plaintiff is denied compensation on the ground of failure to mitigate or on that of remoteness.<sup>26</sup>

But the core of my objection is that this solution works only when the loss is undoubtedly an avoidable consequence of the breach. There are instances where the question of whether the loss incurred was avoidable or not may be open to debate and, in such circumstances, a judgment phrased in terms of remoteness and reasonable contemplation of the parties would hide the true motives of the decision. The best interests of justice would be much better served if the tribunal expressly set forth the avoidable consequences arguments which it is implicitly using, so they could be argued fully, and a decision could be reached on the matter which is truly in question. This would be best achieved by holding that mitigation and remoteness are two distinct, although not entirely unrelated, issues.

*Second argument.* The proposition that mitigation is a part of the doctrine of remoteness implies that this doctrine is concerned with the foreseeability of the plaintiff's acts of mitigation. This is mistaken. The parties must have contemplated the type of loss suffered by the plaintiff, not the degree to which it may affect the plaintiff, and certainly not the fact that it may be circumscribed or avoided. I would suggest that even if a loss was entirely avoidable by the plaintiff, and the plaintiff was precluded from recovering compensation for this loss on the ground of

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26. See for instance *Payzu v. Saunders*, [1919] 2 K.B. 581, p. 589.

mitigation, this cannot in any way affect the issue of remoteness in relation to the loss in question. Mitigation, being a set of rules used for determining what part of the plaintiff's damage is protected by law, is not subject to the test of remoteness. Certainly, the results of the rules of mitigation have some effect on the measure of the plaintiff's damage; but losses which remain uncompensated because they could have been avoided do not become too remote from the breach for that reason.

Nevertheless, there are certain circumstances where the demarcation line between the concepts of mitigation and remoteness becomes somewhat unclear. I have in mind, particularly, cases where the plaintiff incurs some expenses in order to minimize his loss and cases where his act of mitigation and the expenses which result from it are affected by his impecuniosity. In these two types of cases it may sometimes appear as if mitigation and remoteness are a single concept. However, in the following pages I will try to demonstrate that this view is mistaken.

#### *a) Mitigation expenses*

In trying to minimize the prejudice resulting from the breach of contract the plaintiff may have to incur certain expenses; these expenses constitute a new loss, which is incurred by the plaintiff as a consequence of the breach of contract *and* of his own efforts to mitigate the loss. Usually, because mitigation is a normal consequence of a breach of contract, and the expenses are part of the process of mitigation, it ensues that the expenses are a foreseeable consequence of the breach. Is mitigation, or at least the cost of mitigation, then an aspect of remoteness? In one sense it is, but one could also hold that when it comes to dealing with expenses of mitigation no issue of remoteness is truly involved since these expenses are *always* foreseeable, inasmuch as the process of mitigation is foreseeable too.

The real issue, as far as expenses are concerned, is an issue of *reasonableness*: a plaintiff will be compensated only for the expenses which were reasonably incurred, that is "if the outlay was "reasonably necessary" and if the amount involved was "reasonable" in the circumstances".<sup>27</sup> Whenever the expenses incurred by the plaintiff are not reasonable, the concept of mitigation is sufficient and much more appropriate to deal with it than the doctrine of remoteness.

#### *b) The problem of impecuniosity*

Impecuniosity of the party who is injured by a breach of contract may affect his situation in three different ways: it may directly augment the damage, it may prevent the plaintiff from mitigating, or it may lead

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27. A. OGUS, *supra* note 6, p. 91.

him into incurring extra expenses in mitigation. I would suggest that *Freedhoff v. Pomalift Industries Ltd.*,<sup>28</sup> illustrates the first category, that *Clippens Oil*<sup>29</sup> and *Wroth v. Tyler*<sup>30</sup> illustrate the second, and that *The Edison*<sup>31</sup> and *The Borag*<sup>32</sup> illustrate the third.

(I) The first category involves issues of remoteness only and no direct issue of mitigation: in the *Freedhoff*<sup>33</sup> case for instance, the plaintiff had bought from the defendant a pomalift ski-tow for the beginning of the 1963-64 season, and in order to finance this purchase, the plaintiff, to the defendants' knowledge, had mortgaged his property. The ski-tow proved to be defective, with the consequence that the plaintiff could not operate his ski center. As a result, he was unable to meet his mortgage payments and his property (land and equipment) was sold. One of the issues raised by this case was whether the plaintiff was entitled to recover compensation from the defendants, who were in breach of their contract, for the loss of his property. The trial judge found that the loss of the plaintiff's property was "reasonably foreseeable" and "liable to result" from the breach of contract;<sup>34</sup> he stated that

There must be a distinction made between impecuniosity extraneous of the tort or breach of contract where damages caused by it must be regarded as being too remote, and between impecuniosity traceable to the wrongful acts of the defendant, foreseeable and a likely consequence of the defendant's default . . . .

Here, however, not only did the defendants by their breaches of contract cause the plaintiff to lose what he had spent in anticipation of profits, and, indeed, to preclude any profits at all, but, directly and foreseeably, *their act created that very impecuniosity which prevented mitigation of damages, and from which flowed . . . his loss of goods and land and the utter ruin of his enterprise.*<sup>35</sup>

The Court of Appeal disagreed with this decision and disallowed the plaintiff's claim for the loss of his land and equipment, on the ground that this loss "is not one so directly related to the defendants' failure to perform the contract with respect to the Pomalift, as to entitle the plaintiff to be compensated for it by the defendants."<sup>36</sup> In other words, The Court of Appeal held that the loss of land and equipment did not meet the test of foreseeability.

28. (1971) 19 D.L.R. (3d) 153.

29. *Clippens Oil Co. v. Edinburgh and District Water Trustees*, (1907) A.C. 291.

30. (1974) Ch. 30.

31. (1933) A.C. 449.

32. *Compañía Financiera Soleada S.A. v. Hamoor Tanker Corp. Inc.*, (*The Borag*), [1981] 1 All E.R. 856.

33. There is no direct issue of mitigation involved in the *Freedhoff* case; if the plaintiff could have refinanced his loan he would have avoided his loss but the courts' decisions did not rest on this ground.

34. (1971) 13 D.L.R. (3d) 523.

35. *Idem*, p. 533 (emphasis added).

36. (1971) 19 D.L.R. (3d) p. 158.

Given the trial judge's findings, and especially the fact that the judge found that the defendants were aware of the plaintiff's financial circumstances, the Court of Appeal's refusal to allow any recovery comes very close to disallowing recovery whenever the plaintiff's impecuniosity is involved. But this point is not in issue here since I only use this case as an example of how impecuniosity may affect a loss without the rule on avoidable consequences coming into play.

(II) *Clippens Oil* and *Wroth v. Tyler* are cases where impecuniosity acted as a factor preventing the plaintiffs from taking mitigation steps. In *Clippens Oil*, the plaintiffs could have obtained the shale which they needed from other sources, since they were prohibited from using their own through the defendants' action; but, their capital in hand being limited and prices in the oil trade being very low, they were unable to mitigate their loss in this way, and eventually they closed their business. By comparison in *Wroth v. Tyler* the plaintiff, who had contracted to buy the defendants' house, was without the necessary means to buy another house in replacement, in mitigation of his loss, when the breach of contract occurred. In both cases the courts held that the plaintiffs were entitled to recover for the full measure of their unmitigated prejudice.

(III) What distinguishes these two cases, on the one hand, from *The Edison* and *The Borag*, on the other hand, is that in the latter cases, the plaintiffs, instead of not mitigating their losses, on the contrary, did try to mitigate them but incurred extra expenses in doing so, due to their lack of financial means. In *The Edison*, the plaintiffs rented a dredger instead of buying one, and incurred extra costs in working with the rented dredger. In *The Borag* the plaintiffs had to provide a guarantee to obtain the return of the vessel which had been wrongfully arrested by the defendants, in breach of the agreement between the two parties; the bank debited the full amount of the guarantee against the plaintiffs' account and, because they operated their business on a substantial overdraft, they were consequently charged U.S. \$ 95 000 in compound interest charges. In both cases the plaintiffs tried to recover these extraordinary mitigation expenses, but were not allowed to do so on the ground of remoteness.

Lord Wright, in *The Edison*, compared his own decision with that given by Lord Collins in *Clippens Oil*; he pointed out that *Clippens Oil* was concerned with mitigation only, while *The Edison* was a case of remoteness, the two issues being, in his view, quite different matters.

I suggest that in the actual circumstances of *The Edison*, this distinction, as Lord Wright applied it, made little sense: the facts of the case, that is, extra expenses incurred in hiring a replacement, could have been interpreted as involving either an issue of remoteness or an issue of mitigation.<sup>37</sup>

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37. Indeed this appears to be the view expressed by TEMPLEMAN LJ. in *The Borag* at pages 863-864.

A possible way to avoid this conclusion and hence to justify the decision in *The Edison*, is to hold that the problem of expenses is always to be dealt with through the doctrine of remoteness, as suggested by Lord Denning in *The Borag*.<sup>38</sup> This would have the effect of establishing a distinction between

a separate loss caused by straitened means, and one which is simply a loss not abated.<sup>39</sup>

Cases where impecuniosity led to extra mitigation expenses, like *The Edison* and *The Borag*, would fall into the first group and would be governed by the doctrine of remoteness; on the other hand, cases where impecuniosity prevented the plaintiff from mitigating, like *Wroth v. Tyler*, would be dealt with according to the decision in *Clippens Oil*. Hence the choice for an impecunious plaintiff would lie between incurring extra expenses in trying to mitigate his losses, and not recovering for these expenses on the ground of remoteness, as in *The Edison*, or not trying to mitigate his losses at all and expect that, following the decision in *Clippens Oil*, the tribunal will hold that losses which would ordinarily have been characterized as "avoidable", would not be so due to the plaintiff's particular financial circumstances.

Clearly, such a choice does not make any sense. First, it defeats entirely one of the most important considerations behind the doctrines of mitigation and remoteness, the avoidance of waste of resources, since ultimately it encourages plaintiffs *not* to mitigate their losses. Secondly, on the point of strict logic, there is really no room for such a distinction: all these cases are concerned with a unique problem, that is how a plaintiff who has financial problems must react to a breach of contract. Once this similarity is admitted, the fact that different results are reached because cases are divided into two categories, appears to be unjustifiable. The real issue, as regards impecuniosity, must be identified: it is not a question of remoteness or mitigation but a question of policy.

Indeed, dealing with extra expenses due to impecuniosity through the theory of remoteness could lead to undesired results: what would happen, for instance, if the defendant was aware of the plaintiff's pecuniary stringency? If the principles of remoteness were followed, there would be no

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38. [1981] 1 All E.R. p. 861:

"It seems to me, as a matter of common sense and common law, that expenditures made to obtain the release of a vessel from arrest should be regarded as an item of damages, and not as mitigation. It is the natural way of dealing with it."

See also *Perry v. Sydney Phillips & Son*, [1982] 1 All E.R. p. 1013.

39. R. G. LAWSON, "The Status of *The Edison*", (1974) 124 *New L.J.* 240.



other possible conclusion but that the plaintiff would necessarily be allowed to recover the extra expenses,<sup>40</sup> the defendant being aware of particular circumstances which made the loss reasonably foreseeable.<sup>41</sup> Consequently, a party to a contract would seek to protect himself from the impecuniosity of the other party: this could be done either by including a special clause in contracts or by simply refusing to contract in such circumstances. Whichever way is chosen, I suggest that both are directly in conflict with the avowed considerations of encouraging and facilitating exchanges and contracts, upon which both doctrines of remoteness and mitigation are founded. It follows that, in my opinion, the doctrine of remoteness is not appropriate to determine which part of the mitigation expenses should be borne by the plaintiff; the rules on avoidable consequences, since they are specifically devised for this sort of problem, are much more appropriate.<sup>42</sup>

It appears from this analysis of the relationship between the concepts of mitigation and remoteness that, even though there is a very close connection between them, they nevertheless fulfill two entirely distinct roles in the law of remedies for breach of contract. 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*.

There are however some circumstances where the doctrines of mitigation and remoteness are even more closely related than usual, and where the differences underlined above are partially eliminated. Firstly, when a plaintiff has incurred some expenses in order to mitigate his loss, the question of whether these expenses ought to be compensated raises issues of mitigation and remoteness at the same time. But, since the expenses are a loss incurred by the plaintiff as a direct consequence of his duty to mitigate, I believe that the issue of whether a plaintiff should be allowed

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40. Unless the form of mitigation he chose was unreasonable, even if his impecuniosity is taken into account (see TEMPLEMAN LJ. in *The Borag* p. 864).

41. This element of knowledge played a role in *Perry v. Sydney Phillips & Son*, [1982] 1 All E.R. 1005.

42. P. J. DAVIES, "Economic Stringency and the Recovery of Damages", (1982) *J.Bus.L.* p. 30.

to be compensated for this loss ought to be completely governed by the rules of mitigation rather than by the doctrine of remoteness.

Secondly, a plaintiff's lack of money may influence his conduct following a breach of contract and consequently it may create new losses or it may prevent him from taking mitigation steps, or, finally, it may increase the cost of the expenses of mitigation. In each case the plaintiff suffers a loss directly caused by his financial situation, owing to his incapacity to mitigate his damage. I suggest that the issue of whether the plaintiff ought to recover some compensation for this loss must be governed by the doctrine of mitigation rather than by that of remoteness. This would bring to the fore the important considerations of policy which are involved in this issue and it would lead to a more coherent body of cases.

Since the beginning of this work I have been concerned with the role of mitigation in the process of measuring the extent of plaintiffs' losses in English law. The most interesting feature of mitigation brought to light by this analysis is, I believe, its distinctive role and character. 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, but mitigation possesses certain particular attributes that differentiate it from these other doctrines. These attributes are mainly found in its legal foundations, considerations of policy such as the avoidance of waste and the efficacy of transactions.

In the following chapters I shall demonstrate that mitigation does not possess the same distinctive role and character in French contract law, where, on the contrary, it is completely intertwined with the legal concepts of *dommage direct* and *préjudice réparable*.

## 2. Civil Law

In pre-codification French law there is clear evidence of the existence of the concept of mitigation of damage following a breach of contract. In the seventeenth century, for instance, Domat discusses the issue of the extent of a wrongdoer's liability and writes that one must take into account whether or not the plaintiff had an opportunity to mitigate his loss<sup>43</sup>. Then Pothier, in 1761, also gives evidence that mitigation was not an unknown issue at this time. Writing first on the question of foreseeability in contractual liability Pothier gives the two following examples:

. . . j'ai vendu mon cheval à un chanoine, et il y avait une clause expresse dans le marché, par laquelle je me suis obligé de le lui livrer assez à temps pour qu'il pût arriver au lieu de son bénéfice, et à temps pour gagner ses

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43. DOMAT, *Les Lois Civiles dans leur Ordre Naturel*, tome I, Paris, Rollin et Fils, 1745, Livre III, Titre V, Section III, paragraph 162.

gros fruits : si dans ce cas j'ai manqué par ma faute, quoique sans dol, à remplir mon obligation, et que *ce chanoine n'ait pu facilement trouver d'autre cheval, ni d'autre voiture*, je serai tenu même des dommages extrinsèques résultant de la perte qu'il a faite de ses gros fruits . . .

Pareillement, si j'ai loué ma maison à quelqu'un en sa qualité de marchand, ou si je l'ai louée pour y faire auberge, et que le locataire soit évincé dans sa jouissance, les dommages et intérêts dont je suis tenu envers lui ne se borneront pas aux frais du délogement et à ceux qui peuvent résulter de l'augmentation du prix des loyers . . . la perte qu'il pourra faire de ses pratiques, *s'il n'a pu trouver d'autre maison dans le quartier*, y devra aussi entrer pour quelque chose . . .<sup>44</sup>

But it is when he discusses the distinction between direct and indirect losses that Pothier gives the most unambiguous support to the view that the concept of mitigation of damage existed in civil law at that time. His opinion takes the form of an illustration:

. . . si un marchand m'a vendu une vache qu'il savait être infectée d'une maladie contagieuse, et qu'il m'ait dissimulé ce vice, cette dissimulation est un dol de sa part, qui le rend responsable du dommage que j'ai souffert, non seulement dans la vache même qu'il m'a vendue, et qui a fait l'objet de son obligation primitive, mais pareillement de ce que j'ai souffert dans tous mes autres bestiaux auxquels cette vache a communiqué la contagion . . .

. . . [Si] la contagion qui a été communiquée à mes bœufs par la vache qui m'a été vendue, m'a empêché de cultiver mes terres, le dommage que je souffre de ce que mes terres sont demeurées incultes, paraît aussi une suite du dol de ce marchand qui m'a vendue une vache pestiférée : mais c'est une suite plus éloignée que ne l'est la perte que j'ai soufferte de mes bestiaux par la contagion; ce marchand sera-t-il tenu de ce dommage? Quid, si la perte que j'ai faite de mes bestiaux, et le dommage que j'ai souffert du défaut de culture de mes terres, m'ayant empêché de payer mes dettes, mes créanciers ont fait saisir réellement et décréter mes biens à vil prix, le marchand sera-t-il tenu aussi de ce dommage? La règle qui me paraît devoir être suivie en ce cas, est qu'on ne doit pas comprendre dans les dommages et intérêts dont un débiteur est tenu pour raison de son dol, ceux qui non seulement n'en sont qu'une suite éloignée, mais qui n'en sont pas une suite nécessaire, et qui peuvent avoir d'autres causes . . .

La perte que j'ai soufferte par le défaut de culture de mes terres paraît être une suite moins éloignée du dol de ce marchand; néanmoins je pense qu'il n'en doit pas être tenu, ou du moins qu'il n'en doit pas être tenu en entier. Ce défaut de culture n'est pas une suite absolument nécessaire de la perte de mes bestiaux, que m'a causée le dol de ce marchand : je pouvais, nonobstant cette perte de mes bestiaux, obvier à ce défaut de culture, en faisant cultiver mes terres par d'autres bestiaux que j'aurais achetés, ou si je n'avais pas le moyen, que j'aurais loués, ou en affermant mes terres, si je n'avais pas le moyen de les faire valoir moi-même. Néanmoins, comme en ayant recours à ces expédients, je n'aurais pas retiré autant de profit de mes terres que si je les avais fait valoir par moi-même, par mes bœufs que j'ai perdus par le dol

44. POTHIER, *Oeuvres*, Paris, Beaucé, 1817-1820, *Traité des Obligations*, tome III, paragraph 162, emphasis added.

de ce marchand, cela peut entrer pour quelque chose dans les dommages et intérêts dont il est tenu.<sup>45</sup>

More than forty years after this was written, in 1804, a civil Code was adopted in France; it includes, among many other things, a codification of the general principles of contract law. At first glance, the concept of mitigation seems to have disappeared from the law of contract at that time, since it is not expressly embodied in the provisions of the Code. The French doctrine, however, believes that the concept of mitigation still exists:

L'idée . . . selon laquelle la victime ne peut assister passive au déclenchement des diverses conséquences de la faute, mais doit réagir de toute sa vigueur d'homme contre ses conséquences dans la mesure où elles aggraveraient le dommage nous semble incontestable.<sup>46</sup>

However, since the concept of mitigation is not to be found in express terms in the *Code civil*, one has to look for it as an implicit constituent of the law of contract. Indeed, I suggest that the concept of mitigation is actually part of the doctrines of *dommage direct* and *préjudice réparable* in civil law.

## 2.1. AVOIDABLE LOSSES AND THE DISTINCTION BETWEEN DIRECT AND INDIRECT LOSSES

In civil law several authors suggest that the concept of mitigation exists under the guise of a refusal to compensate plaintiffs for indirect losses. For instance, R. E. Charlier writes that

cette idée évidemment avancée du *devoir de la victime*, a pu s'introduire dans notre droit parce qu'elle se présente comme s'opposant à ce que le fardeau du débiteur soit excessif et aille au-delà de ce dont il est *directement* responsable.<sup>47</sup>

45. *Idem*, paragraphs 166 ff.

46. A. TUNC, « Les récents développements des droits anglais et américain sur la relation de causalité entre la faute et le dommage dont on doit réparation », (1953) 5 *R.I.D.C.* p. 29; Professor Tunc was then writing on the subject of delictual liability, but the same is undoubtedly true of contractual liability as well. Indeed, in relation to the problem of mitigation the usual duality between delictual and contractual liabilities disappears in civil law: the concept of mitigation applies equally in the two regimes. See MAZEAUD, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, 6<sup>th</sup> ed., Paris, Éditions Montchrestien, 1965, tome 2, paragraph 1447, hereafter referred to as Mazeaud, *Traité*.

47. R. E. CHARLIER, « Les effets de la hausse des prix dans la responsabilité civile et administrative », *J.C.P.* 1947.I.650 paragraph 51; see also P. MARTEAU, *La notion de la causalité dans la responsabilité civile*, Marseille, Barlatier, 1914; MAZEAUD, *Traité*, *supra* note 46, tome 2, paragraph 1671; CONTRA H. LALOU, *Traité pratique de la responsabilité civile*, 6<sup>th</sup> ed., Paris, Dalloz, 1962, paragraph 337.

The requirement of a direct connection between each part of the loss suffered by the plaintiff and the breach of contract is expressed in article 1151 of the French Code civil.<sup>48</sup> Compensation is granted only if the loss suffered is direct, not if it is indirect. Very often the whole solution of a case turns around this distinction which, unfortunately, has never been clearly formulated by the courts or by the doctrine.

This uncertainty has given rise to an important theoretical controversy on the issue of whether the distinction between direct and indirect damage is part of the theory of causation or whether it has another role to play. Some writers believe that the requirement that the damage be direct really means that there must be a *sufficient causal relation* between the loss and the breach. What constitutes a sufficient causal relation is then an issue which belongs in the realm of the theory of causation. Other writers, however, hold that the distinction between direct and indirect damage has nothing to do with causation, but is merely a way of giving some *discretionary power* to the courts in order to enable them to give a decision that will be fair for both parties.

The first hypothesis is the one which has met with the most approval in French law, there being too many important objections to making compensation a matter of judiciary discretion.<sup>49</sup>

However it remains true that the distinction between direct and indirect losses may be considered an issue of causation only if the prevailing theory of causation is a theory which distinguishes several degrees of causal power among the various conditions and circumstances which produce a loss. In French law, this characteristic belongs to the theory of *causalité adéquate* according to which all the conditions and circumstances which contribute to the occurrence of a loss do not equally cause it, in a legal sense.

One reason why a condition may be held to be indirectly connected to the loss it contributed to producing is that there has been some interference in the causal relation between these two elements, that is, another circumstance has arisen, to which the loss may be more directly attributed (*cause étrangère*).

One way in which such interference may result is from a fault on the part of a plaintiff, and particularly from a failure to mitigate his loss.<sup>50</sup> An author has even suggested that the concept of mitigation could

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48. Article 1151 French C.C.: « Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé que ce qui est une suite immédiate et directe de l'inexécution de la convention. »

49. A. JOLY, *Essai sur la distinction du préjudice direct et du préjudice indirect*, Caen, Caron, 1939.

50. R. SAVATIER, *Traité de la responsabilité civile en droit français*, 2<sup>nd</sup> ed., Paris, L.G.D.J., 1951, tome 1, paragraph 184, hereafter referred to as R. SAVATIER, *Traité*. PIRSON

be the foundation of the causal distinction between direct and indirect losses.<sup>51</sup> Without endorsing this view, I believe that *the distinction between direct and indirect losses is part of the general issue of causation*, and that the concept of mitigation, being connected with that distinction, is related to such problems of causation as those of *cause étrangère* and *pluralité des causes*.

In spite of an extensive survey of the decisions of the French tribunals, I have not found any decision where the concept of mitigation was used in the context of the distinction between direct and indirect losses in *contract* law. At first sight, therefore, it appears impossible to illustrate my conclusions on this subject through any actual judicial decision. I believe, however, that one should not infer from this that these conclusions are necessarily mistaken. On the contrary, I suggest that there may be some particular characteristics of French law that may elucidate the apparent lack of decisions on this subject.

First, there are not many decisions from superior courts on the whole subject of the distinction between direct and indirect losses;<sup>52</sup> it is an issue of fact rather than a problem of legal theory in civil law<sup>53</sup> and, as such, it belongs to the *pouvoir souverain des juges du fond*, who are best acquainted with all the facts and circumstances of a case. Hence, it is an issue that is rarely reviewed and discussed by the appellate courts. It is quite possible therefore, that since such decisions as there may be on the subject of mitigation have not reached the higher instances, they have been left unreported. And, as for those cases about direct losses which, naturally, have come to be discussed by high instances since 1804, I believe that some of them might be concerned with mitigation, but are not identified as such in the reports.<sup>54</sup>

When issues such as mitigation are discussed by the courts, nothing or very little of these theoretical discussions ever transpires in the final judgments. Indeed, it is a characteristic of civil law that the judicial decisions contain very little or no reference at all to the theoretical discussions upon which the solution of a problem may be founded. Besides the

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and DE VILLÉ, *Traité de la responsabilité civile extra-contractuelle*, Bruxelles, Bruylant, 1935, tome 1, paragraph 184.

51. P. AZARD, note to *Montpellier*, 9 décembre 1965, *D.*1967.J.477, p. 479.

52. *I.E.C.L.* volume VII chapter 16, paragraph 95: Professor Treitel suggests that "the explanation for the scarcity of contract cases illustrating the requirement of directness is that in many such cases the defendant's liability is adequately limited by the test of foreseeability."

53. MAZEAUD, *Traité*, *supra* note 46, tome 2, paragraph 1673; R. DEMOGUE, *Traité des obligations en général; source des obligations*, Paris, Rousseau, 1923-1933, tome VI, paragraph 271; P. Marteau, *supra* note 47, p. 167.

54. For an example of this type of decision, see *Civ.* 2<sup>e</sup>, 21 novembre 1963, *Bull. Civ.* 1963. II no. 758, p. 567. See also *Lambert v. Comeau*, (1921) 59 C.S. 429, a decision from Québec.

circumstances of the case, all that is reported of a decision is usually the immediate motives for the decision. This is even more obvious in the *arrêts* of the French Court of *Cassation* than in the judgments of lower courts, since the latter must give detailed opinions on the cases presented to them, while the Court of *Cassation* merely approves or disapproves these opinions.<sup>55</sup>

Such observations are useful in explaining why there appear to be no reported cases on the subject of mitigation of damage in the context of the distinction between direct and indirect losses. Yet, even with these explanations in mind, it might be tempting to deny that there is a connection between mitigation and article 1151 of the French *Code civil* on the ground that there are no practical illustrations of this connection. It is fortunate therefore that besides cases on contractual liability in French law, there are other sources of illustrations to which we may turn, which other sources are (1) cases on the French law of delictual liability, and (2) cases on the law of contractual liability in Québec.

#### *a) French law of delictual liability*

Although there are important doctrinal controversies on the subject of the unity or separation of the two forms of civil liability, contractual and delictual, there are also some points of agreement. The fact that the distinction between direct and indirect losses is similar with respect to both types of liabilities appears to be one of these points. Despite some dissension, brought about by the fact that article 1151 of the French *Code civil* belongs nominally to the law of contract only, most of French doctrine believes that the distinction is also part of the law of delictual liability. We find in Mazeaud, for instance, that

C'est . . . l'analyse du lien de causalité qui conduit à décharger le défendeur de la réparation des dommages indirects : sa responsabilité est déchargée parce que le lien de causalité manque. Aussi la règle est-elle vraie non seulement dans le domaine de la responsabilité contractuelle, où l'article 1151 du Code civil la formule expressément, mais encore dans celui de la responsabilité délictuelle, la nécessité d'un lien de causalité s'imposant dans l'un et dans l'autre cas.<sup>56</sup>

Therefore, cases where the distinction between direct and indirect losses is discussed or applied in a context of delictual liability bear some authority in the context of contractual liability too.

I have found only one French decision where the concept of mitigation has been applied, as part of the distinction between direct and

55. MAZEAUD, *Leçons de Droit Civil*, 6<sup>th</sup> ed., Paris, Montchrestien, 1972-, tome 1, volume 1, paragraph 127, hereafter referred to as MAZEAUD, *Leçons*.

56. MAZEAUD, *Traité*, *supra* note 46, tome 2, paragraph 1670, 1672.

indirect losses, in a context of aggravation of an economic loss, following a *delit civil*.<sup>57</sup> In this decision from the Court of Appeal of Montpellier the defendant was liable to pay damages to the plaintiff, a bookseller who had been injured in an accident. These damages were

[en] réparation du préjudice qui est pour lui résulté de l'accident tant en raison de l'atteinte portée à son intégrité corporelle que du préjudice qui trouve sa source dans le ralentissement de son activité sur le plan commercial . . . .

The litigious issue was concerned with the latter kind of loss, that is the economic loss due to the plaintiff's incapacity to operate his business as usual. Plaintiff was claiming compensation for having been forced to keep his bookstore closed from the day of the accident, December 23<sup>rd</sup> 1960, until May 1<sup>st</sup> 1961. The defendant and his insurance company argued that, if plaintiff had got the help of a temporary employee, readily available in Montpellier at this time, he could have opened his store again just after he had left the hospital in February. In other words, what the defendant argued was that the plaintiff's loss of income between February and May was due to his own fault, in not hiring any help, rather than being due to the accident. The Court of Appeal largely agreed:

[Attendu que le demandeur] ne saurait exciper de l'impossibilité de se procurer l'aide à laquelle sa relative impotence justifiait qu'il eût à recourir; qu'en effet la compétence des commis de librairie placés sous l'autorité directe de l'employeur ne requiert pas de qualités exceptionnelles, les demandes d'emploi de cette nature étant nombreuses à Montpellier; — Attendu qu'il convient dès lors d'écarter la fermeture de la librairie au-delà du 15 février comme conséquence nécessaire de l'accident; . . . .

What the court said in fact is that the plaintiff could easily have mitigated his loss by hiring an employee, as suggested by the defendant in his appeal. Since he did not do so, the ensuing aggravation of his loss, due to the store being kept closed for two and a half months more than necessary, was a direct consequence of the plaintiff's own fault rather than a direct consequence of the accident. In more theoretical language, by his fault, his failure to mitigate his loss, the plaintiff had broken the chain of causation originating from the defendant's fault, the accident. Although the defendant's fault remained a condition of the whole damage, it was only the plaintiff's own fault which was a *cause adéquate* of the unavoided loss, and therefore, it was the plaintiff who had to bear responsibility for this loss.

This is clearly an application of the concept of mitigation to a case of economic loss. The fact that the original wrong is a *délit civil* rather than a breach of contract is of no importance in this particular context, and a similar solution would certainly be given to similar cases arising in contract. This case provides unquestionable evidence that, not

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57. MONTPELLIER, 9 décembre 1965, *D.S.* 1967. J. 477.



only in theory but also in practice, the concept of mitigation plays a role in the determination of what loss counts for compensation after a wrong. This is achieved through the distinction between direct and indirect losses, as part of the theory of causation. It is confirmed by some evidence taken from the law of Québec, which not only shows that mitigation is not incompatible with civil law, but demonstrates expressly how it functions in a context of contractual liability.

*b) Québec law*

It is possible to look outside French law, into other jurisdictions governed by a similar legal system, to find a confirmation of my conclusions as regards the link between mitigation of damage and the distinction between direct and indirect losses. For instance, it is possible to examine the law of the province of Québec, whose *Civil Code*, adopted in 1866, was in good part built from the French Napoléon Code, and whose private law, especially on the subject of *obligations*, derives from the same sources which have given birth to modern, post-Revolution, French law.<sup>58</sup>

On the subject of the distinction between direct and indirect losses, article 1075 of the Québec *Civil Code* repeats the same idea as article 1151 of the French *Code civil*.<sup>59</sup> The doctrine in Québec acknowledges that the concept of mitigation exists in the law of contract, and that it is related to article 1075 C.C.<sup>60</sup> Certain tribunals even use the French doctrine to support their arguments and decisions, in cases which are concerned with the problem of mitigation.

Thus, in *Boutin c. Paré*,<sup>61</sup> French and Québec law are both used to solve a problem, the facts of which bear great similarity to Pothier's

58. J. DAINOW and P. AZARD, *Two American Civil Law Systems: Québec civil law and Louisiana civil law*, Ottawa, Canadian and Foreign Law Research Centre, 1964, p. 3; P. CARIGNAN and A. MAYRAND, *Le Code Civil Français et son influence en Amérique — Province de Québec*, Paris, A. Pédone, 1954, pp. 1-4; J.G. Cardinal, *Le Droit Civil au Québec: ses sources, son évolution, son originalité*, Paris, L.G.D.J., 1967, pp. 418, 424.

59. Article 1075 Québec *Civil Code*: « Dans le cas même où l'inexécution de l'obligation résulte du dol du débiteur, les dommages-intérêts ne comprennent pas ce qui est une suite immédiate et directe de cette inexécution ». Compare with article 1151 of the French *Civil Code*, *supra* note 48.

60. L. FARIBAUT, *Traité de Droit Civil du Québec*, tome 7 bis, Montréal, Wilson & Lafleur, 1957, paragraph 465; P. BEULLAC, *La Responsabilité Civile dans le droit de la Province de Québec*, Montréal, Wilson & Lafleur, 1948, p. 770; P.B. MIGNAULT, *Le droit civil canadien*, Montréal, Théoret, tome 5, pp. 419 note c, 420-421; F. LANGELIER, *Cours de Droit Civil de la Province de Québec*, Montréal, Wilson & Lafleur, 1905-1911, tome 3, p. 526; C. DE LORIMIER, *La Bibliothèque du Code civil de la Province de Québec*, vol. VIII, Montréal, Senécal, 1883, pp. 305 ff, 346; J.J. BEAUCHAMP, *Le Code Civil de la Province de Québec annoté*, Montréal, L.G.D.J., 1904-1905, pp. 1048-1049.

61. [1959] B.R. 459.

pestiferous-cattle illustration. The plaintiff had bought from the defendant a cow which turned out to be infected with *brucellosis*, a contagious disease that renders the infected animal's milk unsuitable for consumption. There was no doubt a fault on the part of the defendant, who had sold the animal as if it were in perfect health, and who was therefore responsible for some damages towards the plaintiff. But when it came to deciding for what loss the defendant had to compensate the plaintiff, the issue arose whether the plaintiff could have avoided part of his actual loss. Mr Justice Bissonnette, speaking for himself and for Mr Justice Rinfret,<sup>62</sup> explains the issue in the following way:

Procédant par le système d'induction, il s'agit maintenant de rechercher si le demandeur pouvait, n'eût été son abstention délibérée, s'affranchir, se prémunir ou se dégager de toute conséquence nuisible causée par la faute de son co-contractant.

Quand le demandeur constata ou qu'il lui fut dit que la vache qu'il avait achetée était susceptible de contaminer son troupeau, il devait alors, indépendamment de la faute de son vendeur, chercher à réprimer l'étendue du préjudice qu'il ne pouvait pas ne pas envisager et prévoir.<sup>63</sup>

No clearer reference to the concept of mitigation could be given. Moreover, Mr Justice Bissonnette goes on to say that (1) the plaintiff's decision to keep his cattle, rather than to sell it for the meat, must have been taken at his own risk, and not at the defendant's risk, so that if the plaintiff did not choose the best solution, he is not allowed to claim that his loss has been entirely caused by the breach of contract; and (2), this must be related to the rule which holds the defendant liable for the direct consequences of the breach only, because if the defendant were made liable for the indirect losses too,

[ce serait] non seulement méconnaître les principes de justice et d'équité, mais ce serait faire de l'auteur de cette faute, non pas un simple débiteur devant la loi mais une victime de la justice.<sup>64</sup>

Mr Justice Bissonnette refers to Pothier, Mazeaud, and René Savatier, and also to a Canadian author, P.B. Mignault, who gives an illustration similar to that of Pothier and concludes that the defendant is not liable for the successive losses borne by the plaintiff,

car, si le dol que j'ai commis en a été la première cause, d'autres y ont également contribué, et, par exemple, votre négligence à vous procurer, par

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62. Mr Justice Owen dissented, not on the subject of the existence of an issue of mitigation but on the question of whether the plaintiff had acted in a reasonable way; he held that the plaintiff had done everything that he could do to mitigate his loss, whereas the two other judges held that he had failed to mitigate.

63. [1959] B.R. p. 464.

64. *Idem*, p. 466.

achat ou location, d'autres chevaux pour cultiver vos terres, ou à chercher un fermier qui les aurait cultivées moyennant un prix que vous auriez perçu.<sup>65</sup>

Thus, in *Boutin c. Paré* we find a practical as well as a theoretical expression of the existence of the concept of mitigation in the law of contract. This is confirmed by three other cases from Québec, *Tessier c. l'Oeuvre et Fabrique de la Paroisse de Notre-Dame-du-Perpétuel-Secours*,<sup>66</sup> *Marcil c. Larouche*,<sup>67</sup> and *Falardeau c. Mérite Compagnie d'Assurances*,<sup>68</sup> in these three cases, although very few references are made to the theoretical aspect of mitigation,<sup>69</sup> the existence of the concept is nevertheless again clearly affirmed.

In these four cases from Québec one undoubtedly finds an expression of the concept of mitigation, of this idea that the victim of a breach of contract must minimize the effects of the breach; if this duty is overlooked, the avoidable losses ought to be borne by the plaintiff himself.

Although *Boutin c. Paré* and *Marcil c. Larouche* are the only cases where the concept of mitigation is expressly linked to article 1075 of the Québec *Civil Code* and to the distinction between direct and indirect losses, all these cases from Québec show that the concept of mitigation is an implicit constituent of the civil law of damage. The main reason why the concept has been developed into a coherent body of cases in Québec while a similar process has not taken place in France, for example, is because of the style of judgments: in Québec, as in the other provinces of Canada, the method of delivering judgments has been copied from the English practice: each judge may present the facts of the case and discuss different elements of the problems at issue before giving his own opinion on them. No direct reference need necessarily be made to articles of the Québec *Civil Code*, in order to justify each assertion made by the judges, whereas in French judgments these references are mandatory. Therefore, due to the different styles of judgments, the concept of mitigation has evolved more openly and in a more articulate way in Québec than in France, even though its theoretical foundations are the same in both jurisdictions.

## 2.2 AVOIDABLE LOSSES AND « PRÉJUDICE RÉPARABLE »

In French contract law, the general rule on the reparation of losses is given by article 1149 C.c. which provides that

Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé.

65. P.B. MIGNAULT, *supra* note 60, tome 5, p. 420.

66. (1917) 52 C.S. 510.

67. [1971] R.L. 549.

68. [1973] R.L. 342.

69. There is only in *Marcil c. Larouche*, [1971] R.L. 549 a reference to an author, Beullac, who writes on the subject of mitigation.

In fact, what the legislator meant to say in this provision is that the *damage* for which the plaintiff may recover compensation is made of the *damnum emergens* and the *lucrum cessans* from which he suffers; the words *dommages et intérêts* were used instead of *dommage* because the legislator borrowed this expression from Pothier.<sup>70</sup> Article 1149 C.c. is concerned, therefore, with setting the characteristics and the limits of the prejudice which is covered by the law.

Article 1149 C.c., however, is a very broad and unspecific rule, expressed generally with respect to all types of contracts; it does not take into account the particularities of any type of contract or any type of loss in particular. For this reason, the courts and the legislator have to supply more detailed rules whenever there is one distinct factor which they wish especially to take into account. Mitigation, or the idea that a plaintiff ought to do everything that is reasonably possible to minimize his loss, is one such factor. Hence, in respect of contracts of lease of dwellings, for instance, article 1760 of the French *Code civil* expressly takes into account the concept of mitigation (a) and in respect of contracts for the sale of goods, it is also given consideration through the processes of replacement and substitute contracts (b).

#### *a) Contracts of lease of dwellings*

Article 1760 of the French *Code civil* provides that

En cas de résiliation par la faute du locataire, celui-ci est tenu de payer le prix du bail pendant le temps nécessaire à la relocation sans préjudice des dommages et intérêts qui ont pu résulter de l'abus.<sup>71</sup>

What is interesting in this article, from the point of view of mitigation, is that the lessor's recoverable prejudice is restricted to the rent for the period of time necessary to get a substitute tenant. The *travaux préparatoires* to the *Code civil* reveal that this was intended to impose upon the lessor a duty to be diligent in mitigating his loss.<sup>72</sup>

70. See « Projet de la Commission du Gouvernement présenté le 24 Thermidor an VIII, articles 1149 & 1150 » in FRENET, *Recueil Complet des Travaux Préparatoires du Code civil*, tome 2, p. 166 and tome 13, p. 232. See also M. PLANIOL and G. RIPERT, *Traité élémentaire de droit civil français*, 10<sup>th</sup> ed., Paris, L.G.D.J., 1925-, tome 2, paragraph 247.

71. The last part of the article (« sans préjudice . . . de l'abus ») refers to a case of fraud by the tenant, in which case the landlord may recover compensation for all the direct losses, whereas when there is no fraud the landlord may only recover for those losses that were direct and foreseeable at the time of the contract (articles 1150, 1151 French C.C.).

72. See the statement by Tribune Mouricault to the tribunate on March 5, 1804 in FRENET, *supra* note 70, tome 14, p. 333.

The impact of article 1760 C.c. bears clearly on the issue of what part of the prejudice is recoverable. Article 1760 C.c. is based on considerations of fairness and efficiency, rather than causation. No doubt the tenant's act of leaving the premises is the cause of the lessor's loss of income. But the law is not willing to let this entire loss fall on the tenant's shoulders: the lessor ought to act in mitigation of his loss and, whether he succeeds or not, his recovery will be restricted to the loss of income for the period of time that, the court estimates, is usually necessary in order to find a substitute tenant in similar circumstances.

If a comparison is made of this position with that adopted in common law one notes that in common law a lease is viewed more as a conveyance of real property than as a contract involving mutual obligations, with the result that normal contractual principles are generally inapplicable.<sup>73</sup> One consequence of this is that when a tenant wrongfully abandons the rented premises, common law imposes no duty upon the lessor to take any steps to find a substitute tenant; he may simply sit back and let damages accrue in his favour.

A number of justifications have been advanced in favour of this position. Some of them are mere technicalities, for instance that the parties could have imposed a duty to mitigate upon the lessor by a specific covenant in the contract, or that steps toward mitigation could be interpreted as a surrender by operation of the law by the lessor, which would deprive him of any further right to sue the tenant. Other justifications are more general, such as that it would impose an additional burden on the landlord, that it could lead to an increase in the number of defaulting tenants, or that the lessor-tenant relationship is too personal for an alternative tenant to be imposed on the lessor.

However, there are substantial public policy arguments to be adduced in favour of imposing a duty to mitigate upon lessors in common law.<sup>74</sup> To impose this duty is a step in favour of achieving the desirable social aims of discouraging waste of resources, encouraging the productive

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73. J. D. CALAMARI and J. M. PERILLO, *The law of contracts*, 2<sup>nd</sup> ed., St. Paul, West Publishing Co., 1977, p. 538 note 10; A. J. BRADBROOK, "The application of the principle of mitigation of damages to landlord-tenant law", (1976-1979) 8 *Sydney L.R.* 15-20; B. H. HENSZEY and J. FIELDS, "Landlord's duty to mitigate damages — a new obligation", (1978) 16 *Am.Bus.L.J.* 351-353; C. T. McCORMICK, "The rights of the landlord upon abandonment of the premises by the tenant", (1925) 23 *Mich.L.Rev.* 211-222; C. F. MILLER, "Landlord-tenant — Landlord's duty to relet when a tenant abandons leased property", (1978) 43 *Missouri L.Rev.* p. 360; G. WEISSENBERGER, "The landlord's duty to mitigate damages on the tenant's abandonment: a survey of old law and new trends", (1980) 53 *Temple L.Q.* pp. 5, 39-40.

74. A. J. BRADBROOK, *supra* note 73, pp. 18-20, 23-24, 29; C. F. MILLER, *supra* note 73, pp. 361-362; C. T. McCORMICK, *supra* note 73, pp. 211-214, 220; R. C. GROLL, "Landlord-tenant: the duty to mitigate damages", (1967-68) 17 *De Paul L. Rev.* pp. 318-319.

use of property, and preventing unjust benefits to one who passively allows damages to accrue; it also assists in deterring loss through vandalism, fire, deterioration in appearance and decline in value.<sup>75</sup> All these factors speak in favour of a change in the law, in favour of imposing a duty to mitigate on lessors who claim from defaulting tenants.

Indeed, these arguments have led provincial legislatures in Canada to adopt statutory provisions providing that the ordinary rules of contract relating to mitigation be made applicable with respect to residential tenancies. Further, the Supreme Court of Canada has declared in *Highway Properties Ltd. v. Kelly, Doublas & Co.*, [1971] S.C.R. 562, that a commercial lease is a contract as much as a conveyance, so that "the full armoury of remedies ordinarily available to redress repudiation of convenants" should be resorted to when a tenant abandons the premises.<sup>76</sup>

*b) Contracts for the sale of goods*

In the law of contracts for the sale of goods a breach of contract by either party, buyer or seller, generally creates a prejudice affecting the other party. For the purposes of compensation, the extent of this prejudice is measured by civil law courts according to certain rules which, I suggest, originate implicitly from the concept of mitigation. It is in regard to a buyer's damage, in case of a seller's failure to deliver, that this influence is most apparent.

When a seller fails to deliver the object of a contract, the unsatisfied buyer is expected to take the step toward mitigation which is most readily available to him. This means that the buyer must buy replacing or substitute goods from a third party whenever he can reasonably do so, then sue the seller for the difference in price.<sup>77</sup> In practice, this requirement of reasonableness means that the extent of the buyer's loss will be measured in a different way, according to whether he intended to keep the goods for his own use when he bought them, or whether he meant to resell them to a third party.

If the buyer intended to keep the goods, then his prejudice is measured like that created by a failure to get the goods themselves, that is a loss of the goods themselves rather than a loss of profit. However, in certain circumstances, the law imposes on the plaintiff a duty to transform this physical loss into a loss of money by obtaining a replacement

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75. C. F. MILLER, *supra* note 73, pp. 363-364; A. J. BRADBROOK, *supra* note 73, pp. 20-21; C. T. MCCORMICK, *supra* note 73, p. 223.

76. WILLIAMS & RHODES, *Canadian Law of Landlord and Tenant*, 5<sup>th</sup> ed., Toronto, Carswell, 1983, volume 1 sect. 7:1:4, volume 2 section 12:2:7.

77. PLANIOL & RIPERT, *supra* note 70, tome 10, paragraph 81; MAZEAUD, *Leçons*, *supra*, note 55, 5<sup>th</sup> ed., tome 3, volume 2, paragraphe 946.

from a third party;<sup>78</sup> the aim of this replacement rule is to encourage plaintiffs to avoid losses due to market fluctuations whenever they could reasonably be avoided (article 1144 of the French *Code civil*).

If the buyer intended to resell the goods, his loss is a loss of profit (*un bénéfice manqué*) which the tribunal will measure, taking into account whether or not it could reasonably have been avoided, totally or partially, through a substitute transaction. If no substitute transaction was reasonably possible, the loss of profit will be entirely compensated; if one was possible, then the loss will be measured as if the buyer had acted accordingly, and subsequent market fluctuations will be ignored for this purpose.<sup>79</sup>

In truth this last hypothesis really belongs to the realm of *commercial law* rather than civil law since, if the buyer intended to resell the goods which he had bought from the defendant, rather than keep them for his personal use, his act was commercial in nature. In commercial law, in civil law jurisdictions, the duty to mitigate following the breach of a contract for the sale of goods has more forceful implications than in non-commercial law.<sup>80</sup> Commercial practice has transformed the recourse offered by article 1144 C.c., that is the execution by a third party with the approbation of the court, into a mandatory replacement without any participation of the judicial system.<sup>81</sup>

It seems therefore that the English law *bacon case* of 1824, *Gainsford v. Carroll*, would be decided in the same way in civil law.<sup>82</sup> Indeed, several trades in France have included in their Codes of practice a formal rule providing that, in case of default, replacement is mandatory and must be used in lieu of *l'exécution forcée en nature*.<sup>83</sup>

78. S. GODLEWSKI DE GOZDAWA, *L'incidence des variations de prix sur le montant des dommages-intérêts dans le droit commun de la responsabilité civile*, Paris, Sirey, 1956, paragraphs 81, 125-128; PLANIOL & RIPERT, *supra* note 70, tome 10, paragraph 81.

79. S. GODLEWSKI DE GOZDAWA, *supra* note 78, paragraphs 119-120, 130; J. SAVATIER, note to *Crim.*, 6 juin 1946, D.1947.J.234; A. TUNC, note to *Trib.Civ.Seine*, 23 octobre 1942, D.C.1943.J.83.

80. J. MARTIN DE LA MOUTTE, « Les sanctions de l'obligation de délivrance », in J. HAMEL (ed.), *La vente commerciale de marchandises*, Paris, Dalloz, 1951, p. 224; see also M. ALTER, *L'Obligation de délivrance dans la vente de meubles corporels*, Paris, L.G.D.J., 1972, paragraph 213; J. P. LE GALL, « Le retard dans la livraison des marchandises vendues », (1963) *Rev.Trim.Dr.Comm.* paragraphs 35 and 40; J. HÉMARD, « Les contrats commerciaux », in J. ESCARRA, E. ESCARRA, J. RAULT (ed.), *Traité Théorique et Pratique de Droit Commercial*, tome 1, Paris, Sirey, 1953, paragraph 255.

81. This practice has been legally acknowledged in article 4, *Loi du 22 avril 1949*, in *fine*:

« Si, conformément aux lois et usages du commerce, l'acheteur s'est procuré aux frais et risques du vendeur, les marchandises qui ne lui ont pas été livrées, le montant des dommages-intérêts devra être réduit . . . ».

82. *Gainsford v. Carroll*, (1824) 107 E.R. 516; see J. P. LE GALL, *supra* note 80, paragraph 35; M. ALTER, *supra* note 80, paragraph 223; *CONTRA Nancy*, 12 décembre 1918, *Gaz.Pal.* 1918-19.1.576.

83. J. P. LE GALL, *supra* note 80 paragraph 35, p. 271 notes 1, 2, 3: Code des règles et usages du commerce des grains article 25; Code d'usages du commerce des

It is, in my opinion, impossible to see anything but the concept of mitigation as the real foundation of this process of replacement and of the rules which govern it. This opinion is sanctioned by that of a French author who writes

Il n'y a là qu'une application supplémentaire de la bonne foi telle qu'elle doit être comprise dans le cadre d'un contrat. Il est raisonnable, en effet, d'imposer au demandeur une diligence minimum le conduisant à prendre les dispositions propres à atténuer ou à limiter le préjudice éprouvé.<sup>84</sup>

This idea of good faith seems to proceed from a certain morality of the law, an idea of fairness between the parties.<sup>85</sup> It partially forms the basis of the concept of mitigation of damage in civil law, through the principle of *préjudice réparable*, which is one of the main principles involved in measuring the extent of plaintiffs' losses.

## II. THE CONCEPT OF MITIGATION AND THE PECUNIARY EVALUATION OF THE LOSS

When the extent of the injured party's loss has been ascertained and the damage that counts for compensation has been identified, through such concepts as causation and *préjudice réparable*, the next step is to determine to what remedy the plaintiff is entitled. In most cases the remedy chosen is an award of money; consequently the pecuniary value of the plaintiff's recoverable loss has to be ascertained. This is done through the *assessment rules*.

In common law it is generally held that the choice of a date of assessment is governed by the concept of mitigation and that assessment must be performed at the date of the breach or at the earliest time when

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légumes article 37-B; Code d'usages du commerce des pommes de terre, article 33; Code des règles et usages pour le commerce des pailles et fourrages, articles 22 & 25; Code des règles et usages pour le commerce des graines fourragères de semence, articles 26 & 29. See also M. ALTER, *supra* note 80 paragraph 223 and note 41.

See also arts. 75-77 of the United Nations Convention on International Contracts for the Sales of Goods, which was adopted April 10, 1980, following a United Nations Conference on this subject, in which France took part. These articles go much further in the direction of mitigation than the actual rules on replacement and substitute contract since they provide for a general duty to mitigate as well as specific rules on substitute contracts, and on how the loss is to be measured if the victim of the breach does not make such a contract.

84. M. ALTER, *supra* note 80, paragraph 223.

85. R. E. CHARLIER, *supra* note 47, paragraph 51.



mitigation steps might have been taken by the plaintiff.<sup>86</sup> For common lawyers the concepts of mitigation and of assessment therefore appear to be intrinsically intertwined.

I believe that this view is mistaken. The most appropriate date for assessing damages is not necessarily the date of the breach nor the date of mitigation. On the contrary, the choice of such an early date of assessment induces consequences that are incompatible with the general theory of remedies for breach of contract in civil law as well as in common law: for instance it places the burden of cost increases due to inflation between the date of breach and the date of judgment on the plaintiffs instead of placing it on the defendants. In the next pages I will try to demonstrate how this consequence is unacceptable in civil law and common law, and I will describe what would appear to be the best rule of assessment.

### 1. Inflation, Mitigation and Assessment of Damages in Common Law and Civil Law

The relevance, and even the urgency, of clarifying the relationship between the concept of mitigation and the process of assessment stems from *inflation*.

Inflation may be defined as “a sustained rise in the general price level” which produces an internal depreciation of the national currency, an erosion of the value of money as measured by its purchasing power.<sup>87</sup> Inflation is of considerable relevance to the law of damages, since it affects the instrument through which the plaintiff’s compensation is assessed, *i.e.*, money. The same number of currency units that would have adequately compensated the plaintiff at the time of the breach, may, at the time of the trial, be worth so much less in terms of the purchasing power of money, that they no longer represent accurate compensation for the injury suffered by the plaintiff.<sup>88</sup> The choice of the date of assessment is thus of considerable significance to the law of damages.

Traditionally, the rule in common law has been that damages must be assessed at the date of the breach of contract or at the date of mitigation. In the last ten years, however, there has been increasing concern with the problem of the date of assessment. This concern is undoubtedly due to the very high rates of inflation which have prevailed during this

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86. G. H. TREITEL, *supra* note 6, p. 709; I.E.C.L. volume VII chapter 16, paragraph 71.

87. E. HIRSCHBERG, *The impact of inflation and devaluation on private legal obligations*, Israel, Bar-Ilan University, 1976, p. 40; K. ROSENN, *Law and Inflation*, Philadelphia, University of Pennsylvania Press, 1982, p. 3.

88. M. D. WHITE, “Pre-assessment inflation as a factor in damages”, (1979) 48 *U.Cin.L.Rev.* p. 1002.

period. They have increased the urgency of the issue of the inadequate compensation awarded to plaintiffs. Consequently there has been a growing tendency toward the adoption of a more flexible rule of assessment. Four cases in particular may be considered landmarks on the subject in English contract law: *Wroth v. Tyler*,<sup>89</sup> *Radford v. De Froberville*,<sup>90</sup> *Malhotra v. Choudhury*<sup>91</sup> and *Johnson v. Agnew*.<sup>92</sup>

If there is a single principle regarding the assessment of damages that emerges from these decisions, it is the one well summarized by Oliver J. in *Radford v. De Froberville*, where he writes that the courts' tendency nowadays is

to assess the damages at the date of the hearing unless it can be said that the plaintiff ought reasonably to have mitigated by seeking an alternative performance at an earlier date, in which event the appropriate measure would seem to me to be the cost of the alternative performance at that date.<sup>93</sup>

This, I suggest, shows that the English courts, although they are willing to adopt a change from the date of breach rule to a more flexible rule, still consider the issues of mitigation and date of assessment as connected. The most important consequence of this position is that the injured party does not usually recover the actual value of his loss on the date of judgment since he must bear *the effect of inflation* occurring after the date of mitigation.

Is this a fair solution? Are there any justifications for making the injured party bear the effect of inflation on his loss? Many justifications have been proposed, and yet I believe that the common law theory of remedies for breach of contract is more favourable to the opposite proposition, *i.e.*, that the entire effect of inflation ought to be borne by defendants. Consequently, even though there is at common law a duty for plaintiffs to mitigate the value of their losses, it does not apply to the effect of inflation.

The basic common law remedy for breach of contract is a claim for monetary compensation. Specific performance, a decree directed against the defendant personally and ordering him to perform the contract, is available only exceptionally, in equity.<sup>94</sup> The reason for this, according to René David, lies in the fundamental conception of contract in common law:

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89. [1974] Ch. 30.

90. [1977] 1 W.L.R. 1262.

91. [1980] Ch. 52.

92. [1980] A.C. 367; see also *Perry v. Sidney Phillips & Son*, [1982] 1 All E.R. 1005 (Queen's Bench Division) where the court held that the proper date for the calculation of the cost of repairs is the date of judgment since there was no failure to mitigate on the part of the plaintiff.

93. [1977] 1 W.L.R. 1262, p. 1286.

94. A. T. KRONMAN, "Specific Performance", (1977-78) 45 *U.Chi.L.Rev.* p. 354; *I.E.C.L.* volume VII chapter 16 paragraphs 9,30: note that the processes by which the

English law . . . sees above all in the contract a bargain; what matters is not that a promise should be enforced, it is that the other party, the promisee, who has furnished a consideration for the promise, should not suffer any damage as a consequence of the breach: an award of damages will be in almost all cases, to this purpose, an appropriate remedy.<sup>95</sup>

Another reason, in my opinion, and one that also hinges on the "bargain" aspect of contracts in common law, is that, for a commercial promisee, the monetary equivalent of performance is often as valuable as the performance itself; and for a commercial promisor, it is much more convenient to know that in case of breach he will be called upon to compensate the promisee in money, rather than to face the uncertain prospect of being ordered to perform the contract. *Commercial efficacy*, one of the main purposes of the whole law of contract,<sup>96</sup> therefore appears to require that damages be made the usual mode of remedying to a loss.<sup>97</sup>

The amount of damages awarded to a plaintiff must be sufficient to put him in the same position as if the contract had been performed. This protection of the plaintiff's expectancy interests is necessary if the law is to promote and facilitate reliance on business agreements.<sup>98</sup> The purposes of encouraging commercial efficacy and of keeping the economic machine running with the least possible interference from the law have modeled the main objective of the law of remedies for breach of contract, *i.e.*, the protection of the plaintiff's expectations.

This objective is most adequately fulfilled when the law takes into account the effect of inflation on money awards.<sup>99</sup> Otherwise plaintiffs are undercompensated and defendants are given large economic incentives

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plaintiff gets the substance of the initial contract, from third parties, are treated as species of enforced performance in civil law but as damages in common law; see *I.E.C.L.* volume VII chapter 16, paragraphs 9,30; C. SZLADITS, "The concept of specific performance in civil law", (1955) 4 *Am.J.Comp.Law* p. 212. It must be underlined that, in spite of this difference between civil law and common law, some writers argue that specific performance is used more often as a remedy in common law than enforced performance is used in civil law; see René DAVID, *supra* note 23, pp. 126-127; F. H. LAWSON, *supra* note 16, p. 213.

95. René DAVID, *supra* note 23, p. 126.

96. E. FRY, *A Treatise on the Specific Performance of Contracts*, 5<sup>th</sup> ed., London, Stevens & Sons, 1911, paragraph 8; R. J. SHARPE, *supra* note 19, p. 125; E. A. FARNSWORTH, "Legal Remedies for Breach of Contract", (1970) 70 *Col.L.Rev.* p. 1154; F. H. LAWSON, *supra* note 16, pp. 213, 290.

97. A third factor to the same effect is that, historically, Chancery feared that its authority would be undermined if it gave orders that it could not enforce; orders of specific performance were therefore used only in relation with contracts that could be very easily enforced and not with those that would have required careful supervision by the court; see E. FRY, *supra* note 96, paragraph 8 p. 5; R. J. SHARPE, *supra* note 19, p. 126; G. H. TREITEL, *supra* note 6, pp. 758 ff.

98. LL. FULLER and W. R. PERDUE, *supra* note 19, pp. 52-53, 61 ff; R. A. HILLMAN, "Keeping the deal together after breach . . .", (1976) 47 *U.Colo.L.Rev.* pp. 561-600.

99. S. A. REA, *Inflation and the Common Law of Contracts*, Document presented at the Canadian Association of Law Teachers Meeting, May 31st, 1982. pp. 6-13.

to default and to delay judgment;<sup>100</sup> the economic reality of inflation, which affects the value of the currency in which damages are given, is ignored, thus making a plaintiff incapable of obtaining the same amount of goods and services as he could have obtained at the date of the breach.<sup>101</sup> The only way to prevent this result is to give the plaintiff a quantity of currency units that represents the value of his loss at the date of judgment, thus placing the burden of inflation on the defendant.

Whilst damages are the usual mode of remedying a loss, one must not forget the other possible remedy, that is specific performance. Although the issue of assessment does not usually arise in the case of specific performance, this no longer holds true when the courts grant damages as a substitute for an order of specific performance.<sup>102</sup> Then the courts are not bound to follow the common law rules on assessment of damages; the special rule of assessment that governs these cases holds that damages must be assessed on the basis of the value of the performance of the contract at the date of judgment. This is clearly the conclusion reached by Megarry J. in *Wroth v. Tyler*, when he writes that

on principle . . . damages "in substitution" for specific performance must be a substitute, giving as nearly as may be what specific performance would have given.<sup>103</sup>

Indeed, the analysis of the civil law theory of remedies for breach of contract reveals that whenever damages are meant to be a substitute for the performance of a contract, no other date than the date of judgment is appropriate for assessing these damages.

In 1948 the French Court of *Cassation* adopted the view that assessment of damages in cases of contractual liability must be performed at the date of judgment. This rule was first expressed in a landlord-tenant case; there the Court declared:

s'agissant d'un préjudice soumis à l'augmentation du cours de la paille sous l'influence des variations monétaires, c'est au jour de la décision que le montant de la réparation devait être fixé.<sup>104</sup>

Although this rule has never been unanimously followed by the inferior tribunals in France, it has received general support from the authors.<sup>105</sup>

I believe that it is indeed the most appropriate rule in view of the civil law theory of remedies for breach of contract.

100. K. ROSENN, *supra* note 87, p. 224.

101. R. HAUSER, "Breach of contracts damages during inflation", (1959) 33 *Tulane L. Rev.* p. 322; M. D. WHITE, *supra* note 88, p. 1006.

102. Section 2, *Chancery Amendment Act*, 1858, 21 & 22 Vict. (1857-1858) c.27; *Leeds Industrial Co-operative Society Ltd. v. Slack*, [1924] A.C. 851, pp. 861-863.

103. [1974] Ch. p. 59; this decision was followed in *Malhotra v. Choudhury*, [1980] Ch. 52.

104. *Cass.Civ.*, 16 février 1948, S.1949.1.69 note by Jambu-Merlin.

105. MAZEAUD, *Traité*, *supra* note 46, tome 3, paragraph 2420-8 note 19.

It is generally acknowledged that the basic remedy for breach of contract in civil law is enforced performance, *i.e.*, to provide the plaintiff with what he wished to obtain, either by forcing the defendant to perform or by having a third party performing in his place.<sup>106</sup> Behind this rule lies an interpretation of the concept of remedy according to which the best way to ensure recovery following a breach of contract is to allow the plaintiff to receive the substance of his contract. René David writes:

The French law of contract is based on a principle of morality, stresses by the canonists, for whom it was a sin for a person not to fulfil his promises: *pacta sunt servanda*, you must keep your word and, if you do not the State and the law will oblige you to do so.<sup>107</sup>

This is the main aspect of the principle of obligatory force of contracts, *la force obligatoire du contrat*, which provides that the parties are bound to perform contracts and the courts are bound to enforce them if possible.<sup>108</sup>

Nothing, however, prevents the plaintiff from claiming compensation in money or in kind rather than enforced performance.<sup>109</sup> Nevertheless, whether the plaintiff asks for it or whether it is the only type of remedy available in a particular case, compensation remains a substitute remedy. Hence its effects must come as close to those of an order of specific performance as possible. It is for this reason that, when compensation in money is ordered, the assessment is performed at the date of judgment.<sup>110</sup> In this way the courts make sure that the amount of damages

106. *I.E.C.L.* volume VII chapter 16, paragraphs 9, 17, 18; M. E. ROUJOU DE BOUBÉE, *Essai sur la notion de réparation*, Paris, L.G.D.J., 1974, pp. 139 ff.

107. René DAVID, *supra* note 23, p. 126. According to W. S. Holdsworth (*A History of English Law*, London, Sweet & Maxwell, 1903-1972, volume 1 p. 455) a similar observation could be made in respect of the equitable jurisdiction in common law: "the court of Chancery interfered to enforce contracts on principles very different from any known to the common lawyers . . . [The courts of common law] had not yet grasped the idea that the essence of contract is consent, and that consent ought, under certain circumstances, to give rise to an actionable obligation. But the Chancellors had from the first approached the subject of contract from this point of view; for the majority of the Chancellors were ecclesiastics; and breach of faith was a sin punishable by the ecclesiastical law . . . the Chancellors carried with them into the court of Chancery the idea that faith should be kept; and enforced agreements, just as they enforced trusts, whenever they thought that in the interests of good faith and honest dealing, they ought to be enforced."

On French law, see also, F. H. LAWSON, *Selected Essays*, Oxford, North Holland, 1977, vol. 2, p. 357.

108. A. WEILL, *Droit Civil — les obligations*, 2<sup>nd</sup> ed., Paris, Dalloz, 1975, paragraphs 351 and 58; M. E. ROUJOU DE BOUBÉE, *supra* note 106, p. 159.

109. MAZEAUD, *Traité*, *supra* note 46, tome 3, paragraph 2321; *I.E.C.L.* volume VII chapter 16, paragraph 17; R. CHAPUS, *Responsabilité publique et responsabilité privée — les influences réciproques des jurisprudences administratives et judiciaires*, Paris, L.G.D.J., 1954, paragraph 508.

110. Some writers have even suggested that the final assessment should be performed on the day when compensation is actually paid to the plaintiff so as to put the entire burden of inflation on the defendant; see MAZEAUD, *Leçons*, *supra* note 55, tome 2 volume 1,

awarded is sufficient to put the plaintiff in the same position as if enforced performance had been ordered on the same day, or better, as if the breach had not occurred in the first place:

Since damages are deemed but an equivalent to performance, it follows that the creditor should receive that sum of money that would give him the same purchasing benefits he would have had had he received the performance.<sup>111</sup>

Thus, the whole burden of the effect of inflation on the loss, between the date of breach and the date of judgment, falls on the defendant without any interference from the concept of mitigation; mitigation is used in civil law to ascertain the extent of a plaintiff's loss, *not* to put upon him the burden of the effect of inflation.

## **2. Cases where Assessment is Traditionally Performed Before the Date of Judgment.**

Both in French and English law, there are traditionally held to be two types of cases where the date of judgment cannot be used for the assessment of losses. The first type of case is where plaintiffs have covered their losses by providing for themselves compensation in kind or enforced performance. The second type of case is where injured parties have been unreasonable in their delays to take legal proceedings or where the injured parties have wilfully rejected reasonable offers of compensation. In the following pages, I will argue that this position is justified as regards the second type of case but not the first, where assessment at the date of judgment would be more adequate.

### **2.1. UNREASONABLE DELAY IN LEGAL PROCEEDINGS AND REFUSAL OF AN OFFER OF COMPENSATION**

When the plaintiff has unreasonably delayed his legal proceedings against the defendant or when he has rejected a reasonable offer of compensation, civil law provides that his damages must be assessed prior to the date of judgment, at the date when the hearing would have taken

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paragraph 625; F. DERRIDA, « L'évaluation du préjudice au jour de sa réparation », *J.C.P.* 1951.I.918 paragraphs 4-11; R. DEMOGUE, note to *Bordeaux*, 26 octobre 1926, (1927) *Rev.Trim.Dr.Civ.* 428 no. 11.

111. R. HAUSER, *supra* note 101, p. 317 note 22. See also MAZEAUD, *Traité, supra*, note 46, tome 3, paragraph 2420-9; MAZEAUD, *Leçons, supra*, note 55, tome 2 volume 1, paragraph 625; F. DERRIDA, *supra* note 110, paragraphs 4, 10.

place had the plaintiff been reasonably diligent<sup>112</sup>, or at the date when the reasonable offer of compensation was made.<sup>113</sup> The aim of these rules providing for a pre-judgment date of assessment is to *encourage plaintiffs to be diligent in seeking their compensation*.

This purpose is pursued in common law through similar rules providing that "the correct date for the assessment of damages payable is the date upon which the plaintiff ought reasonably to have brought the case on for hearing",<sup>114</sup> and that a plaintiff is bound to accept a reasonable offer of compensation from the defendant.<sup>115</sup>

In both legal systems, therefore, the effect of inflation on the value of the currency, and consequently on the compensation the plaintiff receives, are only taken into account if they arise before the date of mitigation; subsequent effects of inflation have to be borne by the plaintiff himself.

It seems that the justifications given in favour of assessing losses at the date of judgment are superseded by some overriding considerations of justice: it would be unfair to burden the defendant with costs, when actually the delay the plaintiff encounters in recovering compensation is entirely his own fault.<sup>116</sup> This position is justified if we consider that the basic function of the law of remedies in cases of breach of contract is to promote efficiency and encourage parties to avoid waste. Let us suppose that a party wilfully breaches a contract in order to re-allocate his resources in some other, more efficient way; if damages were assessed at the date of judgment, the injured party, by postponing legal proceedings or refusing reasonable offers of compensation, could force the breaching party to bear a cost, namely the effect of inflation, which would increase the cost of the breach. It could be argued, if this added cost were too important, that it would make this breach more costly for the breaching party than the benefits that he draws from it. This could incite the parties *not* to reallocate their resources by breaching contracts and thus it would encourage inefficient decisions and waste.

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112. R SAVATIER, *Traité*, *supra* note 50, tome 2 paragraph 484; R. E. CHARLIER, *supra* note 47, paragraphs 49, 50; H. LALOU, *supra* note 47, paragraph 338; *Cass.Civ.* 16 mars 1910, *D.P.*1913.Somm.25; *Douai*, 8 avril 1948, *J.C.P.*1948.IV.145; *Soc.*, 1 mars 1957, *Bull. Civ.* IV no. 259; *Lyon*, 12 mars 1921, *D.P.*1922.2.168; *Bourges*, 20 mars 1899, *D.*1899.2.493.

113. F. DERRIDA, *supra* note 110, paragraph 7; S. GODLEWSKI DE GOZDAWA, *supra* note 78, paragraphs 81-83; *Civ.* 7 décembre 1955, *Bull. Civ.* I no. 433; *Soc.* 10 juillet 1953, *D.*1954.73, 2 espèce.

114. *Radford v. de Froberville*, [1977] 1 W.L.R. 1287; See H. MCGREGOR, *supra* note 6, paragraphs 490, 492.

115. R. A. HILLMAN, *supra* note 98, pp. 559-570, 598-615; G. H. TREITEL, *supra* note 6, p. 724; *Radford v. de Froberville*, [1977] 1 W.L.R. p. 1287.

116. Naturally the defendant must prove that the plaintiff has not been reasonably diligent in his attitude towards the legal proceedings or towards offers of compensation made by the defendant.

The pre-judgment rule of assessment prevents these undesirable consequences and allows the breaching party to gauge his liability toward the plaintiff without taking into account such imponderable factors as the plaintiff's unwillingness to settle the issue of compensation quickly.

## 2.2. PLAINTIFF HAS COVERED HIS LOSS

Let us suppose that the injured party has taken upon himself not merely to prevent an aggravation of his loss, but to *cover his loss*, that is « [de] *faire le nécessaire pour effacer les effets du dommage* ». <sup>117</sup>

Civil law and common law adopt similar positions in such cases: they allow the plaintiff to recover the exact number of currency units that he has spent. <sup>118</sup> In other words, the pecuniary value of the loss is assessed at the date when the plaintiff covered his loss.

In civil law the doctrine holds that by covering his loss the plaintiff has "*crystallized*" his prejudice; his right to claim the enforced performance of the contract or, as a substitute, an unliquidated sum of money as damages, has been transformed into a money debt. It is governed henceforth by the principle of nominalism: <sup>119</sup>

Lorsque la victime a procédé elle-même à la réparation . . . il y a, en quelque sorte, novation de son droit à réparation en un droit au remboursement de ses frais, exprimé en une valeur nominale désormais invariable . . . <sup>120</sup>

As there is, in fact, a further requirement, namely that the amount of money thus spent by the plaintiff with a view to covering his loss be reasonable, what this rule amounts to in practice is that the plaintiff is not entitled to recover more than the reasonable cost of mitigation, "*la valeur de remplacement ou le coût des réparations au jour où la victime a procédé à la remise en état*". <sup>121</sup> The effect of inflation on the purchasing power of this sum of money is totally ignored by the courts; the effect is left to be borne entirely by the plaintiff.

In common law, similarly, when an injured party covers his loss his damages are assessed on the basis of the actual number of currency units spent. Here again the law reasons in terms of the loss being "*crystallized*" into a nominal sum of money:

117. R. E. CHARLIER, *supra* note 47, paragraph 23.

118. F. DERRIDA, *supra* note 110, paragraph 17; MAZEAUD, *Leçons*, *supra* note 55, tome 2 volume 1, paragraph 625; MAZEAUD, *Traité*, paragraphs 2423-3 and 2423-7; *I.E.C.L.* volume VII chapter 16, paragraph 71.

119. F. A. MANN, *The Legal Aspect of Money*, 4<sup>th</sup> ed., Oxford, Clarendon Press, 1982, pp. 130-131.

120. *Juris-Classeur*, Responsabilité Civile, tome 1 fasc. III-f, paragraph 132.

121. MAZEAUD, *Leçons*, *supra* note 55, tome 2 volume 1, paragraph 625.



the damage is . . . "crystallized" by the expenditure, the amount is fixed and, like all liquidated sums, subject to the principle of nominalism, so that the plaintiff can claim the amount actually spent, but not more.<sup>122</sup>

Although there are no objections against measuring the extent of the plaintiff's loss at the date when the loss was covered, I believe that there are some objections against choosing this date for the assessment of damages as well.

A French author, R. E. Charlier, submits that assessing damages at the date when the loss is covered makes the French system of remedies for breach of contract inefficient.<sup>123</sup> On the one hand, damages are supposed to be assessed at the date of judgment, independently of the plaintiff's attitude toward the mitigation of his loss; on the other hand, if the plaintiff covers his loss completely, his damages are assessed at the date of mitigation. In certain cases, this is almost an encouragement for the plaintiff *not* to cover his loss. Moreover, it confers undeserved benefits upon the defendant who benefits from the plaintiff's positive attitude, since it saves him from bearing the effect of inflation from the date of mitigation onward until the date of judgment.

The distinguished jurist F. A. Mann shares this view; he writes that inflation is an uncertainty with which the plaintiff must not be burdened under all circumstances. Whether he or the defendant will bear it in the final analysis,

will depend on the size of the expenditure, on his and the defendant's means, the likelihood and speed of recovery and similar facts.<sup>124</sup>

D. Feldman and D. F. Libling, however, adopt the opposite view. Obviously, they argue, the existence of two different rules of assessment may lead to a situation where

the same physical damage leading to a judgment on the same date may result in a different award depending on whether the plaintiff had repaired the damage prior to the trial.<sup>125</sup>

But this is not necessarily an undesirable situation, they argue: the injured party who *has covered his loss* has got the commodity he wanted and he is not out of pocket since he will recover the amount of money that he has spent plus interest;<sup>126</sup> as for the injured party who *has not covered his loss*, he will recover the amount of money necessary to enable him

122. F. A. MANN, *supra* note 119, p. 131; *Dodd Properties Ltd v. Canterbury City Council and others*, [1980] 1 W.L.R. 433.

123. R. E. CHARLIER, *supra* note 47.

124. F. A. MANN, *supra* note 119, p. 131.

125. D. FELDMAN and D. F. LIBLING, "Inflation and the Duty to Mitigate", (1979) 95 *L.Q.R.* 270-286, p. 284.

126. F. A. MANN, *supra* note 119, p. 110 note 146; *Pickett v. British Rail Engineering*, [1980] A.C. 136.

to obtain the commodity in question. I believe that civil law and common law authors, when they write that by covering his loss a plaintiff thereby transforms his right to damages, a debt of value, into a debt of money, are mistaken. A debt of money exists where the sum which the defendant owes to the plaintiff is liquidated in the contract itself, such as in a contract of loan or in a contract of sale. Damages, on the contrary, are liquidated only by the decision of a court: it is only by virtue of the decision on the issue of the assessment of the loss that the claim for damages is transformed into a debt of money. It is true that, by covering his loss, the plaintiff indicates what the pecuniary value of this loss is at that date; but this *libellé monétaire* may be revalued by the tribunal at the date of judgment, on the basis of the value of the currency at that time. Until then, the plaintiff's claim is always a debt of value: the fundamental obligation of the defendant remains *to remedy a loss*, the payment of a sum of money being only the means of achieving it.<sup>127</sup>

I suggest that it is wrong in these circumstances to hold that the appropriate date of assessment is the date of mitigation. This position partially defeats the purposes of the rules of remedy for breach of contract: a debt of value is wrongly held to have become a debt of money and the theory of nominalism is applied to damages which have not yet been judicially liquidated. As the American author K. Rosenn writes,

Whether or not one subscribes to the doctrinal construct of the debt of value, the end result of revaluing damage awards at the date of judgment is far preferable to that which occurs with the traditional view of assessing damage as of the date of the injury. The traditional view is unworkable in an inflationary economy. Not only does it prevent the plaintiff from being made whole, but it also gives the defendant an enormous economic incentive to delay the litigation as much as possible. Application of the nominalist principle to damages that have become liquidated by virtue of the victim's payment makes no sense whatsoever. In terms of social policy, it is unwise to have a legal rule that discourages persons from repairing damaged property for substantial periods.<sup>128</sup>

The most appropriate solution to this problem, I suggest, would be to use the pecuniary value of the loss at the date of mitigation and to *revalue* this sum to take into account the effect of inflation between the date of mitigation and the date of judgment. This will be the subject of my last chapter.

### 3. The Assessment of Damages and the Problem of Market Fluctuations

It appears from this discussion of the issue of the date of assessment that both in civil law and in common law there is no legal

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127. G. L. PIERRE-FRANÇOIS, *La notion de dette de valeur en droit — essai d'une théorie*, Paris, L.G.D.J., 1975, paragraph 95.

128. K. ROSENN, *supra* note 87, p. 224.

impediment, in theory, to the adoption of *a rule of assessment that assigns to defendants the burden of the effect of inflation* on the value of the plaintiff's loss. It remains to be seen, however, whether a rule can be formulated that would fulfill this role without conflicting with the general aims of the law of remedies for breach of contract. My purpose in the present chapter is to discuss what "assessing the damages on the date of judgment" should mean in practice.

One method of assessment that takes inflation into account is to use variations in the market value of the commodity that was the object of the contract: the courts assess what would be the price of such a commodity on an available market at the date of judgment, and compare this with the price fixed in the contract.

This method, however, does not always give adequate results: it cannot be used adequately, for instance, where there is no market for the object of the contract. Besides, to assess damages on the basis of their market value may not always be in accordance with the theory of remedies for breach of contract since the several factors which may affect market values ought not to be all treated in the same way.

Inflation generates a general increase in prices and costs; other variations in the market value of goods and services may also be due to other factors entirely independent of inflation: changes in consumers' tastes, supply inelasticity, unexpected shortages or gluts,<sup>129</sup> are examples of such market factors that create fluctuations in the prices of particular commodities. Consequently, when, in assessing a loss, the tribunal uses the market price of a commodity affected by such factors, it compensates the victim not only for the effects of inflation, but for the effects of these other factors too.

In French law, where this method of assessment is used, the doctrine holds that there is no difference between changes in value due to inflation and those due to other factors:

Alors que les éléments du dommage sont restés les mêmes, la valeur du préjudice, c'est-à-dire le chiffre de l'indemnité nécessaire pour le compenser, exprimé en une monnaie déterminée, a pu varier. La modification est, en pareil cas, extrinsèque au dommage. Ce n'est pas une modification du dommage. C'est une variation de sa valeur, de son prix en une monnaie donnée, que cette variation provienne d'une hausse ou baisse du cours d'une marchandise ou d'une modification du pouvoir d'achat de la monnaie.<sup>130</sup>

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129. A. SCHWARTZ, "Sales law and inflation", (1976-77) 50 *S. Ca. L.R.* pp. 1, 16-18.

130. MAZEAUD, *Traité*, *supra* note 46, tome 3, paragraph 2420.

In fact, this attitude gives the plaintiff a speculative advantage over the defendant: if the price of the commodity rises more rapidly than the general price level, the plaintiff may recover more than this original loss plus monetary depreciation.<sup>131</sup> The plaintiff gets to be overcompensated and, consequently, resources are inefficiently allocated between him and the defendant.

Contrary to what the theory of market values is based upon, I believe that there is a fundamental difference between inflation and market fluctuations: the effects of inflation affect all goods, they are unavoidable; but the effects of market fluctuations can be avoided by a plaintiff since they affect only particular commodities. By covering his loss, a plaintiff can put himself out of reach of the effects of market fluctuations, while he can never do the same with the effects of inflation. *Market fluctuations are avoidable, inflation is not.* Therefore, to compensate the plaintiff for market fluctuations which could have been avoided is to encourage waste of resources and inefficient decisions.

Consequently the real question is how to compensate plaintiffs for the effect of inflation without taking into account the effects of market fluctuations that may have occurred between the date when mitigation became possible and the date of judgment.<sup>132</sup> This result can only be secured by using the value of damages on the date when mitigation became possible and to then correct this value in order to take into account the effects of monetary depreciation. I believe that the most efficient way to achieve this result is to use retrospective rates of inflation and economic indexes.<sup>133</sup> For example one could hold that a damage worth \$10 000 in 1970 would now be worth twice as much assuming that economic indexes show that the value of the Canadian dollar has decreased by half since then ( $\$10\,000 \times 2 = \$20\,000$ ).<sup>134</sup> This type of revaluation, although it is not entirely free from drawbacks,<sup>135</sup> is the most adequate way of making defendants bear the burden of inflation following a breach of contract, without overcompensating plaintiffs. In other words, it appears to be the best way to achieve efficiency and avoidance of waste while at the same time compensating plaintiffs for the entire cost of their recoverable losses.

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131. K. ROSENN, *supra* note 87, p. 237.

132. *Contra*: see S. WADDAMS, (1981) 97 *L.Q.R.* p. 461, who writes that the decision of a tribunal concerning market fluctuations cannot be founded on a requirement of reasonable conduct on the part of the plaintiff.

133. R. HAUSER, *supra*, note 101, pp. 314-322; K. ROSENN, *supra*, note 87, p. 237; A. CURTIS, "The inflation factor in damages for breach of contract", (1980) 12 *Ottawa L.Rev.* 489-501, pp. 500-501.

134. These figures are given only as an example of how retrospective rates of inflation and indexes would work; they are not intended as an actual illustration of how the value of the Canadian dollar decreased between 1970 and 1984.

135. F.A. MANN, *supra* note 119, pp. 83-84.

Therefore, if the law would acknowledge the need to use economic indexes, and if serious thought were given to devising the best index to be used for this purpose, I believe that civil law as well as common law could achieve simultaneously the aims of encouraging plaintiffs to mitigate losses and of giving them full compensation, as at the date of judgment, for those losses which were not avoidable, particularly the effects of inflation.

## CONCLUSION

In the preceding pages I have shown that, both in civil law and in common law, there is a duty for plaintiffs to take reasonable steps to mitigate losses that follow breaches of contract; however, it appears that the concept of mitigation has achieved a much greater level of abstraction in common law than in civil law.

In common law mitigation is a principle of law: it is equivalent to other principles such as causation and remoteness. The principle of mitigation gives solutions to legal problems by giving rise to legal rules, through judicial decisions. By comparison, in civil law mitigation has not reached the status of a legal principle; it is simply an element to be taken into account in the practical implementation of certain legal principles to which it is related, namely *dommage direct* and *péjudice réparable*. In other words, although the concept of mitigation unquestionably exists in civil law, it does not possess the same status or the same level of abstraction as in common law.

This difference has its origins in two main factors: it is due to the effect of the codification of the civil law and also to the different lights in which breach of contract is viewed in common law and civil law.

The theoretical foundation of contracts in civil law is "the theory of the inherent moral force of a promise".<sup>136</sup> As may be seen in article 1134 of the French *Code civil*, a contract is a type of private law that regulates the behaviour of the parties:

Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites . . . .

Elles doivent être exécutées de bonne foi.

A breach of contract is an offence to this private law; it follows that, just as a person may not buy the right to contravene a public law, one may not buy the right to break a contract by giving pecuniary compensation to the injured party. Therefore, remedying breaches of contract becomes

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136. R. POUND, *An Introduction to the Philosophy of Law*, London, Yale University Press, 1954, p. 146.

primarily an issue of making the offending party hold to his promise. René Savatier writes that

l'homme digne de ce nom est celui qui s'engage, qui se lie par ses promesses : il est libre de n'en pas faire; mais quand il les fait, il engage sa foi. Le plus grave, dans un affaiblissement du contrat, c'est qu'on perd de vue la valeur de cette foi contractuelle.<sup>137</sup>

From this doctrine of the moral obligatory force of contracts stems the rule that enforced performance, rather than monetary compensation, is the basic remedy for breach of contract. Unfortunately, the concept of mitigation is not readily compatible with enforced performance :

It would be inconsistent, on the one hand, to allow or encourage the plaintiff to insist upon performance by the defendant, but on the other hand, to insist that he take reasonable steps to avoid the full implications of the breach.<sup>138</sup>

Hence, a consequence of the predominance of enforced performance over pecuniary compensation in civil law is to keep the concept of mitigation to a subsidiary role.

In contrast, in common law, monetary compensation rather than specific relief is the primary remedy for breach of contract. This has allowed the concept of mitigation to emerge and to develop into a principle of law. The evolution of the status of the concept is quite clear: in the first half of the eighteenth century plaintiffs were bound to claim the full value of the defendants' failed promises and in exchange they were bound to perform their own promises. During the second half of the eighteenth century plaintiffs became allowed to seek relief from third parties and to sue the contract breakers for the deficiency; this change in the law was in accordance with the development of the view of contract as a bargain, undoubtedly influenced by the emergence of a market economy.<sup>139</sup>

Once plaintiffs were allowed to mitigate their losses, the next step was to force them to do so, *i.e.*, "to recognize the right of the jury to award damages on a similar basis even where the plaintiff had not mitigated his loss but the jury felt that he ought to have done so."<sup>140</sup> This step was taken in the course of the nineteenth century, and the actual concept of mitigation became part of the law of remedies for breach of contract.

In civil law jurisdictions the fact that a plaintiff was in a position such as to be able to mitigate his loss was also considered an important

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137. R. SAVATIER, *Les métamorphoses économiques et sociales du droit civil d'aujourd'hui*, 3<sup>rd</sup> ed., Paris, Dalloz, 1964, p. 151.

138. D.H. PARRY, *The Sanctity of Contracts in English Law*, London, Stevens & Sons, 1959, pp. 5-8.

139. P.S. ATYIAH, *The Rise and Fall of Freedom of Contract*, Oxford, Clarendon Press, 1979, p. 425; R.J. Sharpe, *supra* note 19, pp. 138-140.

140. P.S. ATYIAH, *supra* note 139, p. 425.

factor in measuring the extent of the loss in the seventeenth and the eighteenth centuries. For instance, both Domat and Pothier refer, by way of illustration, to the fact that avoidable losses following a breach of contract ought not to be compensated. By the end of the eighteenth century civil law and common law positions with regard to mitigation were indeed quite similar; however, from the beginning of the nineteenth century a serious and irreconcilable split evolved between these two legal systems.

At that time, mitigation was transformed from a legal rule into a legal principle in common law.<sup>141</sup> From this point on, it gradually became settled that

The plaintiff *must* mitigate his loss, and the jury *must* only award damages representing the loss which the plaintiff would have suffered if he had done so. . . . By the mid-nineteenth century the mitigation [principle] was generally established throughout most of contract law.<sup>142</sup>

There are no grounds for denying that a similar evolution could have taken place in civil law too, except for the fact that civil law was codified and *codification prevented this process*.

In the pre-codification doctrine of Domat and Pothier, mitigation had not yet attained the status of a legal principle.<sup>143</sup> At this time, mitigation was considered to be a subsidiary and subordinate factor, related to the legal principles that govern the process of measuring the extent of recoverable losses. For instance, Pothier refers to the issue of avoidable losses in the course of his discussions of the issues of foreseeability and direct losses in contractual liability; Domat mentions it in a discussion of the extent of liability following a breach of contract. I suggest that, at the time when codification of civil law was achieved, mitigation had not yet reached the status of abstraction necessary to justify its inclusion among the legal principles that were to be embodied in Civil Code. The process towards this result was begun; however, as in common law at that time, it had not yet been completed. Hence, no provision dealing expressly with avoidable losses in contract was included in the Code. As a consequence of this, mitigation was forced to remain an implicit constituent of those legal principles governing the extent of recoverable losses that were expressly formulated in the Code.

An important characteristic of codified systems of law is that every legal problem must be answered on the basis of an existing legal principle. When the problem is one of civil law, one must refer to the appropriate provision of the Civil Code. In this context, no theory of

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141. On legal rules and legal principles in civil law and common law, see René DAVID, *French law — its structure, sources and methodology*, Bâton Rouge, Louisiana State University press, 1972, pp. 76 ff.

142. P.S. ATIYAH, *supra* note 139, pp. 425-426.

143. See René DAVID, *supra* note 141, p. 24.

mitigation could be devised in civil law outside of the concepts to which mitigation is implicitly related in the Code. In addition, no consideration of policy could transform mitigation into a legal principle, equal to and independent from those expressed in the Code. Consequently through codification *the role of the concept of mitigation was crystallized into that of a subsidiary and implicit factor in the measurement of the extent of losses.*

Since codification, in order to be raised to the level of abstraction of a legal principle in civil law, the concept of mitigation would have to be made the object of an express and general provision in the Code. However, at the present time, there is no evidence that such process is going to take place. Indeed mitigation, although it undoubtedly exists in civil law, remains poorly developed on a practical level, as it appears that there are hardly any decisions on this subject among reported cases of breach of contract. The only explanation I may offer to account for this state of affairs is that the considerations which give mitigation its primordial importance in common law, namely efficiency and avoidance of waste, are much less important in civil law. The two basic concepts which govern the civil law of remedies for breach of contract are the moral obligatory force of contracts and the predominance of enforced performance over monetary compensation. Considerations of efficiency and avoidance of waste do exist in civil law and they have allowed the concept of mitigation to emerge in the law of remedies; but the role of these considerations remains subsidiary, owing to the attitude that civil law adopts toward breach of contract and the recovery of losses consequent on a breach.

If this attitude toward remedies for breach of contract was going to change in civil law, the status of mitigation could possibly evolve. At the present time, however, one is bound to acknowledge that, although the concept of mitigation exists in civil law as well as in common law, it has achieved *a much greater level of abstraction and of generality in common law by gaining the status of a legal principle* in the nineteenth century. Meanwhile mitigation remains a subordinate and dependent rule in civil law.

The only way in which civil law may be more developed than common law regarding the issue of mitigation, is that civil law acknowledges that the effect of inflation cannot be subject to a duty to mitigate on the part of plaintiffs. However, the advantage of civil law in this respect is very slight since, like common law, it still holds that when a plaintiff has covered his loss, the effect of inflation ought to be ignored in assessing his pecuniary compensation. Moreover, it appears that common law also tends to consider mitigation and inflation as two distinct issues.

In this context, I believe that the most appropriate conclusion to this work must be, very broadly, to underline the fact that this comparative study of mitigation in contract law has revealed certain similarities between civil law and common law but also, and more importantly, certain



differences in respect of their processes of remedying breaches of contract, and in respect of the historical and theoretical backgrounds upon which these processes are built.