Mitigation
in the Law of Damages

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Abstract

This thesis is the first monograph on mitigation in the English law of damages. Mitigation concerns the effect of the claimant's post-breach conduct on the assessment of damages. The leading texts propose that the doctrine consists of two main rules: first, the claimant cannot recover damages for losses that it could reasonably have avoided (the 'avoidable loss rule'); and second, the claimant cannot recover damages for losses that it has in fact avoided, except where the benefit did not 'arise out of the breach' (the 'avoided loss rule').

This thesis proposes a new descriptive and explanatory account of mitigation. It argues that the apparent distinction between the avoidable and avoided loss rules is illusory; instead, the rules of mitigation apply symmetrically to both harms and benefits. Contrary to the leading texts, it is argued that judges have been correct to explain mitigation as an aspect of causation. However, to understand why, we must move beyond the 'but-for' concept of causation and instead seek to apply the ordinary causal principles that people use outside the law.

The implications of the thesis extend beyond the law of mitigation. First, the rules of mitigation also explain the so-called 'market rule', the 'betterment' rule, and 'supervening acts by the claimant'. Second, the thesis shows why the rights-based model of damages has overstretched in claiming that the law provides a universal entitlement to 'substitutive damages' for the infringement of rights. Third, the thesis revives and defends key arguments from Hart and Honoré's seminal investigation into ordinary causal concepts, with implications for every area of law where causal reasoning is invoked.

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1
Preliminaries

1.1 Introduction

'The principle of mitigation is to a surprising degree theoretically undernourished and underwritten'.[1] Bridge wrote this nearly thirty years ago, but his article remains the only extended attempt to explain the English law of mitigation. With one important exception,[2] the treatment of mitigation in the leading texts on damages is brief.[3] Unlike the remoteness and penalties rules (amongst others), mitigation has received virtually no scholarly attention to date. And yet mitigation is perhaps the single most litigated doctrine in the whole of the law of damages, indeed perhaps in all of private law.[4] If the central arguments of this thesis are accepted, the law of mitigation also has great theoretical significance, both to other legal rules and to general theories of damages.

Mitigation concerns the effect of the claimant's post-breach conduct on the assessment of damages. It applies whenever the court is required to assess loss, including (but not limited to) compensatory damages for torts and breaches of contract.[5] The

[1] Michael G Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398, 399.

[2] Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) ch9.

[3] See eg Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 122-28; HG Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015); GH Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015).

[4] Since 2015 there have been eight appellate decisions raising points of law concerning mitigation: *Stevens v Equity Syndicate Management Ltd* [2015] EWCA Civ 93, [2015] 4 All ER 458; *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629, [2015] PNLR 28; *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2015] EWCA Civ 1262, 163 Con LR 27; *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082; *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] PNLR 7; *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep 383; *Bacciottini v Gotelee & Goldsmith* [2016] EWCA Civ 170; *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359. On a rough count, there have been around twenty appeals since 2010.

[5] 'Damages' hereafter refers to 'compensatory damages' unless otherwise specified.

orthodox account of mitigation consists of two rules: first, the claimant cannot recover damages for losses that it could reasonably have avoided (the 'avoidable loss rule'); second, the claimant cannot recover damages for losses that it has in fact avoided, except where the benefit did not 'arise out of the breach' (the 'avoided loss rule'). The orthodox account of these rules places a heavy emphasis on fact. The leading texts disclaim any attempt to specify how the mitigation rules are applied; instead their descriptions of mitigation consist of a catalogue of 'illustrative' decisions.

This thesis makes a fresh attempt to describe and explain the English law of mitigation. Its conclusions are quite different from the leading texts. First, the application of mitigation can be specified using rules that distinguish between questions of law and fact. Indeed, once these rules are accurately described, the apparent distinction between the avoidable and avoided loss rules dissolves. Second, judges have been right all along to explain mitigation as an aspect of causation; the leading texts have been wrong to resist this explanation. However, to see why, we must move beyond the 'but-for' concept of causation, and instead seek to understand the ordinary causal principles that people use outside the law. In this respect, the law of mitigation draws on principles that are not specifically legal.

The implications of this thesis extend beyond mitigation. First, the rules of mitigation also explain the so-called 'market rule', the 'betterment' rule, and 'supervening acts by the claimant'. These doctrines are discussed briefly in the conclusion to the thesis.[6] Second, the thesis shows why the rights-based model of damages has overstretched in claiming that the law provides a universal entitlement to 'substitutive damages' for the infringement of rights.[7] However, it also shows that the loss-based model of damages can and must accommodate at least some compensatory awards greater than 'factual loss'. Third, the

[6] Section 8.2. In relation to the market rule, see further Andrew Dyson and Adam Kramer, 'There is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 LQR 259.

[7] Robert Stevens, *Torts and Rights* (OUP 2007) ch4; Robert Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart 2009).

thesis revives and defends key arguments from Hart and Honoré's *Causation in the Law*,[8] with implications for every area of law where causal reasoning is invoked.[9]

1.2 Aims and Scope

The aim of the thesis is to describe and explain, but not to justify, the law of mitigation. These aims are clarified in detail in Chapter Two. The thesis rejects the recent trend towards 'interpretive' accounts of private law. The methodology of the thesis rests on a positivist theory of law. In short, it supposes that one can describe and explain the law as it is, without evaluating its merits. Lawyers are often not best-placed to provide (normative) justifications of the law, and this is especially true of mitigation. The law of mitigation may well be justified, but the thesis does not stand or fall by that claim. Description and explanation of the law are complex tasks in themselves, particularly in relation to mitigation, where the case law is vast and relatively untouched by legal scholars.

The scope of the thesis is the English law of mitigation. Mitigation can roughly be defined as the rules for determining the effect of the claimant's post-breach conduct on the assessment of damages. This definition captures the law of mitigation in its entirety,[10] but it is too broad. The following other rules of damages would also fall (at least partly) within this definition: remoteness; contributory negligence; the market rule; betterment; and supervening causation. A thesis of such broad scope would have had to sacrifice too much detail. Consequently, a narrower definition was needed. The definition adopted is essentially formalist: the scope of 'mitigation' is whatever the judges say it is; in other words, the thesis focuses on those cases that judges have expressed in terms of mitigation.[11]

[8] HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985).

[9] For example, criminal law as well as private law.

[10] Cf McGregor, *Damages* (n2) [9-002]: 'The principal meaning of the term "mitigation" … concerns the avoiding of the consequences of a wrong'. This definition, which would include conduct by third parties, defendants and natural events, does not reflect modern usage.

[11] An exception concerns cases predating the first judicial references to 'mitigation'. In other words, the rules that are now understood as part of 'the law of mitigation' are traced back before the terminology of mitigation was first introduced: see further Section 3.3.1.

This formalist definition has the advantage of reducing the indirect evaluation associated with selecting a subject of study.[12] By adopting the judges' internal perspective to determine the scope of the analysis, one can avoid imposing one's own hypothesis in selecting the relevant cases. On the other hand, this method excludes many cases that, following analysis, appear to share a common explanation with the law of mitigation (so defined). In particular, this thesis does not address in detail the market rule, betterment, or supervening acts by the claimant.[13] There is no doubt that this weakens the argument on mitigation; or to put things more positively, the argument would be more compelling with these other cases in mind. However, a line had to be drawn somewhere, and the formalist definition seemed the most neutral way to draw it.

The thesis examines the *English* law of mitigation. Its scope extends only to decisions of the courts of England and Wales, including appeals from other jurisdictions heard by the English courts.[14] At the risk of 'cherry-picking' favourable authorities from other jurisdictions, this thesis excludes foreign decisions altogether.[15] Likewise, the thesis only addresses legal scholarship pertaining to English law.[16] There are two main reasons for this restriction. First, the body of English cases on mitigation is already vast; to analyse other jurisdictions was not practically possible. Second, the law of mitigation has to some extent diverged in other jurisdictions, most notably in the United States. A comparative study of mitigation would make for an interesting further project, but was not feasible in this thesis.

The law of mitigation is universally applicable whenever the court is required to assess damages.[17] It applies in the same way to claims in torts and breach of contract, as

[12] Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) ch3. It is not claimed that this thesis avoids indirect evaluation altogether.

[13] These rules are discussed in the body of the thesis, but only to the extent that judges themselves have expressed a link with the law of mitigation.

[14] For example, decisions of the Privy Council, and Scottish appeals in the House of Lords.

[15] The only exception is where the foreign decision was cited in an English decision, and then only to the extent of the citation.

[16] In relation to the description of 'ordinary causal principles' (which do not pertain to any legal system), the thesis does refer to foreign materials. The thesis also refers to foreign scholarship where it is cited in other scholarship on English law.

[17] Section 6.4.1.

well as to statutory rights to compensation (whether strict liability or fault-based). It also applies to claims for equitable compensation for breach of trust. The scope of the thesis accordingly extends beyond torts and breach of contract where appropriate, although such cases are relatively limited in number. The law of mitigation concerns only the claimant's conduct after it had knowledge of the breach.[18] The rules applicable to the claimant's earlier conduct (which are not expressed as 'mitigation' and differ in several respects) are outside the scope of the thesis. The universal application of mitigation and its temporal scope are discussed in Chapter Six.

1.3 Overview

Chapter Two clarifies the aims of the thesis. It outlines a framework for the aims of private law scholarship based on Hart's positivist theory of law.[19] It establishes three possible accounts of the law: descriptive, explanatory and justificatory. Descriptive accounts of the common law aim to describe rules of law abstracted from the body of precedents. Explanatory accounts of the common law aim to describe the actual reasons why these rules are as they are. Justificatory accounts aim to provide normative reasons in favour of the law as it is. These three aims are distinguished from the trend towards 'interpretive' accounts of private law. Most private law scholarship is not really interpretive in the Dworkinian sense,[20] and this label has the potential to mislead. The chapter defends the decision to describe and explain, but not to justify, the law of mitigation.

Chapter Three outlines the orthodox account of mitigation put forward in the leading texts. It places mitigation in context within the orthodox account of the law of damages as a whole. It briefly describes the historical development of the law of mitigation, highlighting the influence of McGregor's description of mitigation on the orthodox account.[21] It argues

[18] Section 6.4.2.1.

[19] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012).

[20] Ronald Dworkin, *Law's Empire* (Hart 1998).

[21] McGregor, *Damages* (n2) ch9.

that on the orthodox account of damages, McGregor's tripartite exposition of mitigation can be simplified into two rules. First, the 'avoidable loss rule' limits the award of damages to less than the claimant's factual loss; this rule applies where the claimant acted unreasonably. Second, the 'avoided loss rule' exceptionally awards damages greater than the claimant's factual loss; this rule applies where the claimant obtained a benefit that did not 'arise out of the breach'. These two rules make up the modern orthodoxy of mitigation.

Chapter Four highlights the problems with the orthodox account of mitigation. It identifies three main descriptive problems with the avoidable loss rule. First, the rule does not seek to prescribe the claimant's conduct, despite references to how the claimant 'must' or 'should' act. Second, the reasonableness of the claimant's conduct is not exclusively a question of fact. Third, the legal effect of the rule does not merely 'cut back' factual losses. The chapter also identifies two main descriptive problems with the avoided loss rule. First, the application of the '*British Westinghouse* test' for collateral benefits is uncertain.[22] Second, the legal effect of the rule is an anomaly within the orthodox account of damages. Finally, the chapter also evaluates the three main explanations of the law of mitigation put forward by the leading texts on damages: encouraging self-reliance, the prevention of waste, and remoteness.

Chapter Five explains the law of mitigation as an application of ordinary causal principles. It highlights the extent of judicial support for the causal explanation of mitigation, but acknowledges the vagueness of judges' causal reasoning. The causal principles that explain the law of mitigation extend beyond the 'but-for' concept of causation. The relevant principles derive from causal attributions outside the law; they are not specifically legal. The chapter relies on Hart and Honoré's account of ordinary causal principles,[23] substantiated and refined by subsequent research within cognitive science. The chapter proposes a new descriptive account of mitigation based on two rules: the 'restoration rule' and the 'abnormality rule'. These rules apply where the claimant made a

[22] *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL).

[23] Hart and Honoré (n8), especially ch2.

choice to depart from a legal norm or a descriptive norm respectively. These rules apply symmetrically to both harms and benefits.

Chapter Six illustrates the application of the new descriptive account of mitigation to the 'avoidable loss' cases. In relation to the restoration rule, the claimant will be held to have acted unreasonably where it made a choice not to restore the position that it would have been in but-for the breach (the 'non-breach position'). In relation to the abnormality rule, the claimant will be held to have acted unreasonably where it made a choice to restore the non-breach position in an abnormal way. The issues of choice and abnormality are not specifically legal; they raise 'questions of fact'. By contrast, the restoration of the non-breach position raises a question of law. Where the restoration or abnormality rule applies, damages are assessed on a counterfactual basis. Finally, the chapter resolves three puzzles concerning the scope and application of the orthodox avoidable loss rule.

Chapter Seven illustrates the application of the new descriptive account of mitigation to the 'avoided loss' cases. The vast majority of avoided loss cases can be explained as an application of the restoration rule. This rule has 'symmetrical' application; it applies in the same way to both harms and benefits. In other words, the claimant is responsible for the outcome of its choice not to restore the non-breach position, for better or worse. Where the restoration rule applies, damages are assessed counterfactually as if the claimant had restored the non-breach position, even though in fact it did not; this is what is meant by the concept of 'avoided loss'. By contrast, where the claimant either had no choice to restore the non-breach position or did in fact restore it, the assessment of damages will take into account the benefit received.

The conclusion highlights the implications of the thesis. The main implication concerns other rules within the law of damages. In particular, the market rule and the betterment rule are also applications of the restoration rule. The rule for supervening acts by the claimant is also an application of the abnormality rule. In short, these rules of damages are also explained by ordinary causal principles. A further implication of the thesis concerns the rights-based model of damages. Many of the authorities cited in support of the 'substitutive damages' thesis are better explained as an application of the restoration rule of mitigation; they do not support a universal award for the infringement of rights. The loss-

based model of damages can accommodate the effect of the restoration rule by recognising that the legal concept of loss incorporates ordinary causal principles.

2
Aims and Methodology

2.1 Introduction

This chapter clarifies the aims and methodology of the thesis. It responds to a recent trend in private law scholarship towards 'interpretive' accounts of private law.[1] This thesis departs from that trend. Instead it relies on a framework for the aims of private law scholarship based on Hart's positivist legal theory. This chapter outlines three possible aims: description, explanation, and justification. Descriptive accounts of the common law aim to describe rules abstracted from the body of precedents. Explanatory accounts aim to provide the actual reasons why these rules are as they are; this is a second-order form of description. Justificatory accounts aim to give normative reasons in favour of the law as it is. Description and explanation of the law are complex tasks for which (unlike justifications) lawyers have unique claims to expertise. This chapter defends the decision to describe and explain the law of mitigation, but not to justify it.

[1] See eg Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 5, where the editors summarise that 'Rights theorists [are] keen to emphasise that their goal is an *interpretive* one: to give the "best account" of private law or particular private law doctrines' (emphasis in original). See also Stephen Smith, *Contract Theory* (OUP 2004) ch1; Allan Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 MLR 320; Robert Stevens, *Torts and Rights* (OUP 2007) 306; Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007) 21; David Winterton, *Money Awards in Contract Law* (Hart 2015) 16-20.

2.2 Three Possible Aims

2.2.1 Description

It might be thought that the aim of 'describing' the law is rather modest. However, this view is only tenable if one confuses a description of *the law* with the distinctly more rudimentary task of describing *legal sources*.[2] The facts, outcomes and judicial reasoning of individual judgments provide the sources from which the common law can be identified, but no branch of legal theory regards these sources as themselves 'the law'.[3] On any view, using legal sources to describe the law is a complex task. The exact requirements of this task depend on contested issues of legal theory. These jurisprudential debates cannot be ignored, even where the aim is to describe some particular aspect of private law (rather than 'law' in general). On the other hand, it would also be impossible to settle questions of legal theory in a thesis on private law. It is therefore necessary to begin by stating some assumptions.

The descriptive account adopted here makes three assumptions, all of which derive from Hart's theory of law in *The Concept of Law*.[4] First, it assumes a positivist theory of law. This means that the existence and content of the law does not depend on its merits.[5] Second, it assumes that it is possible to describe the law without evaluating its merits.[6] The descriptive methodology adopted in this thesis seeks to reduce indirect value-judgements by using the internal perspective of judges as the method for selecting an initial category of

[2] Smith appears to make this mistake in his version of a 'descriptive account' of the law: Smith, *Contract Theory* (n1) 6. See further text to n136.

[3] On Dworkin's interpretive legal theory, judgments may be used at the preinterpretive stage, but they are not 'law' *in the interpretive sense*: Ronald Dworkin, *Law's Empire* (Hart 1998) 90-92, 101-104.

[4] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012).

[5] For more detailed clarification of this proposition see: John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 American Journal of Jurisprudence 199. In this chapter, 'merits' is taken to encompass not only morality but also any other normative criteria (insofar as they are distinct).

[6] Hart, *The Concept of Law* (n4) vi, 240, 242-44. See further Nicola Lacey, 'Analytical Jurisprudence Versus Descriptive Sociology Revisited' (2005) 84 Texas Law Review 944, 953-960. It has been argued that Hart failed to adhere to this methodology in his own work: see Stephen R Perry, 'Hart's Methodological Positivism' in Jules L Coleman (ed), *Hart's Postscript: Essays on the Postscript to "The Concept of Law"* (OUP 2001).

description ('the law of mitigation').[7] Third, it assumes that the common law consists of rules abstracted from the body of precedents; judges create (rather than declare) these rules incidentally when they decide individual cases.[8] None of these assumptions are defended here. In particular, all three assumptions are incompatible with Dworkin's interpretive legal theory.[9]

2.2.1.1 *Methodology*

There are two stages to developing a descriptive account of the law.[10] First, one must apply the doctrine of precedent to determine both the ratio decidendi and the degree of authority of individual cases. Second, one must attempt to 'abstract' from these individual precedents a set of rules that is as consistent as possible with the body of precedents. These two stages are discussed sequentially in this section. In practice, the process of developing a descriptive account of the law is likely to be iterative, as the 'describer' switches back-and-forth between (1) and (2) in order to adjust their provisional account of the rules as they read further cases. This is due to the practical difficulty of picking out material facts and reasoning on the first read of a case; it does not involve evaluating the *merits* of the rules provisionally described.

The first stage involves applying the doctrine of precedent. In order to determine what a particular case is precedent for, one must determine the ratio decidendi of the decision.[11] This is a complex task. The approach to determining the ratio is a matter of

[7] See further Section 1.2.

[8] Hart, *The Concept of Law* (n4) ch7.

[9] Dworkin's legal theory is 'relentlessly interpretive', both substantively and methodologically: Dworkin, *Law's Empire* (n3) 226. Throughout this chapter, references to Dworkin are references to Dworkin's view in *Law's Empire*, unless otherwise indicated.

[10] Descriptive accounts of the law are sometimes referred to as 'doctrinal' scholarship.

[11] This is a simplification because the authority of precedent is not reducible solely to the ratio: Neil Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 91. See especially ibid 70: 'The most compelling *dicta* will often, for all practical purposes, be indistinguishable from pronouncements which form part of the *ratio*'. See eg *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), taken as authority for liability in tort for negligent misstatements.

judicial practice, for which a set of 'meta-rules' can loosely be stated but not precisely defined.[12] Although literally translated as 'the reason for the decision', the ratio of a case is not simply the whole of the judge's reasoning.[13] Simple 'definitions' of the ratio are liable to mislead.[14] For the purpose of deciding individual cases, judges can (and do) take the pragmatic approach that it is not necessary 'to spell out with great difficulty a ratio decidendi in order to be bound by it'.[15] However, this approach is not really open to those seeking to provide a description of the law.

How can the ratio be determined? Two broad approaches are discernible in judicial practice; these are the approaches that a legal scholar must mirror in developing a descriptive account of the law. They are best understood not as 'alternatives' (let alone 'definitions') but rather as concurrent features of judicial practice.[16] First, Cross and Harris suggest that the ratio 'is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him'.[17] On this approach, the ratio is the reasoning that the judge believed to be necessary for the decision, rather than the reasoning that actually was necessary.[18] The crucial point is that this approach relies directly on the *judicial reasoning* expressed by the judges in their judgments.

[12] Duxbury (n11) 75-90. Duxbury also highlights several other difficulties, including that: the distinction between ratio and obiter dicta can be blurred; not every case has a ratio; and some cases have multiple rationes. On these difficulties, see further ibid 68-75.

[13] Ibid 67. In particular, some parts of the reasoning may be obiter dicta.

[14] Ibid 76-77: 'It is certainly wrong … to define the ratio decidendi as a proposition in a judgment which, were its meaning to be inverted, would have altered the decision'.

[15] *Great Western Railway Co v Owners of the SS Mostyn (The Mostyn)* [1928] AC 57 (HL) 73 (Lord Dunedin). Cf *Nash v Tamplin & Sons Brewery Ltd* [1952] AC 231 (HL) 250 (Lord Reid), emphasising the judicial importance of establishing the ratio of previous cases.

[16] The exact approach may well vary from judge-to-judge, although collectively some relatively stable practices can be discerned.

[17] Rupert Cross and JW Harris, *Precedent in English Law* (4th edn, Clarendon 1991) 72, cited in *R (on the application of Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609, [2007] QB 140 [145] (Brooke LJ).

[18] Duxbury (n11) 77.

Another approach was identified by Goodhart.[19] Initially, Goodhart had been convinced that it was essential to stick to the reasons that the judges actually gave for their decisions, and not to construct other possible reasons for the outcome.[20] However, he later changed his mind in a seminal essay on 'Determining the *Ratio Decidendi* of a Case'.[21] There he argued that 'the first rule for discovering the *ratio decidendi* of a case … is that it must not be sought in the reasons on which the judge has based his decision'.[22] On this approach, the judge's reasons are only indirectly relevant, in that 'they may furnish us with a guide for determining which facts he considered material and which immaterial'.[23] Goodhart's conclusion was that 'It is by his choice of the material facts that the judge creates law'.[24] In other words, judges may determine the ratio of an earlier case based on its *material facts plus the outcome*.[25]

Unlike statutory rules, the authority of individual precedents can vary in degrees.[26] Again the 'meta-rules' for determining the degree of authority are a matter of judicial practice. In relation to the 'hierarchy of authority', this practice is well-established.[27] However, the authority of a decision also depends on various 'soft' qualities, including whether the decision was unanimous, whether it was given by highly-regarded judges or comparative lightweights, and on how other judges and scholars have assessed the decision as an effort in legal reasoning.[28] Furthermore, 'occasionally, judges will find in a precedent

[19] AL Goodhart, 'Determining the *Ratio Decidendi* of a Case' in *Essays in Jurisprudence and the Common Law* (CUP 1931).

[20] AL Goodhart, 'Three Cases on Possession' (1928) 3 CLJ 195, 197-98.

[21] For a summary of the criticisms leading to this change of mind, see further Duxbury (n11) 81-82.

[22] Goodhart, *Determining the Ratio* (n19) 4.

[23] Ibid 18.

[24] Ibid 10. Duxbury notes that this approach 'links the doctrine of precedent with the principle that like cases be treated alike': Duxbury (n11) 83.

[25] Goodhart, *Determining the Ratio* (n19) 25. This is the definition of ratio adopted in Glanville Williams, *Glanville Williams: Learning the Law* (ATH Smith ed, 15th edn, Sweet & Maxwell 2013) 96, also acknowledging Cross and Harris's alternative definition in fn3.

[26] Duxbury (n11) 23. See also ibid 58: 'The idea of judges formulating decisions so that they might bind as a statute binds is not inconceivable. But it is simply not what common-law judges do'.

[27] Williams, *Learning the Law* 110-20. Judicial practice is occasionally put on record in the law reports: see eg *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (HL).

[28] Duxbury (n11) 62-65.

"a canonical form of words" that they are content to treat as the settled formulation of a common-law rule'.[29] In developing descriptions of the law, legal scholars tend to apply these soft qualities by feel, but the underlying aim is to mirror judicial practice in applying the doctrine of precedent.

The second stage in developing a descriptive account of the law involves abstracting rules from the whole body of precedents. On Hart's positivist theory of the common law, the individual precedents are not themselves the law; they are the application of the law to the facts of particular cases.[30] The common law itself consists of a set of rules abstracted from the body of precedents. To describe the law is to describe these rules. This understanding rests on the assumption (not universally shared)[31] that the common law is judge-*made* law.[32] In other words, the rules of the common law are created rather than declared by judges,[33] as an incident of their deciding individual cases. The task of the 'describer' is to abstract a set of rules that is as consistent as possible with the whole body of precedents, having regard to the varying degrees of authority of individual precedents.

In every case that comes before the court, the judge's decision rests to some (often minimal) extent on the exercise of judicial discretion. Here, 'discretion' refers to a choice that is not constrained by the rules abstracted from the body of precedents, although in practice that choice remains constrained by other factors.[34] In most cases, there is little or no discretion because the application of the rules to the facts is clear.[35] However, in cases

[29] Ibid 60. See eg Viscount Haldane's formulation in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL) 689, which is now described as the 'classic statement of mitigation': *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep 383 [21] (Longmore LJ).

[30] Hart, *The Concept of Law* (n4) 134-35.

[31] See eg Dworkin, *Law's Empire* (n3) 254-58.

[32] Hart, *The Concept of Law* (n4) 135-36. This view is shared by all legal positivists.

[33] See further Allan Beever, 'The Declaratory Theory of Law' (2013) 33 OJLS 421. For an internal perspective, see eg Lord Reid, 'The Judge as Law Maker' (1972) 12 Legal Studies 22; and more recently Lord Neuberger, '"Judge Not, That Ye be Not Judged": Judging Judicial Decision-Making' (FA Mann Lecture, 2015) [41]: 'Judges are and always have been law-makers'.

[34] See further text to n75.

[35] Hart, *The Concept of Law* (n4) 135: 'the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule'.

where the existing rules appear to be (to varying degrees) 'indeterminate',[36] there will be greater scope for discretion. To the extent that a judge's decision rests on the exercise of discretion rather than the application of existing rules, its effect will be to develop rather than merely to apply the law, through the incidental creation of a new precedent.[37]

The scope and exercise of judicial discretion raises difficult issues.[38] In an essay published after his death, Hart wrote that 'the distinguishing feature of the discretion case is that there remains a choice to be made … which is not determined by principles which may be formulated beforehand'.[39] Lacey infers from this that 'the most natural reading … seems to be that [Hart] did not regard those constraints as counting as law in the same sense that rules do'.[40] That understanding is also adopted in this thesis. In other words, this thesis assumes that the principles that guide and constrain judicial discretion are not themselves part of the law. In describing the law, it is unnecessary to incorporate these principles, because in cases where the rules abstracted from the existing body of precedents no longer determine a judge's decision, by hypothesis the law has 'run out'.

Descriptive accounts of the law may themselves constrain judicial discretion, by clarifying what the body of precedents requires. In other words, the account may clarify where the law runs out *and where it does not*. If there were no descriptions of the law (for example, no textbooks) then judges would have to decide cases by following whatever handful of precedents were put before them.[41] A judge might then conclude that no precedent was applicable, or that the precedents conflicted, and therefore that the law was indeterminate. But in light of rules abstracted from the *whole body* of precedents, the

[36] Ibid 128.

[37] Ibid 272-76. See also HLA Hart, 'Discretion' (2013) 127 Harvard Law Review 652, discussed in Nicola Lacey, 'The Path Not Taken: HLA Hart's Harvard Essay on Discretion' (2013) 127 Harvard Law Review 636 and Geoffrey C Shaw, 'HLA Hart's Lost Essay: Discretion and the Legal Process School' (2013) 127 Harvard Law Review 666.

[38] Some of these issues are discussed in more detail below in relation to explanatory accounts of the law: text to n72.

[39] Hart, 'Discretion' (n37) 661.

[40] Lacey, 'The Path Not Taken' (n37) 644.

[41] Even if every precedent could be bundled together and presented to the judge on mass, there would be no prospect of hearing argument on them all.

application of the law to the facts may be clear. In such circumstances the judge's discretion is more constrained. It is unnecessary to conclude whether this constraint is a good or a bad thing, but it is clear that the doctrine of precedent rests on it.[42]

2.2.1.2 *Evaluating descriptive accounts*

What makes a good descriptive account of the law? The only relevant criterion is the *consistency* of the proffered set of rules with the body of precedents.[43] Here, 'consistency' is not some independent virtue; it is simply what it means to describe. Suppose that a spectator is watching a football match for the first time, and does not know the rules of the game. The spectator will eventually be able to abstract the rules of the game by observing the referee's decisions. Here, the referee's decisions are a metaphor for the body of precedents. If the spectator suggests rules that are 'inconsistent' with the referee's decisions (eg 'midfielders are allowed to handle the ball') then this is a poor descriptive account of the rules. To be clear, this conclusion has nothing to do with consistency in the evaluative sense: for example, it is irrelevant to description to propose that 'midfielders *should* be allowed to handle the ball because the goalkeeper can handle the ball'.

In assessing the consistency of the proffered set of rules with the body of precedents, one must take into consideration the features of the doctrine of precedent. In other words, the description of the rules must reflect the judicial practices that determine how precedents are relied upon by the courts.[44] So, one must assess the consistency of the set of rules with the rationes of the individual precedents. Given the two approaches that feature

[42] Duxbury (n11) 183: 'The value of the doctrine of precedent rests … in its capacity simultaneously to create constraint and allow a degree of discretion'.

[43] Charlie Webb, 'Contract as Fact and as Reason' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014) 137: 'If our inquiry is directed to decisions *in fact* reached and norms *in fact* identified and applied then … nothing should make its way in other than by virtue of its unqualified "fit" with these practices'.

[44] This is reflected in Smith's point that: 'traditional or doctrinal legal scholarship … [aims] to examine the law using language, concepts and techniques that are similar to those employed by (and in) the courts': Stephen A Smith, 'Taking Law Seriously' (2000) 50 University of Toronto Law Journal 241, 241.

in judicial practice for determining the ratio, an account can fairly be evaluated according to its consistency with both the *judicial reasoning* and the *material facts plus the outcome* of individual cases.[45] In assessing the consistency of the rules with the whole body of precedents, one must also take into account the varying authority of individual precedents, not only as regards their place in the hierarchy of authority, but also their other 'soft' qualities.[46]

If one succeeds in delivering a descriptive account of the law that is very consistent with the body of precedents, one occasionally hears the objection: 'So what difference does it make?' In its most extreme form, this is asking the impossible. If the proposed account shows that most of the cases were 'rightly decided' (in other words, consistent with the proffered rules), then the describer will have to concede that the judges have managed well enough by applying the rules as they already understood them. But on the other hand, if the proposed account shows that numerous cases were 'wrongly decided' (in other words, inconsistent with the proffered rules), then it is simply a bad descriptive account, because it is inconsistent with the precedents. It seems that it can only be one or the other.

This circle can sometimes be squared by reference to the varying authority of judicial precedents. So, where an account is broadly consistent with the precedents of most significant weight, but also points out a few 'weaker' precedents that would be decided differently according to the proffered rules, it can 'make a difference' whilst also being broadly consistent. 'Weak' precedents may include cases from the lower courts, cases with dissenting judgments, cases where the judges themselves expressed uncertainty about their decision, and so on. Note, however, that only consistency is strictly relevant to the account's success as a description of the law.[47] Whether the account 'makes a difference' is merely a by-product that may make the account more or less significant in practice, but not any better or worse. Any desire to demonstrate significance must not compromise the aim of consistency.

[45] Text to n16.

[46] Text to n28.

[47] In areas where the law is 'settled', it is quite easy to give a very good descriptive account that makes no 'difference' at all.

One further clarification is required. This thesis aims to provide a descriptive account of the law of mitigation. This account will be distinguished from the 'orthodox account' of mitigation. That term refers to the descriptive account put forward by the leading texts; in other words, the 'orthodox account' is a rival *scholarly* description of the law. Of course, the leading texts also claim that their description of the law is consistent with the body of precedents; however, they have abstracted different rules from those precedents ('the orthodox understanding'). The orthodox understanding of the law put forward in the leading texts should obviously not be equated automatically with the law itself,[48] because the law can only be abstracted from the body of precedents. In *Johnson v Agnew*, Lord Wilberforce famously warned of:

> …the dangers, well perceived by our predecessors but tending to be neglected in modern times, of placing reliance on textbook authority for an analysis of judicial decisions. It is on the face of it a jumble of unclear propositions not logically related to each other. It is 'supported' by footnote references to cases (two of this House and one of the Privy Council) which are not explained or analysed. It would be tedious to go through them in detail, but I am satisfied that, with the exception of the reference to *Henty* v *Schroder,* they fail to support the text.[49]

Textbooks, then, are fallible. Their description of the law can be 'orthodox' but wrong. The descriptive account put forward in this thesis is quite different from the orthodox account of mitigation.[50] That does not mean that the aim is to argue for a change in the law; the aim remains to give a more accurate description of the law as it is. As Smith puts it, 'What makes work doctrinal is that the author uses legal arguments and legal language – even when arguing for a radical reorganisation of the conventional legal understanding of law'.[51] It may well be that there is work left to do in refining the rules abstracted by the proposed account. Nevertheless, it is appropriate to evaluate the proposed account according to the extent to which it improves (descriptively) on the rules put forward by the leading texts.

[48] However, by 'reflexive effect' textbook accounts can sometimes *become* law: text to n93.

[49] *Johnson v Agnew* [1980] AC 367 (HL) 395-96.

[50] As it happens, the orthodox account of mitigation currently presented in the leading texts is only about fifty years old and was in effect the creation of a single scholar: see further Section 3.3.3.

[51] Smith, 'Taking Law Seriously' (n44) 247.

2.2.2 Explanation

An explanatory account of the law aims to describe the reasons why the law is as it is.[52] More specifically, it aims to describe the 'actual' reasons why the law is as it is, as opposed to the 'normative' reasons that could count in favour of the law as it is.[53] Here, the actual reasons are the reasons that in fact guided judges in the exercise of their judicial discretion. In these terms, an explanatory account of the law is a second-order form of description; instead of describing the law itself, we are describing the reasons why the law is as it is. In principle, any type of reason could be within the scope of the explanation;[54] in practice, the reasons identified are likely to be recognisably 'legalistic' because judges are constrained as a matter of social fact only to take into account certain factors in exercising their discretion.[55] Similarly, in principle any source may be relevant, but in practice the explanation is likely to be drawn mainly or exclusively from judgments.[56]

2.2.2.1 *Terminology and assumptions*

This thesis draws a distinction between providing 'normative' and 'actual' reasons. Raz, Scanlon and Parfit all broadly recognise this distinction, although they differ somewhat in their terminology.[57] As Raz puts it, '"Reasons" has two meanings. When the term is used in one meaning it refers to a normative consideration, when used in the other it refers to an

[52] This definition is based on Joseph Raz, 'Reasons: Explanatory and Normative' in *From Normativity to Responsibility* (OUP 2011) 16: 'Whatever provides or constitutes an explanation is the reason why whatever it explains is as it is … Reasons provide explanations'.

[53] Explanatory accounts of the law are sometimes referred to as 'theoretical' (rather than 'doctrinal') scholarship. The problem with the label 'theoretical' is that it often fails to distinguish between giving actual (descriptive) or normative (evaluative) reasons.

[54] In this sense, explanatory accounts of the law are not fundamentally different in kind from explanations in any other branch of the social sciences.

[55] See further text to n73 on factors in judicial discretion; cf text to n84 on subconscious biases. Here 'legalistic' refers to the types of reason commonly invoked in judicial practice; this is broader than 'legal' in the sense of reasons derived from rules of law.

[56] Text to n98.

[57] Raz, *Reasons* (n52); Joseph Raz, *Practical Reason and Norms* (OUP 1999) 15-20; Derek Parfit, *On What Matters* (OUP 2011) 31-38; Thomas Scanlon, *What We Owe to Each Other* (HUP 1998) ch1.

explanatory factor'.[58] Normative reasons '*count in favour* of that for which they are reasons';[59] normative reasons are therefore necessarily evaluative. By contrast, one can describe the reasons that explain why in fact something is as it is, without evaluating whether these are good or bad reasons. Raz calls these 'explanatory reasons';[60] Scanlon calls them 'operative reasons';[61] this thesis calls them 'actual reasons'. In application to the law, actual reasons *explain* why in fact the law is as it is, whereas normative reasons *justify* why the law should be as it is.[62]

Outside the law, hardly anyone denies this distinction between explaining and justifying.[63] For example, we can explain beliefs, actions and states of affairs without justifying them, by stating actual reasons: 'Why does he dislike Jack? Because Jack is French'; 'Why did he shoot the policeman? Because he wanted to escape'; 'Why does John have so much money? Because John works in banking'.[64] Conversely, we can justify without explaining, by offering normative reasons. For example, suppose that Bob dives into a pond to save a drowning baby. Here we might say that Bob 'did the right thing', because his action was supported by normative reasons. But, we might nevertheless acknowledge that Bob's actual reasons were different: for example, suppose that in fact Bob just wanted to impress Sally.

This thesis assumes that one can explain the law without justifying it. In other words, one can describe the actual reasons why the law is as it is, without evaluating whether or not those are 'good' ('normative') reasons. Hart's 'descriptive jurisprudence' adopted this

[58] Raz, *Reasons* (n52) 14. See also Raz, *Practical Reason* (n57) 18.

[59] Raz, *Reasons* (n52) 18.

[60] Ibid 13: 'The task of the present chapter is to vindicate the distinctness of the concept of normative reasons, and separate it from another, that of explanatory reasons'.

[61] Scanlon (n57) 18-19. Raz has also used the term 'operative reason', but in a slightly different connection (to distinguish 'auxiliary reasons'): see Raz, *Practical Reason* (n57) 33-35. That distinction is not drawn here.

[62] Coleman draws a broadly similar distinction between explanation and justification but defines his explanatory account of the law in a different way: see Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2001) ch1.

[63] Dworkin does deny this distinction, because he regards every description as implicitly evaluative: see Dworkin, *Law's Empire* (n3) 62-65.

[64] See also Raz, *Reasons* (n52) 16.

distinction.[65] Hart argued that as an external observer one could describe the 'insider's internal point of view' without sharing or endorsing that view.[66] In exercising judicial discretion, the actual reasons that guided the judge's decision may have been expressed in normative terms: for example 'defendants should not be allowed to profit from their wrongs'. Nevertheless, the aim of an explanatory account of the law is to *describe* whatever those actual reasons were, not to evaluate them as 'good' or 'bad' reasons. As Hart put it, 'Description may still be description, even when what is described is an evaluation'.[67]

In summary, explaining an area of the law involves describing the actual reasons that guided judicial discretion in the cases that make up the relevant body of precedents. By contrast, earlier it was clarified that describing the law involves describing the rules of law abstracted from the body of precedents. Both of these accounts are descriptive (not evaluative), but they are describing different things. To signpost the difference between the two objects of description, this thesis will refer to the actual reasons as 'principles', distinct from the 'rules' of the common law. So, in these terms, descriptive accounts describe the rules themselves, whereas explanatory accounts describe the principles that explain the creation, development and maintenance of those rules. Principles explain why the rules of law are as they are.

This definition of rules and principles is consistent with Hart's understanding. Hart gave two grounds for distinguishing rules and principles.[68] First, 'principles are, relatively to rules, broad, general, or unspecific, in the sense that often what would be regarded as a number of distinct rules can be exhibited as the exemplifications or instantiations of a single principle'.[69] This fits with the idea that explanatory principles provide the actual reasons why the rules of law are as they are. Second, Hart thought that principles 'refer more or less explicitly to some purpose, goal, entitlement, or value', adding that such principles may be

[65] Hart, *The Concept of Law* (n4) 242. For discussion and criticism of this methodology, see further John Finnis, 'On Hart's Ways: Law as Reason and as Fact' (2007) 52 American Journal of Jurisprudence 25, 27-29.

[66] Hart, *The Concept of Law* (n4) 242. See further 240-44.

[67] Ibid 244.

[68] Ibid 259-63.

[69] Ibid 260.

'regarded from some point of view' as contributing to a justification of the rules of law.[70] This fits with the idea that the actual reasons that guided judicial discretion ('principles') are likely to have been *regarded as* normative reasons by the judges who relied on them.[71]

2.2.2.2 *Methodology*

The rules of the common law are created, developed and maintained through the exercise of judicial discretion. Recall that 'discretion' refers to a choice that is not constrained by the rules abstracted from the body of precedents.[72] The common law is created and developed when judges exercise discretion in circumstances where the application of the existing law to the facts is to some degree indeterminate. The common law is also constantly 'maintained' by judicial discretion, in the sense that courts with the power to overrule previous decisions have the power to change the law; even their decision not to do so thus involves a passive exercise of discretion. It follows that to explain why a particular area of the common law is as it is, the central aim is to describe the actual reasons that guided judicial discretion in the creation, development and maintenance of the relevant rules.

The scope and exercise of judicial discretion depends on judicial practice. As Lord McCluskey put it, 'judges are not engaging in some inexorable exercise in which every choice is determined by existing law'; instead, discretion enables judges 'to declare results which derive at least in part from philosophies, attitudes and influences which are not themselves rules of law'.[73] It would be impossible to provide a full account of judicial discretion here.[74] It is merely noted that in practice the exercise of judicial discretion is subject to some fairly

[70] Ibid 260.

[71] To be clear, this does not mean that the judge's reasons *were* good reasons; it just means that the judges *thought* that they were good reasons, which is why they relied on them.

[72] Text to n34.

[73] Lord McCluskey, 'Law, Justice and Democracy: The Clanking of Medieval Chains' (Reith Lectures, 1986).

[74] See further Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1994) ch11 'The Inner Logic of the Law'.

stable constraints, even though there are no formal sanctions for their non-observance.[75] For example, judges may exercise discretion by invoking 'the principle that wrongdoers should not be allowed to profit from their wrong' (even though this is not a rule of law), or by invoking some general moral principle, but they nevertheless realise that it would not be acceptable to exercise discretion on the basis of annoyance at counsel for the claimant.

In the most general terms, the types of actual reason that guide judicial discretion may be categorised as 'legal' or 'non-legal'. In relation to legal principles, Lord Neuberger has acknowledged that 'A Judge is often called upon to make new law … by developing existing principles to address novel situations'. [76] In these circumstances, although the decision is not determined directly by any existing rule of law, new rules are developed by recourse to the principles that explain (or 'underlie') the existing rules. An example of this type of actual reasoning might be the invocation of the 'principle of freedom of contract'. This principle is not itself a rule of law, but it appears to explain various rules such as the common law enforcement of exclusion clauses. Note that we can describe this principle as an actual reason without evaluating whether freedom of contract is a 'good thing'.

In relation to the non-legal principles that guide judicial discretion, we enter into even more complex territory. An important factor is the perceived 'merits' of the individual case; lawyers are entirely familiar with the proposition that 'hard cases make bad law'.[77] However, the perceived merits in turn depend on a variety of factors. Lord Neuberger has suggested that these include 'the commercially sensible, practical and morally acceptable result'[78] and 'the practicalities and justice of the case'.[79] Note that 'morality' (at least in the narrow sense) is only one of the non-legal factors listed by Lord Neuberger. Internally, all of these factors may be regarded by judges as providing normative reasons for their

[75] Sociologists would describe these constraints as matters of 'social fact'.

[76] See Neuberger, 'Judging Judicial Decision-Making' (n33) [42].

[77] See eg *Cerberus Software Ltd v Rowley* [2001] EWCA Civ 78, [2001] ICR 376 [26] (Sedley LJ): 'Mr Dineen urges us to say that it is the law and to leave it alone, reminding us that hard cases make bad law. My concern is that bad law makes hard cases'.

[78] Neuberger, 'Judging Judicial Decision-Making' (n33) [11].

[79] Ibid [15].

decision; as external observers we can describe each of these factors without evaluating them as 'good' or 'bad' reasons.

The rules of the common law are created and developed incrementally over many cases; these rules may then be maintained in many subsequent cases. It is impossible to think that in every one of these cases judicial discretion was exercised for exactly the same actual reasons. It is openly acknowledged that the weight given to legal and non-legal principles varies from judge-to-judge and case-to-case.[80] Within these two categories there is likely to be further variation as to the precise reasons relied upon. It follows from this that any rule abstracted from the body of precedents will, strictly speaking, have several explanations and not just one. On the other hand, in most areas of the law it is equally unlikely that judicial discretion will have been exercised for entirely disparate reasons in every case, so to a large extent there will be overlap and replication as well as some differences between reasons.

One could develop an explanatory account of the law that provided a comprehensive list of all of the actual reasons that guided judicial discretion in each of the cases from which the relevant rules of law are abstracted. There would be nothing inherently wrong with this, but it is not the type of explanatory account that one normally sees. Instead, an explanatory account tends to focus on the reasons that the judges appeared to regard as the most important factors in the exercise of their discretion, taking into account the modal reasons across the whole body of precedents. In other words, the aim is usually to identify broad themes rather than to establish a comprehensive list. This process does involve analysis of the individual reasons, for example in order to classify and generalise them, but the aim remains to describe rather than to evaluate themes.

The most important sources in developing an explanatory account of the law are obviously the judgments. These may provide 'direct' support for an explanation, where judges have expressed the view that a particular rule is 'based on' or 'an aspect of' or 'supported by' a particular principle. The judgments may also indicate 'indirect' support for an explanation, where it can be inferred from the judges' reasoning that their discretion was

[80] Emphasising the diversity of approaches, see ibid [8]-[23].

guided by a particular principle. For example, if judicial reasoning emphasises the importance of the parties' agreement or their ability to negotiate different terms, this might be taken as indirect support for an explanation based on freedom of contract. These forms of direct and indirect support are probably the two main ways in which explanatory accounts are developed.

There are some occasions where the judge's express reasoning may not provide a good indication of the actual reasons for their exercise of their discretion. This does not involve any conspiracy theory or suggestion of impropriety. It just a matter of fact that people (including judges) are not always successful at articulating the reasons for their own decisions. Although now popularised by books like *Thinking, Fast and Slow*,[81] this is not a new insight. Lord Mansfield reportedly offered the following advice to an army officer who had been called to judge disputes in the West Indies: 'Tut, man, decide promptly, but never give any reasons for your decisions. Your decisions may be right, but your reasons are sure to be wrong'.[82] More recently in *The Reborn*, Rix LJ opened his judgment with the same sentiment.[83]

An acknowledgement of the occasional fallibility of express judicial reasoning will not usually require one to engage in a full-blown examination of the subconscious biases that affect judicial decisions.[84] This is mainly because in developing an explanatory account of the law, one is looking for broad themes across the whole body of precedents, rather than explanations for individual decisions.[85] One can generally trust that the most important and recurrent actual reasons will not be too far from the surface. As Smith puts it, 'the suggestion

[81] Daniel Kahneman, *Thinking, Fast and Slow* (Penguin 2012).

[82] John Cordy Jeaffreson, *A Book About Lawyers*, vol 1 (Hurst and Blackett 1867) 85. See also Webb (n43) 139: 'the reasons which in fact guided [judicial decisions] will often be opaque or confused or simply incomplete'.

[83] *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531, [2009] 1 CLC 909 [47] (Rix LJ).

[84] See eg Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, 'Judging by Heuristic: Cognitive Illusions in Judicial Decision Making' (2002) 86 Judicature 1, 44; Eyal Peer and Eyal Gamliel, 'Heuristics and Biases in Judicial Decisions' (2013) 51 Court Review 114; Epstein and Knight, 'Reconsidering Judicial Preferences' (2013) 16 Annual Review of Political Science 11 and further studies cited at 13.

[85] It is not impossible that an entire area of law might be explained by systematic subconscious biases, but it is not likely.

that [judges] have all wildly misunderstood the reasons with which they explain the law is prima facie implausible'.[86] On the other hand, there may be times when caution is required; for example, a useful signpost is where judges 'take refuge in metaphor or Latin'.[87]

Descriptive accounts of the law depend solely on legally authoritative sources; in other words, the rules of the common law can only be abstracted from the body of precedents.[88] By contrast, explanatory accounts of the law may sometimes look beyond the judgments to other relevant sources. Any source that might cast light on the judges' actual reasons is potentially relevant. For example, explanations of the law often refer to an historical context,[89] a particular school of thought,[90] or the influence of individual scholars.[91] An explanation could refer more broadly to the characteristics of non-legal reasoning.[92] Although any of these factors have the potential to guide the exercise of judicial discretion, an explanatory account of the law will usually require some supplementary indication that the factor did affect the judges' actual reasoning.

One interesting feature of the common law is that legal scholarship can sometimes have 'reflexive effect'. Sociologists have termed this phenomenon the 'double hermeneutic'.[93] It occurs where legal scholars influence the development of the law because their scholarship is read and followed by judges. For example,[94] in *Doyle v Olby*, Winn LJ

[86] Smith, *Contract Theory* (n1) 20.

[87] *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) 29 (Lord Hoffmann).

[88] For example, even a serving judge could not change the law by expressing views extra-judicially; nor could English law be changed by persuasive decisions from other jurisdictions. Such views and decisions may influence how judges exercise discretion in the future, but (until then) they cannot affect the law as it is.

[89] See eg Morton J Horwitz, *The Transformation of American Law 1780-1860* (HUP 1977).

[90] See eg James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon 1991).

[91] See eg Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

[92] See eg HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985). In relation to mitigation, see further Section 5.3.

[93] See further Anthony Giddens, *Social Theory and Modern Sociology* (Polity 1987) 20: 'the concepts of the social sciences are not produced about an independently constituted subject-matter, which continues regardless of what these concepts are. The 'findings' of the social sciences very often enter constitutively into the world they describe'.

[94] Here, the judge was conscious that the proposed account was not an accurate description of the law, but the same effect is possible without this realisation.

noted that *Mayne & McGregor on Damages* had 'in effect proposed, in the absence of authority - since the cases to which they refer really lend no support for their proposition',[95] a change to the law on deceit, adding that 'if the judgment of this court were to stand, they will in their next book have support for what they themselves were thinking'.[96] In this way, descriptive accounts in the leading texts can sometimes 'become' law,[97] even if the account was to some extent inconsistent with the body of precedents when it was written.

2.2.2.3 *Evaluating explanatory accounts*

What makes a good explanatory account of the law? The answer, in summary, is an account that describes the actual reasons (or 'principles') that guided judicial discretion in the cases that created, developed and maintained the relevant rules of law. The account is most likely to identify broad themes that emerge from the actual reasons in individual cases, but the account could provide a comprehensive list. Even cases that merely maintain existing rules are relevant to the account, at least in relation to decisions of the higher courts, because in these cases the actual reasons explain why the law *remains* as it is. In other words, a good explanatory account need not be confined to an historical description of the actual reasons in the cases that first created or developed the relevant rules.

In the absence of any supplementary indications, it seems unlikely that a good explanation could be totally detached from the reasons expressed by the judges in their judgments. In other words, if the judicial reasoning does not disclose any support for the explanation, either direct or indirect, then it is likely to be a poor account. As Smith puts it, in these circumstances one would have to believe that the judges 'suffer from a collective and deep false consciousness',[98] in that they were entirely unaware of the actual reasons guiding their discretion. Proponents of this type of explanatory account could be expected

[95] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA) 167, citing Harvey McGregor, *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961) ch41 [955].

[96] *Doyle* (n95) 167.

[97] This point is acknowledged in Duxbury (n11) 23.

[98] Smith, *Contract Theory* (n1) 20.

to specify why the actual reasons might not be reflected in the express judicial reasoning. They might further be expected to show some high degree of consistency between the suggested principles and the application of the relevant rules of law.

It is irrelevant to an explanatory account whether the actual reasons described are 'good' or 'bad' reasons. Either way, evaluation plays no part in the account. Similarly, an explanatory account is not concerned with providing normative reasons that *could* have guided judicial discretion in the relevant cases, but in fact did not. These normative reasons instead form part of a justificatory account of the law.[99] For an explanatory account, only actual reasons are relevant. It is worth adding that there is no 'half-way house' between actual and normative reasons, and no 'third way'. As Webb points out, if we are no longer asking what reasons *in fact* guided judges, then 'why would be concerned with anything other than good reasons?'[100] It is hard to see why any account would be interested in the bad reasons that could have guided judges but in fact did not.

The framework outlined in this section should enable us fairly quickly to reclassify certain 'explanations' of the law as something obviously different.[101] For example, economic efficiency is unlikely to explain many or any of the rules of English private law. One would have to contend that economic efficiency was one of the actual reasons that guided judicial discretion despite the fact that English judges almost never make any reference (either directly or indirectly) to concerns of economic efficiency in private law decisions. However, lawyer-economists probably would not even contend that their accounts were explanatory in this sense. Instead, they might say that they were concerned with evaluating or justifying the law, by asking whether economic efficiency provides a normative reason in support of the law as it is.[102]

[99] Section 2.2.3.

[100] Webb (n43) 140.

[101] This is not to deny that such accounts might be termed explanatory in some other (usually undefined) sense; it is merely to ensure that in comparing 'explanations' we are truly comparing like-with-like.

[102] There is nothing wrong with this approach, so long as its aims are made clear: horses for courses.

2.2.3 Justification

A justificatory account of the law aims to give normative reasons why the law should be as it is. Justifications are evaluative. To justify the law is to claim that it is 'merited'. This encompasses any evaluative criteria, not just moral criteria. It is assumed that one can justify in degrees; in other words, the law can be more or less justified depending on the weight of normative reasons that count in its favour. Although justifications are evaluative, they rest on prior description. For example, 'Her promotion is justified' refers to the fact of promotion. By contrast, one can 'prescribe' without referring to facts. For example, 'She should be promoted'. This marks the difference between justificatory and prescriptive accounts of the law. Justificatory accounts seek to justify the law as it is, whereas prescriptive accounts propose the 'ideal law' regardless of what the law actually is.

For practical purposes, not every description or explanation of the law needs to be accompanied by a justification. It depends on who the scholarship is intended for. Explanation without justification has scholarly significance in its own right, as any social scientist would attest.[103] If one is seeking to assist barristers and judges (especially in the lower courts), justification is not particularly important.[104] If one wishes to influence the justices of the Supreme Court, who have more discretion to change the law, then justification is correspondingly more important. For a Law Commission project on codification, only a descriptive account is required, whereas for a project on law reform, it would be important not only to ask whether the law is justified but also to provide a prescriptive account of the ideal law. In short, for some purposes a justification of the law is important, but for many purposes it is not.

But is it enough for legal scholars 'just' to describe and explain? Description and explanation of the law (especially the common law) are highly skilled tasks. They require a

[103] An historian of the Tudor period would probably be surprised to be told that his explanation for why Henry VIII broke from Rome was flawed because it failed to assess whether Henry's decision was justified.

[104] Also recall that descriptive accounts themselves have the potential to constrain this discretion. See further text to n41.

deep understanding of judicial practice: for example, the application of the doctrine of precedent and the exercise of judicial discretion. Abstracting rules from the body of precedents or identifying broad themes of explanation, are complex analytic tasks, no less so because they are descriptive rather than evaluative. Unfortunately, descriptive and explanatory accounts have received a bad press in the trend towards 'interpretive' accounts of private law,[105] which (at least superficially) purport to justify as well as to describe.[106] The denigration of 'pure' description and explanation is unwarranted; it proceeds on a misunderstanding about what these tasks involve.[107] Description and explanation are enough on their own, both practically and intellectually.

What is more, description and explanation of the law are tasks for which a 'doctrinal' lawyer has unique claims to expertise. It is far less clear that lawyers are best-placed to provide justifications of the law. This issue tends to be obscured in private law, but is more obvious in other areas. Section 222 of the Taxation of Chargeable Gains Act 1992 provides relief from Capital Gains Tax for a taxpayer's primary residence. If we wanted someone to describe the application of this rule, we would surely ask a doctrinal lawyer. But what if we were to ask: 'Is Section 222 justified? In other words, 'Should taxpayers receive relief on their primary residences?' It is much less clear that a lawyer is best-placed to answer this question. We might rather ask an economist or political theorist. The point can be made more obvious. Suppose there is a law requiring that all roads of a certain type must be built to a specified width. Is this law justified? We would almost certainly rather ask a civil engineer.

In private law, the need for a division of labour seems less commonly-accepted. This may be attributable to the view that one can intuit the answers to problems of interpersonal

[105] For a robust defence of 'doctrinal' scholarship, see Smith, 'Taking Law Seriously' (n44) 248-251, 242: 'The conclusion of the review is that doctrinal scholarship … is academically significant – indeed it is indispensable'. By doctrinal scholarship, Smith appears to mean effectively descriptive and explanatory accounts in the terms outlined here. This defence is a further indication that Smith's 'interpretive' methodology was not intended to be interpretive in the Dworkinian sense: see further Section 2.3.2.

[106] It is doubtful that most 'interpretive' accounts of private law actually pursue this aim: text to n164.

[107] See eg text to n136. It may alternatively proceed from a particular view of legal theory (Dworkinian interpretivism), but it is suggested that many or most private lawyers do not actually hold this view: text to n164.

justice.[108] But there is no automatic reason to suppose that the skills needed to justify the law overlap much or at all with those needed to describe and explain the law as it is. If it is accepted that one can describe without justifying, then not all lawyers need to be economists and moral philosophers as well. The converse is also true: experts in economics and moral philosophy may be better-off taking their description and explanation of the law from doctrinal lawyers; sometimes they can obtain this indirectly through textbooks, but even then the task is not entirely straightforward,[109] and reliance on textbooks is fallible.[110] A division of labour supported by collaboration may be the most productive approach.

This argument for the division of labour is of course premised on a particular view of legal theory that not everyone will share. On the one hand, the approach seems entirely consistent with Hart's positivism. In his 'Postscript' to *The Concept of Law*, Hart emphasised that his account aimed to be '*descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of the law'.[111] But he also added that 'a clear understanding of these [forms and structures] is, I think, an important preliminary to any useful moral criticism of law'.[112] In other words, Hart regarded description (and explanation) as a precursor to justification, but did not think that these aims needed to be pursued together.

By contrast, the separation of these three aims is plainly inconsistent with Dworkin's interpretive legal theory.[113] In Hart's words, Dworkin 'appears to rule out … descriptive legal theory as misguided or at best simply useless'.[114] Dworkin argued that 'the flat

[108] See eg Stevens, *Torts and Rights* (n1) 329: 'In order to understand and justify the law of torts it is unnecessary to be a profound thinker'. But lawyer-economists reject the premise that private law is concerned with interpersonal justice, and the result is an impasse.

[109] The textbooks may disagree, they may not be comprehensive, etc.

[110] Text to n49.

[111] Hart, *The Concept of Law* (n4) 240 (emphasis in original).

[112] Ibid 240.

[113] See generally Dworkin, *Law's Empire* (n3) ch2 and ch3. For other criticisms of the distinction between description and evaluation in legal theory, see: John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) ch1.

[114] Hart, *The Concept of Law* (n4) 242.

distinction between description and evaluation' has 'enfeebled legal theory'.[115] Instead, his view was that '*useful* theories of law … are interpretive',[116] meaning that it would be *useless* for someone to attempt description without justification. Dworkin adopted this view across the board: for law and for legal theory; and for specific theories (for example, of the law of mitigation) as well as for general theories of law.[117] His approach was 'relentlessly interpretive'.[118] So, whatever its practical merits may be, it must be conceded that the division of labour proposed here would be a non-starter for any Dworkinian.

2.3 'Interpretation'

It is fair to say that the majority of private law scholarship proceeds without any express statement of its aims.[119] But amongst those who have stated their aims expressly (and some who have not), many scholars purport to adopt an 'interpretive' account of private law.[120] The most detailed and often-cited exposition of interpretive methodology in private law is that developed by Smith in *Contract Theory*.[121] Smith's exposition is not the only variant of interpretive theory evident in private law scholarship;[122] indeed, a major concern is that scholars often mean different things when they say that they are doing 'interpretive' theory. However, Smith's exposition appears to have emerged as the practical point-of-reference for many private law scholars and so forms the focus of this section.

[115] Ronald Dworkin, *A Matter of Principle* (Clarendon 1986) 148.

[116] Dworkin, *Law's Empire* (n3) 102 (emphasis added). It is unclear to what extent Dworkin mollified this claim in later work: see discussion in Hart, *The Concept of Law* (n4) 243.

[117] Dworkin, *Law's Empire* (n3) 90: 'any judge's opinion is itself a piece of legal philosophy … Jurisprudence is the general part of adjudication, silent prologue to any decision at law'.

[118] Ibid 226.

[119] To be clear, this is not to suggest that such scholarship proceeds without any thought about its aims; it often rests on a tacit understanding that is broadly (but not universally) shared amongst private law scholars.

[120] See eg Stevens, *Torts and Rights* (n1) vii; Beever, *Rediscovering the Law of Negligence* (n1) 21; *Rights and Private Law* (n1) 5-6; Winterton (n1) 16-20.

[121] Smith, *Contract Theory* (n1) ch1.

[122] See also Beever and Rickett, 'Interpretive Legal Theory' (n1).

On the surface, Smith's methodological framework is easily explained by his starting-point. Whereas this thesis explicitly assumes a positivist theory of the common law,[123] Smith draws heavily on Dworkin's interpretive legal theory.[124] Dworkin's theory affects not only Smith's 'interpretive account', but also his 'descriptive account', which broadly reflects Dworkin's preinterpretive stage.[125] But on closer inspection, things are more complicated. Smith departs fundamentally from Dworkin's interpretivism. In particular, the 'moderate' version of the interpretive account that Smith advocates is not really interpretive in the Dworkinian sense. Instead, Smith's exposition of interpretive methodology is essentially a mixture of the descriptive and explanatory accounts outlined above.

2.3.1 Historical, prescriptive and descriptive accounts

Smith proposes that 'Broadly-speaking, four types of accounts are possible of any area of the law: (1) historical, (2) prescriptive, (3) descriptive, and (4) interpretive'.[126] These four accounts differ from but overlap with the three aims of description, explanation and justification outlined above. It is therefore important to clarify the relationship between each of Smith's accounts and the aims of this thesis. First, Smith's 'historical' account is effectively subsumed within what this thesis terms an explanatory account. Second, this thesis is not concerned with what Smith terms a 'prescriptive' account because that account is entirely evaluative. Third, this thesis does not recognise Smith's 'descriptive' account as being an account *of the law* at all; it must not be confused with what this thesis terms a descriptive account. Finally, the complex relationship between Smith's 'interpretive' account and the aims of this thesis is discussed separately below.[127]

[123] See further text to n4.

[124] Smith, *Contract Theory* (n1) 5, 7, 9, 11, 17, 20, 22, citing Dworkin, *A Matter of Principle* (n115) and Dworkin, *Law's Empire* (n3).

[125] Text to n136.

[126] Smith, *Contract Theory* 4.

[127] Section 2.3.2.

Historical accounts aim to 'explain how and why the law has developed the way it has; they reveal the law's causal history'.[128] In this sense an historical account is an aspect of the explanatory account adopted above; it gives reasons why the law is as it is. Smith stresses that although 'historical accounts obviously provide valuable clues as to how the present law should be understood', they are 'not the same thing as an interpretive account of the law'.[129] This is because 'What an interpreter is trying to understand – to interpret – is the law, not what motivated the judges who made the law'.[130] Although Smith here refers to interpretation, his distinction broadly reflects the boundary between the descriptive and explanatory accounts adopted above. If we understand 'what motivated the judges who made the law' to mean 'the reasons why the law is as it is', then we can see why an historical account provides an explanation of the law rather than a description of it.

Prescriptive accounts are 'accounts of what the law should be: of the ideal law'.[131] This differs from the justificatory account outlined above. A prescriptive account requires no reference at all to the law *as it is*.[132] By contrast, a justificatory account *does* have to refer to the law as it is, because its aim is to show that the current law is justified, or in other words that the current law is supported by normative reasons.[133] Within Smith's scheme, the task of showing that the current law is justified appears (at least on its face) to be allocated to the 'interpretive' account.[134] Of course, 'prescriptive' accounts can be very useful, but it is important to realise that they are not accounts '*of the law*' in the way that any of the descriptive, explanatory or justificatory (or indeed interpretive or historical) accounts are;

[128] Smith, *Contract Theory* (n1) 4.

[129] Ibid 5-6.

[130] Ibid 6.

[131] Ibid 4.

[132] Dworkin's interpretive theory of law may not yield the ideal law, because 'The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one': Dworkin, *Law's Empire* (n3) 66.

[133] Text to n62.

[134] Text to n150.

instead prescriptive accounts bear no necessary relation to the law as it is or ever has been.[135]

Smith's 'descriptive account' differs significantly from the descriptive account outlined above. Although Smith says that 'Descriptive accounts, as the name suggests, aim to describe the law as it is now',[136] he adds that 'A purely descriptive account [of the law] would be entirely useless, if not impossible. It would amount to little more than a randomly collected list of data'.[137] Here Smith appears to understand 'the law' to mean legal sources such as judgments. Smith seems to have in mind Dworkin's 'pre-interpretive' stage 'in which the rules and standards taken to provide the tentative content of the practice are identified'.[138] However, by definition what is described at the pre-interpretive stage is *not* law *in the interpretive sense*.[139] Nor would any legal positivist understand 'the common law' as consisting of the judgments themselves. So, Smith's version of a descriptive account involves describing legal sources, but not describing 'the law' in either the positivist or interpretive sense.

2.3.2 Interpretive accounts

The key feature of an interpretive account of the law, according to Smith, is its aim 'to enhance understanding of the law by highlighting its significance or meaning'.[140] In particular, 'this is achieved by explaining why certain features of the law are important or

[135] It is important to emphasise '*necessary* relation', because a prescriptive account might *coincide* with accounts of the law as it is; where the current law does coincide with the ideal law, the current law is to that extent 'justified'.

[136] Smith, *Contract Theory* (n1) 5. Smith adds '…or as it was at a certain time', but this distinction is not relevant for present purposes.

[137] Ibid 6.

[138] Dworkin, *Law's Empire* (n3) 65-66. Dworkin adds by way of analogy that 'The equivalent stage in literary interpretation is the stage at which discrete novels, plays, and so forth are identified textually'. See also, on the preinterpretive stage: ibid 90-92, 101-04.

[139] Dworkin argues that the preinterpretive data may still be referred to as 'law', because he rejects the claim that 'we must choose, once and for all, between a "wide" or preinterpretive and a "narrow" or interpretive sense [of law]': ibid 104.

[140] Smith, *Contract Theory* (n1) 5.

unimportant and by identifying connections between those features – in other words, by revealing an intelligible order in the law'.[141] It is not immediately clear what is meant by 'importance' or 'intelligibility', or how these aspects of legal analysis relate to the aims of description, explanation and justification outlined above. However, several clues can be taken from the list of four criteria that Smith suggests should be used to evaluate interpretive theories, namely: fit; transparency; coherence; and morality.[142]

On 'fit', Smith summarises that a theory fits 'if it is consistent with, and supported by, the relevant facts,'[143] where 'those facts include (at a minimum) a group of legislative or precedent based legal rules and a set of decisions'.[144] This criterion broadly corresponds with the descriptive account outlined above, in that a good descriptive account should be consistent with the 'material facts plus the outcome' of individual precedents. On 'transparency', Smith states that interpretive theories should 'account for what may be called the "legal" or "internal" explanation of [the] law,'[145] which means that they 'take account … of the reasons that judges give for their decisions'.[146] Again, this criterion broadly corresponds with the descriptive account outlined above, in requiring consistency with the judicial reasoning of individual precedents. It may also overlap with the explanatory account, insofar as the reasons seek to address why the law is as it is.

On 'coherence', Smith proposes that 'a theory satisfies the coherence criterion to the extent that it presents [the] law as consistent or non-contradictory'.[147] In particular, 'A theory that reveals the law as inconsistent is less successful at achieving … the basic goal of interpretation: that of revealing an intelligible order in the law'.[148] It is slightly less clear how this criterion maps on to the descriptive and explanatory accounts outlined above.

[141] Ibid 5.

[142] See ibid 7-32 for a full discussion of these criteria.

[143] Ibid 7.

[144] Ibid 7.

[145] Ibid 24.

[146] Ibid 25.

[147] Ibid 11. See also Ernest Joseph Weinrib, *The Idea of Private Law* (HUP 1995) 29-46.

[148] Smith, *Contract Theory* (n1) 11.

However, Smith adds that the 'strong' version of this criterion 'states that theories should also be evaluated according to the extent that they show contract law as a *unified system*', which means that 'all of its constituent parts flow from a *single master idea* or principle'.[149] Framed in these terms, it seems that Smith's coherence criterion seeks a single explanation (one dominant actual reason) for why the law is as it is.

On 'morality', Smith proposes that 'the morality criterion plays a critical role' in assessing interpretive accounts of the law.[150] In its 'strong' version, Smith's morality criterion requires that an interpretive account must 'show that the law is, in fact, morally justified'.[151] This requirement explicitly draws on Dworkin's interpretive legal theory. Smith cites Dworkin for the proposition that 'A successful interpretation must not only fit *but also justify* the practice it interprets',[152] further clarifying that 'legal interpretation must thus engage in substantive moral argument'.[153] Stopping here, Smith's interpretive account seems clear: it is effectively an attempt to flesh out Dworkin's interpretivism in the context of private law. However, matters become more confusing when Smith rejects the 'strong' version of the morality criterion, describing it as 'unpersuasive' on the basis that:

> [I]f our aim is to understand the law – to make it intelligible – the strong version's requirement of explaining the law in a way that shows the law's claim to authority to be true is unwarranted. The version conflates accounts of what the law should be (the goal of a prescriptive theory) with accounts of what the law is (the goal of an interpretive theory).[154]

However, this 'conflation' is precisely what Dworkin's interpretive equilibrium between fit and justification requires.[155] Smith therefore appears to be rejecting interpretivism in the Dworkinian sense.[156] Instead, Smith proposes a 'moderate' version of the morality criterion,

[149] Ibid 11-12 (emphasis added).

[150] Ibid 13.

[151] Ibid 17. See also Weinrib (n147) ch1.

[152] Smith, *Contract Theory* (n1) 17, citing Dworkin, *A Matter of Principle* (n115) 285.

[153] Smith, *Contract Theory* (n1) 17.

[154] Ibid 18.

[155] Dworkin, *Law's Empire* (n3) 90.

[156] See also Smith, *Contract Theory* (n1) 22, expressly contradicting Dworkin.

which requires merely that 'a good legal theory should explain the law in a way that shows how the law might be thought to be justified *even if it is not justified*'.[157] He also states that 'It is a reasonable starting assumption (*but no more*) that the actual law bears some relation to good law'.[158] Smith's moderate version of the morality criterion therefore appears to rest on no more than an evidential presumption that the actual reasons that guided judicial discretion were the same as the normative reasons that would show the law to be justified. For Smith (unlike Dworkin), interpretation does not require a true justification.[159]

Smith's position is made clearer by his analogy with the 17th century practice of blood-letting. In this practice, doctors *thought* they were making patients better, but they were actually making them sicker.[160] Smith suggests that a good 'interpretive' account of this practice could conclude that the practice was best explained as an attempt to cure patients, even though in fact it did the opposite.[161] In other words, Smith appears to be seeking actual reasons for why the doctors acted as they did, irrespective of whether they had normative reasons for so acting. On this view, Smith's 'interpretive' account explains without justifying. Smith added the gloss that the relevant actual reasons must *purport* to be (even if they are not in fact) normative reasons of a 'moral' kind,[162] but this appears to be merely because he regards 'functionalist' explanations of contract law as implausible.[163]

Although Smith's 'interpretive account' initially appears to diverge from the descriptive and explanatory accounts outlined above, on closer inspection it does not. Once Smith rejects the 'strong' version of the morality criterion, his moderate version essentially involves a mixture of the descriptive and explanatory accounts outlined above, particularly having regard to the fit, transparency and coherence criteria. Smith's view of interpretation appears to be that one must 'interpret' rules from the body of precedents, rather than

[157] Ibid 18 (emphasis added).

[158] Ibid 6 (emphasis added).

[159] Dworkin's interpretation need not show that the law is perfectly justified, but it must take into account true (not merely mistaken) justifications.

[160] Smith, *Contract Theory* (n1) 14.

[161] Ibid 23.

[162] Ibid 22.

[163] Ibid 22. See also 19-20.

merely describe legal sources. On this view, Smith's interpretation is essentially no different from the descriptive account of the law outlined above. Of course, one could insist upon a 'true' interpretive account in the Dworkinian sense, but that is not the version actually advocated by Smith.

What do other private lawyers mean when they say that their aims are 'interpretive'? In particular, are they referring to Dworkin's version, Smith's version, or another understanding? It seems probable that not all private lawyers hold the same view even though they may adopt the same label. If they are referring to Dworkin's version, then they are bound to assume that justification is integral to their account. Earlier it was argued that if this methodology is adopted then it has some unfortunate practical consequences, given the relative expertise of lawyers.[164] But if this is what 'law' is, then so be it. If on the other hand private lawyers intend Smith's version, then it seems at least plausible that what they really mean (as Smith seems to mean, on closer inspection) is to describe and explain the law but not to justify it.

Aims and methodology matter. The relevant evaluative criteria differ significantly depending on which type of interpretivism one has in mind: must we evaluate the account according to whether (or the extent to which) it is justified, or not? Ambiguity allows private lawyers to equivocate. When one's descriptive or explanatory account can also plausibly be justified, it may be tempting to become a Dworkinian interpretivist. But when some contrary normative consideration is posed, it is tempting instead to seek refuge in Smith's 'interpretivism' by invoking the moderate morality criterion. We see this in the seamless switch that private lawyers often make between 'showing the law in its best light' (Dworkin's 'law as integrity') and showing 'the law as we find it' (Dworkin's preinterpretive standing practice).[165] Private lawyers cannot be allowed to play both hands at once.

[164] See text to n108.

[165] Dworkin, *Law's Empire* 90: 'interpretations … try to show legal practice as a whole *in its best light*, to achieve equilibrium between legal practice *as they find it* and the best justification of that practice' (emphasis added).

2.4 Conclusion

This thesis aims to describe and explain, but not to justify, the law of mitigation. In these terms, its aims can be stated quite simply. Nevertheless, it has not been straightforward to pick apart the tasks of description, explanation and justification, and to separate each of them from the 'interpretive' school of private law scholarship. This lengthy discussion of aims and methodology may strike one as something of a digression in a thesis on mitigation. However, it has been necessary for two main reasons. First, Smith is correct to insist that without such groundwork, 'we may end up comparing the theoretical equivalents of apples and oranges'.[166] The rival 'explanations' of mitigation will provide a good illustration of this problem. Second, it has been necessary to defend the view that it is legitimate to describe and explain the law of mitigation without seeking to justify it; as this thesis will show, a justificatory account of mitigation is not a task best-suited to a lawyer.

[166] Smith, *Contract Theory* 3.

3
Introduction to Mitigation

3.1 Introduction

This chapter introduces the orthodox account of the law of mitigation as described by the leading texts on damages.[1] The first section outlines the orthodox account of compensatory damages, to set mitigation in context. The second section briefly outlines the historical development of mitigation. The third section outlines the orthodox account of mitigation in more detail, describing the division of mitigation into three rules: the avoidable loss rule; the reasonable attempts rule; and the avoided loss rule. It is argued that, applying the orthodox account of damages, the reasonable attempts rule and the first limb of the avoided loss rule are both redundant. The 'modern orthodoxy' of mitigation can therefore be simplified as just two rules: the avoidable loss rule; and the second limb of the avoided loss rule.

3.2 Mitigation in Context

This section outlines the orthodox account of compensatory damages.[2] The assessment of damages is conventionally divided into two main stages. First, the court must apply the compensatory principle to determine the claimant's 'factual loss'. Second, it must apply

[1] Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014); Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004); HG Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015); MA Jones (ed) *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014); GH Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015); Andrew Tettenborn, *The Law of Damages* (2nd edn, LexisNexis 2010).

[2] 'Damages' hereafter refers to 'compensatory damages' unless otherwise specified.

various limitations on damages that may restrict recovery of the claimant's factual loss. Mitigation is conventionally understood as one of these limitations on damages. The orthodox account of damages is complicated by the existence of several 'exceptions' that may allow the claimant to recover more than its factual loss: these include the insurance and benevolence rules; the market rule; and a rule for 'mitigation in fact'. The scope of these exceptions and their relationship with the compensatory principle, is controversial.

3.2.1 The compensatory principle

The first stage of assessment involves applying the compensatory principle. As Lord Bingham highlighted in *The Golden Victory*, the compensatory principle 'has been enunciated and applied times without number and is not in doubt'.[3] It has been described as the 'foundation',[4] the 'fundamental principle'[5] and the 'overriding rule' of damages.[6] In practice, the compensatory principle forms the point of departure for virtually every judicial decision on damages.[7] There are two common formulations of the principle, depending on whether the claim is in contract or tort. The apparent difference between these two formulations can be explained by the different content of the underlying obligations; the remedial rule is the same for both causes of action.[8]

In relation to contract, in *Robinson v Harman* Baron Parke held that:

[3] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 [9].

[4] *Ruxley Electronics & Construction Ltd v Forsyth* [1994] 1 WLR 650 (CA) 660 (Mann LJ).

[5] *The Golden Victory* (n3) [29] (Lord Scott).

[6] *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916 (CA) 925 (Bingham LJ).

[7] It has also sometimes been used as a cross-check on the final award: see eg *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 (CA) 451 (Megaw LJ).

[8] Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628, 638-43. Contra Jane Stapleton, 'The Normal Expectancies Measure in Tort Damages' (1997) 113 LQR 257, 260.

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, *as if the contract had been performed*.[9]

In relation to tort, in *Livingstone v Rawyards Coal* Lord Blackburn held that:

> in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the *same position as he would have been in if he had not sustained the wrong*.[10]

These two formulations can be restated as a single universal principle: damages aim to put the claimant in the same position as if the breach had not occurred.[11] Of course, it may not always be possible to put the claimant in exactly the same position as if the breach had not occurred. First, money may be incapable of providing direct equivalence to the claimant's injury.[12] Second, even where money could in principle buy direct equivalence, it may no longer be possible to restore the claimant's position exactly, due to the effluxion of time or other events.[13] Lord Blackburn therefore clarified that the aim of the compensatory principle was to put the claimant '*as nearly as possible*' in the same position as if the breach had not occurred.[14]

The application of the compensatory principle requires the assessment of two distinct positions.[15] First, it requires an assessment of the position that the claimant *is* in as a result

[9] *Robinson v Harman* (1848) 1 Ex 850 855 (emphasis added). See also *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL) 688-89 (Viscount Haldane); *Johnson v Agnew* [1980] AC 367 (HL) 400 (Lord Wilberforce).

[10] *Livingstone v The Rawyards Coal Co* (1879-80) LR 5 App Cas 25 (HL) 39 (emphasis added).

[11] See also, in relation to equitable compensation: *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2014] 3 WLR 1367 [64] (Lord Toulson), [93] (Lord Reed), discussed in Chapter Six, text to n272.

[12] For example: pain and suffering; loss of enjoyment; or loss of amenity.

[13] For example, where the stipulated time for performance has already passed.

[14] *Livingstone* (n10) 39 (emphasis added). See also *Robinson* (n9) 855: 'so far as money can do it'.

[15] See eg *Parry v Cleaver* [1970] AC 1 (HL) 23 (Lord Morris); *Jobling v Associated Dairies* [1982] AC 794 (HL) 814 (Lord Keith); *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 (HL) 1631 (Lord Nicholls); *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289 (CA) 314-15 (Chadwick LJ); *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), [2013] 2 Lloyd's Rep 653 [18] (Teare J).

of the breach, referred to in this thesis as the 'breach position'.[16] Second, it requires an assessment of the position that the claimant would have been in if the breach had not occurred, referred to in this thesis as the 'non-breach position'.[17] Lord Hoffmann has referred to the breach and non-breach positions as 'the actual and the hypothetical calculations', respectively.[18] The difference between these two positions, expressed in monetary terms, constitutes the legal concept of loss.[19] In other words, the compensatory principle prescribes that the claimant has suffered a 'loss' if and to the extent that it is in a worse position than it would have been in if the breach had not occurred.[20]

The assessment of the non-breach position is necessarily counterfactual.[21] As Diplock LJ emphasised in *Lavarack v Woods of Colchester*, it involves 'assuming that what has not occurred and never will occur has occurred or will occur'.[22] The assessment is therefore a 'hypothetical exercise'[23] and in this sense 'a fiction'.[24] The importance of the counterfactual approach to assessment of the claimant's loss has not always been fully appreciated. For

[16] This is sometimes referred to as the claimant's 'actual' position, but that term can be misleading, because the breach position can sometimes also involve a counterfactual assessment, as the effect of applying mitigation.

[17] This terminology was first adopted in Andrew Dyson and Adam Kramer, 'There is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 LQR 259, 261.

[18] *South Australia Asset Management Corp v York Montague Ltd ('SAAMCo')* [1997] AC 191 (HL) 210. See also Burrows, *Remedies* (n1) 157: 'The compensatory aims require the courts to assess not only the position the claimant would have been in if the breach of contract or tort had not been committed but also its actual position … so that damages can make up the difference'.

[19] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 580 (Lord Millett): 'compensation is compensation for loss; its object is to make good a loss'. See also *The Golden Victory* (n3) [57] (Lord Carswell); *Parry* (n15) 32 (Lord Morris); *Kuwait Airways Corp v Iraqi Airways Co (No6)* [2002] UKHL 19, [2002] 2 AC 883 [67] (Lord Nicholls); *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 (HL) 357 (Lord Jauncey); Burrows, *Remedies* (n1) 29: 'Compensation means the award of a sum of money which, so far as money can be so, is equivalent to the claimant's loss'.

[20] See eg *Nykredit* (n15) 1631 (Lord Nicholls): 'it is axiomatic that in *assessing loss* caused by the defendant's negligence the basic measure is the comparison between (a) what the plaintiff's position would have been if the defendant had fulfilled his duty of care and (b) the plaintiff's actual position' (emphasis added). See also *Procter & Gamble Phillipine Manufacturing Corp v Becher* [1988] 2 Lloyd's Rep 21 (CA) 31 (Nicholls LJ).

[21] *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 All ER (Comm) 731, [63] (Patten LJ).

[22] *Lavarack v Woods of Colchester* [1967] 1 QB 278 (CA) 294.

[23] *Flame* (n15) [18] and [85] (Teare J). See also *Stephenson Blake (Holdings) Ltd v Streets Heaver Ltd* [2001] Lloyd's Rep PN 44 (QB) [158] (n15) (Hicks QC).

[24] *Jet2.com Ltd v SC Compania Nationala de Transporturi Aeriene Romane Tarom SA* [2014] EWCA Civ 87 [45].

example, in *Kennedy v Van Emden*, Nourse LJ held that 'damages are to be assessed in the real world. Compensation is a reward for real, not hypothetical, loss'.[25] Similarly, it has been argued that 'loss which turns on hypotheticals which did not in fact happen, can hardly, without more, be classified as "actual loss"'.[26] These comments appear to misunderstand the counterfactual nature of the comparison built in to the compensatory principle.[27]

In applying the compensatory principle, there is often a debate as to the appropriate 'date of assessment' for damages.[28] In *The Golden Victory*, Lord Bingham highlighted an apparent ambiguity in the compensatory principle:

> The compensatory principle … does not, however, resolve the question whether the injured party's loss is to be assessed as of the date when he suffers the loss … or at a later date when the assessment happens to be made, in the light of such later events as may then be known. [29]

The (so-called) date of assessment problem is metaphorical. In a literal sense, the claimant's loss must obviously be assessed at trial,[30] or occasionally on appeal.[31] In particular, assessment cannot literally take place at the date of breach, before proceedings have even been initiated.[32] Instead, commonplace references to assessment 'as of' an earlier date (usually the date of breach) metaphorically refer to the range of post-breach events that the

[25] *Kennedy v Van Emden & Co* [1996] PNLR 409 (CA) 414. See also *Shepheard v Broome* [1903] 1 Ch 586 (CA) 621 (Sir Richard Collins MR).

[26] Jill Poole and James Devenney, 'Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles' [2007] Journal of Business Law 269, 286. See also KR Handley, 'Causation in Misrepresentation' (2015) 131 LQR 275, 282-85, sub-section entitled 'The Irrelevance of Hypothetical Events'.

[27] The statements are instead best understood as emphasising that there is no *other* counterfactual element in assessing loss, besides the assessment of the non-breach position. See further text to n60.

[28] See further Dyson and Kramer, 'There is No "Breach Date Rule"' (n17).

[29] *The Golden Victory* (n3) [9].

[30] M Stiggelbout, 'The Case of "Losses in Any Event": A Question of Duty, Cause or Damages?' (2010) 30 Legal Studies 558, 576.

[31] Occasionally, damages may be reassessed on appeal in light of post-trial events: see eg *Curwen v James* [1963] 1 WLR 748 (CA) 754 (Pearson LJ); *Mulholland v Mitchell (No1)* [1971] AC 666 (HL) 679-80 (Lord Wilberforce).

[32] However, relying on this metaphor, Edelman has invoked the 'judge at the roadside' test to explain the legal concept of loss: James Edelman, 'The Meaning of Loss and Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 212.

judge may take into account when assessing the claimant's breach and non-breach positions. This issue is sometimes framed as whether the judge must ignore *evidence* that arises after a certain date.[33] More precisely, the issue is whether the judge must ignore *events* (and associated harms and benefits) that occur after a certain date, regardless of the time when the relevant evidence emerged.

The compensatory principle is conventionally understood to require the judge to take into account *all* events between breach and trial, for better or worse.[34] This approach yields (both literally and metaphorically) an assessment 'as at' the date of trial. The most famous expression of this approach is Lord Macnaghten's rhetorical question in *Bwllfa and Merthyr Dare Steam Collieries v Pontypridd Waterworks*: 'with the light before him, why should [the judge] shut his eyes and grope in the dark?'[35] This has subsequently become known as the 'Bwllfa principle'.[36] The same approach was put forward by Scrutton LJ in *The Kingsway*, who proposed that 'In the courts of common law [it is] perfectly clear … that when damages which would be otherwise prospective come to be assessed, facts which have actually happened may be taken into account'.[37] More recently, the Bwllfa principle was expressly applied by the majority in *The Golden Victory*.[38]

[33] *Seatbooker Sales Ltd v Southend United FC Ltd* [2008] EWHC 157 (QB) [110] (HHJ Richard Seymour QC); H Street, 'Supervening Events and the Quantum of Damages' (1962) 78 LQR 70, 72.

[34] See eg Burrows, *Remedies* (n1) 192. Of course, this understanding is inconsistent with the various 'exceptions' described in Section 3.2.3, which may require the court to 'ignore' certain post-breach events.

[35] *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL) 431. See also 432 (Lord Robertson): 'estimate and conjecture are superseded by facts'.

[36] See eg *The Golden Victory* (n3) [12] (Lord Bingham), [65] (Lord Carswell), [78] (Lord Brown); *Whitehead v Searle* [2008] EWCA Civ 285, [2009] 1 WLR 549 [80] (Rimer LJ); *Secretary of State for Defence v Duncan* [2009] EWCA Civ 1043 [48] (Elias LJ).

[37] *The Kingsway* [1918] P 344 (CA) 362. See also *Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)* [1952] AC 292 (HL) 300 (Viscount Jowitt): 'it is well established that in considering the damages occasioned by a wrongful act all those facts which have actually happened down to the date of the trial must be taken into account'; *Curwen* (n31) 753 (Harman LJ); *Kennedy* (n25) 419 (Schiemann LJ); *Dudarec v Andrews* [2006] EWCA Civ 256, [2006] 1 WLR 3002 [50] (Waller LJ).

[38] *The Golden Victory* (n3) [36] (Lord Scott), [66] (Lord Carswell), [78] (Lord Brown). The decision is better explained without wholesale adoption of the Bwllfa principle, on the basis that *on those facts* no relevant legal rule applied to displace assessment of the claimant's factual loss.

The assessment of loss prescribed by the compensatory principle (in conjunction with the Bwllfa principle) has often been described as the claimant's 'factual loss'. This term derives from *Parry v Cleaver*, where Lord Pearce emphasised that 'in claiming that he has lost something a plaintiff must prove a genuine *factual loss*'.[39] Other terms used interchangeably include the claimant's 'actual loss',[40] the 'loss actually suffered',[41] and the loss 'in fact suffered'.[42] Although the concept of loss is rarely defined directly in judicial decisions,[43] it is plain that references to *factual* loss rely upon an account of *all* events up to the date of trial. This understanding is also adopted in some of the leading texts: for example, Burrows argues that 'true compensation' requires the court to take full account of post-breach events.[44]

The term 'factual loss', although commonly invoked, is strictly a misnomer. A more accurate term would be 'single counterfactual loss', in recognition of the counterfactual assessment involved in comparing the claimant's breach and non-breach positions.[45] The risk with describing the application of the compensatory principle as an assessment of 'factual' loss is that it may mislead one into thinking that the assessment reflects some extra-

[39] *Parry* (n15) 17 (emphasis added).

[40] See eg ibid, 7, 10 and 22 (Lord Morris); *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 268 (Lord Browne-Wilkinson); *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 (CA) 91 (Otton LJ). *Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 WLR 1091 [48] (Lord Walker); *Murfin v Campbell* [2011] EWHC 1475 (Ch), [2011] PNLR 28 [18] (HHJ Pelling QC).

[41] See eg *Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570, [2004] 2 EGLR 95 [19] (Potter LJ); *Forsyth-Grant v Allen* [2008] EWCA Civ 505, [2008] Env LR 41 [26] (Patten LJ); *Smith New Court* (n40) 268 (Lord Browne-Wilkinson); *The Golden Victory* (n3) [63] (Lord Carswell).

[42] See eg *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL) 395 (Lord Reid); *Durham Tees* (n21) [78] (Patten LJ); *Seatbooker* (n33) [121] (HHJ Seymour QC); and in the context of equitable compensation *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) 439 (Lord Browne-Wilkinson); *Ruxley* (n19) 365 (Lord Lloyd); *Dudarec* (n37) [49] (Waller LJ); *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528 (CA) 539 (Asquith LJ).

[43] For a rare example, see *Forster v Outred & Co* [1982] 1 WLR 86 (CA) 95 (Stephenson LJ): 'any detriment, liability or loss capable of assessment in money terms … things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases'. See also the definition of 'damage' offered by Lord Hoffmann in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281, 289: 'an abstract concept of being worse off, physically or economically'.

[44] Burrows, *Remedies* (n1) 192. See also Edelman, *The Meaning of Loss and Enrichment* (n32) 221: 'the short point is that a loss which is known not to eventuate is plainly not a loss at all'.

[45] On this approach, 'compound counterfactual loss' would describe the application of more than one counterfactual assessment to determine the breach and/or non-breach positions.

legal truth about loss. However, Fuller and Perdue were correct (despite other serious flaws with their thesis)[46] to point out that 'the loss which the plaintiff suffers … is not a datum of nature but the reflection of a normative order'.[47] In other words, although frequently referred to as 'factual' loss, the concept of loss prescribed by the compensatory principle involves the application of a *legal norm* to assess the position as if the breach had not occurred.

3.2.2 Limitations on damages

The second stage of assessment involves applying limitations on damages. These limiting rules may 'reduce the damages that full adherence to the compensatory aims would dictate'.[48] In other words, the rules limit recovery of the claimant's factual loss.[49] Where none of the limitations apply, it follows that the assessment of the claimant's factual loss is not displaced.[50] Five main doctrines are conventionally classified as limitations on damages: remoteness; mitigation; supervening causation; contributory negligence and the 'SAMMCo principle'.[51] Other rules that might plausibly be classified as limitations on damages include

[46] See further Friedmann (n8).

[47] LL Fuller and William R Perdue, 'The Reliance Interest in Contract Damages' 46 Yale Law Journal 52. See also Andrew Tettenborn, 'What is a Loss?' in Jason W Neyers, Erika Chamberlain and Stephen G A Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) 456.

[48] Burrows, *Remedies* (n1) 73. See also Adam Kramer, *The Law of Contract Damages* (Hart 2014) 339, noting that mitigation 'may seem to interfere with the basic compensatory principle'.

[49] See eg *Total Transport Corp v Arcadia Petroleum Ltd (The Eurus)* [1996] 2 Lloyd's Rep 408, [1996] CLC 1084 (QB) 1102 (Rix J): 'The law has therefore cut down or limited the basic principle by a number of devices, such as contributory negligence, proximate or effective cause, contemplation of the parties, mitigation, avoidable loss, uncertainty, and so on'.

[50] In *Wells v Wells* [1999] 1 AC 345 (HL) 382-83, this outcome was described by Lord Steyn as the '100% rule'. See also Peter Cane and PS Atiyah, *Atiyah's Accidents: Compensation and the Law* (8th edn, CUP 2013) 130-131.

[51] Burrows, *Remedies* (n1) ch6. See also Treitel, *Contract* (n1) [20-093]-[20-128] ('Methods of Limiting Damages'), which adopts a similar list but excludes the SAAMCo rule: [20-023]. Until fairly recently, it might have been suggested that there was a sixth limitation based on the impecuniosity of the claimant but this rule was abolished by the House of Lords in *Lagden v O'Connor (sub nom Burdis v Livsey)* [2003] UKHL 64, [2004] 1 AC 1067. See further Burrows, *Remedies* (n1) 73.

the doctrine of 'betterment',[52] and the rule restricting the availability of 'cost of cure' damages.[53]

On the orthodox account, the relationship between mitigation and the other limitations is somewhat unclear. Broadly speaking, mitigation concerns the effect of the claimant's post-breach conduct on the assessment of damages.[54] However, the rules of remoteness, supervening causation and contributory negligence can also concern the claimant's post-breach conduct. As Bridge puts it, 'An injured plaintiff's failure to recover on the ground of his intervening behaviour may be variously put down to lack of factual causation, remoteness, contributory negligence and mitigation'.[55] Similarly, in *County v Girozentrale*, Hobhouse LJ noted that 'The related principles of remoteness of damage, contributory negligence, and mitigation of damage are all legal principles which … directly concern the evaluation of the responsibility of the [claimant] for his own conduct'.[56]

As a result of this interrelationship, the same set of facts may raise the application of more than one limitation. In *Smith New Court Securities v Citibank*, after referring to the 'three limiting principles' of causation, remoteness and mitigation, Lord Steyn noted that 'In practice the inquiries under these headings overlap'.[57] For example, in *The Borag*, Templeman LJ concluded that 'if the interest charges were unreasonable, they were too remote: they were not caused by the breach; they were not part of a reasonable form of mitigation; all these matters hang together'.[58] Nevertheless, in *Smith New Court*, Lord Steyn also sought to emphasise that the various limitations on damages 'are distinct legal

[52] See eg *Voaden v Champion (The Baltic Surveyor)* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623.

[53] See eg *Ruxley* (n19).

[54] Section 1.2.

[55] Michael G Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398, 403.

[56] *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 (CA) 857-58. See also *Kuwait Airways (No6)* (n19) [70] (Lord Nicholls).

[57] *Smith New Court* (n40) 284. See also *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL) 208 (Lord Hobhouse); *Lamb v Camden LBC* [1981] QB 625 (CA) 636 (Denning LJ).

[58] *Compania Financiera Soleada SA v Hamoor Tanker Corp Inc (The Borag)* [1981] 1 WLR 274 (CA) 285.

concepts'.[59] This raises the question of whether each limiting rule has a distinct explanation, or whether more than one rule (including mitigation) may be descended from the same general principles.

3.2.3 Exceptions to the factual loss cap

Factual loss is sometimes regarded as an upper limit on the award of damages.[60] This understanding will be referred to as the 'factual loss cap'. Awards exceeding the claimant's factual loss may be said to 'offend the compensatory principle'[61] because 'damages must not put the claimant in a better position than if the breach had not occurred'.[62] For example, in *Wertheim v Chicoutimi Pulp*, Lord Atkinson held that it would be 'against all justice' for the claimant to 'be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position'.[63] For this reason, recovery greater than the claimant's factual loss has sometimes been criticised as 'overcompensation'.[64]

There are nevertheless three main exceptions to the factual loss cap that are acknowledged to form part of the orthodox account of *compensatory* damages.[65] First, there

[59] *Smith New Court* (n40) 284.

[60] See eg *Cerberus Software Ltd v Rowley* [2001] EWCA Civ 78, [2001] ICR 376 [27] (Sedley LJ): 'The principle that a claimant's damages should not exceed his real losses is a bedrock of our law'.

[61] *The Golden Victory* (n3) [38] (Lord Scott).

[62] *Flame* (n15) [17] (Teare J). See also *The Golden Victory* (n3) [83] (Lord Brown); Burrows, *Remedies* (n1) 156 and 215; David McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 384.

[63] *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (PC), 308. See also *Elbinger AG v Armstrong* (1874) LR 9 QB 473 (QB) 479 (Blackburn J).

[64] See eg *Bacciottini v Gotelee & Goldsmith* [2016] EWCA Civ 170 [39] (Davis LJ); Burrows, *Remedies* (n1) 213; McLauchlan, *Expectation Damages* (n62) 364-65. Samuel Beswick, '"Losses in Any Event" in the Case of Damage to Property' (2015) 35 OJLS 755, 773.

[65] The claimant may also recover more than its factual loss through an award of restitutionary damages or disgorgement damages, although these awards tend to be explained and justified separately from the compensatory aims.

are 'two well established exceptions'[66] for insurance payments and benevolent donations by third parties. The insurance rule provides that 'where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages'.[67] The benevolence rule similarly provides that 'when the plaintiff receives money from the benevolence of third parties … the amount received is again to be disregarded'.[68] Both rules have been affirmed by the House of Lords on several occasions,[69] despite that their effect is to award 'a net gain to the plaintiff resulting from his injury' and thereby to allow 'double recovery'.[70]

Second, the claimant may recover more than its factual loss through the application of the 'market rule' of damages.[71] Under the Sale of Goods Act 1979,[72] the prima facie statutory measures of damages have been awarded despite exceeding the claimant's factual loss.[73] At common law, such awards preceded the first Sale of Goods Act,[74] and have also

[66] *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514 (HL) 527 (Lord Bridge). See also *British Transport Commission v Gourley* [1956] AC 185 (HL) 197-98 (Earl Jowitt).

[67] *Hussain* (n66). See also *Bradburn v The Great Western Railway Co* (1874-75) LR 10 Ex 1 (Ex Ch). The rule also extends to other benefits earned by the claimant: see eg *Smoker v London Fire and Civil Defence Authority* [1991] 2 AC 502 (HL) (contractual disablement pension); *Parry* (n15) (incapacity pension); *Hopkins v Norcros plc* [1994] ICR 11 (CA) (retirement pension).

[68] *Hussain* (n66). See also *Redpath v Belfast & County Down Railway* [1947] NI 167 (HCNI); Law Commission, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (Law Com No 262, 1999). The rule also extends to benefits in kind and services: see eg *Liffen v Watson* [1940] 1 KB 556 (CA) (board and lodging); *Donnelly v Joyce* [1974] QB 454 (CA) 462 (Megaw LJ) (personal care), although see criticism of this decision in *Hunt v Severs* [1994] 2 AC 350 (HL) 361 and 363 (Lord Bridge).

[69] In relation to insurance, see: *Parry* (n15) 14 (Lord Reid); *Hussain* (n66) 527 (Lord Bridge); *Hodgson v Trapp* [1989] AC 807 (HL) 819 (Lord Bridge). In relation to benevolence, see *Parry* (n15) 13 (Lord Reid); *Hunt* (n68) 358 (Lord Bridge).

Parry (n15); *Hunt* (n68); *Dimond v Lovell* [2002] 1 AC 384 (HL).

[70] *Hussain* (n66) 527-28 (Lord Bridge).

[71] See further Section 7.2.1.1. See also Dyson and Kramer, 'There is No "Breach Date Rule"' (n17).

[72] ss50(3) (non-acceptance), 51(3) (non-delivery) and 53(3) (breach of warranty).

[73] See eg *Williams Bros v Ed T Agius Ltd* [1914] AC 510 (HL); *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 (CA); *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65 (CA).

[74] See eg *Jones v Just* (1867-68) LR 3 QB 197 (QB); *Rodocanachi, Sons & Co v Milburn Bros* (1887) LR 18 QBD 67 (CA). The preamble to the first Sale of Goods Act 1893 describes it as 'an Act for codifying the Law relating to the Sale of Goods'; see also MD Chalmers, *The Sale of Goods: Including the Factors Act 1889* (Clowes 1890) iv.

been applied in relation to shares and land outside the statutory regime.[75] Furthermore, damages have sometimes been awarded for 'diminution in value' or 'direct loss' measured by the market cost of repairs,[76] even where it is known that the claimant did not in fact pay for the repairs,[77] or paid less than the market rate.[78] These decisions appear to contradict the factual loss cap on damages, and have accordingly sometimes attracted criticism as 'contrary to the avowed compensatory goal'.[79]

Third, the orthodox account of damages recognises a further exception known as 'mitigation in fact'[80] or the 'avoided loss rule'.[81] This rule applies where the benefit obtained by the claimant was not 'one arising from the consequences of the breach'.[82] In cases where this rule applies, the claimant's recovery of damages greater than its factual loss is attributed to its own post-breach conduct.[83] This exception to the factual loss cap has no settled home in the leading texts, appearing under various headings besides mitigation, including 'compensating advantages',[84] 'collateral benefits',[85] or 'avoided loss'.[86] Some proponents of the orthodox account of damages regard most or all of the cases purporting

[75] See eg *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC) (shares); *Blue Circle* (n15) (land). In *Smith New Court* (n40) 279, Lord Steyn held that 'the same legal principle must govern sales of shares, goods, a business or land'.

[76] *Coles v Hetherton* [2013] EWCA Civ 1704, [2015] 1 WLR 160 [27], [33] (Aikens LJ).

[77] See eg *The Endeavour* (1890) 6 Asp MC 511 (PD); *The Glenfinlas* [1918] P 363 (PD); *The London Corporation* [1935] P 70 (CA); *Burdis v Livsey (sub nom Lagden v O'Connor)* [2002] EWCA Civ 510, [2003] QB 36; *Mueller Europe Ltd v Central Roofing (South Wales) Ltd* [2013] EWHC 237 (TCC), 147 Con LR 32.

[78] *Jones v Stroud DC* [1986] 1 WLR 1141 (CA); *Coles* (n76). See also, in relation to car hire at less than the market rate: *Bee v Jenson* [2007] EWCA Civ 923, [2007] 4 All ER 791.

[79] Burrows, *Remedies* (n1) 218. See also McLauchlan, *Expectation Damages* (n62) 377-78.

[80] See eg Treitel, *Contract* (n1) [20-120]; Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 337.

[81] See eg McGregor, *Damages* (n1) ch9; Tettenborn, *Damages* (n1) ch5.

[82] Treitel, *Contract* (n1) [20-121], citing *British Westinghouse* (n9) 690 (Viscount Haldane).

[83] See eg *Primavera v Allied Dunbar Assurance plc* [2002] EWCA Civ 1327, [2003] Lloyd's Rep PN 14 [38] (Mance LJ), noting that the rule 'refers not to steps which the [claimant] was under any duty to take, but simply to steps which he did take'.

[84] See eg Burrows, *Remedies* (n1) ch7.

[85] See eg Law Commission, 'Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits', Section B.

[86] See eg McGregor, *Damages* (n1) ch9; Tettenborn, *Damages* (n1) ch5.

to apply this rule as wrongly decided.[87] However, these cases (together with the other exceptions) have been relied upon in support of the rival 'right-based' account of damages.[88]

3.3 The Historical Development of Mitigation

This section briefly outlines the historical development of the law of mitigation. Its history can be divided into three main parts. First, the earliest authorities developed rules for determining the effect of the claimant's post-breach conduct on damages without any mention of 'mitigation'. Second, the landmark decision in *British Westinghouse v Underground Electric Railways of London* developed from these early authorities to establish two important rules of mitigation.[89] Third, the orthodox understanding of mitigation has been significantly shaped by *McGregor on Damages*,[90] which has without doubt served as the most influential text on the law of mitigation from the mid-twentieth century to the present day.[91]

3.3.1 Early authorities

The rules that we now know as part of the law of mitigation were developed before the first references to 'mitigation'.[92] For example, in *Ansett v Marshall*, the defendants wrongfully prevented the claimant from travelling aboard a voyage from England to Australia, thinking

[87] See eg McLauchlan, *Expectation Damages* (n62); Burrows, *Remedies* (n1) 157-61.

[88] Robert Stevens, *Torts and Rights* (OUP 2007) ch4; Robert Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart 2009), discussed in Andrew Burrows, 'Damages and Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 275-90.

[89] *British Westinghouse* (n9).

[90] For the current edition, see McGregor, *Damages* (n1).

[91] The chapter on mitigation underwent a major re-write in Harvey McGregor's inaugural edition: Harvey McGregor, *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961).

[92] See eg *Boyce v Bayliffe* (1807) 1 Campbell 58, 170 ER 875; *Harries v Edmonds* (1845) 174 ER 991, 1 Carrington & Kirwan 686; *Beckham v Drake* (1849) 2 HL Cas 579, 9 ER 1213; *Ansett v Marshall* (1853) 22 LJ (QB) 118; *Borries v Hutchinson* (1865) 18 CB (NS) 445, 144 ER 518 (CP); *Anderson (Commander of the Flying Fish) v Hoen (The Flying Fish)* (1865) 16 ER 29 (PC).

that he had not paid the full fare.[93] Upon realising their mistake, the defendants offered the claimant free passage on another ship sailing a few days later. The claimant refused and instead stayed in England to pursue his claim. Crompton J held that 'the damages could not legally include the expenses of the plaintiff's keep up to the time of trial, for he might have gone to Australia in a very few days after he was removed from the vessel'; the test was 'whether it was reasonable' that the claimant should have remained in England.[94]

The earliest general statement of what we would now refer to as the avoidable loss rule similarly made no mention of 'mitigation'. In *Dunkirk Colliery v Lever*, James LJ held that:

> What the Plaintiffs are entitled to is the full amount of the damage which they have really sustained by a breach of the contract; the person who has broken the contract not being exposed to additional cost by reason of the Plaintiffs not doing what they ought to have done as reasonable men, and the Plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.[95]

Three points about *Dunkirk Colliery* are worthy of note. First, the term 'mitigation' is entirely absent from the decision; the nominal 'law of mitigation' developed later. Second, the rule applies where the claimant has not done what he ought to have done as a 'reasonable man', but this test is explicated by reference to 'the ordinary course of business'.[96] Third, where the rule applies, James LJ does not appear to envisage a reduction in damages; instead he regards the effect of the rule as being to assess 'the full amount of the damage which they have really sustained'.[97] In other words, rather than serving as a distinct limitation on the claimant's factual loss, the rule was expressed as part of the assessment of loss itself.

It was not until the late nineteenth century that the rules for determining the effect of the claimant's post-breach conduct on damages started to become known as 'mitigation'. Previously, although 'mitigation' appeared in the cases on damages, this term had been used

[93] *Ansett* (n92).

[94] Available at http://solo.bodleian.ox.ac.uk/OXVU1:oxfaleph013186467, 226.

[95] *Dunkirk Colliery Co v Lever* (1878) 9 Ch D 20 (CA) 25.

[96] Ibid.

[97] James LJ envisages an '*additional* cost' attributable to the claimant's failure to act as a reasonable man: n95.

to describe the reduction of damages on several different legal grounds.[98] *Frost v Knight*, decided in 1871, appears to be the earliest authority in which mitigation was used to refer to the claimant's conduct specifically, rather than to the effect on damages generally.[99] Cockburn CJ held that the claimant would be entitled to damages subject to 'abatement in respect of any circumstances which may have afforded him the means of *mitigating his loss*'.[100]

3.3.2 The decision in *British Westinghouse*

The landmark decision in *British Westinghouse v London Underground* marks the beginning of the modern law of mitigation.[101] The case concerned the supply of eight steam turbines by the defendant for use by the claimant in supplying power to its London Underground lines. The turbines were less efficient than specified and therefore consumed additional coal at the claimant's expense. The claimant replaced the defendants' turbines with new machines from Parsons. The Parsons turbines were more efficient even than turbines of the contractual specification. In a claim to recover the cost of replacing the defendants' turbines, the issue was whether the additional efficiency of the Parsons turbines should be taken into account in the assessment of damages.

[98] See eg *Bonham Kight v Lord Sturton* (1554) 73 ER 230 (justification of slander); *Barker v Holder* (1685) 23 ER 493 (delay in bringing a claim); *Michell v Reynolds* (1711) 88 ER 610 (no reduction in recovery of debt); *Crake v Northfolke* (1719) 170 ER 21, 24 (prevention of double recovery); *Mondel v Steel* (1841) 8 Meeson and Welsby 858, 151 ER 1288 (counterclaim for breach of warranty).

[99] *Frost v Knight* (1871-72) LR 7 Ex 111 (Ex Ch) 113. See also *Brown v Muller* (1871-72) LR 7 Ex 319 (Ex Ch) 323 (Kelly CB).

[100] *Frost* (n99) 113 (emphasis added). In *Roper v Johnson* (1873) LR 8 CP 167 (CP) 183, Grove J refers to Cockburn CJ's judgment but reverts to using mitigation to describe the effect on assessment of damages.

[101] *British Westinghouse* (n9). For detailed analysis of the decision, see further Andrew Dyson, 'British Westinghouse Revisited' [2012] LMCLQ 412.

Giving the only judgment in the House of Lords, Viscount Haldane expressed what has since become known as the 'classic statement of mitigation'[102] or 'the avoidable loss rule'.[103] He held that this first rule 'imposes on the plaintiff *the duty of taking all reasonable steps to mitigate the loss* consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps'.[104] This appears to be the first judicial expression of a 'duty … to mitigate'.[105] Viscount Haldane emphasised that the rule 'does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business'.[106] The effect of the rule, which 'debarred' the claimant from recovering part of the damage, was described as a 'qualification' of the compensatory principle.[107]

Viscount Haldane also expressed a second rule, now commonly referred to as 'mitigation in fact'[108] or the 'avoided loss rule'.[109] Here Viscount Haldane's judgment is frequently misunderstood and needs to be examined carefully.[110] The rule consisted of two limbs. The first (and most often-cited) limb was that 'when in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act'.[111] In these circumstances, the court 'may

[102] *Pilkington v Wood* [1953] Ch 770 (Ch) 775 (Harman J); *Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB), 88 (Robert Goff J); *Burdis* (n77) [89] (Aldous LJ); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep 383 [21] (Longmore LJ).

[103] McGregor, *Damages* (n1) [9-004].

[104] *British Westinghouse* (n9) 689 (emphasis added). See also *Jamal* (n75) 179 (Lord Wrenbury).

[105] However it was not the first time that 'duty' had been used in relation to the claimant's post-breach conduct: see eg *Harries* (n92); *Beckham* (n92).

[106] *British Westinghouse* (n9) 689. The reference to the 'ordinary course of business' affirmed James LJ's formulation in *Dunkirk Colliery* (n95), which Viscount Haldane quoted immediately below his own formulation.

[107] *British Westinghouse* (n9) 689. In this regard, Viscount Haldane's understanding of the rule differed from that of James LJ: text to n97.

[108] See eg Treitel, *Contract* (n1) [20-120]; McGregor, *The Role of Mitigation* (n80) 337.

[109] See eg McGregor, *Damages* (n1) [9-006].

[110] See further Section 4.3.1.

[111] *British Westinghouse* (n9) 689.

properly look at the whole of the facts and ascertain the result in estimating the quantum of damage'.[112] In other words, where the first limb applied, the compensatory principle was not displaced; the claimant recovered its factual loss and no more.

The first limb only applied to conduct 'which a reasonable and prudent person might in the ordinary conduct of business properly have taken'.[113] Viscount Haldane emphasised that 'the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business'.[114] Conversely if the claimant's conduct was 'an independent or disconnected transaction' or not 'part of a continuous dealing',[115] then the claimant's conduct was '*res inter alios acta*',[116] meaning that it would not be 'taken into account' in the assessment of damages.[117] This proposition formed the second limb of Viscount Haldane's formulation. Its effect was also to qualify the compensatory principle,[118] but rather than limiting recovery of the claimant's factual loss, it instead involved an award of damages exceeding the factual loss.

On the facts of *British Westinghouse*, Viscount Haldane held that both the costs and benefits of the replacement turbines should be taken into account in the assessment of damages.[119] The claimants had accordingly suffered no loss because the cost of purchasing the Parsons turbines was outweighed by the benefit of their increased efficiency.[120] Viscount Haldane held that the second limb of the avoided loss rule did not apply because 'The transaction was not *res inter alios acta*, but one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the

[112] Ibid 690.

[113] Ibid 690.

[114] Ibid 690.

[115] Ibid 692.

[116] Ibid 691.

[117] Ibid 690.

[118] In this respect, it mirrored the classic statement of mitigation: text to n107.

[119] *British Westinghouse* (n9) 691: 'I think the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain'.

[120] The case was sent back to the arbitrator for a final assessment, but this was the inevitable conclusion: ibid 692.

circumstances in which he was placed by the breach'.[121] In relation to the application of the first limb on these facts, Viscount Haldane's reasoning has been the subject of scholarly debate, discussed in the next chapter.[122]

3.3.3 The influence of *McGregor on Damages*

Perhaps more than any other doctrine in the law of damages, the orthodox account of mitigation has been shaped by a single text. *McGregor on Damages*, which was authored by McGregor for eight editions from 1961 to 2014,[123] stands above all others for its influence on mitigation. In judicial decisions, the text achieved such authority that several cases cited whole passages from it verbatim,[124] or relied upon it directly as authority instead of citing judicial precedents.[125] The reflexive effect of successive editions of *McGregor on Damages* on the law of mitigation can scarcely be doubted.[126] McGregor himself highlighted several occasions on which the courts had expressly adopted the position that he had taken in earlier editions of his text.[127] McGregor's descriptive account of the law has also influenced several other leading texts on damages.[128]

McGregor took over the twelfth edition of *Mayne's Treatise on Damages* in 1961.[129] The eleventh edition was by then fifteen years old and it was widely agreed that a thorough

[121] Ibid 691.

[122] Section 4.3.1.1.

[123] McGregor, *Mayne and McGregor* (12th edn 1961) (n91); McGregor, *Damages* (n1).

[124] See eg *Bellingham v Dhillon* [1973] QB 304 (QB) 307 (Forbes J); *Moore v DER Ltd* [1971] 1 WLR 1476 (CA) 1479 (Davies LJ), 1481 (Karminski LJ); *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC) [159] (Akenhead J); *Manton Hire and Sales Ltd v Ash Manor Cheese Co Ltd* [2013] EWCA Civ 548 [32] (Tomlinson LJ) and further at n140.

[125] See eg *Downs v Chappell* [1997] 1 WLR 426 (CA) 437 (Hobhouse LJ); *Gardner v Marsh & Parsons* [1997] 1 WLR 489 (CA) 507-08 (Gibson LJ); *Lagden* (n51) [78] (Lord Scott); *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep 482 [50] (Gross J); *Sayce v TNT (UK) Ltd* [2011] EWCA Civ 1583, [2012] 1 WLR 1261 [29] (Moore-Bick LJ).

[126] On the phenomenon of 'reflexive effect', see further Chapter Two, text to n93.

[127] See eg McGregor, *Damages* (n1) [9-098]-[9-099], [9-121] fn484.

[128] Text to n137.

[129] McGregor, *Mayne and McGregor* (12th edn 1961) (n91). The series began with John D Mayne, *A Treatise on the Law of Damages* (Sweet 1856). This was the second ever treatise on the English law of damages: the first was Joseph Sayer, *The Law of Damages* (London 1770). John Mayne continued

re-editing was 'badly needed'.[130] To this end, McGregor rewrote the chapter on mitigation completely.[131] In the new text, he proposed the subdivision of mitigation into 'three different, although closely interrelated, rules': the 'avoidable loss rule'; the 'reasonable attempts rule'; and the 'avoided loss rule'.[132] Previous editions of *Mayne's Treatise*,[133] in common with other contemporaneous texts,[134] had not drawn this distinction. As McGregor himself put it, 'this analysis into three rules, although clearly implicit in the cases, is one which had not, at the first time of writing in the late 1950s, been given explicit statement in English law. It is submitted that such a division lends clarity to a difficult topic'.[135]

The tripartite exposition proposed by McGregor was subsequently replicated in many (but not all)[136] of the other leading texts on damages. Starting with its 1968 edition, *Chitty on Contracts* transposed McGregor's three rules in full.[137] Others, such as Tettenborn's *The Law of Damages*, have adopted the division between the avoidable and avoided loss rules but not the reasonable attempts rule.[138] Starting with the judgment of Robert Goff J in *The Elena D'Amico*,[139] several judicial decisions have quoted McGregor's tripartite exposition directly from the text.[140] Recently, even decisions that have raised doubts about certain

to edit the series (jointly with Lumley Smith) up to and including the seventh edition in 1903, after which the series had different editors for each of the next four editions from 1909-1946.

[130] Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) v.

[131] McGregor, *Mayne and McGregor* (12th edn 1961) (n91) ch7; cf WG Earengey (ed) *Mayne's Treatise on Damages* (11th edn, Sweet & Maxwell 1946), ch7.

[132] McGregor, *Mayne and McGregor* (12th edn 1961) (n91) [144].

[133] In particular, the (modern) 'avoidable' and 'avoided' loss rules were intermixed in the chapter on mitigation: *Mayne's Treatise* (11th edn 1946) (n131) ch7.

[134] See eg *Chitty on Contracts* (21st edn, Sweet & Maxwell 1955) 433-35; GH Treitel, *The Law of Contract* (1st edn, Stevens 1962) 610-11.

[135] McGregor, *Damages* (n1) [9-003].

[136] See eg Burrows, *Remedies* (n1); Treitel, *Contract* (n1). See also Kramer, *Contract Damages* (n48), which expressly rejects McGregor's exposition: 348 fn47.

[137] *Chitty on Contracts* (23rd edn, Sweet & Maxwell 1968) [1482]-[1489]; *Chitty* (n1) [26-079].

[138] Tettenborn, *Damages* (n1) ch5. See also Bridge, 'Mitigation of Damages in Contract' (n55) 398.

[139] *The Elena d'Amico* (n102) 88.

[140] See eg *Gardner* (n125) 505 (Gibson LJ); *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] 1 Lloyd's Rep 747, [1999] CLC 761 (QB) 775 (Toulson J); *Sembawang Corp Ltd v Pacific Ocean Shipping Corporation* [2004] EWHC 2743 (Comm) [19] (Gross J); *The New Flamenco (CA)* (n102) [14] (Longmore LJ).

aspects of McGregor's analysis have nevertheless begun their exposition of mitigation by quoting from his three rules.[141] In this way, the tripartite exposition now constitutes the orthodox account of the law of mitigation.

McGregor's description of the 'avoided loss rule' has greatly influenced the orthodox account. In the 1961 edition, McGregor proposed that 'Put shortly, the claimant cannot recover for avoided loss'.[142] The term 'avoided loss' appears to have been McGregor's own invention.[143] In summarising the avoided loss rule, McGregor invoked Viscount Haldane's first limb, but excluded the second.[144] In other words, he emphasised that 'the defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss as lessened'.[145] In a change from the previous editions,[146] McGregor's tripartite summary excluded the proposition (contained in Viscount Haldane's second limb) that the claimant's conduct may sometimes be '*res inter alios acta*'.[147] This approach continues in the present edition.[148]

The descriptive account of the avoided loss rule proposed by McGregor was subsequently transposed into several other leading texts. The summary in *Chitty on Contracts* now states (without qualification) that 'if the claimant in fact avoids or mitigates his loss consequent upon the defendant's breach, he cannot recover for such avoided loss'.[149] Similarly, in *Clerk & Lindsell on Torts*, the main text states only that 'Damages are

[141] *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2014] EWHC 1547 (Comm), [2015] 1 All ER (Comm) 1205 [18] (Popplewell J); *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [32] (Leggatt J), who also expressed reservations about the exposition at [33].

[142] McGregor, *Mayne and McGregor* (12th edn 1961) (n91) [144].

[143] McGregor, *The Role of Mitigation* (n80) 330: 'The terms which I use here – which indeed I coined when I first wrote my book on damages – are therefore avoidable loss and avoided loss'.

[144] See further Section 4.3.1.2.

[145] McGregor, *Mayne and McGregor* (12th edn 1961) (n91) [144].

[146] Cf *Mayne's Treatise* (11th edn 1946) (n131) 148. See also 151-152, sub-headed 'Collateral matter not admissible to reduce damages'.

[147] The second limb is not excluded from the text altogether: at Ibid [162], McGregor describes it as raising an 'important practical question'.

[148] McGregor, *Damages* (n1) [9-006].

[149] *Chitty* (n1) [26-077]. Furthermore, the relevant sub-section is headed 'Loss which is avoided cannot be recovered': [26-095].

not recoverable for such losses as the claimant has avoided by taking action subsequent to the tort: the general principle of compensation implies that he can claim only for losses actually sustained'.[150] The second limb of Viscount Haldane's formulation (and supporting authorities) is relegated to the footnotes.[151] Of the leading texts on damages, only Burrows and Treitel eschew 'avoided loss' in favour of their own expositions.[152]

There are clear signs that McGregor's description of the avoided loss rule also had reflexive effect in judicial decisions. In *The World Beauty*, Wilmer LJ held (without qualification) that 'Where the plaintiffs have taken action arising out of the casualty, which has avoided or diminished their loss, they cannot recover in respect of such avoidance or diminution. Put more shortly, they cannot recover for avoided loss'.[153] Although Wilmer LJ cited *British Westinghouse* in support of this proposition,[154] his wording bears a striking resemblance to McGregor's text.[155] Other authorities have repeated this simplified exposition.[156] In *Dimond v Lovell*, Lord Hobhouse held (again without qualification) that 'compensation is not paid for an avoided loss'.[157] McGregor's summary has accordingly become established as the orthodox understanding.

[150] *Clerk & Lindsell* (n1) [28-09].

[151] Ibid fn52 and fn53.

[152] Burrows, *Remedies* (n1) 156-61; Treitel, *Contract* (n1) [20-120].

[153] *Owners of the Andros Springs v Owners of the World Beauty (The World Beauty)* [1970] P 144 (CA) 19.

[154] Ibid, citing *British Westinghouse* (n9).

[155] Text to n142.

[156] See eg *IM Properties plc v Cape & Dalgleish* [1999] QB 297 (CA) 307 (Hobhouse LJ); *Lagden* (n51) [78] (Lord Scott); *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd (The Mamola Challenger)* [2010] EWHC 2026 (Comm), [2011] Bus LR 212 [65] (Teare J).

[157] *Dimond* (n69) 406, cited in *Pankhania v Hackney LBC* [2004] EWHC 323 (Ch), [2004] 1 EGLR 135 [33] (Vos QC); *Coles v Hetherton* [2012] EWHC 1599 (Comm), [2013] 1 All ER (Comm) 453 [22] (Cooke J).

3.4 Modern Orthodoxy

The exposition of mitigation proposed by McGregor comprises three rules: the 'avoidable loss rule'; the 'reasonable attempts rule'; and the 'avoided loss rule'.[158] This section outlines briefly the content of each rule, according to the leading texts. The first and third rules are said to derive from Viscount Haldane's judgment in *British Westinghouse*;[159] the second rule is said to be a 'corollary' of the first.[160] In light of the orthodox account of damages, this section clarifies that the reasonable attempts rule and the first limb of the avoided loss rule are both redundant. The tripartite exposition of mitigation can be simplified into just two operative rules: the avoidable loss rule and the second limb of the avoided loss rule. These two rules make up the 'modern orthodoxy' of mitigation.

3.4.1 The tripartite exposition

3.4.1.1 *Avoidable loss rule*

The avoidable loss rule provides that 'the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid'.[161] In summary, 'the claimant cannot recover for avoidable loss'.[162] This rule is said to derive from Viscount Haldane's 'classic statement of mitigation' in *British Westinghouse*.[163] The terminology of avoidable loss has now been adopted judicially. For example, in *Sayce v TNT*, Moore-Bick LJ expressed 'the established rule that avoidable loss

[158] See McGregor, *Damages* (n1) [9-003] and authorities cited at n140.

[159] Ibid [9-014] and [9-103].

[160] Ibid [9-096].

[161] Ibid [9-004].

[162] Ibid [9-004]. See also Treitel, *Contract* (n1) [20-114]: 'the claimant cannot recover damages for a loss that he ought to have avoided'.

[163] *British Westinghouse* (n9) 689.

(that is, loss that the claimant could and should reasonably have avoided) is not recoverable'.[164]

Although the leading texts note that there is not really any 'duty' to mitigate, the rule is usually expressed in prescriptive terms: the claimant 'must' or 'should' act reasonably.[165] All of the leading texts emphasise that the reasonableness of the claimant's conduct is a question of fact.[166] Accordingly, the application of the reasonableness test tends to be illustrated rather than explained. The texts provide the reader with a catalogue of decided cases, subdivided by context rather than by legal principle.[167] As Tettenborn puts it, 'no fixed rules can be laid down'.[168] Where the claimant acted unreasonably, it is prevented from recovering the avoidable loss. The legal effect of the rule is thus sometimes described as 'all-or-nothing', but is more often understood to involve 'cutting back' the award of damages.[169]

The avoidable loss rule applies equally in relation to both torts and breaches of contract; it also applies in the same way irrespective of the defendant's fault.[170] However, the leading texts note that the temporal scope of the rule is constrained because the duty to mitigate only arises once the claimant becomes aware of the breach, or once it accepts the defendant's anticipatory breach of contract.[171] The relationship between the avoidable loss rule and the other limitations on damages is uncertain. The leading texts acknowledge that there is likely to be an overlap with the rules of remoteness and supervening causation; there also appears to be a further overlap with the doctrine of betterment and the market rule of damages.

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[164] *Sayce* (n125) [27]. See also *Standard Chartered Bank v Pakistan National Shipping Corp (No2)* [2002] UKHL 43, [2003] 1 AC 959 [41] (Potter LJ); *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 CLC 80 [49] (Moore-Bick LJ).

[165] Section 4.2.1.

[166] Section 4.2.2.

[167] See eg McGregor, *Damages* (n1) [9-043]-[9-073], [9-078]-[9-095]; Burrows, *Remedies* (n1) 123-26.

[168] Tettenborn, *Damages* (n1) [5.79].

[169] Section 4.2.3.

[170] Section 6.4.1.

[171] Section 6.4.2.

3.4.1.2 *Reasonable attempts rule*

The reasonable attempts rule provides that 'where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing'.[172] The apparent significance of the rule is that 'this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken'.[173] McGregor summarises that 'the claimant can recover for loss incurred in reasonable attempts to avoid loss'.[174] The rule is said to be a 'corollary' of the avoidable loss rule.[175] McGregor claims that 'At the date of this book's initial compilation and publication in 1961, this principle boasted no clear illustration in English law'.[176] This claim is not strictly correct,[177] but it is right to point out that the rule is now largely uncontroversial.[178]

The reasonable attempts rule has been affirmed several times by the appellate courts. Most recently, in *Lagden v O'Connor*, Lord Scott held that 'If the mitigating steps do not succeed in reducing the loss but were, nonetheless, reasonable steps in all the circumstances for the injured party to take … the injured party can add to his damages claim the cost of taking the steps in question'.[179] The rule has been applied in various contexts.[180] If the claimant reasonably enters into a substitute transaction, the costs of so doing are

[172] McGregor, *Damages* (n1) [9-005].

[173] Ibid [9-005].

[174] Ibid [9-005].

[175] Ibid.

[176] Ibid [9-098].

[177] See eg *Borries* (n92) 525 (Erle CJ); *Wilson v United Counties Bank Ltd* [1920] AC 102 (HL) 125 (Lord Atkinson); *Melachrino v Nickoll & Knight* [1920] 1 KB 693 (KB) 697 (Bailhache J); *Harling v Eddy* [1951] 2 KB 739 (CA); *Jones v Watney Combe Reid & Co* (1912) 28 TLR 399 (KB); *Bloor v Liverpool Derricking & Carrying Co Ltd* [1936] 3 All ER 399 (CA) 402 (Greer LJ, obiter).

[178] One remaining area of controversy arises where the claimant's reasonable expenses were incurred to 'prevent' the occurrence of a wrong: Donal Nolan, 'Preventive Damages' (2016) 132 LQR 68. See further Chapter Six, text to n238.

[179] *Lagden* (n51) [78]. See also *Downs* 437 (Hobhouse LJ).

[180] See further: *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764 (QB) 782-83 (Edmund-Davies J); *Nigerian National Shipping Lines Ltd v Mutual Ltd (The Windfall)* [1998] 2 Lloyd's Rep 664 (QB) 671-72 (Rix J); *Humber Oil Terminal Trustee Ltd v Owners of the Sivand (The Sivand)* [1998] CLC 751 (CA) 107-08 (Hobhouse LJ); *Vinmar International Ltd v Theresa Navigation SA* [2001] 2 Lloyd's Rep 1 (QB) 15 (Tomlinson J).

recoverable even if (with hindsight) it would have been better not to have entered into the substitute at that time, or at all.[181] If the claimant reasonably attempts to repair defective goods, the cost is recoverable even if the repairs are ultimately unsuccessful.[182] Similarly, the costs of reasonable medical treatments are recoverable even if they exacerbate the claimant's injury.[183]

3.4.1.3 *Avoided loss rule*

The avoided loss rule provides that 'where the claimant does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the claimant's action'.[184] It is commonly specified that 'this is so even though the claimant would not have been debarred under the first rule from recovering the whole loss',[185] had it not taken the relevant steps. This understanding is said to derive from the first limb of Viscount Haldane's formulation in *British Westinghouse*.[186] McGregor summarises that 'the claimant cannot recover for avoided loss'.[187] This summary is adopted by the most of the leading texts on damages and has also been repeated in several judicial decisions.[188]

Although McGregor omits the second limb of Viscount Haldane's formulation from his summary of the avoided loss rule,[189] in a later section he notes that it is 'the core of the

[181] See eg *Melachrino* (n177) 697 (Bailhache J); *Esso Petroleum Co v Mardon* [1976] QB 801 (CA) 821 (Lord Denning MR), 829 (Ormrod LJ), 833 (Shaw LJ); *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 (CA) 364 (Browne-Wilkinson LJ); *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) [156]-[161] (Christopher Clarke J).

[182] See eg *Harling* (n177); *Hoffberger v Ascot International Bloodstock Bureau* (1976) 120 SJ 130 (CA).

[183] See eg *Jones v Watney* (n177); *Bloor* (n177) 402 (Greer LJ, obiter).

[184] McGregor, *Damages* (n1) [9-006].

[185] Ibid [9-006].

[186] Text to n111.

[187] McGregor, *Damages* (n1) [9-006].

[188] See text to n149.

[189] McGregor, *Damages* (n1) [9-006]. See further Section 4.3.1.2.

problem of mitigation by way of avoided loss'.[190] In particular, 'the important practical question' is to ascertain the scope of conduct 'arising out of the consequences of the breach'.[191] On this key issue, McGregor has conceded that 'the authorities are in a bit of a jumble';[192] other scholars have similarly lamented that 'the current law is in a dreadful muddle'.[193] The leading texts generally regard the application of the second limb an exceptional departure from the compensatory principle.[194] Several legal scholars have sought to dismiss as wrongly decided most (if not all) of the cases that have applied the rule.[195]

3.4.2 Three rules or two?

In light of the orthodox account of damages described above, the tripartite exposition of mitigation can be simplified as just two rules. Recall that the orthodox account of damages involves two main stages: first, apply the compensatory principle to assess the claimant's factual loss; and second, apply limitations on damages.[196] Also recall that factual loss takes into account all events up to the date of trial.[197] Applying this orthodox account, the reasonable attempts rule and the first limb of the avoided loss rule are redundant. Both of these rules are already encapsulated within the compensatory principle as conventionally understood. The only rules with distinctive legal effect are the avoidable loss rule and the

[190] Ibid [9-104].

[191] Ibid [9-104]. See further Section 4.3.1.2.

[192] McGregor, *The Role of Mitigation* (n80) 336.

[193] McLauchlan, *Expectation Damages* (n62) 384.

[194] See further Section 4.3.1.2.

[195] See eg McLauchlan, *Expectation Damages* (n62), which expressly concludes that all of the following cases were wrongly decided: *Williams Bros* (n73); *Rodocanachi* (n74); *Campbell Mostyn* (n73); *Gardner* (n125); *Primavera* (n83).

[196] Section 3.2.1.

[197] Text to n44.

second limb of the avoided loss rule. These rules can be derived directly from Viscount Haldane's judgment in *British Westinghouse*.[198]

McGregor's reasonable attempts rule merely reiterates the proposition that the avoidable loss rule only applies where the claimant's conduct was *unreasonable*.[199] In *Thai Airways v KI Holdings*, Leggatt J described the reasonable attempts rule as 'simply the non-application of any rule'.[200] Where the claimant acted reasonably, the avoidable loss rule is inapplicable and there is thus no reason to limit the claimant's recovery of its factual loss.[201] For this reason, some of the leading texts have (correctly) omitted the reasonable attempts rule from their exposition of mitigation.[202] For example, Burrows points out that 'it is simpler to view this proposition as a natural consequence of there being no relevant restriction limiting the compensatory principle'.[203]

The first limb of the avoided loss rule is similarly redundant.[204] This limb holds that 'the claimant cannot recover for avoided loss',[205] or to use Viscount Haldane's formulation, 'the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act'.[206] But to the extent that the claimant's conduct successfully 'avoided' harm, the orthodox account of damages simply holds that the claimant has not suffered any factual loss. In other words, the first limb is simply a consequence of the conventional application of the compensatory principle and does not require expression as a separate limiting rule. McGregor's terminology of 'avoided loss' is itself alien to the orthodox account of damages, because by definition such loss has not in fact eventuated, looked at from the date of trial.[207]

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[198] Section 3.3.2.

[199] Chapter Four, text to 40.

[200] *Thai Airways* (n141) [33], citing Kramer, *Contract Damages* (n48) 348 fn47 with approval.

[201] Unless one of the other limiting rules (such as remoteness) applies.

[202] See eg Burrows, *Remedies* (n1) ch6; Tettenborn, *Damages* (n1) ch5.

[203] Burrows, *Remedies* (n1) 122 fn7.

[204] See *Thai Airways* (n141) [33] (Leggatt J), describing it as the 'non-application of any rule'.

[205] McGregor, *Damages* (n1) [9-006].

[206] *British Westinghouse* (n9) 689.

[207] See further Section 4.3.2.3.

The redundancy of the foregoing two rules leaves two remaining rules with distinctive legal effect: the avoidable loss rule and the second limb of the avoided loss rule.[208] The avoidable loss rule operates as a limitation on damages.[209] This rule applies where the claimant's post-breach conduct was unreasonable. The effect of the rule, at least as conventionally understood, is to depart from the compensatory principle by limiting the claimant's recovery of its factual loss. In other words, although the compensatory principle (at the first stage) prescribes an assessment of the claimant's factual loss, the avoidable loss rule may apply (at the second stage) such that the claimant recovers *less than* its factual loss.

The second limb of the avoided loss rule also has distinctive legal effect. This rule applies where the claimant's conduct amounted to an 'independent or disconnected transaction'[210] or did not 'arise out of the consequences of the breach'.[211] Its effect is that the claimant's conduct is '*res inter alios acta*', or not 'taken into account' in the assessment of damages.[212] This involves a departure from the compensatory principle that may result in an award of damages *greater than* the claimant's factual loss. In other words, it prescribes circumstances in which damages for 'avoided loss' *are* recoverable. Within the orthodox account of damages, this rule must be classified as an exception to the factual loss cap on damages, alongside the insurance, benevolence and market rules.[213]

3.5 Conclusion

This chapter has introduced the orthodox account of the law of mitigation. Applying the orthodox account of damages, it was argued that McGregor's tripartite exposition of

[208] Although the 'tripartite' exposition formally consists of three rules, the third (avoided loss) rule itself consists of two limbs; thus the modern orthodoxy is effectively in four parts (two of which are redundant).

[209] See eg *Smith New Court* (n40) 285 (Lord Steyn): 'The third limiting principle is the duty to mitigate'.

[210] *British Westinghouse* (n9) 692.

[211] Ibid 690.

[212] Ibid 690-91.

[213] Section 3.2.3.

mitigation can be simplified as just two rules: the avoidable loss and the avoided loss rule (more specifically its second limb).[214] This restatement is purely cosmetic. It does not involve any substantive challenge to the other elements of McGregor's tripartite exposition; it merely contends that the other elements are already incorporated within the conventional understanding of the compensatory principle. The avoidable loss rule and the avoided loss rule make up the modern orthodoxy of mitigation. The next chapter highlights the problems with that orthodox understanding.

[214] In this thesis, references to the 'avoided loss rule' should be understood as references to the second limb of Viscount Haldane's formulation, unless otherwise specified.

4
Problematic Issues

4.1 Introduction

This chapter highlights several problems with the descriptive and explanatory accounts of mitigation put forward in the leading texts. The first section identifies three main problems with the orthodox account of the avoidable loss rule: the rule does not seek to prescribe the claimant's conduct; there is no guidance as to how the reasonableness test is applied; and the legal effect of the rule is stated ambiguously. The second section identifies two main problems with the orthodox account of the avoided loss rule: the application of the *British Westinghouse* test is uncertain; and the recovery of 'avoided loss' is an exception to the 'factual loss cap' on damages. The third section evaluates the three main explanations of mitigation put forward by the leading texts: self-reliance; the prevention of waste; and remoteness.

4.2 The Avoidable Loss Rule

There are three main problems with the orthodox account of the avoidable loss rule. First, although it is often expressed in prescriptive terms, the rule does not seek to tell citizens (prospectively) how they should behave; instead it attributes responsibility (retrospectively) for the outcome of the claimant's decisions. Second, the orthodox account provides almost no guidance as to how the reasonableness test is applied. In particular, the reasonableness of the claimant's conduct is not just a question of fact. The 'case-by-case' approach adopted by the leading texts is essentially empty; it does not attempt to describe the relevant rules of law. Third, the legal effect of the rule is often mischaracterised. The rule

has counterfactual effect; it does not merely 'chop off' the claimant's recovery of its factual loss.

4.2.1 Prescriptive or attributive?

The avoidable loss rule is sometimes described as 'the duty to mitigate'. The origin of this expression appears to be Viscount Haldane's classic statement in *British Westinghouse*.[1] Although judges do still occasionally refer to the 'duty to mitigate',[2] it is also often emphasised that this phrase is an inaccurate characterisation of the rule. As Lord Toulson put it in *Bunge v Nidera*, 'It is well recognised that the so-called duty to mitigate is not a duty in the sense that the innocent party owes an obligation to the guilty party to do so'.[3] Several cases make clear that the claimant's decision not to mitigate involves 'no wrong against the defendant or anyone else',[4] and does not give rise to any cause of action.[5]

The orthodox account of mitigation acknowledges that the 'duty to mitigate' is technically inapt. For example, Tettenborn seeks to clarify that 'strictly speaking, the idea of a "duty" to mitigate loss is a misnomer'.[6] This point is routinely asserted in the leading texts.[7]

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[1] *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL) 689. Other references to the claimant's 'duty' can be traced to *Harries v Edmonds* (1845) 174 ER 991, 1 Carrington & Kirwan 686, 687 (Baron Parke).

[2] See eg, recently: *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082 [32] (Lord Sumption); *Trebor Bassett Holdings Ltd v ADT Fire & Security plc* [2012] EWCA Civ 1158, [2012] BLR 441 [67] (Tomlinson LJ).

[3] *Bunge* (n2) [81]. See also *Wallems Rederij v Muller & Co* [1927] 2 KB 99 (KB) 104-05 (Mackinnon J); *Darbishire v Warran* [1963] 1 WLR 1067 (CA) 1075 (Pearson LJ); *Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB) 88 (Goff J); *Sealace Shipping Co Ltd v Oceanvoice Ltd (The Alecos M)* [1991] 1 Lloyd's Rep 120 (CA) 124 (Neill LJ).

[4] *Darbishire* (n3) 1075 (Pearson LJ).

[5] *Empresa Cubana Importada de Alimentos "Alimport" v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 586 (QB) 597 (Staughton J).

[6] Andrew Tettenborn, *The Law of Damages* (2nd edn, LexisNexis 2010) [5.63].

[7] Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [9-017]; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 122; GH Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) [20-114]; HG Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [26-081]; MA Jones (ed) *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014) [28-09] fn50; Adam Kramer, *The Law of Contract Damages* (Hart 2014) 348.

Nevertheless, it is rarely explained. The basis for the clarification appears to be the Hohfeldian insight that, since the defendant has no 'claim-right' to mitigation, there can be no correlative duty on the claimant.[8] But despite these reservations, references to the 'duty to mitigate' remain commonplace in the leading texts on mitigation.[9] Bridge concluded that the language of duty was 'entrenched and difficult to substitute'.[10] In this way, the orthodox account equivocates on the question of duty.

The problem is that the 'duty to mitigate' is deep-rooted. It stems from the orthodox view that the avoidable loss rule aims to *prescribe* the claimant's conduct. As McBride summarises (in another context), 'To say that someone has a legal duty to do *x* is a shorthand way of saying that the law tells, or requires, him or her to do *x*'.[11] The 'duty' to mitigate is a reflection of the view that the law tells claimants that they 'should' take steps to mitigate. This view is commonplace in the leading texts:[12] 'the claimant *must* take all reasonable steps to mitigate the loss';[13] 'the claimant cannot recover damages for a loss that he *ought* to have avoided';[14] 'a claimant *should not* sit back and do nothing'.[15] Whilst this prescriptive view of mitigation remains, references to the duty to mitigate will not be weeded out.

In opposition to the prescriptive view, judges have often emphasised that the avoidable loss rule does not seek to tell citizens how to behave. For example, in *The Solholt*, Sir John Donaldson MR emphasised that the claimant is 'completely free to act as he judges

[8] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-14) 23 Yale Law Journal 16; cf John Finnis, 'Some Professorial Fallacies About Rights' (1971-72) 4 Adelaide Law Review 377, 380. See also Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 331.

[9] See eg Treitel, *Contract* (n7) [20-114]; Tettenborn, *Damages* (n6) [5.63].

[10] Michael G Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398, 399.

[11] Nicholas J McBride, 'Duties of Care - Do They Really Exist?' (2004) 24 OJLS 417, 417 fn1. See also, to the same effect: Stephen A Smith, 'Duties to Try and Duties to Succeed' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart 2015) 67.

[12] Although the prescriptive view has also been reflected in judicial expositions of the avoidable loss rule, it is less prevalent in the cases. See eg *Payzu v Saunders* [1919] 2 KB 581 (CA) 589 (Scrutton LJ); *Lagden v O'Connor (sub nom Burdis v Livsey)* [2003] UKHL 64, [2004] 1 AC 1067 [27] (Lord Hope).

[13] McGregor, *Damages* (n7) [9-004].

[14] Treitel, *Contract* (n7) [20-114].

[15] Burrows, *Remedies* (n7) 122.

to be in his best interests'.[16] In *Darbishire v Warran*, Pearson LJ held that the claimant is 'fully entitled to be as extravagant as he pleases',[17] and 'if he wishes to adopt the more expensive method, he is at liberty to do so'.[18] Such statements appear to go further than merely denying the existence of any legal obligation to mitigate.[19] Instead, they seem to reflect the idea that, in applying the avoidable loss rule, the law is really not seeking to prescribe the claimant's conduct.

Letsas and Saprai convincingly reject the prescriptive view of mitigation.[20] They give an example in which A agrees to drive B to the airport but fails to turn up.[21] B could take another taxi, or a train, to get him to the airport on time. However, B chooses not to take any of these options and so misses his flight. In these circumstances, Letsas and Saprai point out that 'Surely, the promisee is free to decide that he no longer wishes to bring about the state of affairs promised. In our example, B may decide that he no longer wishes to travel'.[22] Indeed, 'it seems that he has a right to make these decisions. It would be odd to say that the promisee has a duty to travel, or a duty to take the cheapest means of getting to the airport'.[23] On the other hand, it is obvious that B cannot recover damages from A for the consequences of missing the flight.[24]

The answer to this apparent puzzle is that the avoidable loss rule is attributive rather than prescriptive. The rule does not prescribe (prospectively) the claimant's conduct; instead it attributes responsibility (retrospectively) for the outcome of the claimant's conduct. We can hold a person responsible for an outcome based on their conduct, without

[16] *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605 (CA) 608 (Sir John Donaldson MR). See also *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1981] 2 Lloyd's Rep 574 (QB) 580 (Staughton J).

[17] *Darbishire* (n3) 1075, adding: '…but not at the expense of the defendant'. In relation to this important qualification, see further text to n35.

[18] Ibid 1075.

[19] Text to n3.

[20] George Letsas and Prince Saprai, 'Mitigation, Fairness and Contract Law' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014).

[21] Ibid 319.

[22] Ibid 326.

[23] Ibid 326.

[24] Ibid 319.

judging whether that person should or should not have conducted themselves in that way. Attributions of responsibility need not rest on judgements of praise or blame (although often they do).[25] This idea has deep roots outside the law. As Honoré puts it, outcome responsibility 'is an essential constituent of our character and identity, without which we would lack both achievements and failures'.[26] On this basis, 'outcome responsibility is … more fundamental than moral or legal responsibility, which are species of it'.[27]

A simple example illustrates the basic point. Consider two golfers on the tee.[28] Albert strikes a perfect shot but his ball lands on a sprinkler-head and bounces into the lake. Brian slices his tee-shot but the ball bounces off a tree and into the hole. Albert's shot is far more worthy of praise than Brian's, but it is Albert's double bogey and Brian's hole-in-one. The game of golf makes no sense without outcome responsibility. This basic idea extends well beyond sport.[29] Within private law, the notion of outcome responsibility has been used to explain instances of strict liability, where a person may be held responsible for the outcome of their conduct without any finding of fault. Likewise, it has been argued that outcome responsibility explains the objective standard in the tort of negligence.[30]

In mitigation, the avoidable loss rule attributes responsibility to the claimant for the outcome of its 'unreasonable' conduct, without needing to establish that the claimant 'should' have acted any differently.[31] In Letsas and Saprai's example, the legal effect of the avoidable loss rule, which would prevent B from recovering the loss resulting from the

[25] Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' in Tony Honoré (ed), *Responsibility and Fault* (Hart 1999) 23-31; Peter Cane, *Responsibility in Law and Morality* (Hart 2002), 94-111; Joseph Raz, 'Being in the World' in *From Normativity to Responsibility* (OUP 2011) 251-54.

[26] Tony Honoré, 'The Morality of Tort Law - Questions and Answers' in *The Philosophical Foundations of Tort Law* (Clarendon 1995) 81.

[27] Honoré, *Responsibility and Luck* (n25) 40.

[28] This example is loosely adapted from ibid 30.

[29] See further ibid 30-31; Raz, *Being in the World* (n25) 237-39.

[30] Honoré, *Responsibility and Luck* (n25); Raz, *Responsibility and the Negligence Standard* (n25).

[31] Of course, the prescription that 'the claimant should act reasonably' sounds unobjectionable, but it is necessary to bear in mind that reasonableness in mitigation does not bear the same meaning as in ordinary language: see further text to n53.

missed flight, does not rely upon (or even imply)[32] the proposition that B should have taken the flight.[33] Instead it reflects the basic idea that where the claimant has chosen not to take the flight (by foregoing other available options for travelling to the airport), the responsibility for the outcome of that decision is attributable to the claimant rather than to the defendant. Smith correctly concludes that 'the law is indifferent as to whether a victim of breach mitigates. The mitigation rule simply provides that damages will be calculated as if the [claimant] mitigated'.[34]

In summary, the avoidable loss rule does not seek to prescribe conduct; it seeks to attribute responsibility for outcomes based on conduct. This is perfectly captured by Pearson LJ's proposition in *Darbishire v Warran* that the claimant is 'fully entitled to be as extravagant as he pleases but not at the expense of the defendant'.[35] The law is not telling the claimant that it should not act extravagantly; it is saying that the defendant is not responsible for the claimant's chosen extravagance.[36] The same idea was clearly expressed by Staughton J in *The Solholt*, emphasising that 'the duty to mitigate is not in any sense an obligation, contractual or otherwise. It is a condition attached to the right to claim damages'.[37] This 'condition' is not contingent on any prior prescription.

The problem with the prescriptive view is not merely semantic; it conceals important links between mitigation and other doctrines. In particular, Bridge argues that the market rule cannot be explained by the rules of mitigation, because of 'the absence of any requirement that the claimant enter the market to conclude a substitute transaction'.[38] McLauchlin similarly argues that in available market cases, 'the references to mitigation …

[32] Contra Kramer, *Contract Damages* (n7) 348.

[33] Text to n21.

[34] Stephen Smith, *Contract Theory* (OUP 2004) 428.

[35] *Darbishire* (n3) 1075.

[36] *Six Continents Retail Ltd v Carford Catering Ltd* [2003] EWCA Civ 1790 [19] (Laws LJ): 'The real question is whether on the proved or admitted facts the respondents should or should not be held responsible for the appellant's loss'.

[37] *The Solholt (QB)* (n16) 580. See also *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 [10] (Lord Bingham), citing *The Elena d'Amico* (n3) 89 (Goff J); *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884 [15] (Lord Bingham).

[38] Michael Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 LQR 404 409 fn41.

are confusing. We may wish to restrict the seller to recovery of the contract/market price differential at the date of the breach, but there ought to be no question of an "obligation" to resell'.[39] These objections stem from the misconception that mitigation really is prescriptive, whereas the market rule obviously is not. But properly understood, both doctrines are attributive.

4.2.2 The reasonableness test

The orthodox account of mitigation provides that the avoidable loss rule applies where the claimant's conduct was unreasonable. Although often referred to as a reasonableness test, the test is strictly one of 'unreasonableness'. As Potter LJ clarified in *Wilding v BT*, 'It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed'.[40] The rule will not apply merely because the claimant could have taken other reasonable steps instead: 'if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice'.[41] It must be shown that the steps in fact taken 'were not within the reasonable range of responses'.[42] It is sometimes said that the standard of reasonableness is 'not a high one'.[43]

The leading texts do not attempt to describe how the reasonableness test is applied. In this sense, the orthodox account is not so much wrong as simply incomplete. Tettenborn

[39] David McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 376.

[40] *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] ICR 1079 [55].

[41] Ibid. See also *Baron Vernon v SS Metagama (The Metagama)* (1928) SC (HL) 21 (HL), 26 (Viscount Haldane).

[42] *Symrise AG v Baker & McKenzie* [2015] EWHC 912 (Comm), [2016] 1 All ER (Comm) 603 [17] (Burton J). See also *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 (HL) 506 (Lord Macmillan); *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 (CA) 634 (Browne-Wilkinson LJ); *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC), [2009] 2 All ER (Comm) 900 [80] (Ramsey J); *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep 482 [50] (Gross LJ); *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [43] (Leggatt J).

[43] See further text to n111.

is most candid, conceding that 'no fixed rules can be laid down'.[44] All of the leading texts emphasise that reasonableness is a 'question of fact'.[45] Following this approach, Longmore LJ recently concluded that 'it is notoriously difficult to lay down principles of law in the realm of mitigation … hard and fast principles are difficult to enunciate'.[46] Rather than attempting to abstract rules from the body of precedents, the leading texts advocate a 'case-by-case' approach, relying on a catalogue of examples.[47] This does not qualify as a description of the law; it is merely a roughly sorted description of legal sources.[48] In practical terms, the orthodox account fails to provide guidance to parties or judges.[49]

The proposition that reasonableness is a 'question of fact' probably originates in the division between the functions of judge and jury; in other words, to designate reasonableness as a question of fact meant that the issue was (or would have been) put to the jury.[50] In the modern law of mitigation, the continued reliance on this proposition is ambiguous; it has three possible meanings.[51] First, it might mean that the application of the reasonableness test raises no specifically legal issues. Second, it might mean that the reasonableness of the claimant's conduct raises an issue of 'primary fact' that cannot be appealed. Third, it might mean that the application of the reasonableness test is 'fact-sensitive', or in other words that reasonableness depends on a close examination of the facts of the case.

[44] Tettenborn, *Damages* (n6) [5.79]. See also McGregor, *Damages* (n7) [9-018]; Kramer, *Contract Damages* (n7) 370.

[45] See eg McGregor, *Damages* (n7) [9-016]; Burrows, *Remedies* (n7) 123, 126; *Chitty* (n7) [26-082]; Tettenborn, *Damages* (n6) [5.101]; David Allen, Robyn Martin and John Hartshorne, *Damages in Tort* (Sweet & Maxwell 2000) [4-067].

[46] *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep 383 [20]. See also *British Westinghouse* (n1) 688 (Viscount Haldane); *The Oropesa* [1943] P 32 (CA) 39 (Lord Wright).

[47] Text to n103.

[48] Section 2.2.1.

[49] Insofar as (contrary to this thesis), the avoidable loss rule seeks to tell citizens how they *should* behave, the uncertainty of the case-by-case approach is even more problematic.

[50] McGregor, *Damages* (n7) [50-016]-[50-108].

[51] The first two possibilities are identified in Letsas and Saprai (n20) 330.

4.2.2.1 *Reasonableness is 'non-legal'*

The proposition that reasonableness is a 'question of fact' might mean that it raises non-legal issues. In other words, it raises questions that are not specifically legal; they could be answered just as easily by non-lawyers. The implication of this view is that there really are no legal principles underlying the reasonableness test; this would explain the absence of principles in the leading texts. There is much that could be said in favour of the view that *some* aspects of the reasonableness test are not specifically legal.[52] However, on the orthodox account of mitigation, it could not be claimed that the question of reasonableness is non-legal. First, the legal meaning of reasonableness in mitigation diverges from its ordinary meaning outside the law. Second, at least on the orthodox understanding of the avoidable loss rule, the reasonableness test does raise some classically 'legal' issues.

As it is used in mitigation, the term 'reasonable' does not carry the same meaning as in ordinary language. As Kramer puts it, it is important to clarify that 'a special sense of "reasonable" is meant' in the context of mitigation.[53] In *Thai Airways*, Leggatt J emphasised that 'the test of what is "reasonable" in this context is not simply one of general rationality but is governed by legal rules'.[54] To signpost this distinction, the courts sometimes refer to whether the claimant's conduct was 'objectively reasonable', clarifying that the test of objective reasonableness does not depend 'upon [the claimant's] reason for acting as they did'.[55] In light of this approach, it cannot plausibly be claimed that the reasonableness is applied simply by asking whether a non-lawyer would regard the conduct as 'unreasonable' in the circumstances.

How exactly does reasonableness in mitigation differ from its ordinary meaning? Outside the law, the primary meanings of the word 'unreasonable' are: 'not guided by or

[52] In Section 6.4.3.1, it is argued that some (but only some) features of the avoidable loss rule *are* properly understood as factual, in this sense.

[53] Kramer, *Contract Damages* (n7) 384.

[54] *Thai Airways* [34] (n42) (Leggatt J).

[55] *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) [159] (Andrew Smith J). See also *Riyad Bank v Ahli United Bank (UK) plc* [2005] EWHC 279 (Comm), [2005] 2 Lloyd's Rep 409 [171] (Moore-Bick J).

based on good sense'; or 'beyond the limits of acceptability or fairness'.[56] By contrast, in mitigation it is clear that 'the claimant may have acted in a way which was reasonable from the point of view of its own business interests or personal objectives and yet not have adopted what the law regards as a "reasonable" response'.[57] In *The Elena D'Amico*, Goff J sought to clarify the application of the reasonableness test in mitigation by emphasising that 'It does not matter … that [the claimant's] decision was a reasonable one, or was a sensible business decision … The point is that his decision so to act is independent of the wrong'.[58]

This distinction can be illustrated with a simple example.[59] Suppose that the claimant's car is negligently damaged by the defendant. Instead of repairing the car, the claimant decides (at greater expense) to buy a new car.[60] This may be an eminently 'reasonable' decision: maybe he decided that it would be more convenient to have a bigger car; or maybe the new car was available at a special temporary discount. Suppose alternatively that the claimant decides to buy a bicycle (at lesser expense). Again this may be eminently 'reasonable': maybe he concluded he really did not need a car anyway and would be better-off cycling to work. The point is that none of these 'reasons' make any difference to the legal application of the reasonableness test. The legal test is not the ordinary question of whether the claimant's conduct was guided by or based on good sense.

The House of Lords' decision in *Dimond v Lovell* raised a similar issue.[61] Following a car accident, the claimant hired a replacement vehicle from a credit hire company. This

[56] *Oxford Dictionary of English* (3rd edn, OUP 2010).

[57] *Thai Airways* (n42) [37] (Leggatt J). See also, in the application of the market rule: *Habton Farms v Nimmo* [2003] EWCA Civ 68, [2004] QB 1 [66], [100] (Clarke LJ); *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65 (CA) 71 (Romer LJ); *Downs v Chappell* [1997] 1 WLR 426 (CA) 437 (Hobhouse LJ); *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289 (CA) 306 (Aldous LJ); 321 (Simon Brown LJ).

[58] *The Elena d'Amico* (n3) 89. This part of Goff J's judgment was repeated in *Glory Wealth Shipping Pte Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819 (Comm), [2012] 1 All ER (Comm) 402 [16] (Blair J) and *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2014] EWHC 1547 (Comm), [2015] 1 All ER (Comm) 1205 [64] (Popplewell J).

[59] This will be referred to as the 'car accident example'.

[60] These were essentially the facts of *Moore v DER Ltd* [1971] 1 WLR 1476 (CA). Davies LJ held that 'It seems to me a sensible and businesslike course to put in for a new Rover' but thought it obvious that this cost could not be recovered by the claimant: 1479-80.

[61] *Dimond v Lovell* [2002] 1 AC 384 (HL). This decision raised an issue of 'betterment', although the House of Lords also referred to mitigation.

service cost more than the standard hire rate because it provided additional convenience and no up-front charges. In considering (obiter) the recoverability of the credit hire costs, Lord Hoffmann held that 'I would accept the judge's finding that Mrs Dimond acted reasonably ... I am sure that any of your Lordships in her position would have done the same … But that does not necessarily mean that she can recover the full amount'.[62] Lord Hobhouse concluded that 'It was reasonable for her to pay the additional sum in order to obtain the additional benefits ... But she cannot claim the whole cost as the cost of mitigating the loss'.[63] The majority held that the claimant would only have been entitled to recover the standard hire rate.[64]

The idea that reasonableness raises only non-legal issues is also internally inconsistent with other features of the orthodox account. For a start, the avoidable loss rule is generally regarded as prescriptive.[65] It is difficult to see how any rule that tells citizens how to behave could raise no specifically legal issues.[66] The reasonableness test is also generally thought to involve balancing the interests of the claimant and defendant;[67] this seems like a classically legal issue of interpersonal justice. Finally, the explanations for the avoidable loss rule offered by the leading texts are based mainly on the policy of encouraging self-reliance, or the prevention of economic waste. These do not seem like issues familiar to non-lawyers. From all this, it is apparent that the orthodox account cannot mean that reasonableness is a 'question of fact' in the non-legal sense.

[62] Ibid 401.

[63] Ibid 407.

[64] Lord Nicholls dissented on this point: ibid 390. The case can be explained as an example of betterment: see further Conclusion.

[65] Text to n12.

[66] See further Letsas and Saprai (n20) 30. Although Letsas and Saprai reject the prescriptive view of mitigation, they regard it as equally implausible that even the attribution of *responsibility* for the claimant's unreasonable conduct could be 'an extralegal or purely factual question' with 'no underlying legal principle'.

[67] See eg *Darbishire* (n3) 1072 (Harman LJ), 1076 (Pearson LJ); McGregor, *Damages* (n7) [9-032], [9-076]; *Chitty* (n7) [26-092].

4.2.2.2 *Reasonableness is a 'primary fact'*

Another possible meaning of the question of fact principle is that the reasonableness of the claimant's conduct raises issues of primary fact that cannot be appealed. This proposition conceals a further ambiguity between its 'narrow' and 'wide' meanings. The narrow meaning is that issues of primary fact are used in applying the reasonableness test; in other words, the application of the test relies on the trial judge's findings of primary fact. This is of course true, but just like the third possible meaning below,[68] it is essentially banal; it is true of every legal test. The wide meaning is that the trial judge's decision on reasonableness is *itself* a finding of primary fact. This proposition is wrong as a matter of description; it is plainly inconsistent with cases on mitigation, both in reasoning and results.

The application of the reasonableness test inevitably relies on certain findings of primary fact, such as the reliability of offers made to the claimant, or the question of whether alternative options were available to the claimant.[69] The appellate courts have emphasised that it will rarely be appropriate to interfere with these findings.[70] For example, in *Fyfe v Fife Coal* the House of Lords rejected the appellant's argument that the claimant had unreasonably given too much weight to the advice of his own doctor instead of other doctors.[71] Viscount Dunedin held that this raised 'a pure question of fact' that was better determined by the arbitrator, who had heard directly from the witnesses.[72] However, none of these judicial decisions show that *reasonableness* is a question of fact, any more than any other legal test.

[68] Section 4.2.2.3.

[69] See eg *The Solholt* (n16) 610 (Sir John Donaldson MR); *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 CLC 80 [50] (Moore-Bick LJ); *Welford v EDF Energy Networks (LPN) plc* [2007] EWCA Civ 293, [2007] 2 P & CR 15 [36] (Thomas LJ).

[70] See eg *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA Civ 55, [2001] 1 All ER (Comm) 822 [47] (Potter LJ).

[71] *Fyfe v Fife Coal Co Ltd* (1927) SC (HL) 103 (HL) 106 (Viscount Dunedin). See also, on very similar facts: *Steele v Robert George & Co* [1942] AC 497 (HL) 501 (Viscount Simon), 502 (Lord Wright).

[72] *Fyfe v Fife* (n71) 107.

Respondents have sometimes made the bolder argument that the trial judge's decision on reasonableness is *itself* a finding of primary fact.[73] In other words, even once all of the relevant primary facts have been decided, it is sometimes argued that the decision as to whether the claimant's conduct was 'unreasonable' in light of those facts also cannot be interfered with on appeal. This proposition is wrong; appellants regularly succeed in overturning decisions on reasonableness.[74] The argument is also inconsistent with judicial reasoning in several appellate decisions on mitigation. For example, in *Wilding v BT*, Potter LJ robustly rejected the respondent's submission that the Court of Appeal was precluded from re-examining the Tribunal's application of the reasonableness test. Instead he emphasised that:

> The primary argument on this appeal is whether the Tribunal properly applied the correct legal test or … asked itself the right question in coming to its conclusion. If it did not do so, or if in applying the legal test it took into account irrelevant factors, or left out of account relevant factors or, if having made its findings of primary fact, it drew a wrong inference or inferences or gave wholly inappropriate weight to a particular factor or factors, the Tribunal may be treated as having erred in law in coming to its decision.[75]

In other words, Potter LJ regarded the reasonableness test itself as a question of law, subject to legal principles that would tell the trial judge which factors to take into account and how to weigh them. It is notable that one year earlier in *Standard Chartered Bank v Pakistan National Shipping*, Potter LJ held that because 'mitigation of damage is a question of fact … it is therefore rarely appropriate to interfere with the conclusions of the trial judge based as they are on the evidence'.[76] However, there is no inconsistency here, because in *Standard Chartered* the appellant's arguments directly concerned primary facts rather than the application of the reasonableness test itself. In particular, the argument was that the trial

[73] See eg n78.

[74] n91.

[75] *Wilding* (n40) [36] (Potter LJ). Potter LJ considered the appellant's grounds of appeal on this basis, but concluded that there had been no error in the Employment Appeal Tribunal's approach.

[76] *Standard Chartered (CA)* (n70) [47] (Potter LJ).

judge should not have rejected the evidence provided by the defendant's expert as to the price for which damaged cargo could have been resold.[77]

In *Copley v Lawn*, the respondents argued that the lower courts' decisions on reasonableness were '"findings of fact" and should not be interfered with by this court'.[78] Longmore LJ rejected that submission on the basis that 'there is no question of any interference with any finding of primary fact'.[79] In particular, he held that 'questions of mitigation are however, questions of evaluation and judgment and there is no reason why this court should not interfere, if the judge's conclusions are, in its considered opinion, wrong'.[80] Longmore LJ considered the facts of the two cases subject to the appeal, and allowed both appeals on the issue of reasonableness, on the basis that the trial judges had erred in concluding that the claimants had acted unreasonably by refusing the defendants' offers.[81]

The Court of Appeal affirmed Longmore LJ's approach in *Sayce v TNT*.[82] Moore-Bick LJ sought to clarify that 'Longmore LJ was merely pointing out that since the question whether the claimant failed to act reasonably in mitigation involves an evaluation of the primary facts, it is a decision with which the court can more readily interfere'.[83] In particular, the trial judge had erred in 'brushing aside' the precedent set by Longmore LJ in *Copley* as to the proper approach for determining whether the claimant's conduct had been unreasonable.[84] Moore-Bick LJ was clear that the principle established by Longmore LJ formed part of the ratio of *Copley*,[85] and therefore bound the trial judge in his subsequent

[77] Ibid [43]-[44] (Potter LJ).

[78] *Copley v Lawn* [2009] EWCA Civ 580, [2010] 1 All ER (Comm) 890 [23] (Longmore LJ).

[79] Ibid [23].

[80] Ibid [23].

[81] Ibid [24].

[82] *Sayce v TNT (UK) Ltd* [2011] EWCA Civ 1583, [2012] 1 WLR 1261. See also *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, [2011] QB 357 [27] (Potter LJ).

[83] *Sayce* (n82) [18].

[84] Ibid [18]-[23].

[85] Ibid [21]-[22] (Moore-Bick LJ): 'I think it is clear, therefore, that [Longmore LJ] did adopt and apply the principle that a claimant does not act unreasonably for the purposes of mitigation in rejecting an offer from the defendant unless he is aware that by doing so he will increase the ultimate burden on

decision. To have had this binding effect, the principle must plainly have settled a question of law not fact.

Most recently, in *LSREF III Wight v Gately*, the Court of Appeal again rejected the respondent's submission that it could not interfere with the trial judge's decision on reasonableness.[86] Briggs LJ accepted that 'mitigation issues are heavily fact sensitive, multifactorial questions'.[87] However he concluded that 'the question at the end of the day is whether there has been an unreasonable failure to mitigate, and the application of a reasonableness test does, in the final analysis, require … something more than just fact-finding'.[88] Briggs LJ went on to consider each of the seven reasons that the trial judge had given for deciding that the claimant's conduct had been reasonable, and rejected all seven.[89] He therefore allowed the appeal on the basis that 'In my judgment, none of the judge's reasons, singularly or in the aggregate, justify the conclusion that the claimant had not unreasonably failed to mitigate its loss'.[90]

There are various other examples in which the appellate courts have overturned the trial judge's decision on reasonableness.[91] Perhaps the most striking of these is *Moore v DER*.[92] The case concerned the reasonableness of the claimant's conduct in hiring a replacement car for eighteen weeks following a car accident. The trial judge held that the claimant's conduct was unreasonable and therefore reduced the damages to the equivalent of three weeks' hire. On appeal, both Davies LJ and Karminski LJ held that reasonableness

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the defendant, regardless of the effect on his own position … If, as I think, that is the ratio of *Copley v Lawn*, the judge was bound to apply it'.

[86] *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359.

[87] Ibid [39].

[88] Ibid [39]. Briggs LJ observed that 'No part of the judge's careful findings of primary fact is challenged': ibid [12].

[89] Ibid [44]-[52].

[90] Ibid [53].

[91] See eg *Richardson v Redpath Brown & Co* [1944] AC 62 (HL) 72-73 (Viscount Simon), 74 (Lord Russell); *Darbishire* (n3) 1072 (Harman LJ); *Fyfe v Scientific Furnishings Ltd* [1989] ICR 648 (EAT) 655-56 (Wood J, on appeal from an industrial tribunal); *Copley* (n78) [23]-[24] (Longmore LJ); *Sayce* (n82) [21]-[22] (Moore-Bick LJ).

[92] *Moore* (n60).

raised a 'question of fact', relying on the authority in *Payzu v Saunders*.[93] Despite this proposition, they unanimously overturned the trial judge's decision on reasonableness and entered judgment for the cost of all eighteen weeks of hire.[94] The most likely explanation is that Davies LJ and Karminski LJ had in mind the third meaning of 'question of fact' outlined below.

4.2.2.3 *Reasonableness is 'fact-sensitive'*

The final possible meaning is that the application of the reasonableness test is 'fact-sensitive'. This understanding is exemplified by *Payzu v Saunders*, where Bankes LJ held that reasonableness 'must be one of fact in the circumstances of each particular case'.[95] However, this proposition was intended to rebut the argument that it would *always* (in all circumstances) be reasonable for the claimant to reject the defendant's offer.[96] Against this background, the Court of Appeal's emphasis on fact merely signified that the application of the reasonableness test requires a close examination of the claimant's circumstances.[97] Recent authorities similarly emphasise that reasonableness is fact-sensitive.[98] Whilst this proposition is undoubtedly correct, it is essentially banal; it is hard to think of a legal test that is not a question of fact in this sense.

[93] *Payzu* (n12). See further text to n95.

[94] *Moore* (n60) 1480 (Davies LJ), 1481 (Karminski LJ), 1481 (Stamp LJ).

[95] *Payzu* (n12) 589. See also 589 (Scrutton LJ). This proposition has been cited in: *Moore* (n60) 1479 (Davies LJ); *The Solholt* (n16) 608 (Sir John Donaldson MR); *Gul Bottlers (PVT) Ltd v Nichols plc* [2014] EWHC 2173 (Comm) [22] (Cooke J).

[96] *Payzu* (n12) 588-89. In particular, the claimant argued that 'in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded': 589 (Scrutton LJ).

[97] It also signified that there is no separate legal rule applicable to offers by the defendant. See further Section 6.2.1.4.

[98] See eg *Borealis* (n42) [47] (Gross LJ); *Barings plc v Coopers & Lybrand (No8)* [2003] EWHC 2371 (Ch) [838] (Evans-Lombe J); *Burdis v Livsey (sub nom Lagden v O'Connor)* [2002] EWCA Civ 510, [2003] QB 36 [147]-[148] (Aldous LJ); *Moore* (n60) 1481 (Karminski LJ). See also Tettenborn, *Damages* (n6) [5.79]; Burrows, *Remedies* (n7) 123.

McGregor refers to *Payzu* as the leading authority for the principle that reasonableness is a question of fact.[99] He adds that this principle 'has never been doubted since; today it tends to be regarded as trite law'.[100] However, here we should heed Diplock LJ's famous warning that 'the law is nearly always most obscure in those fields in which judges say the principle is plain, but the difficulty lies in its application to particular facts'.[101] Fact-sensitivity cannot serve as a principle on its own; other principles are needed to determine *which* facts the court must be sensitive to. In other words, describing reasonableness as a 'question of fact' is not sufficient, because as Lord Hoffmann has remarked on this issue, 'unless you know the question, you will not be able to get the right answer'.[102]

In lieu of specifying how the reasonableness test is applied, the leading texts tend to 'illustrate' the application of the avoidable loss rule by providing a catalogue of decided cases. McGregor's exposition of the avoidable loss rule comprises four paragraphs on 'the criterion of reasonableness and the standard of reasonableness',[103] bookended by forty-seven paragraphs of 'illustrative decisions'.[104] These illustrations are roughly sorted under sub-headings that do not purport to be legally significant, such as whether the defendant's liability was in contract or torts.[105] Similarly, Kramer acknowledges that his analysis of mitigation 'does not seek to formulate a general principle or set of factors that govern all of

[99] McGregor, *Damages* (n7) [9-016].

[100] Ibid [9-016].

[101] *Ilkiw v Samuels* [1963] 1 WLR 991 (CA) 1004. Cf McGregor, *The Role of Mitigation* (n8) 334: 'Illustrations of circumstances raising the issue of whether loss from breach of contract should have been avoided abound ... English law on such issues being fairly straightforward, I leave these on one side'.

[102] Lord Hoffmann, 'Common Sense and Causing Loss' (Chancery Bar Association Lecture, 15th June 1999) 3.

[103] See eg McGregor, *Damages* (n7) [9-074]-[9-077].

[104] See eg ibid [9-043]-[9-073], [9-078]-[9-095].

[105] Other sub-headings are by context, for example: goods, employment, land etc. Again, there is no suggestion that these categories are legally significant.

these cases'.[106] Instead he argues that 'it is best to look at the decisions in the cases similar to the one at hand … rather than rely on general formulations'.[107]

This 'case-by-case' approach is not a description of the law. Descriptive accounts of the law aim to describe rules abstracted from the body of precedents.[108] In relation to the reasonableness test, the leading texts disclaim the task of abstracting rules; instead they merely report the precedents themselves. In other words, they describe legal sources but not the law. The problem with this case-by-case approach is that 'until it is established what resemblance and differences are relevant, "Treat like cases alike" must remain an empty form'.[109] The case-by-case approach alone is not capable of guiding parties or judges. Bridge acknowledges this problem, concluding that 'the constant emphasis on fact and reasonableness, so characteristic of a common law that is concerned with the need for retaining flexibility, has served the law badly in this section of mitigation'.[110]

4.2.2.4 *The standard of reasonableness*

One further principle often invoked by the orthodox account is the proposition that the standard of reasonableness is 'not a high one'.[111] The authority most often cited is *Banco de Portugal v Waterlow*,[112] where Lord Macmillan held that the claimant's conduct 'ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty'.[113] Various other decisions emphasise lenience in view of the

[106] Kramer, *Contract Damages* (n7) 370.

[107] Ibid 343. See also Burrows, *Remedies* (n7) 123.

[108] Section 2.2.1.

[109] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 159.

[110] Bridge, 'Mitigation of Damages in Contract' (n10) 423.

[111] See eg McGregor, *Damages* (n7) [9-074]; *Chitty* (n7) [26-082]; Tettenborn, *Damages* (n6) [5.79].

[112] *Waterlow* (n42). See also *Walker v Geo H Medlicott & Son* [1999] 1 WLR 727 (CA) 743 (Simon Brown LJ); *Wilding* (n40) [37] (Potter LJ); *Borealis* (n42) [137] (Gross LJ).

[113] *Waterlow* (n42) 506.

defendant's breach.[114] However, in isolation, this principle is again essentially empty. Identifying a threshold without stating the scale is like saying that the test requires 'sixty per cent' without saying sixty per cent of what. The unstated assumption seems to be that the scale is based on the claimant's fault. However, there are two main problems with this understanding.

The first problem is that a fault-based scale only makes sense if the avoidable loss rule is prescriptive. By contrast, if the claimant is 'completely free to act as he judges to be in his best interests',[115] it is not clear what it really means to say that the standard of reasonableness is 'not a *high* one'.[116] The problem here is not with establishing a legal standard of conduct, but rather with locating the claimant's departure from that standard on a *vertical* scale from 'not-faulty' to 'very-faulty'. To return to Letsas and Saprai's example,[117] where on the fault-based scale would we locate B's decision not to take alternative transport to the airport? Is this decision above or below the requisite standard of fault where, for example, B decides that he would rather stay at home with his family instead of taking the flight?[118]

The second problem is that the fault-based scale does not fit with the cases establishing that the test of reasonableness is the same regardless of the defendant's fault.[119] Lord Macmillan's proposition is inapplicable where the defendant's liability was strict; in such cases the defendant cannot be blamed for 'occasioning the difficulty'.[120] One might expect that the standard of reasonableness required of the claimant would be higher where the defendant's liability was strict. However, there is no stricter standard on the claimant in

[114] See eg *Lodge Holes Colliery Co Ltd v Wednesbury Corp* [1908] AC 323 (HL) 325 (Lord Loreburn CJ); *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509 (QB) 530 (Roskill J); *London and South of England Building Society v Stone* [1983] 1 WLR 1242 (CA) 1262-63 (Stephenson LJ).

[115] *The Solholt* (n16) 608 (Sir John Donaldson MR). See further text to n16.

[116] *Walker* (n112) 743 (Simon Brown LJ) (emphasis added).

[117] Text to n21.

[118] These questions are rhetorical because the point is that no sensible answer can be given in terms of the claimant's fault in these circumstances.

[119] See further Section 6.4.1.2.

[120] n113.

strict liability cases.[121] Conversely, Lord Macmillan's proposition seems to dictate that the standard of reasonableness should be even lower in cases where the defendant's liability consisted of intentional wrongdoing. Again, this does not fit the cases.[122]

4.2.3 Legal effect

The orthodox account of mitigation equivocates over the legal effect of the avoidable loss rule. The leading texts offer subtly different descriptions,[123] and each of these descriptions also leave scope for multiple interpretations. The two prevailing expositions are the 'all-or-nothing' view and the 'partial recovery' view. It is unlikely that any of the leading texts really holds the all-or-nothing view. The partial recovery view leaves open the scope of the counterfactual assessment involved limiting damages. Some (but by no means all) of the leading texts now more openly accept the counterfactual effect of the avoidable loss rule. This understanding can be expressed as the proposition that where the claimant acted unreasonably, damages are assessed as if it had acted reasonably.

4.2.3.1 *All-or-nothing*

The avoidable loss rule is sometimes thought to have 'all-or-nothing' effect: if the claimant acted reasonably, it recovers its loss in full; but if it acted unreasonably, it recovers nothing at all.[124] Several of the leading texts could be read as adopting this view. McGregor summarises that 'the claimant must take all reasonable steps to mitigate the loss … and

[121] See eg *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127 (CA); *Welford* (n69).

[122] See eg *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 285 (Lord Steyn); *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] 1 Lloyd's Rep 747, [1999] CLC 761 (QB) 760 (Toulson J).

[123] Indeed, some of the leading texts offer different descriptions within the same chapter: compare McGregor, *Damages* (n7) n125 and n131; *Chitty* (n7) n126 and n152.

[124] See eg Burrows, *Remedies* (n7) 143. On 'all-or-nothing' rules generally (but not including mitigation), see Tony Weir, 'All or Nothing?' (2004) 78 Tulane Law Review 511.

cannot recover damages for any such loss which he could thus have avoided'.[125] Likewise in *Chitty*, 'Any loss which is directly caused by a failure to [mitigate] is not recoverable from the defendant'.[126] Burrows also concludes that 'the consequence of [a failure to mitigate] is simply that no damages are given for the avoidable loss'.[127]

It is doubtful that any of these scholars really hold the all-or-nothing view. An example may clarify the position. Suppose that the defendant supplies defective goods to the claimant. If the claimant unreasonably spends £1000 on repair, where the repair would normally have cost £500, the all-or-nothing view holds that the claimant recovers nothing at all. It seems unlikely that anyone actually adopts this view. The authorities on mitigation establish beyond any doubt that the claimant would be entitled to recover £500 on these facts.[128] The expositions above may be flexible enough to accommodate this award, but the problem is that their formulation is equivocal and leaves open the all-or-nothing view. In Kramer's words, they are 'unhelpful' rather than wrong.[129]

4.2.3.2 *Partial recovery*

The expositions in other leading texts suggest that the avoidable loss rule allows for 'partial recovery' of the claimant's loss. This provides a somewhat clearer account, but it remains equivocal in a crucial respect. Treitel summarises that 'If the claimant fails to take reasonable steps to minimise his loss, he cannot recover anything *in respect of extra loss* due

[125] McGregor, *Damages* (n7) [9-004] (emphasis added). Cf n131.

[126] *Chitty* (n7) [26-079]. Cf n152.

[127] Burrows, *Remedies* (n7) 122. See also 143. In Andrew Burrows, 'Contributory Negligence in Contract: Ammunition for the Law Commission' 109 LQR 175, 177, Burrows criticises the 'all or nothing concepts of causation and duty to mitigate', on the basis that they 'do not always permit the courts to achieve a satisfactory result' and accordingly advocates an extension of apportionment for contributory negligence to breach of contract claims.

[128] *The Pactolus* (1856) 166 ER 1079, 1081 (Dr Lushington); *Lodge Holes* (n114) 325 (Lord Loreburn LC); *Owners of the Georgidore v Owners of the Pacific Concord (The Pacific Concord)* [1961] 1 WLR 873 (PD) 884 (Lord Merriman); *Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* [2013] EWHC 463 (TCC), 147 Con LR 105 [37], [43], [46] (Eduards Stuart J), affirmed *Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* [2013] EWCA Civ 1656, [2014] 1 EGLR 30 [14] (Lewison LJ); *Coles v Hetherton* [2013] EWCA Civ 1704, [2015] 1 WLR 160 [45] (Aikens LJ).

[129] Kramer, *Contract Damages* (n7) 348 fn47.

to that failure'.[130] McGregor clarifies that 'the law requires [the claimant] to take all reasonable steps to mitigate the loss … and refuses to allow him damages *in respect of any part of the loss* which is due to his neglect to take such steps'.[131] In light of this clarification, it appears that despite his initial summary of the rule,[132] McGregor does not really hold the all-or-nothing view.

These expositions are closer to the 'classic statement of mitigation' put forward in *British Westinghouse*.[133] There, Viscount Haldane held that the avoidable loss rule 'debars [the claimant] from claiming *any part of the damage* which is due to his neglect to take [reasonable] steps'.[134] Similar reasoning has been adopted in more recent cases.[135] For example, in *Coles v Hetherton*, Aikens LJ held (obiter) that where the claimant unreasonably incurred excessive costs in repairing its car, 'the sum claimed … will simply be reduced to the notional reasonable repair cost'.[136] Likewise in *Minchburn v Peck*, Dillon LJ held that 'some small allowance ought to be made by way of mitigation' and proposed to 'reduce the sum of £800, which the judge awarded as compensation for discomfort and dampness and so forth, to a sum of £700'.[137]

The problem with expressing the effect of the avoidable loss rule in terms of partial recovery is that it hides from view the counterfactual assessment used to determine the amount by which damages are reduced.[138] So, when Aikens LJ held that the damages 'will

[130] Treitel, *Contract* (n7) [20-116] (emphasis added). See also Allen, Martin and Hartshorne (n45) [4-067]: 'that part of the loss that could have been avoided through taking reasonable steps will be deducted from the damages'.

[131] McGregor, *Damages* (n7) [9-014] (emphasis added).

[132] n125.

[133] *British Westinghouse* (n1) 689 (Viscount Haldane).

[134] Ibid 689 (emphasis added).

[135] See eg *Joyce v Bowman Law Ltd* [2010] EWHC 251 (Ch), [2010] PNLR 22 [118]-[119] (Vos J); *Compania Financiera Soleada SA v Hamoor Tanker Corp Inc (The Borag)* [1981] 1 WLR 274 (CA) 284 (Templeman LJ), 279-80 (Lord Denning MR).

[136] *Coles* (n128) [45] (Aikens LJ). See also *Dimond* (n61) 403 (Lord Hoffmann); *Lagden* (n12) [27] (Lord Hope); *Copley* (n78) [30] (Longmore LJ).

[137] *Minchburn v Peck* (1988) 20 HLR 392 (CA) 398.

[138] In particular, the effect of the rule is not an apportionment as under the Law Reform (Contributory Negligence) Act 1945. The damages are reduced on a counterfactual basis, not by a percentage.

simply be reduced to the notional reasonable repair cost',[139] he implicitly envisaged a counterfactual assessment of the repair costs that would have been incurred if the claimant had acted reasonably. Indeed, this is how we arrive at an award of £500 in the example above.[140] Similarly, on Viscount Haldane's classic statement, in order to work out the 'part of the damage which is due to' the claimant's neglect to take reasonable steps,[141] the judge must compare the damage actually suffered with the damage that would have been suffered if the claimant had acted reasonably.

The partial recovery expositions obscure the scope of the counterfactual assessment. The most natural reading of these expositions is what we might call the 'guillotine heuristic'.[142] On this view, the avoidable loss rule simply 'chops off' any divisible harm that could have been avoided if the claimant had acted reasonably. Applying this heuristic, some heads of damage may be denied altogether: for example, the costs of a mediation that would not have been necessary if the claimant had acted reasonably.[143] Other heads of damage may be reduced to the lesser amount that would have been suffered if the claimant had acted reasonably: for example, where the claimant incurred unreasonably expensive repairs,[144] or suffered a loss of profits that could have partially been reduced by reasonable action.[145] In all of these examples, the guillotine heuristic works tolerably well.

The problem is that the guillotine heuristic breaks down in cases where the harm in fact suffered was of a different type altogether from the harm that would (counterfactually) have been suffered.[146] Here, it is no longer possible simply to 'chop off' parts of the claimant's factual loss to arrive at a reduced sum; the guillotine heuristic effectively leads us back to the all-or-nothing approach. Bridge expresses this concern when he notes that 'at

[139] *Coles* (n128) [45].

[140] Text to n127.

[141] *British Westinghouse* (n1) 689.

[142] This terminology is adopted in Kramer, *Contract Damages* (n7) 353.

[143] *Stacey v Autosleeper Group Ltd* [2014] EWCA Civ 1551 [25] (Floyd LJ).

[144] n128.

[145] See eg *Joyce* (n135).

[146] An analogous issue arises in relation to the remoteness rule: *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1867-68) LR 3 QB 181 (QB).

present it might be easier to limit the effect of a failure to mitigate where the plaintiff's injury is a divisible one' compared with 'where the injury is an indivisible whole'.[147] The solution to this problem is to dispense with the (overly simplistic) guillotine heuristic and instead to recognise the counterfactual effect of the avoidable loss rule head-on. The partial recovery exposition merely obscures this understanding.

4.2.3.3 *Counterfactual assessment*

The counterfactual effect of the avoidable loss rule now appears to be gaining recognition in some of the leading texts.[148] In truth, it is not a new insight. Street highlighted the counterfactual effect of mitigation in *Principles of the Law of Damages*, summarising that 'Where the defendant proves that the plaintiff has failed to mitigate his loss, damages are assessed on the assumption that he had so mitigated'.[149] More recently, Kramer has emphasised that mitigation 'does not merely act as a guillotine to a benefit or harm, but deems to have been incurred a harm (cost) that was in fact not incurred'.[150] Despite some equivocal support for the all-or-nothing view,[151] *Chitty* also states that damages 'will be calculated as if the claimant had acted reasonably to minimise his loss'.[152]

Whilst many of the leading texts continue to equivocate on this issue, the law has been clear for some time. In *Payzu v Saunders*, referring to the avoidable loss rule, Scrutton LJ held that the claimant 'can recover no more than he would have suffered if he had acted reasonably'.[153] In *McAuley v London Transport Executive*, where the claimant unreasonably

[147] Bridge, 'Mitigation of Damages in Contract' (n10) 404. Bridge nevertheless adopts the cutting-back view: ibid, 399: 'mitigation operates pro tanto as a conditional bar to the recovery of damages'.

[148] See eg text to n150 and n176.

[149] Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 42.

[150] Kramer, *Contract Damages* (n7) 345; see also 353.

[151] Text to n126.

[152] *Chitty* (n7) [26-079]. See also Dan Dobbs, *Law of Remedies: Damages, Equity, Restitution* (2nd edn, West Pub Co 1993) 381; Law Commission, *Contributory Negligence as a Defence in Contract* (No 219, 1993) [3.21].

[153] *Payzu* (n12) 589.

refused an operation that would have helped to treat his personal injury, Jenkins LJ held that 'damages ought to be assessed as they would properly have been assessable if he had, in fact, undergone the operation'.[154] In *Lavarack v Colchester*, Lord Denning MR held that 'If [the claimant] has not acted reasonably, the court must calculate the sums which he might reasonably have been expected to receive if he had acted reasonably'.[155] Several other examples can be given.[156]

The limits of the guillotine heuristic were recently highlighted in *Herrmann v Withers*.[157] In that case, the claimants were awarded damages for the hypothetical cost of negotiating a licence to access a communal garden,[158] even though in fact they had (unreasonably) chosen not to enter into these negotiations.[159] Applying the guillotine heuristic, the claimants would have recovered nothing.[160] McGregor has subsequently described *Herrmann* as 'the first decision where damages have been claimed and allowed for expenditure which has not been incurred at all'.[161] This is incorrect. Indeed, although this view is widely held on the orthodox account, it is a failure to see the forest for the trees. Several of the best-known cases on mitigation have awarded damages for types of harm not in fact suffered, and on closer inspection the examples are ubiquitous; remarkably, this point appears to have been overlooked by the leading texts.

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[154] *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500 (CA) 505.

[155] *Lavarack v Woods of Colchester* [1967] 1 QB 278 (CA) 287.

[156] See eg *Stephenson Blake (Holdings) Ltd v Streets Heaver Ltd* [2001] Lloyd's Rep PN 44 (QB) [159] (Hicks QC); *The Golden Victory* (n37) [10] (Lord Bingham); *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 1 Lloyd's Rep 359 [59] (Leggatt J); *Thai Airways* (n42) [33] (Leggatt J). The counterfactual view can also be inferred from judicial reasoning that the avoidable loss rule has no effect where the same loss would have been suffered even if the claimant had acted reasonably: see eg *Standard Chartered (CA)* (n70) [39], [41] (Potter LJ); *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2015] EWHC 73 (TCC), [2015] PTSR 1106 [51] (Edwards-Stuart J); *Borealis* (n42) [105] (Gross LJ); *Stacey* (n143) [24] (Floyd LJ).

[157] *Herrmann v Withers LLP* [2012] EWHC 1492 (Ch), [2012] PNLR 28.

[158] Ibid [91], [94].

[159] Ibid [82].

[160] Newey J expressly rejected this approach on the basis that 'It could not be right for [the claimants] to be denied damages altogether': ibid [93].

[161] McGregor, *Damages* (n7) [9-102].

To take an example from a well-known case,[162] in *Darbishire v Warran*, the claimant unreasonably spent £192 repairing his car when the value of the undamaged car was only £85.[163] The Court of Appeal held that 'the reasonable course for the plaintiff would have been to purchase a comparable car rather than repair the damaged car',[164] and therefore rejected the claim for the cost of repairs. The court nevertheless awarded damages based on the cost of buying a comparable car, even though this cost was not in fact incurred because the original car had been repaired. The judges differed slightly as to the appropriate counterfactual: Harman LJ and Pennycuick J thought that the claimant could have obtained a comparable car for £85,[165] whereas Pearson LJ thought that it would have cost £105.[166] This difference of opinion nicely illustrates the application of the counterfactual assessment.

Once one starts to look more closely at the cases on mitigation, it becomes obvious that counterfactual assessment is ubiquitous and essentially uncontroversial. To take just one more example in detail, in *Commercial Fibres v Zabaida*, the sellers delivered yarn to the buyers in damaged packaging.[167] The buyers unreasonably attempted to transport the yarn without re-packaging it, such that most of the yarn was ruined. Donaldson J rejected the claim for the full value of the damaged yarn, but awarded £150 'as being the cost of re-cartoning', even though this re-packaging was never undertaken.[168] Claimants are routinely awarded damages for reasonable steps that they did not in fact take, including the hypothetical costs of: undergoing medical treatment;[169] moving house;[170] sub-letting;[171]

[162] See also *Payzu* (n12) 587 (McCardie J): 'even if the plaintiffs had [acting reasonably] accepted the defendant's offer, they would nevertheless have lost the very useful period of credit which the contract gave them', citing *Cory* (n146) as authority for this counterfactual assessment.

[163] *Darbishire* (n3). This valuation was taken from Glass's Guide.

[164] Ibid 1079 (Pennycuick J, sitting in the Court of Appeal).

[165] Ibid 1073 (Harman LJ), 1079 (Pennycuick J).

[166] Ibid 1077 (Pearson LJ).

[167] *Commercial Fibres (Ireland) Ltd v Zabaida* [1975] 1 Lloyd's Rep 27 (QB).

[168] Ibid 30.

[169] *McAuley* (n154) 505 (Jenkins LJ).

[170] *Patel v Hooper & Jackson* [1999] 1 All ER 992 (CA) 1801 (Nourse LJ).

[171] *Marionette Ltd v Visible Information Packaged Systems Ltd* [2002] EWHC 2546 (Ch) [78] (Warren QC).

borrowing money;[172] repairing property;[173] pursuing legal proceedings;[174] and re-negotiating a lease.[175]

In seems likely that the counterfactual effect of the avoidable loss rule will eventually come to be recognised by the leading texts. Burrows and McGregor express support for a counterfactual assessment, without describing this as the current law. Burrows notes that 'although there appears to be no case in point, the principle of *Cory v Thames Ironworks* may apply by analogy: ie even though the actual expenses were unreasonably incurred, a lesser amount, equivalent to what would have been reasonable expenses, may be recoverable'.[176] In response to *Herrmann*,[177] McGregor argues that 'If [the claimants] fail to mitigate and so cannot recover for the loss that could and should have been avoided, they *should* still be entitled to recover for the loss that would have remained after they had mitigated, viz, for the expenditure not in fact incurred'.[178]

Although the trend appears to be towards recognition of the counterfactual effect of the avoidable loss rule, there remain some anomalies where this approach has been misunderstood. In *Watts v Morrow*, Gibson LJ objected to awarding damages as if the claimant had acted reasonably on the basis that 'The plaintiff must, I think, prove that the loss which he claims to have suffered was caused by the breach of duty proved and he cannot do that by proving what his loss would have been in circumstances which have not happened'.[179] This categorical rejection of counterfactual assessment is misplaced. It overlooks the obvious point that the assessment of loss prescribed by the compensatory

[172] *Equitas Ltd v Walsham Bros & Co Ltd* [2013] EWHC 3264 (Comm), [2014] Lloyd's Rep IR 398 [123] (Males J). See also *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2011] QB 477 [58] (Toulson LJ) (obiter).

[173] *McGlinn v Waltham Contractors Ltd* [2007] EWHC 149 (TCC), [2008] Bus LR 233 [875]-[880] (Coulson QC).

[174] *Symrise* (n42) [66] (Burton J).

[175] *Jolliffe v Charles Coleman & Co* (1971) 219 EG 1608 (QB) (Brown J).

[176] Burrows, *Remedies* (n7) 126 fn6, citing *Cory* (n146), which concerns the assessment of damages where the remoteness rule applies.

[177] Text to n161.

[178] McGregor, *Damages* (n7) [9-102] (emphasis added).

[179] *Watts v Morrow* [1991] 1 WLR 1421 (CA) 1436.

principle itself involves a counterfactual comparison with the position as if the breach had not occurred.[180]

Another anomaly is *Beoco v Alfa Laval*.[181] This case can usefully be compared with *Schering Agrochemicals v Resibel*,[182] where Hobhouse J applied the law correctly on remarkably similar facts.[183] In both cases, the defendants had supplied the claimants with defective parts for their factory machinery. Despite realising that the parts were defective and might lead to an explosion, the claimants decided to keep their production lines in operation. The defective parts did then lead to an explosion, severely damaging the claimants' factories. In both cases, it was held that the claimants had acted unreasonably by not withdrawing the defective parts from the production line once they realised that they were defective.[184]

In *Schering*, Hobhouse J rejected the claim for damages in respect of the explosion, but nevertheless held that 'The Plaintiffs are entitled to recover the cost of bringing the alarm and safety system up to specification and the loss of profit etc that would result from the line being out of production meanwhile'.[185] He correctly clarified that the effect of the avoidable loss rule involved a counterfactual assessment, holding that 'The assessment will have to be on a hypothetical basis assuming that reasonable steps had been taken to avoid the loss that the Plaintiffs did in fact suffer'.[186] Hobhouse J's award was not challenged on appeal.[187] It is a perfect application of the counterfactual view.

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[180] Section 3.2.1.

[181] *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137 (CA).

[182] *Schering Agrochemicals Ltd v Resibel NV SA* (QB, 4 May 1991); *Schering Agrochemicals Ltd v Resibel NV SA* (CA, 26 November 1992).

[183] Kramer, *Contract Damages* (n7) 357: 'the approach of *Schering* is to be preferred'.

[184] *Schering Agrochemicals (QB)* (n182) 24 (Hobhouse J); *Beoco* (n181) 146 (Stuart-Smith LJ).

[185] *Schering Agrochemicals (QB)* (n182). It appears that this aspect of Hobhouse J's decision was overlooked by Burrows, who criticised *Schering* on the basis that it 'meant that no damages at all should be awarded for the loss caused by the fire': Burrows, *Remedies* (n7) 142. See also Burrows, 'Contributory Negligence in Contract' (n127) 177.

[186] *Schering Agrochemicals (QB)* (n182).

[187] *Schering Agrochemicals (CA)* (n182) 2 (Purchas LJ). See also *Beoco* (n181) 152-53 (Stuart-Smith LJ), noting that in *Schering*, a 'third party sought to appeal the judge's decision on damages for the hypothetical loss of profit. It is not at all clear what happened to this cross-appeal, since there is no mention of it in the judgment of the Court of Appeal'.

In *Beoco*, the trial judge took the same approach as Hobhouse J.[188] He rejected the claim for the harm suffered in the explosion, but instead awarded damages (on a counterfactual basis) for the cost of repairing the defective part and for the loss of profits on production that would have been suffered whilst taking the production line out of service during the period of repair.[189] However, in the Court of Appeal, Stuart-Smith LJ overturned the trial judge's assessment of damages and criticised the decision in *Schering*.[190] Instead, Stuart-Smith LJ held that 'the assessment of damages should be limited to the cost of replacement of the defective casing of the heat exchanger',[191] and rejected the claim for the 'hypothetical loss of production'.[192]

Beoco illustrates the pitfalls of the guillotine heuristic. Stuart-Smith LJ appears to have reasoned that the hypothetical cost of repairing the heat exchanger was recoverable because the heat exchanger was in fact destroyed in the explosion.[193] In other words, because the hypothetical repair of the heat exchanger was broadly the same type of harm as the actual cost of replacing the heat exchanger, one could superficially 'chop off' part of the claimant's factual loss (replacement) to leave just the part that would have been suffered even if the claimant had acted reasonably (repair).[194] By contrast, the loss of production was a different type of harm altogether from the harm in fact suffered (destruction of property). This arbitrary distinction based on type of harm is inconsistent with the numerous precedents cited above.[195]

[188] The decision of Bowsher QC at first instance is unreported, but decision is summarised by Stuart-Smith LJ in *Beoco* (n181) 145.

[189] Ibid 145 (Stuart-Smith LJ).

[190] In particular, 'Hobhouse J's decision was per incuriam, since there was no argument on the point': ibid 153.

[191] Ibid 153.

[192] Ibid 155.

[193] Ibid 149. Stuart-Smith LJ refers to the 'cost of *replacement* of the defective casing' but this is in substance a repair to the part.

[194] Note that this award still involved a counterfactual assessment: the heat exchanger was not in fact repaired, because it was destroyed in the explosion.

[195] n167 to n175.

In summary, the orthodox understanding of the effect of the avoidable loss rule is more equivocal than wrong. Even the expositions that apparently favour the all-or-nothing view can just about be salvaged to explain partial recovery. In turn, expositions of partial recovery can in most cases accommodate the counterfactual assessment required to determine the reduction in damages. They achieve this through the guillotine heuristic. However, the breaking point is reached where the type of harm that the claimant would have suffered if it had acted reasonably was altogether different from the harm in fact suffered. In these cases, the confusion arising from the orthodox expositions is exposed, even though the law itself is remarkably clear. The first step towards a correct description of the law requires an open recognition of the counterfactual effect of mitigation.

4.3 The Avoided Loss Rule

There are two main problems with the orthodox account of the avoided loss rule. First, the application of Viscount Haldane's formulation in *British Westinghouse* is widely misunderstood. The first limb has been misinterpreted by McGregor, leading other leading texts into error. The second limb has been marginalised by the orthodox account and the cases applying this limb are conventionally regarded as impossible to reconcile. Second, the effect of the rule is controversial because it may result in an award of damages greater than the claimant's factual loss. The heuristic of 'ignoring' benefits serves to hide the counterfactual effect of the rule. There is a deep conceptual confusion underlying the term 'avoided loss'.

4.3.1 The *British Westinghouse* test

In *British Westinghouse*, Viscount Haldane's formulation of what is now known as the 'avoided loss rule' was divided into two limbs,[196] outlined in the previous chapter.[197]

[196] *British Westinghouse* (n1) 689-90 (Viscount Haldane).

[197] Section 3.3.2.

Although the first limb is essentially redundant on the orthodox account of damages, its interpretation remains practically significant because it has influenced the conventional understanding of the second limb. McGregor's exposition of the first limb misreads Viscount Haldane's formulation and attributes the wrong ratio to the decision;[198] this has led other leading texts into error. As a result, the application of the second limb is often marginalised; indeed, some of the leading texts ignore it altogether. The cases applying the second limb are generally regarded as impossible to reconcile, leading to a reprise of the 'case-by-case' approach.

4.3.1.1 *The first limb*

Viscount Haldane's formulation of the avoided loss rule has acquired canonical status in the leading texts and judicial decisions. There is a well-recognised danger in reading judgments as though they were statutory provisions.[199] The avoided loss rule exemplifies the pitfalls of this approach. The modern orthodoxy contains a significant and unwarranted gloss on the *British Westinghouse* decision, attributable to a subtle misinterpretation of Viscount Haldane's formulation. This error can be traced to McGregor's 1961 edition,[200] although it has now crystallised into orthodoxy in the leading texts. It is therefore necessary to re-examine Viscount Haldane's formulation in detail, not for its own sake, but rather to unpick the confusion that has taken root in the orthodox account.

In *British Westinghouse*, the first limb of Viscount Haldane's formulation followed immediately from his 'classic statement of mitigation':

> [The classic statement of mitigation] does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has

[198] McGregor, *Damages* (n7) [9-006].

[199] For a recent warning, see eg *Makdessi v Cavendish Square Holding BV* [2015] UKSC 67, [2015] 3 WLR 1373 [22] (Lord Neuberger and Lord Sumption).

[200] Harvey McGregor, *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961) (n200) ch7.

> diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.[201]

This paragraph of Viscount Haldane's judgment is now rarely quoted in full; instead the leading texts invariably quote the second sentence in isolation.[202] However, the two parts are intimately connected. The reference to the 'course of business' in the second sentence is a reference to the standard of conduct expected under the classic statement of mitigation in the first sentence. In other words, read as a whole, the passage proposes that: where the claimant acted reasonably in mitigation, the effect in actual diminution of the loss may be taken into account in assessing damages.[203] This reading is confirmed by Viscount Haldane's further (less often quoted) clarification that:

> provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may property look at the whole of the facts and ascertain the result in estimating the quantum of damage.[204]

Here, the integration of the standard of conduct expected under the classic statement of mitigation is made more explicit. Again, read as a whole, the passage proposes that: provided that the claimant's conduct was reasonable, the judge may look at the whole of the facts. As we will see, this relatively straightforward proposition also forms the ratio of the decision in *British Westinghouse*, properly understood.[205]

To those familiar with the orthodox account of the avoided loss rule, it may be natural to enquire about the phrase 'even though there was no duty on him to act'.[206] To be sure, this phrase (here referred to as the 'no duty gloss') has achieved pre-eminence in the modern orthodoxy.[207] However, contemporaneous texts did not accord any great

[201] *British Westinghouse* (n1) 689.

[202] See eg Burrows, *Remedies* (n7) 158; McGregor, *Damages* (n7) [9-103]; *Chitty* (n7) [26-095].

[203] See further Andrew Dyson, 'British Westinghouse Revisited' [2012] LMCLQ 412, 420-21.

[204] *British Westinghouse* (n1) 690.

[205] Text to n319.

[206] n201.

[207] n219. See further Section 3.3.3.

significance to it, instead emphasising Viscount Haldane's second limb.[208] Nor is the phrase discussed in any of the early twentieth century cases that followed *British Westinghouse*.[209] Instead, the modern pre-eminence of the no duty gloss is attributable entirely to McGregor's 1961 edition.[210] In rewriting the chapter on mitigation, McGregor took this phrase to be the centrepiece of what he termed the 'avoided loss rule':

> the defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss as lessened; this is so *even although the plaintiff would not have been debarred under the first rule from recovering the whole loss*, which would have accrued in the absence of his successful mitigating steps…[211]

The same exposition was adopted in subsequent editions of *McGregor on Damages* to the present day.[212] McGregor's formulation differs from Viscount Haldane's.[213] It entirely severs the link with the classic statement of mitigation. This appears to be deliberate; elsewhere McGregor emphasises that 'we must distinguish between two aspects of mitigation as they are completely different from each other'.[214] McGregor took the view that Viscount Haldane's first limb applied to a further standard of conduct, distinct from that entailed in either the classic statement of mitigation or the second limb. In other words, McGregor envisaged a 'middle tier' of conduct whereby the claimant acted 'better-than-reasonably', interposed between reasonable mitigation (under the classic statement) and conduct that was res inter alios acta (under the second limb).

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[208] WG Earengey (ed) *Mayne's Treatise on Damages* (11th edn, Sweet & Maxwell 1946) 148-49; *Chitty on Contracts* (21st edn, Sweet & Maxwell 1955) [843].

[209] See eg *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC); *Williams Bros v Ed T Agius Ltd* [1914] AC 510 (HL); *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 (CA); *Jewelowski v Propp* [1944] KB 510 (KB). In all of these cases, the claimant was awarded damages greater than its factual loss. Notably, Viscount Haldane gave judgment in both *Jamal* and *Williams*.

[210] McGregor, *Mayne and McGregor* (12th edn 1961) (n200) ch7.

[211] Ibid [144].

[212] McGregor, *Damages* (n7) [9-006].

[213] The formulations also differ in that Viscount Haldane refers to the absence of a 'duty' to take certain steps, whereas McGregor refers to the quantum of damages that would be recoverable absent those steps. In other words, McGregor (mistakenly) reads across from prescription to attribution: see further text to n25.

[214] McGregor, *The Role of Mitigation* (n8) 329-30.

McGregor's exposition rests entirely on the passages quoted above.[215] There is no clarification, or indeed any mention, of a middle tier of conduct anywhere else in the judgment, nor in any of Viscount Haldane's subsequent decisions on mitigation.[216] In *Williams Bros v Agius*, Viscount Haldane upheld an award of damages greater than the claimant's factual loss, specifying that 'This decision is quite in harmony with what was recently said in this House in *British Westinghouse*',[217] without referring to any middle tier of conduct. Since McGregor's intervention, the phrase 'even though there was no duty on him to act' has nevertheless taken on a life of its own. Despite some initial resistance from Treitel and Street,[218] McGregor's exposition now forms the orthodox understanding of Viscount Haldane's first limb.[219]

On the facts of *British Westinghouse*, Viscount Haldane was perfectly clear that the claimants' conduct was a straightforward application of his classic statement of mitigation. He held that 'The transaction was … one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach'.[220] In particular, 'men of business would be doing the only thing they could properly do in replacing [the turbines] with new and up-to-date machines'.[221] The claimant's conduct was 'a natural and prudent course followed by those whose object was to avoid further loss'.[222] In these circumstances, it was 'right for the jury or arbitrator to look at what actually happened, and to balance loss and gain'.[223]

[215] n201 and n204.

[216] *Williams Bros* (n209); *Jamal* (n209); *Hill v Showell* (1918) 87 LJKB 1106 (HL).

[217] *Williams Bros* (n209) 520.

[218] GH Treitel, *The Law of Contract* (1st edn, Stevens 1962) 611, arguing rhetorically, 'Why should A benefit from subsequent acts on B's part, which B was not bound to do?' In relation to Street, see text to n228.

[219] See eg McGregor, *Damages* (n7) [9-006]; *Chitty* (n7) [26-095]; Tettenborn, *Damages* (n6) [5.07].

[220] *British Westinghouse* (n1) 691.

[221] Ibid 691.

[222] Ibid 691.

[223] Ibid 691.

In his 1961 edition, McGregor was the first to propose the alternative explanation that the claimant 'avoided more consequences than the dictates of the law required of him'.[224] At the time, other scholars disagreed.[225] In 1962, Street put forward the contrary explanation of *British Westinghouse* that 'the House of Lords dealt with the case on the assumption that the plaintiff was under a duty to take steps of a similar character to the ones taken provided that they were reasonable'.[226] In direct contradiction of McGregor's exposition,[227] Street sought to clarify that 'There is no authority for the proposition that where a claimant is under no duty to mitigate his loss by acting in a certain general way the gain which accrues to him from so acting is to be set off'.[228]

The opposing analyses of McGregor and Street marked a cross-roads in the orthodox account of mitigation. *Chitty* quickly adopted McGregor's view,[229] and other leading texts have subsequently followed suit;[230] Street's explanation was buried. However, the correct understanding of *British Westinghouse* is exactly as Street stated it. The claimants' reasonably purchased replacement turbines.[231] Having done so, it was entirely uncontroversial that both the costs *and benefits* associated with that purchase were taken into account in assessing the claimants' loss.[232] Indeed, as Mustill LJ has subsequently clarified, 'In retrospect it is hard to see how the contrary could have been maintained … To compensate the appellants for the cost of replacement whilst ignoring the additional benefits which this replacement had brought would have been palpable injustice'.[233]

[224] McGregor, *Mayne and McGregor* (12th edn 1961) (n200) [162]. See also McGregor, *Damages* (n7) [9-103]; McGregor, *The Role of Mitigation* (n8) 338.

[225] n218.

[226] Street, *Principles* (n149) 182.

[227] No one but McGregor had offered this explanation, so Street's clarification appears to be a direct response to McGregor's analysis.

[228] Street, *Principles* (n149).

[229] *Chitty on Contracts* (23rd edn, Sweet & Maxwell 1968) [1482].

[230] See eg Tettenborn, *Damages* (n6) [5.07].

[231] For more detailed analysis, see Dyson, 'British Westinghouse Revisited' (n203) 421-23.

[232] See further text to n319.

[233] *Hussey v Eels* [1990] 2 QB 227 (CA) 236.

Fortunately, with isolated exceptions,[234] the error adopted by the leading texts has not been replicated in the cases. In *Dimond*, Lord Hoffmann correctly held that *British Westinghouse* exemplified 'the rule that requires additional benefits obtained as a result of taking reasonable steps to mitigate loss to be brought into account in the calculation of damages'.[235] Recently, McGregor's explanation of the *British Westinghouse* decision has been expressly rejected by Leggatt J in *Thai Airways v KI Holdings*.[236] There he held that 'It is clear that in the *British Westinghouse* case the House of Lords considered that London Underground would have been acting unreasonably if they had continued to use the British Westinghouse turbines'.[237] From this Leggatt J (correctly) concluded that 'There is thus no need to invoke McGregor's "avoided loss" rule in order to explain the decision'.[238]

In summary, the emphasis conventionally placed on the first limb of Viscount Haldane's formulation by the leading texts is doubly misplaced. First, as the previous chapter clarified, even on McGregor's interpretation this limb adds nothing to the conventional understanding of the compensatory principle, which holds that the claimant will recover damages for its factual loss unless some contrary legal rule applies.[239] Second, this section has argued that McGregor's exposition of the first limb is incorrect. The proper reading of Viscount Haldane's formulation, particularly in light of its application to the facts of *British Westinghouse* itself, is that the first limb is a straightforward corollary of the classic statement of mitigation. It merely clarifies that where the claimant took reasonable steps to mitigate its loss, the benefits (as well as the costs) are taken into account in the assessment of damages.

[234] *Gardner v Marsh & Parsons* [1997] 1 WLR 489 (CA) 506 (Peter Gibson LJ, dissenting); *Bacciottini v Gotelee & Goldsmith* [2016] EWCA Civ 170 [60] (Davis LJ).

[235] *Dimond* (n61) 401-02. See also, in support of this view: *Hussey* (n233) 236 (Mustill LJ); *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The Fanis)* [1994] 1 Lloyd's Rep 633 (QB) 635-36 (Mance J); *Gardner* (n234) 498 (Hirst LJ); 514 (Pill LJ);

[236] *Thai Airways* (n42).

[237] Ibid [41].

[238] Ibid [45].

[239] Section 3.4.2.

4.3.1.2 *The second limb*

In *British Westinghouse*, Viscount Haldane followed his first limb with the clarification that 'the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business'.[240] This will be referred to as the 'second limb'. One may note here the reprise of the phrase 'ordinary course of business', which mirrors the classic statement of mitigation.[241] Viscount Haldane sought to illustrate the second limb with various authorities in which benefits obtained by the claimant had been regarded as 'res inter alios acta'.[242] On the facts of *British Westinghouse*, he clarified that the claimants' conduct did not fall within this second limb, because the purchase of the replacement turbines 'formed part of a continuous dealing with the situation in which they found themselves, and was not an independent or disconnected transaction'.[243]

The orthodox account of mitigation now frequently marginalises the second limb of the 'avoided loss rule'. McGregor omits the second limb entirely from his summary of the avoided loss rule,[244] addressing it only later in the chapter on mitigation.[245] *Chitty* adopts essentially the same summary,[246] later noting the effect of the second limb but without attributing this aspect of the rule to Viscount Haldane's formulation in *British Westinghouse*.[247] Likewise, Burrows discusses the requirement of 'directness' of the benefit,

[240] *British Westinghouse* (n1) 690.

[241] Section 3.3.2.

[242] *British Westinghouse* (n1) 690-91, citing *Jebsen v East & West India Dock Co* (1874-75) LR 10 CP 300 (CP); *Bradburn v The Great Western Railway Co* (1874-75) LR 10 Ex 1 (Ex Ch); *Joyner v Weeks* [1891] 2 QB 31 (CA).

[243] *British Westinghouse* (n1) 692.

[244] McGregor, *Damages* (n7) [9-006]. See also McGregor, *Mayne and McGregor* (12th edn 1961) (n200) [144].

[245] Here, McGregor clarifies that the application of the second limb 'represents the core of the problem of mitigation by way of avoided loss': McGregor, *Damages* (n7) [9-104]. In light of this, it is unclear why the second limb is excised from the summary altogether.

[246] *Chitty* (n7) [26-079]. See also Tettenborn, *Damages* (n6) [5.01].

[247] *Chitty* (n7) [26-095].

but without reference to Viscount Haldane's second limb.[248] Clerk and Lindsell omits the second limb from the text altogether, relegating it to the footnotes.[249] Again, this modern emphasis appears to originate with McGregor's 1961 edition, because previously the leading texts had stressed the importance of the second limb, and had conversely marginalised the first limb.[250]

The leading texts have offered various expositions of the relevant test, either expressly or implicitly derived from Viscount Haldane's second limb. McGregor cites Viscount Haldane's formulation,[251] adding that 'For what it is worth, my own formulation … is that the benefit must arise out of the mitigating act itself'.[252] Tettenborn also starts with *British Westinghouse*,[253] but reaches the slightly different conclusion that 'Another formulation … is that there must be a direct causal link between the matters reducing the claimant's loss and the defendant's original wrongdoing'.[254] Burrows summarises that 'indirect compensating advantages are not deducted',[255] adding that the test of directness turns on 'whether the compensating advantage was derived from actions taken by the claimant *to avoid* the consequences of the wrong'.[256]

In the cases on 'avoided loss', judges have mostly stuck to Viscount Haldane's formulation.[257] Recently, there has been a concerted judicial attempt to settle the relevant

[248] Burrows, *Remedies* (n7) 157-61.

[249] *Clerk & Lindsell* (n7) [28-09], fn52 and fn53.

[250] n208.

[251] McGregor, *Damages* (n7) [9-115].

[252] McGregor, *The Role of Mitigation* (n8) 338. See also McGregor, *Damages* (n7) [9-107].

[253] Tettenborn, *Damages* (n6) [5.40].

[254] Ibid [5.40]. See also [5.15]. This formulation is (at least superficially) different from McGregor's, because McGregor robustly rejects references to causation in this context: McGregor, *Damages* (n7) [9-115].

[255] Burrows, *Remedies* (n7) 157.

[256] Ibid 158 (emphasis in original). Burrows expressly aligns his exposition with McGregor's approach: 158 fn6.

[257] See eg *Primavera v Allied Dunbar Assurance plc* [2002] EWCA Civ 1327, [2003] Lloyd's Rep PN 14 [20] (Simon Brown LJ), [38] (Mance LJ); *Hussey* (n233) 241 (Mustill LJ); *Gardner* (n234) 503 (Hirst LJ). Cf *The Fanis* (n235) 636, where Mance J opposed the use of 'precise verbal formulae'.

legal test. In *The New Flamenco*, after quoting from *British Westinghouse* at some length,[258] Longmore LJ concluded that:

> The important principle which emerges from these citations is that, if a claimant adopts by way of mitigation a measure which arises out of the consequences of the breach and is in the ordinary course of business and such measure benefits the claimant, that benefit is normally to be brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant. That should be a principle sufficient to guide the decision of the fact-finder in any particular case.[259]

In the same decision, Christopher Clarke LJ also concluded that 'Viscount Haldane's formulation in *British Westinghouse* that the benefit must "arise from the consequences of the breach" remains, in my view, entirely apposite'.[260] In *Bacciottini*, Davis LJ expressly affirmed Longmore LJ's summary,[261] although he added two further points of his own. First, he suggested that 'perhaps it is not particularly enlightening to talk in terms of whether the original breach "caused" the mitigating or avoiding act',[262] and second, he approved Mance J's approach in *The Fanis*, which asked 'whether the asserted act of mitigation generating the benefit "arose out of or was sufficiently connected with a breach"'.[263]

On the orthodox account, it is somewhat unclear whether Viscount Haldane's formulation extends to the conduct of third parties as well as the claimant. McGregor acknowledges that 'It is clear that what Viscount Haldane was envisaging in *British Westinghouse* were steps taken by the aggrieved party himself'.[264] Likewise, Burrows seeks to clarify that the authorities 'dealing with compensating advantages provided by third parties shed little light on the directness principle' applicable to the claimant's conduct.[265] McGregor nevertheless suggests the generic formulation (encompassing benefits conferred

[258] *The New Flamenco (CA)* (n46) [21]-[22] (Longmore LJ).

[259] Ibid [23].

[260] Ibid [47].

[261] *Bacciottini* (n234) [62].

[262] Ibid [62].

[263] Ibid [62].

[264] McGregor, *The Role of Mitigation* (n8) 341. See also McGregor, *Damages* (n7) [9-106].

[265] Burrows, *Remedies* (n7) 158.

by third parties) that 'matter completely collateral and merely res inter alios acta cannot be used in mitigation of damage'.[266] He admits that this exposition 'gives no indication of how the rule operates'.[267]

In *Burdis v Livsey*, the Court of Appeal applied McGregor's generic formulation to a free repair obtained through a credit agreement with a third party.[268] Aldous LJ held that the unenforceability of the credit agreement fell into the category of 'events which, on a true analysis, are collateral to the commission of the tort, or res inter alios acta, or too remote'.[269] If treated as labels rather than legal tests, these phrases are relatively harmless, albeit unenlightening. However, in *Swynson v Lowick Rose*, Longmore LJ was led to the conclusion that the underlying legal test was also the same.[270] He attempted to analogise from the *British Westinghouse* test, despite acknowledging that the decision was 'not strictly applicable'.[271] Longmore LJ concluded that 'The principles governing the assessment of damages are (or, at any rate, should be) similar in both categories of case'.[272]

Burrows is correct to argue that the analogy between the claimant's own conduct and benefits conferred by third parties is unhelpful.[273] In a dissenting judgment, Davis LJ also reached this conclusion in *Swynson*.[274] However, the basis for distinguishing third party benefits is unclear on the orthodox understanding of Viscount Haldane's formulation. Of course, one can raise the simple point that the facts of *British Westinghouse* itself were not concerned with third parties. However, without understanding the basis for Viscount Haldane's formulation, one cannot effectively explain why it cannot appropriately extend

[266] McGregor, *Damages* (n7) [9-106].

[267] Ibid [9-106].

[268] *Burdis* (n98).

[269] Ibid [91] (Aldous LJ). McGregor wrote the skeleton argument for the claimants: [78] (Aldous LJ).

[270] *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629, [2015] PNLR 28 [10]. Sales LJ reached the same decision on the facts, but preferred an analogy with *Parry v Cleaver* [1970] AC 1 (HL): [56]. Davis LJ dissented.

[271] *Swynson* (n270) [17].

[272] Ibid [10].

[273] n265.

[274] *Swynson* (n270) [33], [43].

beyond the claimants' conduct. Unfortunately, vague formulations such as 'directness' or events 'arising out of' the breach inevitably lend themselves to wider application.

The main problem with the orthodox account of the avoided loss rule is that it has entirely given up on any attempt to reconcile the various decisions that have applied the second limb. McLauchlin describes the application of the second limb as 'One of the most intractable areas of the law relating to the assessment of damages', because 'The cases are difficult and replete with fine distinctions, and many of them are irreconcilable'.[275] He concludes that 'the current law is in a dreadful muddle'.[276] McGregor similarly concludes that 'the line between those avoided consequences which are collateral and those which are not is an exceedingly difficult one to draw'.[277] Elsewhere McGregor admits that 'Moving to avoided loss we come upon a topic of great difficulty. It needs to be handled with great care because the authorities are in a bit of a jumble'.[278]

The aim of a descriptive account of the law must be to abstract rules from the body of precedents; the orthodox account of the avoided loss rule effectively abandons this aim. Given that the leading texts conclude that many or even most of the relevant precedents are impossible to reconcile, it is unsurprising that this despair has come to be reflected in the cases themselves. For example, in *Hussain v New Taplow Paper Mills*, Bridge LJ conceded that 'many eminent common law judges, I think it is fair to say, have been baffled by the problem of how to articulate a single guiding rule to distinguish receipts by a plaintiff which are to be taken into account in mitigation of damage from those which are not'.[279] In *The New Flamenco*, Longmore LJ recently summarised that 'The search for legal principle in this area is undoubtedly elusive'.[280]

[275] McLauchlan, *Expectation Damages* (n39) 360.

[276] Ibid 384.

[277] McGregor, *Damages* (n7) [9-106].

[278] McGregor, *The Role of Mitigation* (n8) 366.

[279] *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514 (HL) 528. See also *Burdis v Livsey* [2001] 1 WLR 1751 (QB) 1757 (Gray J).

[280] *The New Flamenco (CA)* (n46) [39]. See also [20].

The most common response to these difficulties has been to fall back on the proposition that the application of the second limb is a question of fact.[281] In *Pagnan & Fratelli v Corbisa*, Salmon LJ concluded that 'the tribunal found that it was not an independent or disconnected transaction but formed part of a continuous dealing between the parties; and these findings of fact cannot be challenged in this court'.[282] Although apparently willing to undertake a review, in *Bacciottini* Davis LJ similarly held that 'Ultimately cases of this kind have to be decided by reference to the facts'.[283] This approach follows in a long line of judicial reasoning characterised by Pill LJ's comment in *Gardner v Marsh & Parsons* that 'There are dangers in attempting statements of principle in this branch of the law and cases will often be determined upon questions of fact'.[284]

The designation of Viscount Haldane's second limb as a question is fact is just as problematic in this area of mitigation as it is in relation to the reasonableness test under the avoidable loss rule. Once again, the contention that the test raises questions of fact is ambiguous as between three possible meanings. First, it is again correct, but essentially banal, to say that the test is sensitive to the circumstances of each case. Second, although references to Viscount Haldane's second limb as a 'causal' test may hint at some non-legal issues, this characterisation is not widely accepted by the orthodox account. Third, it is plainly wrong to suggest that the application of the second limb is itself a matter of primary fact, because there are again numerous cases in which the trial judge's decision has successfully been overturned on appeal.[285]

[281] See eg Allen, Martin and Hartshorne (n45) [4-082]; McLauchlan, *Expectation Damages* (n39) 384.

[282] *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltd* [1970] 1 WLR 1306 (CA) 1315.

[283] *Bacciottini* (n234) [65].

[284] *Gardner* (n234) 511. See also 503 (Hirst LJ), 510 (Peter Gibson LJ); *Hussey* (n233) 236 (Mustill LJ); *Wapshott v Davis Donovan & Co* [1996] PNLR 361 (CA) 361 (Hobhouse LJ); *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501 (Ch) [24] (Sir Andrew Morritt V-C); *Farmer v Wood* (CA, 7 July 2000) [57] (Robert Walker LJ).

[285] See eg *Hussey* (n233) 234-36 (Mustill LJ); *Gregory v Shepherds* [2000] Lloyd's Rep PN 724 (CA) [46] (Morritt LJ); *Burdis* (n98) [105] (Aldous LJ). See also *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 (CA), allowing the appeal, though not directly applying the test in *British Westinghouse* (n1) 689 (Viscount Haldane).

4.3.2 Legal effect

There are three main problems with the orthodox account concerning the legal effect of the avoided loss rule. First, when Viscount Haldane's second limb applies, it may result in an award of damages greater than the claimant's factual loss; this brings the avoided loss rule into tension with the orthodox account of damages. Second, references to 'avoided loss' reveal a deep conceptual confusion about the meaning of 'loss'; in particular, they show that scholars and judges alike do not appear to regard factual loss as the *only* meaningful concept of loss. Third, the legal effect of the avoided loss rule is hidden by the misleading heuristic of 'ignoring' events; once again, just as in relation to the avoidable loss rule, the true position is that damages are assessed on a counterfactual basis.

4.3.2.1 *Damages exceeding factual loss*

The orthodox account of damages consists of two main stages.[286] First, apply the compensatory principle to determine the claimant's factual loss; this stage involves taking into account all events up to the date of trial. Second, apply limitations on damages; this stage involves the application of legal rules that reduce (but cannot extend) recovery of the claimant's factual loss.[287] It follows from this orthodox understanding that the claimant cannot, other than in exceptional circumstances,[288] recover more than its factual loss. This was referred to as the 'factual loss cap'. Damages exceeding the factual loss cap are said to

[286] Section 3.2.1.

[287] See eg Qiao Liu, 'The Date for Assessing Damages for Loss of Prospective Performance Under a Contract' [2007] LMCLQ 273, 275: 'the mitigation principle, even when applied, cannot be employed in such a way as to derogate from the compensatory principle or enable the innocent party to claim damages in excess of its actual loss'.

[288] Section 3.2.3.

involve 'overcompensation'[289] or 'double recovery'[290] because they put the claimant in a better position than if the breach had not occurred.[291]

The legal effect of the avoided loss rule is in tension with this orthodox understanding. In cases where Viscount Haldane's second limb applies, the claimant's conduct is regarded as 'res inter alios acta',[292] meaning that is not 'taken into account' in the assessment of damages.[293] By ignoring the benefit obtained by the claimant between breach and trial,[294] the avoided loss rule may result in an award of damages greater than the claimant's factual loss. Burrows acknowledges the challenge that this poses to the orthodox account of damages:

> Where the claimant's actual position has been, or will be improved by benefits acquired subsequent to and as a result of the tort or breach of contract, one might expect (in accordance with the compensatory aims) that such benefits would be taken into account … But in fact compensating advantages are often not deducted.[295]

This tension between the effect of the avoided loss rule and the 'compensatory aims' explains why the orthodox account of mitigation has sought to marginalise Viscount Haldane's second limb.[296] In his analysis of the avoided loss rule, McLauchlin argues that 'A court should never compensate the plaintiff for a loss which it knows has not been suffered. To award more than the "real" loss is, by definition, to allow an unjustifiable windfall'.[297] McLauchlin's conclusion is that all of the cases applying Viscount Haldane's second limb are 'wrongly decided'.[298] The other leading texts on damages adopt a similar approach. Burrows

[289] See eg Burrows, *Remedies* (n7) 213; McLauchlan, *Expectation Damages* (n39) 364-65. Samuel Beswick, '"Losses in Any Event" in the Case of Damage to Property' (2015) 35 OJLS 755, 773.

[290] See eg *Gardner* (n234) 511 (Pill LJ).

[291] Section 3.2.3.

[292] *British Westinghouse* (n1) 691 (Viscount Haldane).

[293] Ibid 690 (Viscount Haldane).

[294] See further text to n312.

[295] Burrows, *Remedies* (n7) 156.

[296] See eg *Chitty* (n7) [26-095]: 'The claimant is entitled to damages only for his actual loss'.

[297] McLauchlan, *Expectation Damages* (n39) 367.

[298] Ibid 360-88, criticising *Jebsen* (n242); *Williams Bros* (n209); *Jamal* (n209); *Rodocanachi, Sons & Co v Milburn Bros* (1887) LR 18 QBD 67 (CA); *Slater* (n209); *Campbell Mostyn* (n57); *Gardner* (n234);

also criticises the decisions that have awarded damages exceeding the claimant's factual loss;[299] McGregor adopts many of these criticisms, but accepts that some of the cases are correctly decided.[300]

The criticism that the cases applying Viscount Haldane's second limb are all 'wrongly decided' is ambiguous. As an evaluation of the law, one might argue that it is never justified for claimants to recover more than their factual loss.[301] This is a tenable viewpoint, although the orthodox account does not offer any normative arguments to support it. By contrast, as a description of the law, the criticism is not tenable. Of course one may conclude that certain outlying decisions are wrongly decided because they are inconsistent with the rules abstracted from the remaining body of precedents. However, there comes a point at which so many cases must be regarded as 'wrongly decided' that one must instead recognise the need to adjust the account.[302] The orthodox account of the avoided loss rule crosses this threshold.

Judicial reasoning also sometimes invokes the factual loss cap. In *Gardner*, Peter Gibson LJ dissented on the basis that 'The law does not permit the plaintiff to recover more than is seen to be his actual loss and the rules of mitigation may deprive the plaintiff of all or part of the damages for loss which otherwise he might have recovered'.[303] Davis LJ relied on this proposition as dispositive in *Bacciottini*,[304] holding that Peter Gibson LJ's comment

Primavera (n257); *Needler* (n284); *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm); *Oxus Gold plc v Templeton Insurance Ltd* [2007] EWHC 770 (Comm).

[299] Burrows, *Remedies* (n7) 157-61, 212-19, criticising *Hussey* (n233); *Williams Bros* (n209); *Slater* (n209); *Campbell Mostyn* (n57).

[300] McGregor, *Damages* (n7) [9-127]-[9-144], criticising *Needler* (n284); *Hussey* (n233); *Gardner* (n234); *Slater* (n209); *Williams Bros* (n209); *Rodocanachi* (n298), but approving *Jamal* (n209); *Campbell Mostyn* (n57); *Primavera* (n257).

[301] See eg Burrows, *Remedies* (n7) 218, criticising *Campbell Mostyn* (n57) on the basis that it 'unjustifiably runs contrary to the avowed compensatory goal'. See also McLauchlan, *Expectation Damages* (n39) 377-78.

[302] McLauchlan analyses a total of sixteen English decisions on 'avoided loss' and concludes that eleven of them were wrongly decided: McLauchlan, *Expectation Damages* (n39) 360-88.

[303] *Gardner* (n234) 505. See also *Blue Circle* (n57) 317 (Chadwick LJ); *Campbell Mostyn* (n57) 69 (Birkett LJ). In both of these cases, the court nevertheless unanimously awarded damages exceeding the factual loss.

[304] *Bacciottini* (n234) [56]. See also *Swynson* (n270) [31] (Davis LJ, dissenting).

was 'surely uncontroversial as a general proposition'.[305] In *The New Flamenco*, Longmore LJ alluded to similar reasoning in suggesting that when applying Viscount Haldane's second limb, 'an arbitrator in my view is entitled to remind himself … of Baron Parke B's even more fundamental principle' that a claimant is to be put in same position (and by implication, no better position) than if the contract had been performed.[306]

The problem with this absolutist approach is that the factual loss cap is already subject to numerous exceptions, acknowledged even by the orthodox account of damages. These exceptions include the insurance and benevolence rules as well as the market rule.[307] It is plainly inaccurate to assert that a claimant can *never* recover more than its factual loss in damages. As Scrutton LJ recognised in *Slater v Hoyle*, 'The rules of English law do not always give exact indemnity'.[308] In *Smiley v Townshend*, Denning LJ similarly acknowledged 'many cases in which a thing that happens after a breach of contract or after a wrong done cannot be prayed in aid by the man who breaks his contract or by the tortfeasor in diminution of damages, because it is res inter alios acta'.[309] As a matter of description, the factual loss cap is evidently not dispositive in every case. The aim must therefore be to describe and explain the scope of the exceptions, rather than denying them altogether.

4.3.2.2 *Counterfactual assessment*

Earlier it was argued that the orthodox account of the avoidable loss rule suffers from overreliance on the 'guillotine heuristic'.[310] This heuristic involves the simplistic mental shortcut of 'chopping off' recovery of the claimant's factual loss, which works well enough in simple cases but breaks down in complex cases because it obscures the underlying

[305] *Bacciottini* (n234) [45].

[306] *The New Flamenco (CA)* (n46) [39].

[307] Section 3.2.3.

[308] *Slater* (n209) 25. See also *Joyner* (n242) 34 (Wright J).

[309] *Smiley v Townshend* [1950] 2 KB 311 (CA). See also *Gardner* (n234) 512; *British Transport Commission v Gourley* [1956] AC 185 (HL) 212 (Lord Reid).

[310] Text to n142.

counterfactual effect of the rule.[311] Precisely the same problem arises in relation to the avoided loss rule. This time, the heuristic involves 'ignoring' benefits obtained by the claimant; this heuristic is also captured by the Latin phrase 'res inter alios acta'.[312] Again, the mental shortcut works well enough most of the time, but unhelpfully serves to hide the counterfactual assessment involved in applying Viscount Haldane's second limb.

The orthodox account of mitigation adopts a variety of phrases to describe the effect of the avoided loss rule. McGregor summarises that 'matter completely collateral and merely *res inter alios acta* cannot be used in mitigation of damage'.[313] McGregor similarly proposes that 'the benefit to the claimant, if it is to be taken into account in mitigation of damage, must arise out of the act of mitigation itself'.[314] This reflects the proposition in *British Westinghouse* that 'the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach';[315] Viscount Haldane also referred to such benefits as 'res inter alios acta'.[316] Burrows similarly asks 'when are compensating advantages ignored?'[317]

The notion of 'ignoring' or not 'taking into account' benefits is a heuristic device. It relies on a metaphorical ledger or balance sheet that is used to total up every harm and benefit that would not have occurred but-for the defendant's breach. This ledger includes all of the harms and benefits incurred up to the date of trial.[318] The balance on the ledger is the claimant's 'loss', and in circumstances where every harm and benefit is taken into

[311] Text to n146.

[312] The resort to Latin ought to serve as a warning. As Stevens notes, 'When English lawyers do not know how to classify a rule, they … use other languages, usually French (eg tort) or Latin (eg res ipsa loquitur)': Robert Stevens, *Torts and Rights* (OUP 2007) 299.

[313] McGregor, *Damages* (n7) [9-106].

[314] Ibid [9-115]. See also *Chitty* (n7) [26-098].

[315] *British Westinghouse* (n1) 690 (Viscount Haldane).

[316] Ibid 691. See also *Slater* (n209) 23 (Scrutton LJ); *Gardner* (n234) 503 (Hirst LJ); *Dimond* (n61) 398-99 (Lord Hoffmann); *Burdis* (n98) [91] (Aldous LJ).

[317] Burrows, *Remedies* (n7) 157. See also, in relation to insurance and benevolence: *Hunt v Severs* [1994] 2 AC 350 (HL) 358; *Hussain* (n279) 527 (Lord Bridge): 'the amount received is again to be disregarded'.

[318] It also includes the harms and benefits that will be incurred after trial, though these need not concern us for present purposes.

account we would refer to this as the claimant's 'factual loss'. The effect of the avoided loss rule is metaphorically to 'strike out' certain benefits from the ledger; in this way one appears to be 'ignoring' benefits in the assessment of damages. Although this mental shortcut works tolerably well in simple cases, it conceals two major pitfalls.

First, what is 'ignored' is not really the benefit itself, but rather the *event* through which the benefit was obtained. This is the simple reason why the claim in *British Westinghouse* was bound to fail.[319] The claimants had argued that the benefit of the increased efficiency of the replacement turbines should be ignored, but that the cost of purchasing the replacement should be taken into account. As Tettenborn puts it, 'the plaintiff cannot, so to speak, take plums but leave the duff'.[320] Viscount Haldane held that effect of the second limb would be to ignore the '*subsequent transaction*' altogether (and not merely the benefits of the transaction).[321] However, on the facts, the second limb did not apply;[322] in these circumstances the court was correct to 'look at what actually happened, and to balance loss and gain'.[323] It is never appropriate to include the harms but ignore the benefits in respect of the same event.[324]

In their original pleadings, the claimants in *British Westinghouse* had alternatively claimed damages based on the cost of excess coal consumption over the lifetime of the defective turbines.[325] This claim was at least internally consistent in that it involved ignoring both the costs and benefits of the claimants' subsequent transaction. If successful, this claim would have involved an award for 'avoided loss' because the excess coal consumption was not in fact suffered. However, this claim was also bound to fail because, as Viscount Haldane held, the purchase of the replacement turbines was 'a reasonable and prudent course quite

[319] *Hussey* (n233) 236 (Mustill LJ); see further text to n233.

[320] Andrew Tettenborn, 'What is a Loss?' in Jason W Neyers, Erika Chamberlain and Stephen G A Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) 450.

[321] *British Westinghouse* (n1) 690 (emphasis added).

[322] Text to n220.

[323] *British Westinghouse* (n1) 691 (Viscount Haldane).

[324] This is the simple explanation for the decisions listed by McGregor in McGregor, *Damages* (n7) [9-124]-[9-126].

[325] See further Dyson, 'British Westinghouse Revisited' (n203) 415-16.

naturally arising out of the circumstances in which he was placed by the breach'.[326] Although pleaded, the claim was not pursued in any of the proceedings, presumably because the claimants realised that it had little chance of success.

Second, the process is really one of counterfactual assessment rather than merely ignoring certain events. Honoré gives a useful non-legal example to illustrate the distinction.[327] Consider the assertion that Churchill kept Britain in the war in 1940. To test this assertion we would not merely eliminate or 'ignore' Churchill's actual role as Prime Minister; instead we would need to substitute another Prime Minister whose hypothetical conduct of affairs would have had a bearing on whether Britain remained in the war. In other words, we would need to engage in a counterfactual assessment of what would have happened if (for example) Halifax had been Prime Minister, and then ask whether Halifax would have been able to convince Parliament and the public to continue the war.

To understand the effect of the avoided loss rule, one must examine carefully not just what was ignored, but what was awarded instead. For example, in *Primavera v Allied Dunbar Insurance*, the claimant was induced to enter into a pension scheme by the defendant's misrepresentation about its tax implications.[328] The Court of Appeal applied the avoided loss rule in ignoring the increase in value of the pension scheme between breach and trial.[329] Damages were awarded for 'the capitalised loss resulting from having to take a higher proportion of the fund in the form of a taxable annuity'.[330] In substance, this 'capitalised loss' relied on a counterfactual assessment of the costs that would have been incurred if the claimant had closed the fund when he first discovered the misrepresentation. The 'avoided loss' was thus a payment of tax that would have been but was not in fact incurred.

[326] *British Westinghouse* (n1) 691.

[327] Tony Honoré, 'Necessary and Sufficient Conditions in Tort Law' in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1997) 371.

[328] *Primavera* (n257).

[329] Ibid [43] (Mance LJ), [49] (Latham LJ).

[330] Ibid [6] (Simon Brown LJ).

The counterfactual effect of the avoided loss rule explains its link with the market rule.[331] In *The Elena D'Amico*, Goff J held that where there is a market for substitute performance, 'the decision not to take advantage of the available market is the independent decision of the innocent party, independent of the wrongdoing which has taken place'.[332] In support of this proposition he relied on the *British Westinghouse* test.[333] In *The Golden Victory*, Lord Bingham expressly approved this analysis,[334] adding that damages are assessed 'on the assumption' that the claimant resorted to the market 'whether in fact the injured party acts in that way or, for whatever reason, does not'.[335] In *Hussey v Eels*, Mustill LJ described this as a 'deemed mitigation'.[336] The assessment is counterfactual; as Lord Bingham put it, 'The actual facts are ordinarily irrelevant'.[337]

We can now address the common objection that 'the court must not speculate when it knows the facts'.[338] In this absolute form, the objection is misplaced because counterfactual assessments are ubiquitous in the law of damages: in applying the compensatory principle;[339] the avoidable loss rule;[340] the market rule;[341] the remoteness

[331] McGregor describes the application of the market rule as 'built-in' mitigation: McGregor, *The Role of Mitigation* (n8) 332; McGregor, *Damages* (n7) [9-034].

[332] *The Elena d'Amico* (n3) 88.

[333] Ibid 88-89.

[334] *The Golden Victory* (n37) [10].

[335] Ibid [10]. See also *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] EWCA Civ 901, [2008] 1 All ER (Comm) 685 [102] (Rix LJ); *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm) [117] (Leggatt J).

[336] *Hussey* (n233) 232-33. See also *Radford v De Froberville* [1977] 1 WLR 1262 (Ch) 1285-86 (Oliver J); *Coastal (Bermuda) Petroleum Ltd v Vtt Vulcan Petroleum SA (The Marine Star)* [1994] CLC 1019 (QB) 1025 (Mance J); *The Golden Victory* (n37) [57] (Lord Carswell); *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2010] EWHC 903 (Comm), [2011] 2 Lloyd's Rep 360 [65] (Steel J); *Deutsche Bank* (n55) [166] (Andrew Smith J).

[337] *The Golden Victory* (n37) [10]. See also *The Achilleas (CA)* (n335) [102] (Rix LJ); *Derby Resources AG v Blue Corinth Marine Co Ltd (The Athenian Harmony) (No1)* [1998] 2 Lloyd's Rep 410 (QB) 415-16 (Colman J).

[338] *Curwen v James* [1963] 1 WLR 748 (CA) 753 (Harman LJ); *Jobling v Associated Dairies* [1982] AC 794 (HL) 802 (Lord Wilberforce), 807 (Lord Edmund-Davies), 813 (Lord Keith). See also *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL) 431 (Lord Macnaghten).

[339] Section 3.2.1.

[340] Section 4.2.3.3

[341] Section 7.2.1.1.

rule;[342] and the benevolence rule.[343] One cannot maintain a universal objection to 'substituting fiction for fact',[344] since this process is required even to assess the non-breach position under the compensatory principle. Even the assessment of the claimant's breach position is sometimes counterfactual where for example the benevolence or market rule applies. To deny this is really just a reprise of the factual loss cap reasoning and similarly fails to explain the established 'exceptions'.[345] Again, the aim must be to describe and explain how the relevant counterfactual is assessed, rather than denying counterfactual assessment altogether.

4.3.2.3 *The concept of 'avoided loss'*

The term 'avoided loss' was invented by McGregor,[346] but has since become widely used.[347] Its adoption reveals a deep confusion about the legal concept of loss.[348] Although the terms 'avoidable loss' and 'avoided loss' are frequently juxtaposed in accounts of mitigation, they are premised on two quite different concepts of loss. Avoidable loss can be understood as that part of the claimant's factual loss that could have been avoided but in fact was not; in other words, avoidable loss can be regarded as a subset of factual loss.[349] By contrast, the problem of 'avoided loss' only arises when the claimant's factual loss has already been

[342] See eg *Cory* (n146); *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528 (CA).

[343] For example, where a third party gratuitously provides non-monetary benefit to the claimant, damages are assessed as if the claimant had purchased that benefit at the market rate: see eg *Liffen v Watson* [1940] 1 KB 556 (CA) 557 (Slesser LJ), 558 (Goddard LJ); *Donnelly v Joyce* [1974] QB 454 (CA) 462 (Megaw LJ).

[344] Contra *Parry* (n270) 53 (Lord Pearson).

[345] Text to n307.

[346] McGregor, *The Role of Mitigation* (n8) 330: 'The terms which I use here – which indeed I coined when I first wrote my book on damages – are therefore avoidable loss and avoided loss'.

[347] See eg *Chitty* (n7) [26-077]; *Clerk & Lindsell* (n7) [28-09]; Tettenborn, *Damages* (n6) [5.01]; *Owners of the Andros Springs v Owners of the World Beauty (The World Beauty)* [1970] P 144 (CA) 19 (Wilmer LJ); *Dimond* (n61) 406 (Lord Hobhouse); *Lagden* (n12) [78] (Lord Scott).

[348] See also the confusing distinction between 'immediate loss' and 'potential future loss': McGregor, *Damages* (n7) [9-111]; *Burdis* (n98) [92] (Aldous LJ).

[349] This understanding is nevertheless imprecise, because it relies on the 'guillotine heuristic': text to n142.

reduced or eliminated by the claimant's conduct.[350] In other words, 'avoided loss' is by definition distinct from factual loss. How then is this alternate concept of loss constructed?

McGregor provides no answer to this fundamental question. The concept of avoided loss is assumed but never defined; this is a major gap in the orthodox account of mitigation. Nevertheless, the concept clearly has powerful intuitive appeal; this is why it is so widely used by scholars and judges.[351] Even proponents of the orthodox account of damages often refer to avoided loss. For example, Tettenborn proposes that 'In so far as the loss was in fact avoided, compensation for it will be cut accordingly'.[352] What is the concept of 'loss' here, if not factual loss? Ironically, although the statement purports to reinforce the factual loss cap on damages, it tacitly concedes that there is a meaningful concept of loss distinct from factual loss; otherwise, 'avoided loss' would simply be 'not loss'.

Avoided loss is just one of many labels invoked to describe a concept of loss distinct from factual loss. In *Burdis*, Aldous LJ held that 'at the moment when the accident occurred Miss Burdis suffered a direct and immediate loss',[353] even though the claimant had in fact obtained her repairs for free.[354] In *Primavera*, Simon Brown LJ reasoned that the defendant's negligence had resulted in 'an immediate loss in the way of a less valuable fund';[355] Mance LJ asked 'whether any prima facie loss suffered … was "mitigated" (or avoided) by the respondent's actual conduct'.[356] In *Biggin v Permanite*, Devlin J referred to 'damages

[350] One may ask: 'reduced' compared with *what*? But this is just to restate the problem 'what is avoided loss?'

[351] n347.

[352] Tettenborn, *Damages* (n6) [5.07]. See also McLauchlan, *Expectation Damages* (n39) 371.

[353] *Burdis* (n98) [85]. See also *Uzinterimpex* (n69) [54] (Moore-Bick LJ); *Parabola* (n172) [55] (Toulson LJ); *Pegasus v Ernst & Young* [2012] EWHC 738 (Ch), [2012] PNLR 24 [39] (Mann J); *Coles* (n128) [29] (Aikens LJ); *Mueller Europe Ltd v Central Roofing (South Wales) Ltd* [2013] EWHC 237 (TCC), 147 Con LR 32 [148] (Stuart-Smith J); *Waterdance Ltd v Kingston Marine Services Ltd* [2014] EWHC 224 (TCC), [2014] BLR 141.

[354] *Burdis (QB)* [47]. See also *Burdis* (n98) [85] (Aldous LJ): 'it was common ground that the repairs restored Miss Burdis' car to its pre-accident value'.

[355] *Primavera* (n257) [27] (Simon Brown LJ). See also *Jamal* (n209) 180 (Lord Wrenbury); *Murfin v Campbell* [2011] EWHC 1475 (Ch), [2011] PNLR 28 [16] (HHJ Pelling QC); *VTB Capital plc v Nutritek International Corp* [2011] EWHC 3107 (Ch) [160] (Arnold J); *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 (HL) 1639 (Lord Hoffmann). In *Dimond* (n61) 406, Lord Hobhouse referred to a 'capital account loss' which was 'suffered as soon as the car is damaged'.

[356] *Primavera* (n257) [37] (Mance LJ). See also *Blamire v South Cumbria HA* [1993] PIQR Q1 (CA) Q4 (Steyn LJ). Some references to prima facie loss do not entail the application of a counterfactual rule

measured by a notional loss in market value' and questioned whether such loss might be recoverable in damages even 'if in fact [the defective product] is used without injurious results'.[357]

Labels such as 'avoided', 'direct', 'immediate' 'prima facie' and 'notional' loss are significant. They show that, contrary to the orthodox account of damages, factual loss is not regarded as the only meaningful concept of loss. We should not too hastily dismiss this intuition. On the other hand, the present labels are unhelpfully vague. The concept of loss must involve a comparison between two positions, but none of the labels give any clear indication of what the relevant positions are or how they are assessed. The labels all appear broadly to reflect a concept of loss that 'ignores' post-breach events; however, we have already seen that this can be a misleading heuristic.[358] In relation to 'avoided loss', once again, the aim should be to describe and explain how this concept is assessed, rather than denying its existence altogether.

4.4 Explanations of Mitigation

Judges have tended to explain mitigation as an aspect of causation.[359] By contrast, scholars have tended firmly to resist this explanation.[360] Many of the leading texts do not offer any affirmative explanation of mitigation.[361] However, three main explanations have been put

but instead merely refer to evidence: see eg *Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd* [2008] EWCA Civ 955, [2009] Bus LR 529 [49] (Rix LJ).

[357] *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 (KB) 436. See also *Hussey* (n233) 241 (Mustill LJ); *Lowe v Guise* [2002] EWCA Civ 197, [2002] QB 1369 [53] (Potter LJ); *Parker v SJ Berwin* [2008] EWHC 3017 (QB), [2009] PNLR 17 [47] (Hamblen J); *Re Whiteley Insurance Consultants* [2008] EWHC 1782 (Ch), [2009] Bus LR 418 [29] (Richards J); Michael Furmston, 'Actual Damages, Notional Damages and Loss of a Chance' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 419.

[358] Text to n146.

[359] This explanation is developed in Chapter Five.

[360] See eg McGregor, *Damages* (n7) [9-018]. See also Bridge, 'Mitigation of Damages in Contract' (n10) 402: 'Even if only a technical explanation of mitigation were sufficient, causation would not be an adequate response'.

[361] See eg McGregor, *Damages* (n7); *Clerk & Lindsell* (n7); Tettenborn, *Damages* (n6).

forward by those that do:[362] self-reliance;[363] prevention of waste;[364] and remoteness.[365] None of these accounts succeed in explaining the law of mitigation. In the terms outlined in Chapter Two, these accounts do not provide plausible reasons for why the law is as it is.[366] It may be that the accounts aim to justify rather than to explain. Although this section does not seek to evaluate the accounts as justifications, it outlines briefly the normative issues raised in relation to self-reliance and the preservation of waste.

Bridge's analysis of mitigation concludes that 'numerous factors are at play in explaining the duty to mitigate. No single one sufficiently explains the requirement of mitigation'.[367] In principle, it is possible that more than one reason could explain the law of mitigation.[368] However, it is not plausible that the three explanations offered by the leading texts could combine to explain mitigation. First, the explanations may pull in opposite directions. For example, the policy of encouraging self-reliance may be economically inefficient and thereby lead to waste.[369] Second, the explanations fail to cross even a minimum explanatory threshold because they simply do not feature at all in judicial reasoning, either directly or indirectly. The paucity of judicial support for these explanations, whether individually or in combination, is most apparent by comparison with the causal explanation.[370]

Before evaluating each of the explanations put forward in the leading texts, it is worth pre-empting the difficulty of proving a negative. It is harder to deny an explanation of the law in isolation than it is to put forward alternative explanations. Take for example the obviously implausible claim that mitigation is explained by 'the policy of punishing

[362] For a longer list of possible explanations, see Bridge, 'Mitigation of Damages in Contract' (n10) 399-411. None of Bridge's other explanations have been taken up in the leading texts.

[363] Burrows, *Remedies* (n7) 122.

[364] *Chitty* (n7) [26-080]; Treitel, *Contract* (n7) [21-013].

[365] Smith, *Contract Theory* (n34) 428.

[366] Section 2.2.2.

[367] Bridge, 'Mitigation of Damages in Contract' (n10) 410.

[368] Chapter Two, text to n80.

[369] Text to n373.

[370] See further Section 5.2.1.

claimants for acting unreasonably'. How would one go about evaluating this explanation? First, one could point out that punishment is not mentioned in any of the judicial decisions on mitigation. Then, one could point out the various respects in which the goal of punishment is inconsistent with the mitigation rules. But, it would remain difficult to prove with certainty that the desire to punish the claimant played no role in guiding judicial discretion.

4.4.1 Self-reliance

In *Remedies for Torts and Breach of Contract*, Burrows offers the following account of the avoidable loss rule:[371] 'the policy is one of encouraging the claimant, once a wrong has occurred, to be to a reasonable extent self-reliant or, in economists' terminology, to be efficient, rather than pinning all loss on the defendant'.[372] Self-reliance and efficiency are not always equivalent: after breach the defendant might remain the 'cheapest cost avoider' for taking action to minimise the harm, and in these circumstances the claimant's self-reliance would be *inefficient*.[373] Nevertheless, the key element in this account appears to be self-reliance, since Burrows also emphasises that the claimant 'should not sit back and do nothing … but should rather use its resources to do what is reasonable'.[374]

As an explanatory account of the law, an initial difficulty with the self-reliance explanation is that it lacks any direct judicial support. In other words, there do not appear to be any cases in English law that have explained mitigation in terms of self-reliance. Nor

[371] It has never been suggested that the *avoided* loss rule can be explained by self-reliance. On the orthodox understanding, the avoided loss rule may discourage self-reliance because benefits from the claimant's (self-reliant) conduct are likely to accrue to the defendant.

[372] Burrows, *Remedies* (n7) 122. See also Bridge, 'Mitigation of Damages in Contract' (n10) 409-10: 'the law quite rightly seeks to bolster stoicism and self-reliance … Life is full of rude shocks and passivity is not to be encouraged'; McGregor, *Damages* (n7) [9-014]: 'Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss'.

[373] On the theory of cheapest cost avoidance generally, see Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press 1970). On its application to the avoidable loss rule, see Charles J Goetz and Robert E Scott, 'The Mitigation Principle: Toward a General Theory of Contractual Obligation' (1983) 69 Virginia Law Review 967, 972-75.

[374] Burrows, *Remedies* (n7) 122. But see also, in the context of claims for the agreed sum, ibid 440: 'economic efficiency dictates that the claimant should be required to mitigate'.

is there much indirect support for the explanation: for example, references to the claimant being idle or overly demanding of others (such as the defendant). The account would therefore have to contend that the avoidable loss rule is explained by the policy of encouraging claimants to be self-reliant even though this does not feature in judicial reasoning. This is not an impossible contention: perhaps judges were motivated by a desire to encourage self-reliance but did not articulate it in their judgments. However, this claim would require some supplementary indication that the judges' actual reasons really were based on self-reliance.

Instead, these indications point the other way. The self-reliance explanation is inconsistent with the application of the avoidable loss rule in important respects. Although the policy of encouraging self-reliance seems to fit with the cases where the claimant sits back and does nothing (the 'unreasonable inaction' cases),[375] it cannot explain why the same rule applies when the claimant *was* self-reliant, but thereby incurred unreasonable expenses.[376] The self-reliance account must suggest that the unreasonable action and inaction cases (which seem to be treated alike) have different explanations. One cannot accommodate the unreasonable action cases by reformulating the explanation as a policy of encouraging *reasonable* self-reliance. This modification renders the 'self-reliance' element entirely redundant: the explanation would then be based on 'a policy of encouraging claimants to act reasonably'.[377]

The self-reliance account might alternatively be understood as an attempt to *justify* the avoidable loss rule. The account could only be a partial justification because it would not justify limiting damages where the claimant took active but unreasonable steps.[378] As regards unreasonable inaction, some scholars regard the justification of mitigation as weak

[375] Ibid 122-26. The 'unreasonable action' cases are discussed at 126-28.

[376] See eg *Darbishire* (n3); *Italian State Railways (The Legnano) v Owners of the SS Minnehaha* (1921) 6 Ll L Rep 12 (CA); *The Borag* (n135); *The Pacific Concord* (n128); *Riyad Bank* (n55); *Beechwood* (n82).

[377] For problems with the prescriptive view of mitigation, see Section 4.2.1.

[378] Self-reliance would also not serve to justify (and indeed seems to contradict) the orthodox understanding of the avoided loss rule.

precisely *because* it may require self-reliance despite a defendant's promise to perform.[379] If proposed as a normative (rather than actual) reason for the law of mitigation, proponents of the self-reliance justification would need to contend with Shiffrin's objection that 'It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor's own wrongdoing'.[380] This thesis does not attempt to resolve that normative debate.

4.4.2 Prevention of waste

The editors of *Chitty* claim that 'The purpose of the rules on mitigation is to prevent the waste of resources in society, since they are obviously limited'.[381] Treitel also suggests that 'the policy of the mitigation rules … is to prevent needless waste'.[382] In this connection, Bridge has pointed out that 'there appears to exist no solid definition of economic waste, and a degree of misconception as to what it actually is'.[383] Although no definition of waste is provided by *Chitty*, the account appears to derive from the US scholarship that has explained mitigation on the basis that 'Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community'.[384] In other words, *Chitty* seems to explain mitigation as part of the aim of maximising community welfare.[385]

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[379] See eg Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (HUP 1981) 131, who struggles to justify mitigation as an 'altruistic duty'. This justification is criticised by PS Atiyah, *Essays on Contract* (Clarendon 1990) 124-125. See also Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2003) 110; Letsas and Saprai (n20) 335-40.

[380] Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708, 725.

[381] *Chitty* (n7) [26-080]. See also Bridge, 'Mitigation of Damages in Contract' (n10) 404-05. This explanation appears only to apply to the avoidable loss rule; it is hard to see how the avoided loss rule could be thought to prevent waste.

[382] Treitel, *Contract* (n7) [21-013].

[383] Bridge, 'Mitigation of Damages in Contract' (n10) 405.

[384] Charles McCormick, *Handbook on the Law of Damages* (West Pub Co 1935) 127. Further examples are cited in Bridge, 'Mitigation of Damages in Contract' (n10) 404 fn41.

[385] In particular, the reference to 'resources in society' supports this interpretation: *Chitty* (n7) [26-080].

As an explanatory account of the law, the prevention of waste account faces the same initial difficulty as self-reliance: it has received virtually no judicial support, directly or indirectly, in the English cases on mitigation.[386] So, the explanation would require one to conclude that the avoidable loss rule aims to prevent economic waste, despite that judges never express this aim. The explanation rests heavily on a paradigm of mitigation in which a claimant sits back and does nothing whilst harm is suffered: for example, by failing to call the fire services to put out a burning building.[387] However, Bridge notes that outside these cases of physical destruction, the avoidable loss rule does not seem to play any role in preventing waste: for example, delay in obtaining a market substitute 'cannot always be characterised as causing economic waste'.[388] In this respect, the explanation is inconsistent with the scope of the mitigation rules.

If the law of mitigation was explained by the prevention of waste, one would expect judicial reasoning in damages cases to look very different. In applying the avoidable and avoided loss rules, judges simply do not inquire at all into the effect of the claimant's conduct on the preservation of resources, or the wider effect of the claimant's conduct on community welfare. The reasonableness test is sometimes thought to require a balancing between the claimant's and defendant's interests,[389] but never a balancing of the interests of society as a whole. Indeed, the House of Lords has emphasised that claimants may be entitled to recover damages for a defendant's failure to perform a 'grotesque folly',[390] despite that such performance would involve the waste of resources that mitigation is said to discourage.[391]

[386] Recently, Leggatt J held that 'Mitigation rules … are also designed to encourage the efficient use of resources': *Mediterranean Shipping* (n156) [111]. However, this case involved an action for the agreed sum, not a claim for damages. There does not appear to be any other judicial support for the prevention of waste explanation in English law.

[387] Bridge, 'Mitigation of Damages in Contract' (n10) 405.

[388] Ibid 405.

[389] n67.

[390] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 (HL) 361 (Lord Mustill).

[391] See ibid 361 (Lord Mustill), emphasising that the folly 'may be so discordant with general taste that in purely economic terms the builder may be said to do the employer a favour by failing to install them'.

Again, we might understand the prevention of waste account as an attempt to justify rather than to explain the avoidable loss rule. It is beyond the scope of this thesis to evaluate whether it is a 'good thing' for judges to adjudicate on matters of community welfare in applying private law rules, but two short points are noted. First, the account would need to defend the institutional capacity and constitutional competence of the courts to engage in the 'polycentric task' of assessing community welfare.[392] Second, the account would also need to demonstrate that the rules of mitigation were actually effective at encouraging claimants to change their behaviour (in order to prevent waste); currently, there does not appear to be any empirical research into the behavioural effects of the law of mitigation.

4.4.3 Remoteness

Mitigation has sometimes been explained in terms of remoteness.[393] In contract, there remains a debate about whether remoteness is an 'external rule' based on reasonable foreseeability or an 'internal rule' based on the defendant's implied assumption of responsibility.[394] This section considers only the reasonable foreseeability explanation.[395] The explanation of the reasonable foreseeability rule is widely contested. In the tort of negligence, the rule has sometimes been explained as following from the foreseeability element of liability.[396] Alternatively, the rule has been explained as an attempt to ensure a

[392] See Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 394-404.

[393] See eg Smith, *Contract Theory* (n34) 428-29. Rejecting this explanation, see Tettenborn, *Damages* (n6) [5.61]-[5.62]; McGregor, *Damages* (n7) [9-101] fn428.

[394] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 [9], [11] (Lord Hoffmann). For a recent overview of this debate, see Andrew Burrows, 'Lord Hoffmann and Remoteness in Contract' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart 2015).

[395] It has never been suggested that mitigation could be explained by an implied assumption of responsibility. This explanation would be unlikely to get off the ground because mitigation is identical in contract and torts, yet an implied assumption of responsibility depends on a prior relationship between the parties.

[396] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388 (PC), 423, 426 (Viscount Simonds).

rough proportion between the degree of the defendant's fault and the burden of liability.[397] The basis of the reasonable foreseeability rule cannot be resolved here, but in light of this contested ground, any explanation of mitigation in terms of remoteness is likely to involve kicking the can down the road.

In *Contract Theory*, Smith argues that 'The mitigation rule is best explained as one aspect of the general concept of remoteness; the reason plaintiffs cannot recover for losses they could have avoided by acting reasonably is that such losses are too remote'.[398] Although this explanation does have some judicial support, it is limited and equivocal. The only direct support for the remoteness explanation refers to remoteness and causation interchangeably,[399] such that the reasoning is based on directness rather than foreseeability.[400] The remoteness rule has sometimes been invoked where the claimant's conduct was unforeseeable,[401] but this does not show that mitigation is an aspect (or 'subset') of remoteness; it merely shows that the remoteness rule may *also* apply to the claimant's conduct.

Smith specifies that 'when determining which losses are reasonably foreseeable (or which 'naturally flow') as a result of a breach, the background assumption is that the [claimant] will act reasonably'.[402] However, unforeseeability and unreasonableness cannot be equated in this way. The claimant's conduct can be unreasonable even though it was foreseeable. For example, 'it is not at all unlikely or unforeseeable that an active man who

[397] See eg Honoré, *The Morality of Tort Law* (n26) 91-92. See also AI Ogus, *The Law of Damages* (Butterworths 1973) 67, cited in Burrows, *Remedies* (n7) 75.

[398] Smith, *Contract Theory* (n34) 428.

[399] *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd (The Stork)* [1955] 2 QB 68 (CA) 93 (Singleton LJ), 98-99 (Hodson LJ). For other interchangeable references to remoteness and causation, see eg: *The Borag* (n135) 281-82 (Denning LJ); *Total Transport Corp v Arcadia Petroleum Ltd (The Eurus)* [1998] 1 Lloyd's Rep 351, [1998] CLC 90 (CA) 96 (Staughton LJ); *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [2010] PIQR P8 [38] (Aikens LJ).

[400] For implicit support in terms of foreseeability, see *Shindler v Northern Raincoat Co* [1960] 1 WLR 1038 (Assizes) 1048 (Diplock J).

[401] See eg *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 (CA) 857 (Hobhouse LJ): 'If the conduct of the plaintiffs had been so exceptional as to take it outside the contemplation of the parties, then it might have made the consequent loss too remote'. See also *Owners of Dredger Liesbosch v Owners of Steamship Edison (The Liesbosch)* [1933] AC 449 (HL), now overruled in *Lagden* (n12).

[402] Smith, *Contract Theory* (n34) 428.

has suffered such a disability will take some quite unreasonable risk. But if he does, he cannot hold the [defendant] liable for the consequences'.[403] Conversely, the claimant's conduct can be reasonable even though it was unforeseeable. In *Saunders v Williams*, Pill LJ rejected the argument that the claimant had failed to mitigate where delays in repairing a damaged wall were unforeseeable.[404] Although there is some overlap between mitigation and remoteness, Tettenborn is correct to highlight that the two doctrines 'differ in a number of respects'.[405]

The underlying distinction between reasonable foreseeability and mitigation is that, as Bridge puts it, 'remoteness is concerned with a hypothetical prediction ex ante of the consequences of a future breach', whereas mitigation is 'invariably concerned with a factual assessment of the quality of the plaintiff's behaviour in the circumstances'.[406] One consequence is that the claimant will not be held to have acted unreasonably in mitigation until after the breach was discovered,[407] whereas the reasonable foreseeability test applies either at the date of contract formation (in contract) or the date of breach (in tort).[408] In remoteness, the focus is on what the defendant could have reasonably foreseen, whereas in mitigation the test of reasonableness focuses directly on the claimant. For these reasons the rules do not appear to share a common explanation.

The avoided loss rule has sometimes been explained in terms of remoteness. Burrows suggests that '"Directness" puts a limit on the extent to which compensating advantages are deducted', adding that directness 'plays an analogous but reverse role to remoteness and intervening cause'.[409] In the next chapter it will be argued that, as Burrows suggests, intervening causation does provide a good explanation for the avoided loss rule. However, the remoteness rule (in terms of foreseeability) does not, because as Lord Reid emphasised

[403] *McKew v Holland & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 (HL) 1623 (Lord Reid). See also *Simmons v British Steel plc* [2004] UKHL 20, 2004 SC (HL) 94 [67] (Lord Rodger).

[404] *Saunders v Williams* [2002] EWCA Civ 673, [2003] BLR 125 [21]-[27].

[405] Tettenborn, *Damages* (n6) [5.62].

[406] Bridge, 'Mitigation of Damages in Contract' (n10) 403.

[407] Section 6.4.2.1.

[408] See eg *Jackson v Royal Bank of Scotland* [2005] UKHL 3, [2005] 1 WLR 377 [36] (Lord Hope).

[409] Burrows, *Remedies* (n7) 157.

in *Parry v Cleaver*, 'No one has ever suggested that the defendant gets the benefit of receipts by the plaintiff after his accident if they are of a kind which he could have foreseen, but not if they are of a kind which he could not have foreseen, or vice versa'.[410] The directness explanation of the avoided loss rule is best understood in terms of causation rather than remoteness.

4.5 Conclusion

This chapter has highlighted a number of problems with the orthodox account of mitigation. Two main themes can be identified. First, the orthodox description of how the avoidable and avoided loss rules are applied is incomplete; a superficial reliance on 'questions of fact' hides the inability of the leading texts to describe the relevant legal rules with sufficient specificity. Second, the legal effect of the avoidable and avoided loss rules has also been hidden by reliance on simplistic mental shortcuts; underlying these heuristics, both rules involve a counterfactual assessment of the claimant's conduct. In addition to these descriptive problems, the leading texts have failed to offer any convincing explanation for the law of mitigation as it is. The next part of the thesis develops an alternative descriptive and explanatory account of mitigation that resolves these problems and addresses new puzzles.

[410] *Parry* (n270) 15.

5
The Causal Explanation

5.1 Introduction

This chapter argues that the law of mitigation is explained by ordinary causal principles. Judicial reasoning strongly supports the causal explanation of mitigation. However, judicial references to causation in mitigation (as in many other areas of the law of damages) are often vague. To describe more precisely the actual reasons that guide judges when they explain mitigation as causation, one must understand the causal principles that ordinary people use outside the law. Hart and Honoré attempted to explicate these 'common-sense' principles in *Causation in the Law*.[1] The principles that they identified have subsequently been substantiated and refined by research in cognitive science. These ordinary causal principles are remarkably consistent with both the judicial reasoning in cases on mitigation and also the rules of mitigation, properly described.

5.2 The Causal Explanation

This section highlights the extent of judicial support for the causal explanation of mitigation. One of the grounds for rejecting the explanations put forward in the leading texts was their lack of judicial support. It was suggested that these explanations faced an uphill challenge to show that judges were guided by reasons that were not apparent in their judgments. The

[1] HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985).

same cannot be said of the causal explanation.[2] Judicial support for this explanation is very strong. Opponents would need to assert that causation does not feature in judges' actual reasoning even though most judges clearly think that it does. One should exercise caution before reaching this bold conclusion. On the other hand, initial scepticism of the judges' causal reasoning is understandable, and warrants careful consideration.

5.2.1 Judicial support

Judicial support for the causal explanation of mitigation predates 'mitigation' itself. This is no paradox. The avoidable loss rule already existed before anyone referred to it as mitigation, and at this time it was directly regarded as a causal rule. In the 1807 case of *Boyce v Bayliffe*, the claimant was falsely imprisoned for one night whilst travelling aboard a ship from Bombay to London.[3] The ship continued to sail for another month, after which the claimant disembarked in South Africa and paid £100 to board another ship to London. Lord Ellenborough held that 'the imprisonment was not the *causa proxima* of the transhipment … the plaintiff was not driven to it in order to redeem himself from any great peril or grievance'.[4] Accordingly the claim for special damage of £100 was denied.[5] We would now regard this decision as an application of the avoidable loss rule.

In the late nineteenth century, the avoidable loss rule started to become known as the law of 'mitigation'.[6] However, judges still explain the rule directly in terms of causation. In *SAAMCo*, Lord Hoffmann held that 'a plaintiff's reasonable attempt to cope with the

[2] Contra Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [9-018]: 'It is significant that the cases on the avoidable loss aspect of mitigation are not full of references to causation'. This assertion is wrong, as this section shows.

[3] *Boyce v Bayliffe* (1807) 1 Campbell 58, 170 ER 875. The Captain had ordered 'all hands on deck' because he mistakenly thought that a hostile vessel was approaching. The claimant passenger was kept in irons overnight as punishment for refusing the order.

[4] Ibid 876. In relation to the 'unreasonableness' of disembarking, one probably needs to appreciate the historical context that such false imprisonment was not regarded with the same indignity as it might be today.

[5] The claimant was awarded £80 in respect of the false imprisonment.

[6] Section 3.3.1.

consequences of the defendant's breach of duty does not negative the causal connection between that breach of duty and the ultimate loss'.[7] In *Activa Europe v Pressure Seal Solutions*, Patten LJ held that 'The defendant is only liable for such loss as can properly be regarded as caused by his breach of contract. In this context the claimant is under a duty to take reasonable steps to mitigate the loss which flows from the breach'.[8] These two examples are just the tip of the iceberg.[9] If one includes judicial reasoning that the claimant's unreasonable conduct 'broke the chain of causation', the list is longer still.[10]

The same is true of the avoided loss rule. We will see that the development of this rule in *British Westinghouse* provides indirect support for the causal explanation.[11] The rule is also often expressed directly in terms of causation. In *The Elena D'Amico*, Goff J held that 'what is alleged to constitute mitigation in law can only have that effect if there is a causative link between the wrong in respect of which damages are claimed and the action or inaction of the plaintiff'.[12] In *Hussey v Eels*, Mustill LJ asked, 'Did the negligence which caused the damage also cause the profit…?'[13] In *Blue Circle Industries*, Aldous LJ thought that 'The

[7] *South Australia Asset Management Corp v York Montague Ltd ('SAAMCo')* [1997] AC 191 (HL) 219. See also, in relation to equitable compensation: *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2014] 3 WLR 1367 [87] (Lord Reed): 'rather than being a distinct principle, ['the plaintiff's responsibility not to act unreasonably'] might be regarded as following from the requirement of a direct causal connection'.

[8] *Activa DPS Europe Sarl v Pressure Seal Solutions Ltd* [2012] EWCA Civ 943, [2012] 3 CMLR 33 [36].

[9] See also *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd (The Stork)* [1955] 2 QB 68 (CA) 99 (Hodson LJ); *Compania Financiera Soleada SA v Hamoor Tanker Corp Inc (The Borag)* [1981] 1 WLR 274 (CA) 285 (Templeman LJ); *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605 (CA) 608 (Sir John Donaldson MR); *Sealace Shipping Co Ltd v Oceanvoice Ltd (The Alecos M)* [1991] 1 Lloyd's Rep 120 (CA) 124 (Neill LJ); *Downs v Chappell* [1997] 1 WLR 426 (CA) 437 (Hobhouse LJ); *Burdis v Livsey (sub nom Lagden v O'Connor)* [2002] EWCA Civ 510, [2003] QB 36 [88] (Aldous LJ); *Habton Farms v Nimmo* [2003] EWCA Civ 68, [2004] QB 1 [66] (Clarke LJ); *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] EWCA Civ 901, [2008] 1 All ER (Comm) 685 [102] (Rix LJ).

[10] See eg *The Oropesa* [1943] P 32 (CA) 39 (Lord Wright); *McKew v Holland & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 (HL) 25 (Lord Reid); *Vinmar International Ltd v Theresa Navigation SA* [2001] 2 Lloyd's Rep 1 (QB) [42] (Tomlinson J); *Simmons v British Steel plc* [2004] UKHL 20, 2004 SC (HL) 94 [67] (Lord Rodger); *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobras (The Kos)* [2012] UKSC 17, [2012] 2 AC 164 [14] (Lord Sumption).

[11] Text to n36.

[12] *Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB) 88. See also 89.

[13] *Hussey v Eels* [1990] 2 QB 227 (CA) 241, cited with approval in *Primavera v Allied Dunbar Assurance plc* [2002] EWCA Civ 1327, [2003] Lloyd's Rep PN 14 [20] (Simon Brown LJ).

question for consideration in this case is one of causation'.[14] In *The Fanis*, Mance J concluded that the rule required the court 'to form a commonsense overall judgment on the sufficiency of the causal nexus between breach and profit or loss'.[15] Again, many more examples could be given.[16]

In light of this, it is unsurprising that judges who have expressly reflected on the reasons for the rules of mitigation have consistently alighted on the causal explanation. In *Standard Chartered Bank v Pakistan National Shipping Corp*, Toulson J summarised that 'The orthodox view is that the rule as to avoidable loss is merely an aspect of the fundamental principle of causation'.[17] Here Toulson J was of course referring to judicial orthodoxy, rather than to the contrary positions expressed in the leading texts. More recently, in *Bunge v Nidera*, Lord Toulson has reiterated that 'the so-called duty to mitigate is not a duty … Rather, it is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided'.[18]

This understanding follows a long line of decisions that have directly explained mitigation as an aspect of causation. Probably the most well-known is Goff J's decision in *The Elena D'Amico*.[19] After summarising McGregor's tripartite exposition of mitigation, Goff J concluded that 'in my judgment, these three aspects of mitigation are all really aspects of a wider principle … they are aspects of the principle of causation'.[20] In *Lagden v O'Connor*, Lord Walker similarly explained that mitigation was 'an aspect (or category) of the larger

[14] *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289 (CA) 305.

[15] *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The Fanis)* [1994] 1 Lloyd's Rep 633 (QB) 637.

[16] See eg *Mobil North Sea Ltd v PJ Pipe & Valve Co Ltd* [2001] EWCA Civ 741, [2001] 2 All ER (Comm) 289 [30] (Rix LJ); *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501 (Ch) [24] (Sir Andrew Morritt VC), cited with approval in *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, [2012] 2 CLC 747 [135] (Rix LJ); *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [46] (Leggatt J); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep 383 [38] (Longmore LJ).

[17] *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] 1 Lloyd's Rep 747, [1999] CLC 761 (QB) 758.

[18] *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082 [81].

[19] *The Elena d'Amico* (n12).

[20] Ibid 88.

principle of causation'.[21] In *Standard Chartered Bank*, Potter LJ concluded that 'In truth, causation and mitigation are two sides of the same coin'.[22] Once again, these examples are just the tip of the iceberg.[23]

The only one of the leading texts to support the causal explanation of the avoidable loss rule is Kramer's *The Law of Contract Damages*.[24] As Kramer puts it, 'Mitigation is merely the name given to the principle of legal causation when applied to the actions and inactions of the claimant'.[25] Other scholarly articles and essays have occasionally explained the avoidable loss rule in terms of causal principles.[26] In relation to the avoided loss rule, the causal explanation appears to be accepted by Burrows, who expresses the rule in terms of 'directness' and suggests that it 'plays an analogous but reverse role to remoteness and intervening cause'.[27] Treitel's *The Law of Contract* also explains the avoided loss rule as an application of causal principles, as do a handful of other texts.[28]

So far this section has considered 'direct' support for the causal explanation, in the form of judicial reasoning that expressly refers to causation as the basis for the rules of mitigation. However, one can also infer from the judgments on mitigation further 'indirect'

[21] *Lagden v O'Connor (sub nom Burdis v Livsey)* [2003] UKHL 64, [2004] 1 AC 1067 [100].

[22] *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA Civ 55, [2001] 1 All ER (Comm) 822 [55].

[23] See also *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 (CA) 857-58 (Hobhouse LJ); *Total Transport Corp v Arcadia Petroleum Ltd (The Eurus)* [1996] 2 Lloyd's Rep 408, [1996] CLC 1084 (QB) 1111 (Rix J); *Southampton Container Terminals Ltd v Schiffahrisgesellsch "Hansa Australia" MGH & Co (The Maersk Colombo)* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275 [28] (Clarke LJ); *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523 [188] (Hart J).

[24] Adam Kramer, *The Law of Contract Damages* (Hart 2014).

[25] Ibid 347.

[26] See eg FMB Reynolds, 'Discharge by Breach as a Remedy' in PD Finn (ed), *Essays on Contract* (Law Book Co 1987) 183-84; Jane Stapleton, 'The Normal Expectancies Measure in Tort Damages' (1997) 113 LQR 257, 272; Robert Stevens, 'Should Contributory Negligence be Analogue or Digital?' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart 2015) 251.

[27] Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 157.

[28] GH Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) [20-121]. See also Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 108; David Allen, Robyn Martin and John Hartshorne, *Damages in Tort* (Sweet & Maxwell 2000) 105-06; Kramer, *Contract Damages* (n24) 362.

support for this explanation. In particular, the cases are replete with causal metaphors.[29] In relation to both the avoidable and avoided loss rules, it is often said that the claimant's conduct was a 'break in the chain',[30] not part of a 'continuous transaction',[31] or eliminated 'any efficacy of the breach'.[32] Likewise the test is often regarded as one of 'directness'.[33] Judges have also reasoned that the harm was not 'due to' the defendant's breach,[34] or more ambiguously that the benefit was 'collateral' or '*res inter alios acta*'.[35]

The most important example of indirect support for the causal explanation comes from Viscount Haldane's seminal judgment in *British Westinghouse*.[36] Viscount Haldane's reasoning matters to the explanation of mitigation because his decision is regarded as a landmark in the development of both the avoidable and avoided loss rules.[37] There is no mention in Viscount Haldane's judgment (either directly or indirectly) of self-reliance, the prevention of waste, or remoteness. Admittedly, nor does the judgment mention causation directly. However, this looks at the reasoning too narrowly, because Viscount Haldane's formulations of the avoidable and avoided loss rules were reliant on causal metaphors,[38]

[29] *Weld-Blundell v Stephens* [1920] AC 956 (HL) 986 (Lord Sumner): 'It is hard to steer clear of metaphors'.

[30] See eg *Blue Circle* (n14) 308 (Aldous LJ), 317 (Chadwick LJ).

[31] See eg *Hussey* (n13) 241 (Mustill LJ); *Primavera* (n13) [20] (Simon Brown LJ), [38] (Mance LJ); *Needler* (n16) [24] (Sir Andrew Morritt VC); *Rubenstein* (n16) [134] (Rix LJ).

[32] See eg *Vinmar* (n10) [42] (Tomlinson J). See also *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [2013] 2 All ER (Comm) 992 [45] (Longmore LJ).

[33] See eg *Lavarack v Woods of Colchester* [1967] 1 QB 278 (CA) 290 (Denning LJ): 'the benefit from that investment was not a direct result of his dismissal'.

[34] See *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL) 689 (Viscount Haldane); *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC) 179 (Lord Wrenbury).

[35] See eg *British Westinghouse* (n34) 691 (Viscount Haldane); *Burdis* (n9) [91] (Aldous LJ); *Pankhania v Hackney LBC* [2004] EWHC 323 (Ch), [2004] 1 EGLR 135 [37] (Vos QC).

[36] *British Westinghouse* (n34).

[37] Indeed, his 'classic statement of mitigation' has acquired almost canonical status in subsequent cases: see further Chapter Two, text to n29.

[38] *British Westinghouse* (n34) 692: 'it formed *part of a continuous dealing* with the situation in which they found themselves' (emphasis added). This reasoning is essentially the obverse of a 'break in the chain'.

and language associated with the attribution of causal responsibility.[39] In this sense, the judgment is strongly (albeit indirectly) supportive of the causal explanation of mitigation.

One striking aspect of the indirect support for the causal explanation is the extent to which it takes precisely the same form for both the avoidable and avoided loss rules. For example, in relation to the avoidable loss rule, in *The Metagama*, Viscount Dunedin held that 'if [the claimant] might reasonably have avoided any part of the damage he has suffered, to that extent the damage is not such as *arises directly from the act complained of*'.[40] This mirrors almost exactly Viscount Haldane's formulation of the avoided loss rule in *British Westinghouse*, that 'The subsequent transaction, if to be taken into account, must be one *arising out of the consequences of the breach*'.[41] Similarly, irrespective of whether the outcome was harmful or beneficial, judicial expositions of both rules have emphasised that the test is whether the claimant's conduct was 'independent' of the breach.[42]

5.2.2 Criticisms

The causal explanation of mitigation has faced staunch opposition from some scholars, most notably McGregor.[43] Responding to judicial support for the causal explanation, McGregor argues that 'this embracing of the principle of causation is unhelpful – even confusing – in

[39] Ibid: 'damage which is *due to* his neglect' (689); '*arising out of the consequences* of the breach' (690); 'not an *independent or disconnected* transaction' (692) (emphasis added).

[40] *Baron Vernon v SS Metagama (The Metagama)* (1928) SC (HL) 21 (HL) 27 (emphasis added).

[41] *British Westinghouse* (n34) 690 (emphasis added). See also, using the same phrase: *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltd* [1970] 1 WLR 1306 (CA) 1315-16 (Salmon LJ); *The Elena d'Amico* 88-89 (n12) (Goff J).

[42] See eg *Owners of the SS Singleton Abbey v Owners of the SS Paludina (The Paludina)* [1927] AC 16 (HL) 28 (Lord Sumner) (avoidable loss rule); *Mobil* (n16) [30] (Rix LJ) (avoided loss rule). See also *British Westinghouse* (n34) 692 (Viscount Haldane); *Glory Wealth Shipping Pte Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819 (Comm), [2012] 1 All ER (Comm) 402 [16] (Blair J); *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2010] EWHC 903 (Comm), [2011] 2 Lloyd's Rep 360 [65] (Steel J); *Pagnan & Fratelli* (n41) 1315 (Salmon LJ).

[43] McGregor, *Damages* (n2) ch9. Previous editions under Mayne did not take this view: see WG Earengey (ed) *Mayne's Treatise on Damages* (11th edn, Sweet & Maxwell 1946) ch7. For more moderate criticisms, see eg Michael G Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398, 400-02; Andrew Tettenborn, *The Law of Damages* (2nd edn, LexisNexis 2010) [5.62].

relation to all three rules'.[44] In relation to the avoidable loss rule, McGregor's main objection is that causation 'does not tell us very much',[45] because '[w]hat must be ascertained is whether the claimant has or has not acted, or failed to act, reasonably'.[46] This criticism was adopted by Moore-Bick LJ in *Uzinterimpex v Standard Bank*, who considered that the rule 'can be viewed [as causation], but I am not sure that to do so adds greatly to one's understanding of the principles'.[47] Bridge similarly objects that 'reasoning like this is conclusive rather than demonstrative, in merely stating a result without giving a coherent explanation'.[48]

McGregor also emphasises that the avoided loss rule cannot be explained by 'climbing the slippery slopes of causation'.[49] This scepticism is reflected in the recent decision in *Bacciottini v Gotelee & Goldsmith*, where Davis LJ suggested that 'perhaps it is not particularly enlightening to talk in terms of whether the original breach "caused" the mitigating or avoiding act'.[50] Instead of causation, McGregor argues that the avoided loss rule:

> may be said to turn upon whether the benefit comes from an act taken in consequence of the wrong, whether the benefit arises out of the act of mitigation itself, whether the act giving rise to the benefit forms part of a continuous transaction starting with the wrong. The test is again not causation.[51]

[44] McGregor, *Damages* (n2) [9-018]. See also Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 331.

[45] McGregor, *Damages* (n2) [9-018].

[46] Ibid [9-018]. See also, to the same effect [9-097]. The irony in this objection is that on McGregor's own account, reasonableness is a question of fact for which no guidance can be given.

[47] *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 CLC 80 [56]. See also *Six Continents Retail Ltd v Carford Catering Ltd* [2003] EWCA Civ 1790 [11] (Laws LJ): 'a formulation of that type merely begs the question what will count as stopping loss from flowing'.

[48] Bridge, 'Mitigation of Damages in Contract' (n43) 400. See also 402: 'even if only a technical explanation of mitigation were sufficient, causation would not be an adequate response'.

[49] McGregor, *Damages* (n2) [9-107]. See also [9-155].

[50] *Bacciottini v Gotelee & Goldsmith* [2016] EWCA Civ 170 [62].

[51] McGregor, *Damages* (n2) [9-107].

McGregor does not indicate how these other tests differ from causation. On their face, the formulations of 'in consequence of', 'arising out of', and 'continuous transaction' all look to be effectively causal tests. In *Bacciottini*, Davis LJ similarly preferred to ask (instead of causation) whether the benefit 'arose out of or was sufficiently connected with' the breach.[52] Nevertheless, the root of McGregor's misgivings about the causal explanation are entirely familiar and warrant careful consideration. In essence, McGregor regards the but-for test as the only meaningful concept of causation,[53] and hence regards all other references to causation as 'a disguise for the real ground of a decision'.[54] This view is known as 'casual minimalism' and it has a strong foothold in legal scholarship.[55]

Causal minimalists argue that there are two stages in assessing the existence and extent of legal liability. First, judges must apply a minimal causal threshold. Although causal minimalists disagree about what exactly this causal threshold entails, it is usually the 'but-for test' or some close variant.[56] Second, judges must apply principles of legal policy.[57] Only the first stage is truly causal in nature; this is often referred to as 'factual causation'.[58] There are no other causal questions. At the second stage, questions of legal policy are answered by determining what limit on liability is required by 'the scope', 'the purpose', or 'the policy' of the relevant rules of law.[59] Although judges commonly refer to the second stage as one of

[52] *Bacciottini* (n50) [62].

[53] McGregor, *Damages* (n2) [8-008]-[8-009].

[54] Ibid [9-018].

[55] For early proponents, see eg Leon Green, *Rationale of Proximate Cause* (Vernon 1927); AL Goodhart, 'Appeals on Questions of Fact' (1955) 71 LQR 402, 413.

[56] In philosophy, this approach is traceable to David Hume, *A Treatise of Human Nature* (London 1739), 171. See also John Stuart Mill, *A System of Logic: Raciocentive and Inductive* (Longmans 1843) 360-61; David Lewis, *Counterfactuals* (Blackwell 1973) 558-59.

[57] See further Hart and Honoré (n1) 88-94.

[58] See eg Arno C Becht and Frank W Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (Washington University 1961). Others have argued that the but-for test is not exclusively factual: see eg Wex S Malone, 'Ruminations on Cause-in-Fact' (1956-7) 9 Stanford Law Review 60.

[59] For a modern defence of this view, see Jane Stapleton, 'Causation in the Law' in Helen Beebee, Christopher Hitchcock and Peter Menzies (eds), *The Oxford Handbook of Causation* (OUP 2009) 753. See also McGregor, *Damages* (n2) [8-008].

'proximate' or 'legal' causation, the causal minimalists deny that this stage involves any causal questions and instead argue that the issues are specifically legal.

The causal minimalist view seems to pose a compelling objection to the causal explanation of mitigation. On the one hand, where the claimant acted unreasonably, judges often claim that the defendant did not cause the subsequent harm; as Lord Toulson puts it, the defendant 'will not be held to have caused loss which the claimant could reasonably have avoided'.[60] On the other hand, in these circumstances it is still the case that the harm would not have occurred but-for the defendant's breach;[61] in this sense the defendant did still cause the harm.[62] Bridge notes that 'a degree of tension plainly exists between these two propositions'.[63] The same tension has been noted in relation to benefits under the avoided loss rule; for example in *The Fanis*, Mance J concluded that 'to apply a pure "but for" test to causation … would conflict with the common sense judgment which the cases call for in this field'.[64]

There are two possible responses to this tension. McGregor's response, in line with the causal minimalists, is that the judges are mistaken. Although judicial reasoning is often expressed in terms of causation, the judges' actual reasons must be something else. Unfortunately McGregor does not say what this 'something else' is. Nevertheless, the structure of the enquiry is clear enough for those who wish to take it up. Causal minimalists argue that the judge's actual reasons (although couched in terms of 'causation') really depend on questions of legal policy. In other words, the reasons are specifically legal principles determined by the purpose of the relevant legal rules. The task must be to 'unmask' the legal policies behind the rules of mitigation. The policies of encouraging self-

[60] *Bunge* (n18) [81].

[61] For reasoning to this effect, see eg *Six Continents* (n47) [21] (Laws LJ).

[62] See Kramer, *Contract Damages* (n24) 342: 'the later event is never literally the "sole cause"'. Nevertheless, Kramer does accept another concept of causation besides 'but-for'.

[63] Bridge, 'Mitigation of Damages in Contract' (n43) 399.

[64] *The Fanis* (n15) 363 (Mance J). See also *Parry v Cleaver* [1970] AC 1 (HL) 33-34, 30 (Lord Pearce).

reliance and preventing waste are two existing candidates, but if these factors are rejected then one must identify others.[65]

The alternative response, which this thesis develops, is that we need to take another look at the concept of causation. The intransigence of the judiciary, who continue to explain mitigation as an aspect of causation despite McGregor's prominent objections,[66] is a phenomenon to which legal scholars should pay heed. If we are seeking the actual reasons why the law of mitigation is as it is,[67] then we should at least start from the premise that the judges, who have been remarkably consistent in their reasoning for over two centuries, are not all mistaken. The task is thus to inquire whether there could be other causal principles (beyond but-for) that might explain judicial reasoning in mitigation. In other words, rather than rejecting the causal explanation out of hand, we must try harder to understand what judges mean when they invoke causation.

5.3 Beyond 'But-For'

This section develops a descriptive account of the ordinary causal principles that people use to attribute responsibility outside the law. The account draws heavily on the work of Hart and Honoré in *Causation in the Law*.[68] However, it further substantiates and refines Hart and Honoré's key principles using empirical research from the cognitive sciences that has emerged since *Causation in the Law* was published.[69] The argument is that outside the law, the principles used by ordinary people making causal attributions extend beyond 'but-for' causation. These ordinary causal principles can be particularised with sufficient precision

[65] The factor need not be policy-based in the sense of concerning community welfare; it could still concern issues of interpersonal justice, but just not issues of causal responsibility.

[66] This is not mere rhetorical flourish: given the significant influence of McGregor's text on so many judicial decisions in mitigation, judges' refusal to abandon the causal explanation is telling.

[67] Section 2.2.2.

[68] HLA Hart and Tony Honoré, *Causation in the Law* (1st edn, Clarendon 1959); Hart and Honoré (n1). All references in this chapter are to the second edition unless otherwise specified.

[69] Section 5.3.3.

to give content to the (otherwise nebulous) 'common-sense' concept of causation. This understanding provides the necessary first step to explaining the law of mitigation.

5.3.1 'Common-sense' causation

Judges have long reasoned that the legal concept of causation is a matter of 'common-sense'. They have rejected the determinacy of the but-for test in answering causal questions. Several House of Lords decisions in the mid-twentieth century expressly advocated a 'common-sense' approach to causation.[70] For example, in *Yorkshire Dale Steamship v Minister of War Transport*, Lord Wright held that 'This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it'.[71] These decisions robustly rejected the 'philosophical doctrine of causation',[72] preferring instead to rely on causation as reflected in 'ordinary everyday life and thoughts and expressions'.[73]

Judicial reliance on 'common-sense' principles persisted through the late twentieth century and has continued to be expressly invoked in more recent decisions.[74] For example, in *Galoo v Bright Grahame Murray*, Glidewell LJ asked himself, 'How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?'

[70] See eg *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 (HL) 363 (Lord Dunedin); *Stapley v Gypsum Mines Ltd* [1953] AC 663 (HL) 781 (Lord Reid); *Hogan v Bentinck West Hartley Collieries* [1949] 1 All ER 588 (HL) 596 (Lord Normand).

[71] *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 (HL) 706.

[72] Ibid 702 (Lord Macmillan). See also *Grant v Sun Shipping Co Ltd* [1948] AC 549 (HL) 564 (Lord Du Parcq), rejecting 'the language of logicians'; *Weld-Blundell* (n29) 986 (Lord Sumner), rejecting 'scientific inquests'; *Monarch Steamship Co Ltd v Karlshamns Oljefabriker* [1949] AC 196 (HL) 228 (Lord Wright), rejecting 'philosophic speculation'; *Stapley* (n70) 681 (Lord Reid), rejecting 'logical or scientific theory'.

[73] *Monarch* (n72) 228 (Lord Wright). See also *Hogan* (n70) 595 (Lord Normand), referring to 'ordinary practical affairs'.

[74] See eg *Alphacell Ltd v Woodward* [1972] AC 824 (HL) 834 (Lord Wilberforce), 837 (Lord Salmon); *County* (n23) 858 (Hobhouse LJ); *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 285 (Lord Steyn).

continuing, 'The answer in the end is "By the application of the court's common sense."'[75] Most recently, in a criminal case Lord Hughes and Lord Toulson expressly approved the approach in *Galoo*, holding that 'In the case law there is a well-recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common sense view is regarded as instrumental in bringing about the occurrence'.[76]

The problem with all of these decisions, rightly seized upon by the causal minimalists, is that the invocation of 'common-sense' formed both the beginning and the end of the judges' reasoning. Burrows fairly criticises that 'unarticulated common sense or instinct is hardly a satisfactory basis for legal decision-making'.[77] Lord Hoffmann's conclusion was more damning: 'the opposition between common sense and abstract theory is a rhetorical device to divert attention from the absence of reasoning in the judgment'.[78] Unfortunately, resort to causal metaphors or Latin labels is no more enlightening. On this issue McGregor is correct: 'These familiar terms are in many ways more of a hindrance than a help because their very familiarity has blunted any precision of meaning they may have once had'.[79]

5.3.2 Hart and Honoré's theory

Causation in the Law can be summarised as a theory of 'common-sense' causation. However, unlike the nebulous judicial references to common-sense, for Hart and Honoré this notion marked the beginning but *not* the end of their enquiry. The first main aim of *Causation in the Law* was to clarify and particularise the common-sense concept of causation.[80] The technique that Hart and Honoré adopted for this purpose was an analysis of causation in

[75] *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA) 1374-75.

[76] *R v Hughes* [2013] UKSC 56, [2013] 1 WLR 2461 [23].

[77] Burrows, *Remedies* (n27) 97.

[78] Lord Hoffmann, 'Common Sense and Causing Loss' (Chancery Bar Association Lecture, 15th June 1999) 2. See also *Six Continents* (n47) [18] (Laws LJ).

[79] McGregor, *Damages* (n2) [8-009]. See also *Weld-Blundell* (n29) 984 (Lord Sumner); *County* (n23) 846 (Beldam LJ); *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) 29 (Lord Hoffmann).

[80] They argued that others' abandonment of this aim was 'a counsel of despair which we should hesitate to accept': Hart and Honoré (n1) 26.

ordinary language.[81] Based on this analysis, they concluded that 'common sense is not a matter of inexplicable or arbitrary assertions, and the causal notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest, at least in part, on statable principles'.[82] This thesis concludes that the ordinary causal principles identified by Hart and Honoré were essentially accurate, and have been substantiated and refined in subsequent empirical research.[83]

The second main aim of *Causation in the Law* was to show that 'it is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned'.[84] In other words, Hart and Honoré claimed that the ordinary causal principles that they had identified *also* explained judges' causal reasoning in legal decisions.[85] The scope of this claim ranged across criminal law and most of private law.[86] It presented a challenge to the causal minimalist view, because it rejected the conclusion that all causal references beyond but-for were merely a disguise for arbitrary decision or legal policy.[87] Hart and Honoré thought that this view was 'a blinding error'.[88] This thesis does not seek to substantiate the claims of *Causation in the Law* as they pertain to all of private law,[89] but it does argue that Hart and Honoré were essentially correct as regards the law of mitigation.[90]

[81] Section 5.3.4.2 addresses objections to this methodology.

[82] Hart and Honoré (n1) 26.

[83] Section 5.3.3.

[84] Hart and Honoré (n1) 1.

[85] They emphasised that this was a descriptive not evaluative claim: ibid 1-2: 'It may, of course, well be that when we thoroughly understand the common-sense notions of causation we should no longer wish our thought on any matters, let alone legal judgments of responsibility, to be dominated by them'. See also xxxiv.

[86] Ibid especially ch6 (Tort), ch11 (Contract) and ch12 (Crime).

[87] Ibid xxxv, 3-5, 88-108. They did accept that there was some role for legal policy questions; it was merely smaller than the causal minimalists supposed: ibid 304-07.

[88] Ibid 3. See also 26.

[89] For a brief discussion of implications beyond the law of mitigation, see Section 8.2.

[90] However, Hart and Honoré themselves said very little about the law of mitigation: see further text to n194.

5.3.2.1 *The 'central notion' of cause*

Hart and Honoré's key insight into ordinary causal principles was that the 'central notion'[91] of cause is 'essentially something which interferes with or intervenes in the course of events which would normally take place'.[92] In other words, the cause is selected because it is 'a departure from the normal, ordinary, or reasonably expected course of events'.[93] More specifically, Hart and Honoré identified two key causal principles:[94] first, 'the contrast between what is abnormal and normal in relation to any given thing or subject-matter' (the 'abnormality principle');[95] and second, the contrast 'between a free deliberate human action and all other conditions (the 'choice principle').[96] To illustrate these two principles, they gave the following example concerning the outbreak of a fire:

> In most cases where a fire has broken out … the plain man would refuse to say that the cause of the fire was the presence of oxygen, though no fire would have occurred without it: [he] would reserve the title of cause for something of the order of a short-circuit, the dropping of a lighted cigarette, or lightning.[97]

Here, the short-circuit and lightning strike both reflect the abnormality principle, and the dropped cigarette reflects the choice principle. It should be noted that in this example, the purpose of the causal enquiry could be either explanatory or attributive.[98] Causal *explanations* respond to the initial puzzle of why something happened; they call for further facts before the cause can be identified.[99] By contrast, causal attributions arise after all of the facts are known; the problem is solely one of selecting 'the cause' from amongst the

[91] See generally Hart and Honoré (n1) 28-44. This thesis does not address other notions relating to 'interpersonal transactions' (see further 51-59) or 'opportunities' (see further 59-60).

[92] Ibid 29. See also Tony Honoré, *Responsibility and Fault* (Hart 1999) 6.

[93] Hart and Honoré (n1) 33.

[94] These principles may overlap because voluntary conduct can sometimes also qualify as the cause by virtue of its abnormality: see further ibid 41, 136, 182-85, 335-36.

[95] Ibid 33.

[96] Ibid 33.

[97] Ibid 11.

[98] Although this example initially features in the discussion of explanations, the same example is repeated in relation to attributions: see ibid 71-74.

[99] Ibid 23-24. See further 32-51.

range of 'mere conditions' (such as the oxygen in the air).[100] Hart and Honoré pointed out that lawyers are usually concerned with causal attributions rather than explanations,[101] but they argued that both types of enquiry rely on the same causal principles.[102]

5.3.2.2 *Abnormality principle*

In relation to the abnormality principle, Hart and Honoré identified that 'what is abnormal … is what "makes the difference" between the accident and things going on as usual'.[103] They emphasised that 'what is normal and what is abnormal is, however, relative to the context of any given inquiry'.[104] To illustrate this point, they gave the example of a fire breaking out in a laboratory where special precautions were normally taken to exclude oxygen; here, one might well say that the presence of oxygen *was* the cause of the fire.[105] Hart and Honoré also emphasised that normality 'is very often an artefact of human habit, custom, or convention'.[106] In other words, what is abnormal may depend on social as well as physical factors. The cause need not be an 'event', in that it might equally consist of a negative or static condition. For example, 'the lack of rain was the cause of the failure of the corn crop; the icy condition of the road was the cause of the accident'.[107]

[100] Ibid 24. See further ch3.

[101] Ibid 24. See further text to n185.

[102] Ibid ch3, especially 68-70, 73.

[103] Ibid 35.

[104] Ibid 35.

[105] Ibid 35.

[106] Ibid 37.

[107] Ibid 31.

5.3.2.3 *Choice principle*

In relation to the choice principle, Hart and Honoré identified that 'a voluntary human action intended to bring about what in fact happens … has a special place in causal inquiries'.[108] In particular, 'the free deliberate and informed act or omission of a human being, intended to exploit the situation created by [an earlier event], negatives causal connection'.[109] Importantly, such action could be regarded as the cause even though it was 'both natural and probable';[110] the choice principle was accordingly distinct from the abnormality principle. Hart and Honoré rejected any causal distinction between actions and omissions.[111] For example, 'someone's failure to wrap up is commonly and intelligibly taken to be the cause of his catching cold, and driving in the dark without lights to be the cause of an accident'.[112]

Hart and Honoré identified that human conduct only had special causal significance where it was 'free, deliberate and informed'.[113] In order to count as 'free', the actor must have been able to make a '*fair* choice':

> When … the actor exercises a choice, his act is in one sense free, but if the choice is made under pressure from a prior wrongful act, or is not a fair choice because the alternative is serious harm, or may be said not to be a 'real' choice because the alternative is neglecting a duty, the decision to avoid the pressure, harm, or breach of duty is not treated as free either in ordinary life or in the law.[114]

It is important to note that this claim concerned the ordinary concept of choice outside the law, and not whether it would be fair to impose legal liability in such circumstances. In short, one would not need to be a lawyer to recognise this understanding of choice. Hart and

[108] Ibid 42.

[109] Ibid 136.

[110] Ibid 158.

[111] Ibid 139. See also Honoré, *Responsibility and Fault* (n92) 12.

[112] Hart and Honoré (n1) 50.

[113] Ibid 136.

[114] Ibid 142. See also 41, 77, 138, 146 and 156.

Honoré particularised their intuitions by suggesting that choices made under pressure,[115] or constrained by legal or moral obligations,[116] would not be regarded as sufficiently free. They recognised that these considerations may 'involve a comparison of the importance of the respective interests sacrificed and preserved',[117] and admitted that in these circumstances 'the concept of a fully voluntary action incorporates judgments of value'.[118] However, this did not mean that the choice principle collapsed into a question of *legal* policy; this weighing of interests was common to ordinary causal attributions outside the law.

Hart and Honoré changed their mind over what it meant for conduct to be 'deliberate and informed'. In the first edition of *Causation in the Law*, they concluded that the relevant act would need to be 'intended to produce the consequence which is in fact produced'.[119] However, in the second edition they recanted that 'This was a mistake. It is clear that the intervening act can be voluntary in the full sense though it is not intended to produce the harm that in fact ensues'.[120] Instead, they concluded that the actor need only 'intend to exploit the situation created', or in other words 'treat it as providing the opportunity or occasion for a certain course of conduct'.[121] The conduct also needed to be 'informed', because the actor could not have intended to exploit the situation where he was 'ignorant of some relevant circumstance'.[122] Beyond this, Hart and Honoré noted merely that the level of information required was 'a matter of degree'.[123]

[115] Ibid 41. See also 149: 'an act done under the influence of panic or extreme fear will not negative causal connection unless the reaction is wholly abnormal'.

[116] Ibid 41, 142.

[117] Ibid 77.

[118] Ibid 157.

[119] This extract from the first edition is quoted in the second edition at ibid 137 fn23.

[120] Ibid 137 fn23.

[121] Ibid 137 fn23.

[122] Ibid 149. See also, on the causal responsibility of children: 153-54.

[123] Ibid 142.

5.3.3 Empirical support

Hart and Honoré's claims about ordinary causal principles were empirical claims.[124] However, they were based on Hart and Honoré's own observations about ordinary language, and some critics doubted whether the language used by two highly-skilled lawyers was really 'ordinary'.[125] Several legal scholars rejected Hart and Honoré's work as empirically unfounded.[126] At the time when *Causation in the Law* was first published in 1959, and even by the time of the second edition in 1985, there had been hardly any relevant experimental research into causal reasoning.[127] This branch of the cognitive sciences was then a nascent discipline. However, starting with two influential papers by Kahneman (with others),[128] there has since developed a huge body of scientific research into how ordinary people make causal judgements. This research can now retrospectively be used to evaluate Hart and Honoré's empirical claims.

The experimental research robustly supports Hart and Honoré's key insights. In particular, the research substantiates their two main principles regarding the causal significance of abnormal events and voluntary human conduct. It also usefully refines certain aspects of these principles that were left open by Hart and Honoré; for example, there has now been extensive research into the types of norm relevant to the abnormality principle. Some gaps in the experimental research remain, especially concerning the precise scope of the choice principle; however this is a rapidly developing field. More broadly, the

[124] Ibid 27: 'as with every other empirical notion we can hope only to find a core of relatively well-settled common usage'. See also Lloyd-Bostock, 'The Ordinary Man and the Psychology of Attributing Causes and Responsibility' (1979) 42 MLR 143, 167.

[125] Peter Cane, *Responsibility in Law and Morality* (Hart 2002) 129. This criticism slightly mischaracterises Hart and Honoré's aim, which was to describe ordinary usage rather than their own.

[126] See further text to n179.

[127] See Lloyd-Bostock (n124), although this focuses on Hart and Honoré's methodology rather than their specific claims. See further Harold H Kelly, 'The Processes of Causal Attribution' [1973] American Psychologist 107, for an overview, although very few of these studies are relevant to Hart and Honoré's concern with selection.

[128] Daniel Kahneman and Amos Tversky, 'The Simulation Heuristic' in Kahneman, Slovic and Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* (CUP 1982); Daniel Kahneman and Dale Miller, 'Norm Theory: Comparing Reality to Its Alternatives' (1986) 93 Psychological Review 136.

research aims through the experimental method to explore the deep interrelationship between causal judgements, counterfactual thinking and attributions of responsibility in ordinary people. The literature is vast, and cannot be evaluated here,[129] but this section summarises its major findings.

5.3.3.1 *Abnormality principle*

In their paper on 'The Simulation Heuristic',[130] Kahneman and Tversky conducted an experiment showing that when prompted to think counterfactually, people tend to select abnormal events and mentally adjust them through 'simulation' to make them normal.[131] This study concerned the process of counterfactual thinking rather than specifically causal judgements. However, in 'Norm Theory',[132] Kahneman and Miller subsequently developed the hypothesis that norms were also central to causal reasoning.[133] In particular, 'an event is more likely to be undone by altering exceptional than routine aspects of the causal chain that led to it'.[134] Kahneman and Miller's norm theory sparked a series of studies that sought to test the significance of abnormal events on causal judgements.[135] These findings substantiate Hart and Honoré's abnormality principle.

The experimental research goes much further than Hart and Honoré's theory in seeking to clarify the types of norm that are relevant to the abnormality principle. As Halpern and Hitchcock have summarised, 'The word "normal" is interestingly ambiguous. It seems to have both a descriptive and a prescriptive dimension'.[136] Descriptive norms, which

[129] In relation to some possible empirical objections, see further Section 5.3.4.2.

[130] Kahneman and Tversky (n128).

[131] The findings are summarised in NJ Roese, 'Counterfactual Thinking' (1997) 121 Psychological Bulletin 133, 137.

[132] Kahneman and Miller (n128).

[133] Ibid, 150. See further Christopher Hitchcock and Joshua Knobe, 'Cause and Norm' (2009) 106 Journal of Philosophy 587, 612.

[134] Kahneman and Miller (n128) 143.

[135] See eg the studies cited in Joseph Halpern and Christopher Hitchcock, 'Graded Causation and Defaults' (2015) 66 British Journal for the Philosophy of Science 413, 415; Roese (n131) 137-39.

[136] Halpern and Hitchcock (n135) 429-30.

were the focus of Hart and Honoré's theory, concern normality in the statistical sense. Kahneman and Tversky's original experiment concerned statistical abnormalities: here participants were presented with a story where the subject 'did not drive home by his regular route' or 'left the office earlier than usual'.[137] Subsequent experiments concerning the phenomenon of 'causal superseding' have similarly demonstrated the causal significance of statistical abnormalities.[138]

In relation to descriptive norms of behaviour, Sytsma, Livengood and Rose distinguished between 'population-level norms' (how a given population normally behaves) and 'agent-level norms' (how the relevant individual normally behaves).[139] Their experiments appeared to suggest that participants had a greater sensitivity to agent-level rather than population-level norms;[140] or in other words, to behaviour that was abnormal for the individual rather than for the wider population. An (untested) example given by Kahneman and Miller also appears to rely on an agent-level norm: they hypothesised that 'an observer who knows Marty's affection for his aunt and his propensity for emotional displays may be surprised if Marty does not cry at her funeral – even if Marty rarely cries and if no one else cries at that funeral'.[141]

Norm theory provides further important insights into the effect of prescriptive norms on ordinary causal attributions. Prescriptive norms concern what *should* normally happen.[142] Accordingly, a statistical majority of individuals could violate a prescriptive norm.[143] These norms can be sub-classified into moral norms, legal norms (rules of law),

[137] Kahneman and Tversky (n128).

[138] Kominsky and others, 'Causal Superseding' (2015) 137 Cognition 196, 199-200, 205.

[139] Sytsma, Livengood and Rose, 'Two Types of Typicality: Rethinking the Role of Statistical Typicality in Ordinary Causal Attributions' (2010) 43 Studies in History and Philosophy of Biological and Biomedical Sciences 814.

[140] Ibid 817-18.

[141] Kahneman and Miller (n128) 136.

[142] Hitchcock and Knobe (n133) 597.

[143] Halpern and Hitchcock (n135) 430. For example, downloading pirated music may violate legal norms of copyright and moral norms of theft; this still holds even if most people do it.

institutional norms,[144] and 'norms of proper functioning'.[145] Stapleton criticised Hart and Honoré's theory partly on the grounds that 'the law is concerned with departures not from normality, but from the mandated course of events'.[146] In other words, in law a person may be held responsible for an event or action even though it was not descriptively abnormal. Stapleton criticised that Hart and Honoré's theory had 'difficulty accommodating the fact that the law needs to and does identify normal departures from a mandated standard as "causes"'.[147]

Experimental research into prescriptive norms exposes a weakness in Stapleton's criticism. The fact that judges recognise departures from prescriptive (legal) norms as causally significant does not show that their causal reasoning must really be rooted in questions of legal policy. This is because several empirical studies show that ordinary causal attributions outside the law are *also* receptive to departures from prescriptive norms.[148] In other words, the causal significance of prescriptive norms is not a unique feature of legal liability. Reviewing the relevant empirical studies, Hitchcock and Knobe summarise that when people make ordinary causal attributions 'we seem to be making a single overall judgment that takes both statistical and prescriptive considerations into account'.[149] The fact that judges often select departures from 'the mandated course of events' as the cause of an outcome, does not in itself differentiate judicial reasoning from ordinary causal attributions.[150]

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[144] For example, 'gentlemen must wear a jacket and tie in the House of Commons'.

[145] On norms of proper functioning, see further Halpern and Hitchcock (n135) 429-30.

[146] Stapleton, *Causation in the Law* (n59) 756.

[147] Ibid 758.

[148] See eg Joshua Knobe and Ben Fraser, 'Causal Judgment and Moral Judgment: Two Experiments' in Sinnott-Armstrong (ed), *Moral Psychology, Volume 2: The Cognitive Science of Morality* (MIT Press 2008) 443; Craig Roxborough and Jill Cumby, 'Folk Psychological Concepts: Causation ' (2009) 22 Philosophical Psychology 205, 209-11; Hitchcock and Knobe (n133) 603-05; Kominsky and others (n138) 206. For further discussion see Christopher Hitchcock, 'Counterfactual Availability and Causal Judgment' in Hoerl, McCormack and Beck (eds), *Understanding Counterfactuals, Understanding Causation: Issues in Philosophy and Psychology* (OUP 2011) 180-83.

[149] Hitchcock and Knobe (n133) 598. Hitchcock and Knobe suggest that this 'plurality' of relevant norms may be a functional consequence of the cognitive tendency to use heuristics in complex reasoning. See also Halpern and Hitchcock (n135) 430.

[150] Contra Stapleton, *Causation in the Law* (n59): text to n146.

There remains a debate in cognitive science about the mechanism by which prescriptive norm violations affect ordinary causal attributions. One argument is that they affect causal attributions directly because they are abnormal.[151] Another argument is that on some occasions they affect causal attributions indirectly because they induce judgements of blame against the norm violator.[152] However, proponents of 'blame theory' still accept that 'norm violations rule the causal roost for benign events that lack nefarious motives, undesirable or reckless actions, or harmful outcomes'.[153] This concession leaves the abnormality principle unchallenged in relation to blameless departures from norms. This has particular relevance to the law of mitigation, where the relevant legal norm does not prescribe the claimant's conduct and can therefore be departed from blamelessly.[154]

5.3.3.2 *Choice principle*

Experimental research into the choice principle developed directly to test Hart and Honoré's theory. This research is less extensive than in relation to abnormality, but experiments have so far been conducted to test between human conduct and natural events; voluntary and involuntary conduct; intended and unintended consequences; and actions and omissions. The findings clearly substantiate Hart and Honoré's key claim that voluntary human conduct has a special place in causal enquiries. However, experimental attempts to specify the scope of voluntariness and the significance of intention have not yet established clear conclusions. This uncertainty does not challenge the importance of choice in causal

[151] Julia Driver, 'Attributions of Causation and Moral Responsibility' in Sinnott-Armstrong (ed), *Moral Psychology, Volume 2: The Cognitive Science of Morality* (MIT Press 2008) 430-31; Julia Driver, 'Kinds of Norms and Legal Causation: Reply to Knobe and Fraser and Deigh' in Sinnott-Armstrong (ed), *Moral Psychology, Volume 2: The Cognitive Science of Morality* (MIT Press 2008) 459-60; Hitchcock and Knobe (n133) 603-05; Kominsky and others (n138) 206.

[152] Alicke, 'Culpable Causation' (1992) 63 Journal of Personality and Social Psychology 368; Alicke, Rose and Bloom, 'Causation, Norm Violation and Culpable Control' (2011) 108 Journal of Philosophy 670: see especially 673, 689 and 693. This argument was foreshadowed in Hart and Honoré (n1) 37-38.

[153] Alicke, Rose and Bloom (n152) 673. See also 689.

[154] Section 5.4.2.1.

attributions, but it does mean that the ordinary concept of choice outside the law remains difficult to pin down.

McClure, Hilton and Sutton sought directly to test Hart and Honoré's claim that people prefer voluntary human conduct over natural events as explanations for why an outcome occurred.[155] They adopted Hart and Honoré's forest fire example as their prototype for a series of experiments that compared human and natural interventions.[156] The results showed that a person fanning the flames was regarded as more causally significant than the wind fanning the flames; similarly, a person igniting the flames was seen as more causally significant than lightning igniting the flames.[157] Overall, the authors concluded that 'we find clear support for the prediction that voluntary causes are preferred to physical ones, despite the fact that both kinds of cause produce the target effect with the same probability'.[158] Other studies have replicated these findings.[159]

The results of experimental research into particular aspects of the choice principle is patchier and less developed than in relation to the abnormality principle. Various studies have shown that voluntary conduct is regarded as more causally significant than accidental (or 'involuntary') conduct.[160] The proposition that voluntary conduct must be informed derives some indirect support from a study showing that causal significance is diminished where the actor lacks mental capacity.[161] Various studies show no clear distinction between

[155] McClure, Hilton and Sutton, 'Judgments of Voluntary and Physical Causes in Causal Chains: Probabilistic and Social Functionalist Criteria for Attributions' (2007) 37 European Journal of Social Psychology 879.

[156] Ibid 883.

[157] Ibid 896.

[158] Ibid 888.

[159] See eg Hilton, McClure and Slugoski, 'The Course of Events: Counterfactuals, Causal Sequences, and Explanation' in Mandel, Hitlon and Catellani (eds), *The Psychology of Counterfactual Thinking* (Routledge 2005) 52-55; Lagnado and Channon, 'Judgments of Cause and Blame: The Effects of Intentionality and Foreseeability' (2008) 108 Cognition 754, 760-63; Hilton, McClure and Sutton, 'Selecting Explanations from Causal Chains: Do Statistical Principles Explain Preferences for Voluntary Causes' (40) European Journal of Social Psychology 383.

[160] See eg Fincham and Shultz, 'Intervening Causation and the Mitigation of Responsibility for Harm' (1981) 20 British Journal of Social Psychology 113, 118. See also Kominsky and others (n138) 197; T Lombrozo, 'Causal-Explanatory Pluralism: How Intentions, Functions, and Mechanisms Influence Causal Ascriptions' (2010) 61 Cognitive Psychology 303.

[161] Fincham and Roberts, 'Intervening Causation and the Mitigation of Responsibility for Harm Doing II: The Role of Limited Mental Capacities' (1985) 21 Journal of Experimental Social Psychology 178.

the causal significance of acts and omissions.[162] On the significance of intention as to consequences, about which Hart and Honoré changed their mind between the first and second editions,[163] the experimental research is inconclusive. The findings of the two main studies conflict,[164] and the authors of the later study concluded that further research was required.[165]

5.3.4 Responding to objections

Causation in the Law has faced criticism from several perspectives.[166] This thesis does not attempt to defend Hart and Honoré's work in its entirety. However, this section responds to three objections that might be thought to bear on the explanation that the law of mitigation is an aspect of ordinary causal principles. These objections are broadly: philosophical; empirical; and semantic. In relation to all three objections (but especially the third) it is important to bear in mind that far less turns on the *language* of 'causation' than one might initially assume; the key debate is about the cognitive principles used by ordinary people. In application to the law of mitigation, the key debate is whether the principles that underlie judicial reasoning are specifically legal and raise only issues of legal policy, or whether they instead mirror the 'non-legal' cognitive principles that ordinary people use outside the law.

[162] See eg Davis and Lehman, 'Counterfactual Thinking and Coping with Traumatic Life Events' in Roese and Olson (eds), *What Might Have Been: The Social Psychology of Counterfactual Thinking* (Psychology Press 1995).

[163] Text to n119.

[164] Lagnado and Channon 760-63 (n159); cf Hilton, McClure and Sutton (n159) 395.

[165] Hilton, McClure and Sutton (n159) 395.

[166] See eg Jane Stapleton, 'Law, Causation and Common Sense' (1988) 8 OJLS 111; JL Mackie, *The Cement of the Universe: A Study of Causation* (OUP 1974) ch5.

5.3.4.1 *Philosophical*

Some causal minimalist objections to *Causation in the Law* appear to rest implicitly on the philosophical school of causal realism.[167] This school holds that causation describes bonds existing in external reality, separate from how people understand or express them.[168] As Menzies has summarised, 'though [causal realist] theories differ in detail, they all subscribe to the doctrine that causal relations depend completely on a substructure of mind-independent relations'.[169] In other words, one cannot determine what causation *is* from what ordinary people *think* it is. If this philosophical concept of causation is correct, so the argument goes, then whatever it was that Hart and Honoré divined from 'common-sense' and ordinary language, was not causation.

The response to this objection is that Hart and Honoré were not seeking to explicate the philosophical concept of causation addressed by the likes of Lewis and Mackie.[170] They were instead interested in how ordinary people and judges used the concepts that these groups respectively *thought of* as causation.[171] The conclusion that those concepts differed from the philosophical concept of causation is of no consequence to either of these groups and is similarly irrelevant to Hart and Honoré's theory, besides perhaps to the label of 'causation'. Confusion may have arisen from the idea that Hart and Honoré had been influenced by ordinary language *philosophers*.[172] As regards their methodology this is true, but *Causation in the Law* does not invoke ordinary language as a means of explicating the

[167] See eg Richard W Wright, 'Causation in Tort Law' (1985) 73 California Law Review 1735, 1746-47.

[168] See eg Mackie (n166); Lewis, *Counterfactuals* (n56). Cf Hume, who insisted that causation is a psychological construct or 'feeling' rather than an external reality: Hume, *A Treatise of Human Nature* Part III, ch14.

[169] Peter Menzies, 'Causation in Context' in Price and Corry (eds), *Causation, Physics, and the Constitution of Reality* (OUP 2007) 191-223.

[170] n168.

[171] Hart and Honoré (n1) 1: 'it is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned'.

[172] For example, Wittgenstein, Austin and Ryle: see further Lynd Forguson, 'Oxford and the "Epidemic" of Ordinary Language Philosophy' (2001) 84 The Monist 325. Hart and Honoré probably also invited confusion about their aims by starting their book with a review of philosophical theories: see Hart and Honoré (n1) ch1.

philosophical concept of causation, but rather to explicate the common-sense and legal concepts, which Hart and Honoré concluded were one and the same.

5.3.4.2 *Empirical*

Causation in the Law aimed to provide a 'delineation of the causal concepts which pervade ordinary thought'.[173] As Lloyd-Bostock clarifies, this involves 'questions of empirical fact about how people perceive causality'.[174] Importantly, Hart and Honoré's analysis of ordinary language was not an end in itself, but rather the tool that they chose to shed light on how people *think* about causal concepts. As Gardner puts it, 'Words play a supporting, mainly illustrative, role'.[175] Likewise, cognitive science now aims to describe ordinary people's thoughts about causal questions, and in order to achieve this, 'the usual approach is to look at how people apply the English word "cause."'[176] But unlike *Causation in the Law*, modern experimental research benefits from a larger sample size,[177] control over variables, and an improved awareness of the pitfalls of conversational pragmatics.[178]

Against this background, empirical objections might be raised on two levels. The first level is to claim that what Hart and Honoré described as usage in ordinary language was really their own idiosyncratic (or even 'legalistic') use of language. Stapleton maintains that Hart and Honoré's linguistic analysis was 'merely an artefact derived from how lawyers used causal words, which they asserted was the same way that ordinary people used

[173] Hart and Honoré (n1) 2. See also 27: 'A conceptual investigation is served by the delineation of the main trends of usage, not by the compilation of a dictionary'.

[174] Lloyd-Bostock (n124) 144-45. Whether what people perceive is the *philosophical* concept of causation, is another question: text to n169.

[175] John Gardner, 'A Life of HLA Hart: The Nightmare and the Noble Dream (Publication Review)' (2005) 121 LQR 329, 331.

[176] Knobe and Fraser (n151) 444.

[177] In other words: not just Hart and Honoré themselves.

[178] See further text to n183.

them'.[179] She adds that 'patterns of usage were merely asserted and illustrated. Yet counterexamples abound'.[180] Cane similarly criticises that 'Hart and Honoré established the "ordinary usage of causal language" by assertion rather than evidence'.[181] Very little survives of this objection. There now is a vast body of empirical evidence on the use of causation in ordinary language, and it robustly substantiates Hart and Honoré's key insights.

The second (trickier) level of objection concerns the relationship between people's use of causal language and their thoughts about causal questions. There are difficulties with capturing thoughts through words, some of which are intractable even with careful experiment design. Lloyd-Bostock's review of Hart and Honoré's methodology gives a useful summary of the pitfalls of linguistic analysis.[182] It is fair to say that *Causation in the Law* lacked a detailed appreciation of these pitfalls. However, cognitive scientists are certainly now aware of them.[183] In particular, Hilton highlights the risk that suppositions about the purpose of the question can affect participants' causal attributions.[184] This thesis cannot negate such concerns, but it is merely noted that within cognitive science, experimental methods are scrutinised with these risks in mind.

5.3.4.3 *Semantic*

Hart and Honoré's 'causal concepts' may be in play even where the language of causation is absent. We can illustrate this through explanatory causal enquiries. Suppose we ask, first, 'What caused the fire?' This calls for a causal explanation. Hart and Honoré argued that in

[179] Stapleton, *Causation in the Law* (n59) 756. See also Stapleton, 'Law, Causation and Common Sense' 123; Jane Stapleton, 'Choosing what we mean by "Causation" in the Law' (2008) 73 Missouri Law Review 433, 462.

[180] Stapleton, *Causation in the Law* (n59) 758.

[181] Cane, *Responsibility in Law and Morality* (n125) 129.

[182] See Lloyd-Bostock (n124).

[183] See eg Knobe and Fraser (n151) 444, 446.

[184] Denis J Hilton, 'Conversational Processes and Causal Explanation' (1990) 107 Psychological Bulletin 65.

this example ordinary people would rely on the principles of abnormality and choice to select 'the cause', and they would discount other but-for conditions, such as the oxygen in the air.[185] But now suppose we ask, second, 'Why did the fire occur?' This also calls for a causal explanation. However, here the question does not expressly mention causation, and it is unlikely that the ordinary person's answer would mention causation either. Nevertheless, the same principles of abnormality and choice are surely in play here, just as in relation to the first question.

Now consider attributive causal enquiries. Suppose we ask, 'Did Bob cause the fire?' The answer may be uncertain, even if we know all of the relevant facts. For example, suppose Bob lit the match but Jim knocked it out of his hand. This situation calls for causal attribution. One might object that ordinary people would not usually ask whether Bob 'caused' the fire in these circumstances; such questions seem unnatural to most non-lawyers. Only lawyers invoke causation in an attributive context. One might conclude from this that ordinary people do not engage in attributive causal enquiries, even though they do make explanatory causal enquiries. Indeed, one might suggest that this calls into question the cognitive scientific method, because when participants in experimental research are asked to identify 'the cause' in an attributive context, they are faced with an alien question to which they have no natural answer.

This objection focuses too narrowly on the use of causal language. Although ordinary people (unlike judges) do not often express their attributive enquiries in causal terms, they frequently do make attributions of responsibility.[186] As with the second question above, the important issue is not whether the language of causation is invoked, but rather which cognitive principles are in play. More specifically, the issue here is whether ordinary people use the abnormality and choice principles when they make attributions of responsibility. The objection, if sound, would also prove too much. Attributions of responsibility outside the law are plainly affected by whether the conduct was a 'but-for cause' of the outcome,

[185] Text to n97.

[186] For a recent example of causal attribution outside the law, see eg Rachael Pells, 'Jeremy Hunt says Junior Doctors are "Responsible" for Any Deaths Caused by All-Out Strike' *The Independent* (26 April 2016) <http://tinyurl.com/jug4ceu> accessed 26 April 2016.

even where the language of causation is absent from the enquiry. The important question, then, is whether other causal principles (beyond but-for) are also in play in these circumstances.

Causal judgements and attributions of responsibility appear to be linked by the phenomenon of counterfactual thinking.[187] Philosophers tend to agree that there is a connection between causation and counterfactuals, although they may disagree about precisely what it is.[188] This view is shared by cognitive scientists.[189] Counterfactuals also play an important role in attributions of responsibility: 'It would not have made a difference anyway' is a popular denial of responsibility. Gerstenberg and Lagnado summarise that 'how responsible for an outcome a person is seen to be depends not only on what the person actually did but also on what would have happened if the person had acted differently'.[190] It may be that the cognitive principles identified by Hart and Honoré are not so much 'causal principles' as principles of 'counterfactual selection',[191] common to both explanatory causal judgements and attributions of responsibility.

For whatever reason, one might agree that judges use the same cognitive principles as ordinary people when they apply the law of mitigation, but disagree that these principles are really 'causal'. Nothing much turns on this objection. The substantive issue is instead to what extent the principles used by judges are specifically legal. Causal minimalists argue that aside from a minimum causal threshold (usually 'but-for'), the attribution of legal responsibility depends solely on questions of legal policy. By contrast, Hart and Honoré argued that legal responsibility depended (at least partly)[192] on the same principles that

[187] See generally Roese (n131).

[188] Peter Menzies, 'The Role of Counterfactual Dependence in Causal Judgements' in Hoerl, McCormack and Beck (eds), *Understanding Counterfactuals, Understanding Causation: Issues in Philosophy and Psychology* (OUP 2011) 186. See eg Lewis, *Counterfactuals* (n56); Mackie (n166).

[189] See eg Kahneman and Tversky (n128) 202, discussed in Hitchcock (n148) 172.

[190] T Gerstenberg and DA Lagnado, 'Attributing Responsibility: Actual and Counterfactual Worlds' in Knobe, Lombrozo and Nichols (eds), *Oxford Studies in Experimental Philosophy: Volume 1* (OUP 2014) 94. See further citations at 93.

[191] Also sometimes referred to as counterfactual 'availability' or 'mutability': see eg Kahneman and Miller (n128) 144.

[192] Hart and Honoré did accept that there was some residual role for legal policy questions as well as causal questions: Hart and Honoré (n1) 304-07.

ordinary people use in attributing responsibility outside the law. They referred to these principles as common-sense 'causal concepts', but the substantive point is that they were not specifically legal. The key question is whether and to what extent the principles that explain the law of mitigation are specifically legal principles.

5.4 Mitigation as Causation

We are now in a better position to understand what judges might mean when they explain mitigation as an aspect of causation. Rather than dismissing their explanation as a disguise for unstated issues of legal policy, we should explore whether the judges' actual reasons might reflect the ordinary causal principles that people use outside the law. This was essentially the motivation behind *Causation in the Law*.[193] However, Hart and Honoré gave very little attention specifically to the law of mitigation.[194] In certain key respects, this thesis is an application of Hart and Honoré's theory of causation to the law of mitigation; however, it also develops their theory by recognising the causal significance of both descriptive and legal norms, reflecting subsequent empirical research.

5.4.1 The argument in outline

This section outlines the descriptive and explanatory account of mitigation proposed in this thesis. The law of mitigation consists of two rules: the 'restoration rule' and the 'abnormality rule'. The restoration rule applies where the claimant made a choice not to restore the non-breach position. The abnormality rule applies where the claimant sought to restore the non-breach position but chose to do so in an abnormal way. The restoration and abnormality rules differ from the orthodox account of the avoided and avoidable loss rules; these two sets of rules do not correspond. Both the restoration and abnormality rules are explained

[193] Text to n82.

[194] On the avoidable loss rule, see Hart and Honoré (n1) 230. On benefits obtained by the claimant's conduct, see ibid 86, 141, 160 and especially 137: 'voluntary conduct negatives causal connection not only with loss but with gain'.

by ordinary causal principles; they each involve a choice to depart from the normal course of events. However, the restoration rule involves a departure from a legal norm, whereas the abnormality rule involves a departure from a descriptive norm.

5.4.1.1 *The descriptive account*

The restoration rule applies where the claimant made a choice not to restore the non-breach position. The compensatory principle prescribes that the defendant is responsible for the cost of restoring (as nearly as possible) the position that the claimant would have been in if the breach had not occurred. However, the defendant is not responsible for the outcome of the claimant's choice to seek a different position after the breach. The claimant's conduct involves a choice to depart from a legal norm. The content of this legal norm depends on the legal obligation breached by the defendant. The judge must assess the non-breach position by asking what would have happened if the defendant had not breached its obligation, and then ask whether the claimant made a choice not to take steps that would have restored it (as nearly as possible) to that position.

The abnormality rule applies where the claimant did seek to restore the non-breach position but chose to do so in an abnormal way. This norm is descriptive not legal; it depends on an assessment of what the claimant would (in fact) normally have done in the circumstances. The test is what the individual claimant would normally have done, not what most people (or a 'reasonable person') would normally have done.[195] The test is essentially subjective: it takes into account all of the claimant's own circumstances, characteristics and preferences. However, it does not take into account the defendant's potential liability to pay damages; this crucial feature of the abnormality rule avoids circularity in the attribution of responsibility.[196] The relevant norm is thus the individual claimant's normal course of conduct if it was paying for restoration out of its own pocket.

[195] In other words, it is an 'agent-level' rather than 'population-level' norm: see further text to n139.

[196] Text to n237.

Where either of these two rules of mitigation apply, damages are assessed on a counterfactual basis. If the claimant made a choice not to restore the non-breach position, damages are assessed as if it had restored the non-breach position. If the claimant chose to restore the non-breach positon in an abnormal way, damages are assessed as if it had restored the non-breach position in a normal way. These counterfactual awards are sometimes referred to as damages for 'direct loss'.[197] However, it is important to stress that the restoration and abnormality rules only apply where the claimant made a choice. Where the claimant had no choice but to depart from the normal course of events, there is no basis for displacing the assessment of the claimant's factual loss. This distinguishes the effect of the restoration and abnormality rules from the so-called 'substitutive damages' thesis.[198]

The proposed descriptive account is more consistent with the body of precedents than the orthodox account; however, it obviously cannot claim to be consistent with every precedent.[199] There are two main (related) influences that explain most of the inconsistencies. Although judicial development of the law has primarily been influenced by ordinary causal principles, some cases have also been influenced through reflexive effect by McGregor's (contrary) orthodox account of mitigation.[200] Second, the factual loss cap favoured by the orthodox account of damages has influenced some (but by no means all) judges to exercise their judicial discretion in a way that limits the application of the restoration and abnormality rules in circumstances where these rules would result in an award of damages greater than the claimant's factual loss.

[197] Section 4.3.2.3.

[198] See eg Robert Stevens, *Torts and Rights* (OUP 2007) ch4; Robert Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart 2009).

[199] Given the sheer number of cases, this would be an impossible task.

[200] For an outline of 'reflexive effect' (or the 'double hermeneutic') in law, see further Chapter Two, text to n93.

5.4.1.2 *The explanatory account*

The restoration and abnormality rules are explained by ordinary causal principles. The requirement of choice is explained by the causal significance of voluntary human conduct. This principle is not specifically legal; it mirrors the way in which ordinary people attribute responsibility outside the law. The importance of the claimant's departure from the normal response to breach is broadly explained by the causal significance of departures from the normal course of events. However, within the law of mitigation, two different types of norm are relevant: legal and descriptive norms. The content of the legal norm (relevant to the restoration rule) depends on the application of the compensatory principle; by contrast the content of the descriptive norm (relevant to the abnormality rule) is not specifically legal.

The causal explanation of mitigation resolves several of the puzzles faced by the orthodox account.[201] First, it explains why the rules of mitigation have 'universal' application whenever the court is required to assess loss: this is because ordinary causal principles transcend different types of legal liability because they are intrinsic to the attribution of responsibility for outcomes. Second, it explains why the rules only apply once the claimant was aware of the breach: this is because the claimant must have made a choice to depart from the normal response to breach. Third, it explains to what extent mitigation raises 'questions of fact': the choice and abnormality principles are not specifically legal and so in this respect their application raises questions of fact; however, the restoration rule requires a careful application of the compensatory principle, and to this extent raises a question of law.

The restoration and abnormality rules also explain other areas of the law of damages.[202] The 'market rule' is a straightforward instantiation of the restoration rule: where the claimant made a choice not to resort to the market to obtain substitute performance (and thereby to restore the non-breach position), damages are assessed as if

[201] Section 6.4.

[202] These other rules are strictly outside the scope of this thesis except to the extent that they are internally expressed by judges as part of the law of mitigation: Section 1.2.

it had done so.[203] 'Betterment' is also an application of the restoration rule: it applies where the claimant made a choice to put itself in a better position than if the breach had not occurred, or in other words to 'supersede' (rather than to restore) the non-breach position. 'Supervening causation' is an application of the abnormality rule: it applies to abnormal conduct by the claimant other than abnormality in the course of restoring the non-breach position.[204]

5.4.1.3 *Comparing the orthodox account*

In many respects the proposed descriptive account corresponds with the orthodox account of mitigation. In relation to the orthodox avoidable loss rule, the distinction between the restoration rule and the abnormality rule roughly coincides with Burrows' distinction between 'unreasonable inaction' and 'unreasonable action' respectively.[205] The advantage of the proposed account is mainly to specify more precisely how the reasonableness test is applied. In relation to the orthodox avoided loss rule, most of the 'avoided loss' cases involve the application of the restoration rule: where the benefit arose from the claimant's choice not to restore the non-breach position it is held not to 'arise out of the breach'. The proposed account acknowledges awards of damages exceeding factual loss, but (unlike the substitutive damages thesis) also shows how their availability is circumscribed.

There are three main differences between the descriptive account proposed in this thesis and the orthodox account of mitigation. The first main difference concerns the application of the orthodox reasonableness test. In relation to cases covered by the abnormality rule, there is relatively little harm in describing the claimant's choice to act

[203] The application (and non-application) of the restoration rule to the so-called market rule is discussed in detail in Andrew Dyson and Adam Kramer, 'There is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 LQR 259.

[204] See eg Burrows, *Remedies* (n27) 75: 'Where the claimant's unreasonable conduct … has been a cause of his suffering loss, both the duty to mitigate and intervening cause can be regarded as denying damages for exactly the same reason'. See also 126.

[205] Ibid 122. However, a choice not to restore the non-breach position may not be inactive; it may involve doing something else instead.

abnormally as 'unreasonable', although the test of abnormality provides greater specificity than the test of reasonableness. However, in relation to cases covered by the restoration rule, the orthodox reasonableness test is highly misleading. In particular, the claimant can make a 'choice' not to restore the non-breach position without having acted 'unreasonably'; furthermore, the reasonableness test fails to capture the legal significance of the claimant's non-breach position in assessing the legal concept of loss.

The second main difference may be regarded as terminological, but it reflects a fundamental difference in explanation. The restoration and abnormality rules are not prescriptive; they do not seek to tell claimants (prospectively) how they 'should' behave. Instead, they attribute responsibility (retrospectively) for the claimant's past conduct; these attributions are not dependent on any judgement of praise or blame. In particular, the restoration rule does not say that the claimant 'should' restore the non-breach position;[206] claimants are perfectly free to seek a different position instead. Similarly, the abnormality rule does not say that the claimant 'should' adopt the normal method of restoring the non-breach position; claimants are perfectly free to adopt an abnormal approach, for better or worse.

The third main difference concerns what this thesis terms the 'principle of symmetry'. This principle expresses the notion that attributions of responsibility depend on the nature of the conduct (its voluntariness and abnormality) and not its outcome (whether it resulted in loss or gain). In the law of mitigation, the application of the restoration and abnormality rules does not depend on whether the claimant's choice turned out to be harmful or beneficial. If the claimant chose not to restore the non-breach position, it is responsible for the outcome, for better or worse; likewise, if the claimant chose to restore the non-breach position in an abnormal way, it is responsible for the outcome, for better or worse. The application of the law of mitigation is symmetrical. In this respect, the apparent distinction between the orthodox avoidable and avoided loss rules is illusory.[207]

[206] This legal norm derives from the defendant's breach of a legal obligation, but it does not prescribe the claimant's conduct.

[207] This is acknowledged in *Thai Airways* (n16) [33] (Leggatt J). See also [31].

5.4.2 Two types of norm

This section gives an overview of the legal and descriptive norms that make up the restoration and abnormality rules respectively. To reiterate, these two rules only apply where the claimant made a choice to depart from the relevant norm. Where the claimant had no choice, the rules do not apply and so (unless any other rule applies) the claimant will be entitled to recover its factual loss. The meaning of 'choice' is outlined separately below.[208] It is also important to reiterate that both the restoration and abnormality rules apply symmetrically to both 'avoidable' and 'avoided' loss; in other words they apply in the same way to both harms and benefits. The application of the restoration and abnormality rules to the cases on mitigation is discussed in detail in the following two chapters. For now, the aim is to outline some general features of each of the rules.

5.4.2.1 *Restoration*

The compensatory principle establishes that the defendant is responsible for the cost of putting the claimant as nearly as possible in the position as if the breach had not occurred. However, the defendant is not responsible for the outcome of the claimant's own choice not to seek this position after the breach. The claimant's own choice not to restore the non-breach position is the cause of its new position; responsibility for the outcome of this choice (for better or worse) is attributed to the claimant rather than to the defendant. Although the departure is from a legal norm (restoration of the non-breach position), its causal significance rests on ordinary causal principles. In particular, the requirement of choice is not specifically legal.

The application of the restoration rule involves three main stages. The first stage is to assess the claimant's non-breach position. This stage follows from the compensatory principle.[209] In order to assess the non-breach position, it is crucial to determine precisely

[208] Section 5.4.3.

[209] Section 3.2.1.

the legal obligation that was breached. As Lord Toulson emphasised in *Bunge*, in relation to breach of contract, 'The fundamental compensatory principle makes it axiomatic that any method of assessment of damages must reflect the nature of the bargain which the innocent party has lost'.[210] In relation to torts, Hobhouse LJ has similarly emphasised the need 'accurately to identify the wrong in respect of which the claimant is entitled to recover damages'.[211] Particular care is required in relation to negligent advice: 'A breach of warranty does not have the same consequences as a failure to advise or warn'.[212]

In order to assess the non-breach position, it is also crucial to ask what would have happened if the defendant had fulfilled the relevant obligation. The only counterfactual element of this enquiry is the assumption that the breach did not occur; in this sense we ask what would 'actually' have happened but-for the breach.[213] In relation to negligent advice (which again raises the most difficulties) there are two main alternatives:[214] if the claimant had been advised carefully, either it would not have entered into the relevant transaction at all (a 'no transaction' case), or it would still have entered into the transaction but on different terms (a 'different terms' case).[215] To 'put the claimant in the same position as if the breach had not occurred',[216] it is essential that these alternatives are distinguished and that appropriate findings are made by the trial judge.[217]

The second stage is to assess the steps that would 'restore' the claimant to its non-breach position. The compensatory principle was historically referred to as 'the principle of

[210] *Bunge* (n18) [85].

[211] *Downs* (n9) 438.

[212] Ibid 438.

[213] The use of the word 'actual' is strained here because the assessment is counterfactual vis-à-vis the breach.

[214] A third possibility is that the claimant would have entered into the same transaction on the same terms, but in these circumstances it is said that the claimant has simply suffered no loss.

[215] See further Kramer, *Contract Damages* (n24) 44-46.

[216] As prescribed by the compensatory principle.

[217] Regrettably, this point is not always appreciated: see eg *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359 [14] (Briggs LJ).

restitutio in integrum',[218] meaning roughly 'restoration of the whole'.[219] In these terms, the law of damages aims to 'restore' the claimant to the position that it would have been in if the breach had not occurred. The term 'restoration' usefully emphasises the legal significance of the non-breach position. Much of the confusion surrounding 'mitigation of loss' stems from the tendency to overlook that the legal concept of loss is prescribed by the compensatory principle.[220] In particular, although a claimant may be 'harmed' if they are worse off than they *were* before the breach occurred (an historical comparison), they have only suffered 'loss' (in the legal sense) to the extent that they are worse off than they *would have been* if the breach had not occurred (a counterfactual comparison).

The steps that would restore the non-breach position depend on the content of the legal obligation breached in each case, but some common examples can be given. If the defendant fails to deliver goods, the claimant can restore the non-breach position by buying replacement goods. If the defendant damages the claimant's property, the claimant can restore the non-breach position by repairing or replacing the property. If the defendant negligently advises the claimant in a 'no transaction' case,[221] then the claimant can restore the non-breach position by 'extricating' itself from the transaction.[222] Often perfect restoration is no longer possible, for example due to the effluxion of time or inadequacy of money.[223] In these circumstances, the compensatory principle provides that the claimant should be restored 'as nearly as possible' to the non-breach position.[224]

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[218] See eg *Owners of the Steamship Gracie v Owners of the Steamship Argentino (The Argentino)* (1888) 13 PD 191 (CA) 196 (Lord Esher MR), 200 (Bowen LJ); *Owners of Dredger Liesbosch v Owners of Steamship Edison (The Liesbosch)* [1933] AC 449 (HL) 459 (Lord Wright); Street, *Principles* (n28) 3-6. For more recent adoption, see eg *Bunge* (n18) [76] (Lord Toulson).

[219] Early variants of 'restoration' predate the classic statements of the compensatory principle: see eg *The Woodrop-Sims* (1815) 2 Dods 83, 165 ER 1422, 1423 (Sir William Scott); *The Dundee* (1827) 2 Hag Adm 137, 166 ER 194, 196 (Lord Stowell); *The Gazelle* (1844) 2 Wm Rob 279, 166 ER 759, 760 (Dr Lushington). Cf 'restitution', which has acquired a different meaning relating to gains obtained by the defendant.

[220] See Chapter Three, text to n19. In short, mitigating 'harm' is not the same as mitigating 'loss' in the legal sense.

[221] Text to n215.

[222] By contrast, if it is a 'different terms' case, then the claimant may be able to restore the non-breach position by renegotiating the terms. Here the cost of extrication is not relevant to restoration.

[223] See further Chapter Three, text to n13.

[224] *Livingstone v The Rawyards Coal Co* (1879-80) LR 5 App Cas 25 (HL) 39 (Lord Blackburn).

The third stage is to assess whether the claimant chose not to take the steps that would have restored the non-breach position. There are several typical circumstances in which the claimant may have no choice. First, where the claimant was unaware of the breach. Second, where the claimant was impecunious so could not afford to restore the non-breach position. Third, where the claimant did not have a 'fair choice' because of overbearing conflicting interests; this concept of a fair choice raises some difficulties in application, but the difficulties are not specifically legal. Finally, there are other circumstances where the claimant could not restore the non-breach position because, for example, there was no available market for substitute performance or the claimant could not access the market. The meaning of 'choice' is discussed in more detail below.[225]

5.4.2.2 *Abnormality*

The abnormality rule applies where the claimant sought to restore the non-breach position but chose to do so in an abnormal way. Within the law of mitigation,[226] there are two main contexts in which the abnormality of the claimant's conduct may arise. First, where the claimant chose an abnormal mode of restoration.[227] For example, in some circumstances it may be abnormal for the claimant to repair rather than replace; similarly, it may be abnormal for the claimant to resort to the market rather than accepting the defendant's offer of performance. Second, the claimant may act abnormally where it incurs excessive costs in restoring the non-breach position. For example, the claimant may conduct a repair in an abnormally inefficient way, or pay over-the-odds for replacement performance.

The early cases on mitigation drew an express connection between the concepts of reasonableness and abnormality. In *The City of Lincoln*, Lindley LJ held that 'the ordinary course of things … includes at least the reasonable conduct of those who have sustained the

[225] Section 5.4.3.

[226] Where the claimant's abnormal conduct arose other than in the course of restoring the non-breach position, it is generally expressed as a 'supervening act' rather than a 'failure to mitigate'.

[227] If the claimant chooses not to seek any of the available modes of restoration, then the restoration rule will apply.

damage'.[228] The classic statements of mitigation in *Dunkirk Colliery* and *British Westinghouse* both linked the reasonableness of the claimant's conduct and the 'ordinary course of business'.[229] In a separate decision, Viscount Haldane held that 'reasonable human conduct is part of the ordinary course of things'.[230] It follows that where the claimant acts 'unreasonably', its conduct is also likely to be abnormal (outside 'the ordinary course of things').[231] However, the test of abnormality clarifies the application of the orthodox reasonableness test in three important respects.

First, the test of abnormality is essentially subjective. The test is not what 'most people' or the (objective) 'reasonable person' would have done, but rather what was normal for the individual claimant. The relevant norm takes into account the claimant's own circumstances, characteristics and preferences. For example, in relation to avoidable loss, the courts have taken into account the claimant's bargaining power,[232] inexperience in dealing with the breach,[233] sentimental preferences,[234] and special additional capacity.[235] The principle of symmetry suggests that these characteristics should also be relevant to avoided loss, but curiously they are sometimes ignored. In these circumstances the claimant has recovered more than its factual loss; the best explanation of these 'outlying' decisions is a separate principle related to the insurance rule.[236]

Second, the test does not take into account the defendant's potential liability to pay damages for the costs of restoration. The relevant norm is the claimant's normal course of

[228] *The City of Lincoln* (1889) 15 PD 15 (CA) 18.

[229] See *Dunkirk Colliery Co v Lever* (1878) 9 Ch D 20 (CA) 25 (James LJ); *British Westinghouse* (n34) 689 (Viscount Haldane).

[230] *The Metagama* (n40) 25, approved in *McKew* (n10) 27-28 (Lord Guest). See also *The Oropesa* (n10) 39 (Lord Wright).

[231] *McKew* (n10) 25 (Lord Reid): 'one may say that unreasonable conduct … is not the natural and probable result of the original fault'.

[232] *Thai Airways* (n16) [176] (Leggatt J); cf *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No2)* [1990] 1 Lloyd's Rep 441 (QB) 443 (Webster J).

[233] *The Hendrik* [1964] 1 Lloyd's Rep 371 (PD) 379 (Hewson J): 'I must have in mind their lack of training in damage control and the absence of effective damage control gear on board their vessel'.

[234] *O'Grady v Westminster Scaffolding Ltd* [1962] 2 Lloyd's Rep 238 (QB) 240 (Edmund Davies J).

[235] *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, [2011] QB 357 [29] (Sir Mark Potter).

[236] See further Section 7.3.2.

conduct if it was paying for restoration out of its own pocket. The claimant will thus act abnormally if it spends extravagantly in reliance on the defendant's potential liability. If it were otherwise, the attribution of responsibility would be circular: the defendant's responsibility would depend on the normality of the expenditure, but the normality of the expenditure would depend on the defendant's responsibility to pay for it.[237] To cut the circle, it is necessary to ignore the defendant's potential liability when assessing the claimant's normal course of conduct. In mitigation, this approach has been described as the 'prudent uninsured' standard.[238]

Third, the claimant's conduct may be 'abnormal' even though it resulted in a positive outcome. The test applies (symmetrically) to avoided as well as avoidable loss. In other words, the abnormality rule also applies where the claimant's abnormal conduct was beneficial, in that it resulted in less harm than if the claimant had acted normally. So, where the claimant chooses to restore the non-breach position in an abnormal way, the claimant is responsible for the outcome of this departure from the normal course of conduct, for better or worse. The reasonableness test is linguistically ill-suited to the problem of avoided loss because 'unreasonable' is naturally understood as pejorative; it would be unnatural to use 'unreasonable' to mean 'better-than-reasonable'.[239]

5.4.3 The meaning of choice

Both the restoration and abnormality rules involve a departure from the normal response to breach. The restoration rule involves a departure from a legal norm (to restore the non-

[237] In full: (1) *the defendant is responsible for the expenditure* because it was normal for the claimant to incur the expenditure; (2) it was normal for the claimant to incur the expenditure *because the defendant is responsible for the expenditure*.

[238] See eg *Owners of the Georgidore v Owners of the Pacific Concord (The Pacific Concord)* [1961] 1 WLR 873 (PD) 881; *The Naxos* [1972] 1 Lloyd's Rep 149 (QB) 154 (Brandon J); *The Ferdinand Retzlaff* [1972] 2 Lloyd's Rep 120 (QB) 123 (Brandon J); *Ateni Maritime Corp v Great Marine Ltd (The Great Marine) (No2)* [1991] 1 Lloyd's Rep 421 (CA) 424 (Lloyd LJ).

[239] Cf *Baker v TE Hopkins & Son Ltd* [1959] 1 WLR 966 (CA) 976-77 (Morris LJ): 'it was said that Dr Baker had been "unreasonably" brave'. The use of scare quotes (in original) acknowledges that this usage is strained. See also *Mobil* (n16) [30] (Rix LJ).

breach position); the abnormality rule involves a departure from a descriptive norm (to take normal steps in restoration). However, the application of both rules further requires that the departure was voluntary; in other words, the claimant must have made a choice to depart from the relevant norm. This is a crucial feature of the law of mitigation. Where for some reason the claimant 'had no choice' but to depart from the normal response to breach, then the rules of mitigation do not apply. In these circumstances, unless remoteness or some other rule applies, the claimant will recover damages for its factual loss.[240]

The requirement of choice is explained by the causal significance of voluntary human conduct. As Hart and Honoré identified, this 'choice principle' is a feature of causal attributions outside the law; it is not a specifically legal principle. To put it another way, one does not need to be a lawyer to apply the choice principle. In this sense the principle raises a question of fact. In most cases it is obvious one way or the other whether the claimant had a choice. However, at the margins, the application of the choice principle is tricky to articulate. Hart and Honoré specified that the choice must be 'informed', must be a 'fair choice', and must be 'intended to exploit the situation created'.[241] These features find reflection in the law of mitigation; the relevant authorities are outlined below.

The impecuniosity rule provides a good illustration of the choice principle. In *Dodd Properties v Canterbury*, Megaw LJ held that 'A plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do'.[242] This approach has now decisively been affirmed by the House of Lords in *Lagden*,[243] overruling apparently contradictory authority in *The Liesbosch*.[244] The reason why the restoration rule does not apply where the claimant was impecunious is because in these circumstances the

[240] For a definition of 'factual loss', see Chapter Three, text to n39. The important point is that factual loss takes into account all events up to the date of trial.

[241] Text to n113.

[242] *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 (CA) 453, affirmed in *Lagden* (n21) [51] (Lord Hope). See also *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397 (QB); *Alcoa Minerals of Jamaica Inc v Broderick* [2002] 1 AC 371 (PC); *Mattocks v Mann* [1993] RTR 13 (CA); *Martindale v Duncan* [1973] 1 WLR 574 (CA); *Clippens Oil Co Ltd v The Edinburgh and District Water Trustees* [1907] AC 291 (HL).

[243] *Lagden* (n21) [8] (Lord Nicholls), [12] (Lord Slynn), [62] (Lord Hope), [82] (Lord Scott), [102] (Lord Walker).

[244] *The Liesbosch* (n218) 460-61 (Lord Wright).

claimant had no choice to restore the non-breach position.[245] In *Lagden*, the House of Lords emphasised the connection between impecuniosity and the claimant's (lack of) choice; for the majority, Lord Hope summarised that 'It has to be shown that the claimant had a choice'.[246]

In *Lagden*, the House of Lords sought to clarify the meaning of 'choice' in the context of impecuniosity. For the majority, Lord Nicholls admitted that it was difficult to give firm guidance because 'lack of financial means is, almost always, a question of priorities'.[247] In a dissenting judgment, Lord Scott attempted a very broad definition of choice, arguing that 'it is very rare indeed for there to be "no other choice". There are nearly always choices'.[248] However, the majority rejected this absolute understanding. Lord Nicholls (with whom Lord Hope and Lord Slynn agreed) held that the appropriate test for impecuniosity was whether restoration would require 'sacrifices the plaintiff could not reasonably be expected to make'.[249] In other words, the question was whether the claimant's choice was sufficiently voluntary (or a 'fair choice') having regard to its interests as a whole.[250]

Although often framed in terms of reasonableness, it would be a mistake to think that this concept of choice is uniquely legal.[251] We often implicitly note that a person's conduct was insufficiently voluntary to hold them responsible for a particular outcome. For example, we might say 'Jim had to leave because his son was unwell'. Here, we would not be taken to mean that Jim was literally forced to leave; instead we would understand that Jim's decision

[245] Or it had no choice to restore the non-breach position in the normal way (the abnormality rule).

[246] *Lagden* (n21) [34]. The issue here was whether the claimant had made a choice to supersede the non-breach position by obtaining additional non-compensable benefits; this is often referred to as 'betterment'.

[247] Ibid [9]. See also [41] (Lord Hope) 'incapable of precise definition'; [88] (Lord Scott) 'imprecise'; [106] (Lord Walker) 'vague'.

[248] Ibid [75].

[249] Ibid [9]. See also [11] (Lord Slynn), asking whether restoration would have required the claimant to take 'steps which he could not reasonably be expected to take in the light of his financial position'. See also *Opoku v Tintas* [2013] EWCA Civ 1299 [30]-[31] (Beatson LJ); *Anselm v Buckle* [2014] EWCA Civ 311 [24] (Briggs LJ).

[250] See also *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] ICR 1079 [38] (Potter LJ), noting that the reasonableness test must 'inevitably be related to the individual conduct and circumstances of the particular claimant when faced with a choice'.

[251] See further Hart and Honoré (n1) 156.

was insufficiently voluntary in the circumstances (we might even say he 'had no choice'). We all have a fairly good grasp of this concept of choice, even though we may struggle to articulate it precisely. The important point is that when faced with marginal decisions, judges do not invent their own legalistic metric of choice but instead seek to reflect the understanding of voluntariness familiar from attributions of responsibility outside the law.

The cases on mitigation illustrate the application of this ordinary meaning of choice. *Emeh v Kensington Area Health Authority* provides a clear-cut example. The claimant became pregnant following a negligent sterilisation procedure performed by the defendant hospital.[252] The Court of Appeal overturned the trial judge's decision that the claimant had unreasonably failed to mitigate by not having an abortion.[253] Of course, the claimant did in an absolute sense have a 'choice' whether to have an abortion, and this step would have restored (as nearly as possible) her non-breach position. However, almost no one would say that she had a fair choice (or any choice at all) in these circumstances; in other words, her decision not to have the abortion was insufficiently voluntary to attract responsibility. One does not need to be a lawyer to reach this conclusion.[254]

Denny v Supplies and Transport provides a less clear-cut example.[255] The claimant was injured whilst unloading timber that had been dangerously stacked by the defendant. Although the claimant knew that the timber was unsafe,[256] Evershed MR concluded that the claimant's conduct was not a 'novus actus interveniens' or 'break in the chain'.[257] In an absolute sense, the claimant could have chosen not to unload the timber. However, the trial judge found that he had 'no practical alternative' but to unload.[258] The reasons for this finding are not entirely clear, but the circumstances suggest that if the claimant had refused

[252] *Emeh v Kensington Area Health Authority* [1985] QB 1012 (CA). See also *R v Blaue* [1975] 1 WLR 1411 (CA), where there was no intervening act in a prosecution for murder, where the victim was a Jehovah's Witness and had refused a blood transfusion.

[253] *Emeh* (n252) 1019 (Waller LJ), 1027 (Purchas LJ) and Slade LJ (1024).

[254] In particular, the conclusion has nothing to do with balancing the claimant's interests in keeping the child against the hospital's interests in preventing expenses towards future care.

[255] *Denny v Supplies & Transport Co* [1950] 2 KB 374 (CA)

[256] Ibid 377.

[257] Ibid 379 (Evershed MR).

[258] Ibid 381 (reported by Evershed MR).

to unload, he would not have been paid and may have lost his job.[259] Again, the issue concerns whether the claimant's choice was sufficiently voluntary in the circumstances; in particular, this is focused on the claimant's interests and does not involve weighing the defendant's interests.

The claimant will also not be regarded as making a fair choice where it was forced to decide in the 'agony of the moment'. The courts have consistently declined to hold that the claimant acted unreasonably where it was faced with an acutely difficult or pressing problem.[260] Where the claimant was deciding under extreme pressure,[261] the rules of mitigation will not apply merely because the claimant made 'an error of judgment in deciding on the best course in difficult circumstances',[262] or sometimes even where it acted negligently.[263] In these circumstances the defendant's breach is said to remain the cause of the further harm.[264] In relation to the abnormality rule, there may be some practical overlap between the issue of choice and the question whether the claimant departed from the normal course in the circumstances.[265]

[259] Cf *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370 (CA), where the claimant would still have been paid in full even if he had refused to work until a replacement step-latter had been provided: see 388 (Sellers LJ). See also, rejecting the *volenti* defence in similar circumstances: *Smith v Charles Baker & Sons* [1891] AC 325 (HL).

[260] See eg *Jones v Boyce* (1816) 171 ER 540; *United States Shipping Board v Laird Line Ltd* [1924] AC 286 (HL); *The Oropesa* (n10); *Sayers v Harlow UDC* [1958] 1 WLR 623 (CA).

[261] See *Symrise AG v Baker & McKenzie* [2015] EWHC 912 (Comm), [2016] 1 All ER (Comm) 603 [80] (Burton J), rejecting an argument along these lines, on the basis that 'there was no time pressure'.

[262] *The Metagama* (n40) 26 (Viscount Haldane).

[263] *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2013] EWHC 2199 (Comm), [2013] 2 All ER (Comm) 1058 [174] (Teare J). The decision was overturned on a different point: *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2015] EWCA Civ 16, [2015] 2 All ER (Comm) 894.

[264] *The Stork* (n9) 99 (Hodson LJ).

[265] *Wilson v Newport Dock Co* (1865-66) LR 1 Ex 177 (Ex Ch) 184 (Baron Martin): 'very often there is no "usual course of things" in the event of a breach'.

5.5 Conclusion

The causal explanation of mitigation is strongly favoured by judges, but their expression of causal reasoning has often been vague or incomplete. Consequently scholars have tended to resist this explanation, preferring to search for the undisclosed reasons of legal policy that they suppose must underlie judicial decisions on mitigation.[266] Although understandable, this is the 'counsel of despair' that Hart and Honoré strived against.[267] The reason why judges' causal reasoning is so vague, and yet so pervasive, is precisely because it is so basic to human thought.[268] The task of articulating ordinary causal principles is far from straightforward; however, the key principles of choice and abnormality are now well-established. The aim of this chapter, in conjunction with the following two chapters, is to show that these principles succeed in explaining the law of mitigation.

This chapter also introduced a descriptive account of mitigation based on two rules: the restoration rule and the abnormality rule. The following two chapters address these rules in more detail by illustrating their application to the cases on mitigation. It is argued that the restoration and abnormality rules are more consistent with the body of precedents than the avoidable and avoided loss rules favoured by the orthodox account. The main descriptive problems with the orthodox account have already been identified; the new account seeks to resolve these problems and solve some further puzzles as well. The restoration and abnormality rules do highlight one significant new problem, in relation to the recovery of damages greater than factual loss, but this is a puzzle that the orthodox account of the law of damages was already bound to face.

[266] See further Section 4.4.

[267] Hart and Honoré (n1) 26.

[268] See Honoré, *Responsibility and Fault* (n92) 5: 'ordinary people learn to apply the concept of cause with reasonable accuracy, just as most of us can drive a car or operate a computer without being able to give a convincing account of the way they work'.

6
Avoidable Loss

6.1 Introduction

This chapter describes the application of the law of mitigation to 'avoidable loss'. The orthodox account is that the avoidable loss rule applies where the claimant's conduct was unreasonable. Instead, this chapter argues that the reasonableness test conceals two distinct rules: the restoration rule and the abnormality rule. These rules enable a more detailed description of the law as it is. Where applicable, the rules provide for a counterfactual assessment of damages as if the claimant had restored the non-breach position in the normal way. Where neither rule applies, the assessment of the claimant's factual loss is not displaced. The final section resolves three further puzzles that arise on the orthodox account of the avoidable loss rule: its universal application; its temporal scope; and procedural matters.

6.2 Application

The orthodox account of mitigation provides that the avoidable loss rule applies where the claimant acted unreasonably. The previous chapter exposed various problems with this understanding. The main problem was that the description of the reasonableness test as a question of fact hides an almost complete lack of guidance as to how the avoidable loss rule is applied. The restoration and abnormality rules enable a more detailed description of the how the law of mitigation is applied. In particular, whereas the issues of choice and descriptive abnormality are not specifically legal (and in this sense are 'questions of fact'), the restoration rule raises an important question of law because it depends on a careful assessment of the claimant's non-breach position.

6.2.1 The restoration rule

The restoration rule applies where the claimant made a choice not to restore the non-breach position. It does not matter whether or not this choice was 'reasonable' in the ordinary meaning of being 'sensible'; the claimant's conduct is an intervening cause because it is voluntary and departs from a legal norm. The claimant is responsible for the outcome of its choice, regardless of whether the choice was blameworthy or praiseworthy. Most of the cases applying the restoration rule involve inaction by the claimant: for example, a choice not to repair, replace or extricate from the breach. The restoration rule occasionally applies where claimant refuses the defendant's offer of performance, or conversely presses for performance in circumstances where it is obviously futile. These sub-categories are not distinct rules; they are all applications of the same restoration rule.

6.2.1.1 *Choice not to repair*

Where the defendant has damaged the claimant's property, or provided defective goods or services, the claimant may be able to restore the non-breach position by repairing the damaged property; by analogy, personal injuries may be treated. If the claimant makes a choice not to seek repair (and does not replace either), it will be held to have acted 'unreasonably'. Such cases are usually expressed as applications of mitigation, although occasionally the claimant's inaction is instead expressed as a 'supervening act'.[1] Where the claimant has chosen to delay repairs, the issue is most often characterised in terms of the 'date of assessment'.[2] Whatever the characterisation, the rule is that the defendant is not responsible for the outcome of the claimant's choice not to conduct the repairs.

[1] See eg *Anderson (Commander of the Flying Fish) v Hoen (The Flying Fish)* (1865) 16 ER 29 (PC); *Grant v Owners of the Egyptian (The Egyptian)* [1910] AC 400 (HL); *Farr v Butters Bros* [1932] 2 KB 606 (CA); *Lambert v Lewis* [1982] AC 225 (HL).

[2] See eg *Radford v De Froberville* [1977] 1 WLR 1262 (Ch) 1285-86 (Oliver J); *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 (CA) 451 (Megaw LJ). See further Andrew Dyson and Adam Kramer, 'There is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 LQR 259, 268-69.

Schering Agrochemicals v Resibel exemplifies the choice not to repair.[3] The defendants supplied defective parts to the claimants. The claimants, who were aware of the defects, nevertheless chose not to repair or replace the parts. Three weeks later, the defects resulted in an explosion and serious fire. At first instance, Hobhouse J held that the claimants 'had an opportunity to mitigate or avoid their loss which they unreasonably failed to take'.[4] In the Court of Appeal, Purchas LJ emphasised the voluntariness of the claimant's choice not to repair the defect.[5] As Tomlinson LJ subsequently summarised, 'The basis for denying recovery … is that continuing to operate the production line in the knowledge that the fire detection or suppression system is defective is a voluntary act which can be held to be the cause of the subsequent damage'.[6]

The restoration rule also explains the application of mitigation where the claimant chose not to undergo available and effective medical treatment. In *McAuley v London Transport Executive*, the Court of Appeal held that the claimant had acted unreasonably where he refused an operation that would have given him a ninety per cent chance of restoring the use of his hand.[7] The rule does not seek to prescribe that the claimant *should* undergo treatment.[8] Instead, as Lord M'Laren held in *Donnelly v William Baird*, 'The question is whether … his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical

[3] *Schering Agrochemicals Ltd v Resibel NV SA* (QB, 4 May 1991). See also, on almost identical facts, *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137 (CA). See further *Tucker v Linger* (1882) 21 Ch D 18 (CA) 30 (Kay J); *Minchburn v Peck* (1988) 20 HLR 392 (CA) 397-98 (Dillon LJ), 398 (Bingham LJ); *Commercial Fibres (Ireland) Ltd v Zabaida* [1975] 1 Lloyd's Rep 27 (QB) 29-30 (Donaldson J); *Trac Time Control Ltd v Moss Plastic Parts Ltd* [2004] EWHC 3298 (TCC) [182] (Grenfell J): 'if [the claimant] becomes aware of a defect in goods, but continues to use the goods notwithstanding this knowledge, there is a break in the chain of causation from that point on'.

[4] *Schering Agrochemicals (QB)* (n3).

[5] *Schering Agrochemicals Ltd v Resibel NV SA* (CA, 26 November 1992).

[6] *Trebor Bassett Holdings Ltd v ADT Fire & Security plc* [2012] EWCA Civ 1158, [2012] BLR 441 [67].

[7] *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500 (CA) 505. See also *Marcroft v Scruttons* [1954] 1 Lloyd's Rep 395 (CA). Cf *Steele v Robert George & Co* [1942] AC 497 (HL) and *Richardson v Redpath Brown & Co* [1944] AC 62 (HL), where the refusal of medical treatment was held not to be unreasonable because it was not clear that the treatment would be effective.

[8] See further Section 4.2.1.

treatment'.[9] Where the refusal of treatment is not voluntary, the restoration rule will not apply.[10]

The same rule applies in circumstances analogous to physical repair. In *Walker v Medlicott*, solicitors were negligent in drafting a will.[11] The Court of Appeal held that 'the courts can reasonably expect the plaintiff to mitigate his damage by bringing proceedings for rectification of the will'.[12] In *Toepfer v Warinco*, the claimant contracted to buy fine-ground meal but course-ground was delivered.[13] Brandon J held that the claimant had failed to mitigate because, although it knew of the error, it did not inform the defendants and so continued to receive goods of the wrong specification.[14] In *Symrise v Baker*, the defendants negligently exposed the claimants to a potential tax liability. Burton J rejected the claimants' tax recovery claim on the basis that they 'acted unreasonably in abandoning the proceedings which they had a very good chance of winning'.[15]

6.2.1.2 *Choice not to replace*

The claimant may be able to restore the non-breach position by seeking a replacement for performance of the defendant's obligation.[16] Where there is an available market for replacement goods, shares or land, judges usually invoke the 'market rule' rather than

[9] *Donnelly v William Baird & Co Ltd* (1908) 15 SLT 799 (CSIH) 801.

[10] Section 5.4.3.

[11] *Walker v Geo H Medlicott & Son* [1999] 1 WLR 727 (CA). The claim was brought in the tort of negligence following *White v Jones* [1995] 2 AC 207 (HL).

[12] *Walker* (n11) 739 (Sir Christopher Slade). See also 742 (Mummery LJ); 743 (Simon Brown LJ). The decision on this point was obiter because it was held that the solicitors did not owe a duty of care.

[13] *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep 569 (QB).

[14] If they had done so, 'the [sellers] would immediately have stopped loading coarse-ground meal, altered the grinding to fine, and thereafter delivered only fine-ground meal': ibid 578 (Brandon J).

[15] *Symrise AG v Baker & McKenzie* [2015] EWHC 912 (Comm), [2016] 1 All ER (Comm) 603 [87]. See also *Joyce v Bowman Law Ltd* [2010] EWHC 251 (Ch), [2010] PNLR 22 [118] (Vos J); *Welford v EDF Energy Networks (LPN) plc* [2007] EWCA Civ 293, [2007] 2 P & CR 15 [34] (Thomas LJ).

[16] In relation to contractual obligations, the replacement will be of the promised performance; in relation to tortious obligations, the replacement will be of whatever goods or services the claimant would have had if the breach had not occurred.

'mitigation', although it is frequently acknowledged that these two rules are related.[17] Occasionally, judges have reasoned these cases directly in terms of mitigation rather than the market rule.[18] In relation to replacement of money or services, mitigation is often invoked directly. It is important to reiterate the significance of the claimant's *choice* not to restore the non-breach position. Where the claimant had no choice, for example if it was unaware of the breach or if no replacement was available, the restoration (or 'market') rule has no application.

Where the claimant chooses not to resort to an available market for replacement, judges often express the assessment of damages as an application of the 'market rule'.[19] McGregor describes this as 'built-in mitigation'.[20] In *The Marine Star*, Mance J reasoned that 'An available market is a means of mitigating any loss otherwise contemplated which has become incorporated into the general measure of recovery'.[21] This principle is widely applicable. In *Smith New Court Securities v Citibank*, Lord Steyn held that 'the same legal principle must govern sales of shares, goods, a business or land'.[22] The rule was established in the early nineteenth century,[23] and the prima facie measures under the Sale of Goods Acts merely codify the common law position.[24] In particular, these statutory measures reflect the

[17] See eg text to n21.

[18] See eg *Bulkhaul Ltd v Rhodia Organique Fine Ltd* [2008] EWCA Civ 1452, [2009] 1 Lloyd's Rep 353 [4], [26] (Smith LJ).

[19] See eg *Radford* (n2) 1285-86 (Oliver J); *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 [57] (Lord Carswell); *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2010] EWHC 903 (Comm), [2011] 2 Lloyd's Rep 360 [65] (Steel J); *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) [166] (Andrew Smith J).

[20] Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 332. See also Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [9-034].

[21] *Coastal (Bermuda) Petroleum Ltd v Vtt Vulcan Petroleum SA (The Marine Star)* [1994] CLC 1019 (QB) 1025.

[22] *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 279 (Lord Steyn). See also *The Golden Victory* (n19) [80] (Lord Brown), noting its application to 'building or repairing contracts' and 'breached charterparties'.

[23] See eg *Gainsford v Carroll* (1824) 2 B & C 624, 107 ER 516, 624-25; *Shaw v Holland* (1846) 15 M & W 136, 153 ER 794, 798 (Parke B); *Borries v Hutchinson* (1865) 18 CB (NS) 445, 144 ER 518 (CP) 524 (Erle CJ).

[24] Sale of Goods Act 1979, ss50(3), 51(3), 53(3). See *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082 [16] (Lord Sumption), noting that these provisions 'reproduce the corresponding provisions of the Sale of Goods Act 1893, and reflect common law principles which had already been

assumption that in a liquid market the claimant can resort to the market immediately at the date of breach.[25]

The market rule, although not always expressed in terms of mitigation, is a straightforward instantiation of the restoration rule. For example, where the claimant receives defective goods, it can restore the non-breach position by reselling these goods and then purchasing replacement goods from the market. In *Kwei Tek Chao v British Traders*, Devlin J held that 'if [the claimant] chooses not to sell the goods he is not to be put in any better or worse position by delaying for his own purposes'.[26] In *The Elena D'Amico*, Goff J reasoned that 'the decision not to take advantage of the available market is the independent decision of the innocent party, independent of the wrongdoing which has taken place'.[27] The same emphasis on choice is clear in the cases on shares,[28] financial products,[29] charterparties,[30] businesses,[31] and land.[32]

established at the time of the earlier Act'. See also MD Chalmers, *The Sale of Goods: Including the Factors Act 1889* (Clowes 1890) iv.

[25] *The Golden Victory* (n19) [79] (Lord Brown); *Bunge* (n24) [17] (Lord Sumption). See also *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), [2013] 2 Lloyd's Rep 653 [18] (Teare J); *Lakatamia Shipping Co Ltd v Su* [2014] EWHC 3611 (Comm), [2015] 1 Lloyd's Rep 216 [111] (Cooke J); *Tharros Shipping Co Ltd v Bias Shipping Ltd (The Griparion) (No2)* [1994] 1 Lloyd's Rep 533 (QB) 537 (Rix J). It follows that where the claimant was unable to resort to the market at the date of breach, the prima facie measure will not apply: *The Marine Star* (n21) 1025 (Mance J).

[26] *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 QB 459 (QB) 494.

[27] *Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB) 88.

[28] *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC) 179 (Lord Wrenbury); *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) [186] (Leggatt J).

[29] *Primavera v Allied Dunbar Assurance plc* [2002] EWCA Civ 1327, [2003] Lloyd's Rep PN 14 [40] (Mance LJ), [52] (Latham LJ) (pension fund); *Dampskibsselskabet Norden A/S v Andre & Cie SA* [2003] EWHC 84 (Comm), [2003] 1 Lloyd's Rep 287 [42] (Toulson J) (freight swap agreement).

[30] *The Elena d'Amico* (n27) 87 (Goff J); *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] EWCA Civ 901, [2008] 1 All ER (Comm) 685 [102] (Rix LJ); *Glory Wealth Shipping Pte Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819 (Comm), [2012] 1 All ER (Comm) 402 [16] (Blair J); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep 383 [49] (Christopher Clarke LJ).

[31] *Downs v Chappell* [1997] 1 WLR 426 (CA) 437 (Hobhouse LJ).

[32] *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289 (CA) 317 (Chadwick LJ), 321 (Simon Brown LJ).

It follows from this reasoning that the market rule will be irrelevant where the claimant had no choice to resort to the market.[33] In *The New Flamenco*, the Court of Appeal emphasised that the market rule 'depends on there being an available market which the innocent party *decides for reasons of his own* to ignore'.[34] Besides (most obviously) where there is no available market,[35] the claimant will also have no choice to resort to the market where: it was unaware of the breach,[36] it was 'locked-in' to another transaction,[37] or it could not afford to resort to the market.[38] In each of these circumstances, the so-called 'breach-date rule' has no application, and market value will be assessed 'as at' the date when the claimant first had the opportunity to resort to the market (if at all).

The 'reasonableness' of the claimant's choice not to replace is irrelevant.[39] The issue is whether the decision was voluntary (and thus independent), not whether it was a 'sensible business decision'.[40] As Romer LJ argued, 'a seller who decided not to take advantage of [the market] could scarcely charge the buyer with a further deterioration in price, on the ground that he had behaved reasonably, if he acted upon his own initiative'.[41] Similarly, as Devlin J put it in *Biggin v Permanite*, 'The man who buys shares on the stock exchange in the belief that they will go up is acting quite as reasonably as the man who sells the same shares in the belief that they will go down'.[42] By choosing not to seek replacement

[33] See further Dyson and Kramer, 'There is No "Breach Date Rule"' (n2) 273-80.

[34] *The New Flamenco (CA)* (n30) [25] (Longmore LJ) (emphasis added).

[35] n230.

[36] n224 to n229. See further Dyson and Kramer, 'There is No "Breach Date Rule"' (n2) 273-75.

[37] n231. See further ibid 276-77.

[38] n232. See further ibid 277.

[39] *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] 1 Lloyd's Rep 747, [1999] CLC 761 (QB) 761 (Toulson J).

[40] *The Elena d'Amico* (n27) 89 (Goff J). This part of Goff J's judgment was repeated in *The Wren* (n30) [16] (Blair J) and *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2014] EWHC 1547 (Comm), [2015] 1 All ER (Comm) 1205 [64] (Popplewell J).

[41] *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65 (CA) 70-71 (Romer LJ).

[42] *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 (KB) 429.

performance, the claimant is said to be 'speculating' on the market and 'does so at his own risk'.[43]

The restoration (or 'market') rule does not prescribe that the claimant *should* seek a replacement. In *The Elena D'Amico*, Goff J stressed that the claimant is 'fully entitled' not to resort to the market.[44] Nevertheless, the rule is sometimes expressed prescriptively. For example, in *Melachrino v Nickoll*, Bailhache J held that 'It is the duty of the buyer to go into the market and buy against the defaulting seller … If the buyer does not perform his duty in this respect the seller is none the less entitled to have damages assessed as at the date when a fresh contract might and ought to have been made'.[45] It is also sometimes suggested that the claimant 'must', 'should' or 'ought to' seek a replacement.[46] These terms are misleading, because the rule is attributive not prescriptive.[47]

Where the claimant chooses not to seek a replacement, this choice is regarded as an intervening cause for which the defendant is not responsible, even though of course 'It is perfectly true that [the claimant's] decision is made in the context of a pre-existing breach'.[48] In *Bunge v Nidera*, Lord Toulson expressed this causal explanation perfectly, linking the claimant's choice to the attribution of responsibility:

> The *option* to re-enter or stay out of the market arises from the breach, but it does not follow that there is a causal connection between the breach and his *decision* whether to re-enter or to stay out of the market, so as to make the guilty party responsible for that decision and its consequences.[49]

In *SAAMCo*, Lord Hoffmann similarly held that 'where there is an available market, any additional loss which the buyer suffers through not having immediately bought equivalent

[43] *The Golden Victory* (n19) [79] (Lord Brown). See also *Jamal* (n28) 179 (Lord Wrenbury); *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH* [1993] 2 Lloyd's Rep 1 (CA) 11 (Bingham LJ), 13 (Dillon LJ); *The Achilleas (CA)* (n30) [102] (Rix LJ); *Bunge* (n24) [80] (Lord Toulson).

[44] *The Elena d'Amico* (n27) 87.

[45] *Melachrino v Nickoll & Knight* [1920] 1 KB 693 (KB) 697.

[46] See eg *The Golden Victory* (n19) [79] (Lord Brown); *Bunge* (n24) [17] (Lord Sumption); *The New Flamenco (CA)* (n30) [49] (Christopher Clarke LJ). See also McGregor, *Damages* (n20) [9-037]; HG Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [26-090].

[47] Section 4.2.1.

[48] *The Elena d'Amico* (n27) 89 (Goff J).

[49] *Bunge* (n24) [80] (emphasis in original). See also *Norden* (n29) [42] (Toulson J).

goods at the market price is prima facie caused by his own change of mind'.[50] Again, the emphasis here is on choice rather than reasonableness. As Leggatt J summarised in *Hirtenstein v Hill Dickinson*, 'As with any "failure to mitigate", the essential point is that the decision whether or not to resort to the market is a voluntary choice made by the claimant which breaks the chain of causation from the defendant's breach'.[51]

The restoration rule also applies where the claimant chose not to replace money. In *Sempra Metals v Inland Revenue Commissioners*, the House of Lords established that claimants may recover damages for late payment of debts, 'subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth'.[52] In quantifying damages for late payment, in *Equitas v Walsham Brothers*, Males J held that where the claimant chooses not to resort to the market to seek a loan, it 'is likely to be met with the defence that … it has failed to mitigate by borrowing in order to replace the money lost'.[53] Males J added, consistently with the importance of choice, that mitigation would not apply where the claimant 'did not know and should not reasonably have known that the money was missing'.[54]

There are numerous cases in which mitigation has been applied to a choice not to seek a replacement for the defendant's service.[55] In *Ansett v Marshall*, the defendants wrongfully refused to carry the claimant on board its ship from England to Australia, but offered passage on another ship sailing one week later.[56] Crompton J rejected a claim for the cost of the claimant's accommodation in England after the time when the second ship departed, on

[50] *South Australia Asset Management Corp v York Montague Ltd ('SAAMCo')* [1997] AC 191 (HL) 221.

[51] *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm) [117]. See also *Bunge* (n24) [17] (Lord Sumption), [80] (Lord Toulson); *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [35] (Leggatt J).

[52] *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [94] (Lord Nicholls). See also [16] (Lord Hope), [132] (Lord Scott).

[53] *Equitas Ltd v Walsham Bros & Co Ltd* [2013] EWHC 3264 (Comm), [2014] Lloyd's Rep IR 398 [123]. See also *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2011] QB 477 [58] (Toulson LJ).

[54] *Equitas* (n53) [123]. On latent breaches, see further text to n224.

[55] See also *Jolliffe v Charles Coleman & Co* (1971) 219 EG 1608 (QB)

[56] *Ansett v Marshall* (1853) 22 LJ (QB) 118. See also *Jolliffe* (n55).

the basis that the claimant could have taken the subsequent voyage to replace the first.[57] Similarly in *Wilson v Newport Dock*, the defendants failed to provide the claimant's ship with a safe dock.[58] The court held that it was unable to decide whether the defendants were responsible for damage to the ship, because the jury had made no finding as to whether the claimant could have obtained an alternative place of safety.[59]

Finally, the restoration rule also explains the legal approach to mitigation by employees following wrongful dismissal. It was established by Erle CJ in *Beckham v Drake* that 'it is the duty of the servant to use diligence to find another employment'.[60] Of course, the claimant is not really under any duty (legal or otherwise) to seek re-employment; it may be entirely sensible to retire instead, and no-one could blame the claimant for doing so. The proper question is whether the claimant made a choice not to restore its non-breach position (as nearly as possible) by seeking replacement employment. Where there is an available market for employment on similar terms, McGregor suggests the 'incorporation of the normal mitigating step into the normal measure of damages'.[61] More complex issues arise where the claimant refuses a specific offer of re-employment by the defendant.[62]

6.2.1.3 *Choice not to extricate*

Where the claimant would not have entered into a transaction but-for the breach, the claimant may be able to restore the non-breach position by 'extricating' itself from that transaction. The restoration rule will apply where the claimant chooses not to extricate

[57] *Ansett* (n56).

[58] *Wilson v Newport Dock Co* (1865-66) LR 1 Ex 177 (Ex Ch).

[59] Ibid 191-92.

[60] *Beckham v Drake* (1849) 2 HL Cas 579, 9 ER 1213, 606-07. See also *Geys v Société Générale* [2012] UKSC 63, [2013] 1 AC 523 [79] (Lord Wilson).

[61] McGregor, *Damages* (n20) [9-036]. Despite there being an available market, the Court of Appeal relied directly on mitigation in *Ministry of Defence v Wheeler* [1998] 1 All ER 790 (CA).

[62] See eg *Brace v Calder* [1895] 2 QB 253 (CA) and *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] ICR 1079, discussed at text to n94.

despite being aware of the breach.[63] These cases seem to raise the most difficulty within the law of mitigation. First, the tension with the reasonableness test is often greatest in this context because it may be entirely 'sensible' for the claimant to adopt the transaction rather than extricating;[64] however, reasonableness (in this sense) is irrelevant to the claimant's responsibility for its choice not to extricate.[65] Second, the application of the compensatory principle demands a careful assessment of what exactly would have happened but-for the breach, as a precursor to assessing the steps that would restore the non-breach position.

Downs v Chappell illustrates the distinction between reasonableness and choice. The claimants were induced to purchase a business based on the defendant's fraudulent misrepresentations.[66] After discovering that they had been misled, the claimants rejected two offers to resell the business. The business subsequently declined further in value. Hobhouse LJ held that 'any losses which the plaintiffs suffered after [they could have sold] were not caused by the defendants' torts but by the plaintiffs' decision not to sell out'.[67] The claimants argued that they had not acted 'unreasonably' in rejecting the offers. However, Hobhouse LJ emphasised that 'Even accepting that they acted reasonably, the fact remains that it was their choice, freely made, and they cannot hold the defendants responsible if the choice has turned out to have been commercially unwise'.[68]

[63] See eg *Waddell v Blockey* (1879) 4 QBD 678 (CA) 681 (Bramwell LJ); *Downs* (n31) 437 (Hobhouse LJ); *Bristol & West Building Society v Fancy & Jackson* [1997] 4 All ER 582 (Ch) 623 (Chadwick J); *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm), [2010] 1 CLC 284 [78] (Blair J); *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [557] (Hamblen J).

[64] Accordingly, it is inaccurate to say that the claimant 'should' have extricated: cf *Patel v Hooper & Jackson* [1999] 1 All ER 992 (CA) 1802 (Nourse LJ).

[65] On the other hand, if the claimant had no choice to extricate because it was 'locked in' to the transaction, then the restoration rule will not apply: see eg *Smith New Court* (n22); *Patel* (n64).

[66] *Downs* (n31).

[67] Ibid 437. Notably this conclusion was unaffected by the fraudulent nature of the wrongdoing: see further Section 6.4.1.2.

[68] Ibid 437. See also *Waddell* (n63) 681 (Bramwell LJ): 'It was for the [claimant] to consider whether he would sell it or retain it. The retention of it was his own voluntary act'; *Cassa di Risparmio* (n63) [557] (Hamblen J): 'Subsequent declines in value of the instrument are caused by the free choice to hold onto the asset … not by the misrepresentation'.

On this basis, the restoration rule should have been applied in *Esso Petroleum v Mardon*.[69] The defendant misrepresented the sales volume of a petrol station leased to the claimant.[70] Despite the claimant's best efforts,[71] the business operated at a significant loss. Although the claimant had an opportunity to quit the tenancy, he decided to continue at a renegotiated rent. Lawson J denied damages for the further losses incurred after the renegotiation, on the basis that that the claimant's decision to continue was 'on an entirely fresh basis'.[72] The Court of Appeal disagreed, holding that the claimant had not 'failed to mitigate'[73] because in persevering with the business he had 'acted most reasonably'.[74] Lawson J's approach was correct, because the claimant made a voluntary and informed choice not to quit the lease when he had the opportunity.[75]

Watts v Morrow illustrates the importance of assessing the non-breach position. The defendant surveyors negligently failed to warn about repairs required to a property that the claimants were thinking of buying.[76] The trial judge awarded damages for the cost of repairs on the basis that the claimants 'acted entirely reasonably in deciding to repair the premises rather than resell'.[77] The Court of Appeal overturned the award, correctly emphasising that the damages should 'put the plaintiff into as good a position as if the contract for the survey had been properly fulfilled'.[78] The defendants had not warranted that the property was free from defects.[79] If the survey had been performed carefully, the claimants would not have

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

[70] See ibid 828 (Ormrod LJ).

[71] Lord Denning noted that the claimant 'put all his work and endeavour into [the business]. No one could have done more to make it a success': ibid 816.

[72] Ibid 821 (quoted by Lord Denning). See also Shaw LJ at 833.

[73] Ibid 833 (Shaw LJ).

[74] Ibid 821 (Lord Denning). See also 829 (Ormrod LJ), 833 (Shaw LJ).

[75] This responsibility cuts both ways: if the business had proved profitable after the renegotiation, this would not have reduced the damages. See Section 7.2.1.3.

[76] *Watts v Morrow* [1991] 1 WLR 1421 (CA).

[77] Recorded by Ralph Gibson LJ at ibid 1428. Indeed, the defendants conceded that the claimant's conduct was 'reasonable': 1432 (Ralph Gibson LJ). See also 1445 (Bingham LJ), holding that the decision to repair rather than resell was 'no doubt for good reason'.

[78] Ibid 1434 (Ralph Gibson LJ).

[79] Ibid 1435 (Ralph Gibson LJ).

purchased the property at all.[80] In these circumstances, as Ralph Gibson LJ correctly held that:

> The fact that it is reasonable for the plaintiff to retain the property and to do the repairs seems to me to be irrelevant to determination of the question whether recovery of the cost of repairs is justified in order to put the plaintiff in the position in which he would have been if … the promise to make a careful report, had been performed.[81]

The restoration rule applied because the claimants chose not to take the steps that would have restored the non-breach position (ie reselling the property). Bingham LJ similarly emphasised that 'If, on learning of the defects … a purchaser decides, for whatever reason, to retain the house and not move out and sell, I would question whether any loss he thereafter suffers, at least in the ordinary case, can be laid at the door of the contract-breaker'.[82] Although the cost of repairs was 'reasonably' incurred and would not have been incurred but-for the breach (because the claimants would not have bought the property), the repairs were not steps taken to restore the non-breach position. The defendants were responsible for putting the claimants in the position as if they had never purchased the property, but were not responsible for the consequences of the claimants' choice not to extricate.

There is a further complication. The claimant's choice not to extricate is only relevant where the claimant would not have entered into the transaction but-for the breach (a 'no transaction' case).[83] Such cases must be distinguished from those in which the claimant would still have entered into the transaction but on different terms (a 'different terms' case).[84] The importance of this distinction emerges directly from the compensatory principle, which requires an assessment of the non-breach position; nevertheless, judges

[80] Ibid 1425-26, 1435 (Ralph Gibson LJ).

[81] Ibid 1435-36.

[82] Ibid 1445.

[83] *Hayes v James & Charles Dodd* [1990] 2 All ER 815 (CA) 818-19 (Staughton LJ); *Downs* (n31) 440 (Hobhouse LJ). In *SAAMCo* (n50), Lord Hoffmann correctly clarified that one must still assess whether the claimant would hypothetically have entered into other transactions and if so on what terms: 218 (Lord Hoffmann).

[84] See eg *Philips v Ward* [1956] 1 WLR 471 (CA); *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 (CA).

have occasionally overlooked this step and thus failed to find the relevant facts.[85] Whilst the restoration rule will very often be applicable in a 'no transaction' case (where it was possible to extricate), it will only rarely be applicable in a 'different terms' case because the opportunity to renegotiate will usually have passed by the time the breach was discovered.

6.2.1.4 *Refusal of the defendant's offer*

The leading texts have often puzzled over whether the claimant will be held to have acted unreasonably where it refuses an offer made by the defendant after the breach.[86] However, a simple application of the reasonableness test fails to draw important distinctions in this regard. It is important to disaggregate three different types of case: first, where the refusal of the defendant's offer amounts to a choice not to restore the non-breach position at all; second, where the defendant's offer would not have succeeded in restoring the non-breach position anyway; and third, where the refusal amounts merely to a choice to adopt a different mode of restoring the non-breach position. It is only in relation to the first type of case that the restoration rule will apply. Occasionally, the abnormality rule may apply to the third type of case; these cases are discussed separately below.[87]

The first type of case is exemplified by the leading authority of *Payzu v Saunders*.[88] The defendants agreed to deliver crêpe de chine (a type of silk material) to the claimants in instalments. However, in repudiatory breach of contract the defendants subsequently refused to deliver unless the claimants paid cash on delivery. The claimants refused this offer. In the Court of Appeal, Bankes LJ and Scrutton LJ held that the claimants' refusal was an unreasonable failure to mitigate.[89] The decision can be explained on the basis that, as the

[85] See eg *Bacciottini v Gotelee & Goldsmith* [2016] EWCA Civ 170 [29] (Davis LJ); *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359 [14] (Briggs LJ).

[86] McGregor, *Damages* (n20) [9-047]-[9-058], [9-070]-[9-073]; Michael G Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398 411-23; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 123-24.

[87] Section 6.2.2.1.

[88] *Payzu v Saunders* [1919] 2 KB 581 (CA).

[89] Ibid 588-89 (Bankes LJ); 589 (Scrutton LJ).

trial judge recorded, 'the market was so bare of goods as to render purchases impracticable'.[90] In these circumstances, the claimants' refusal of the defendant's offer amounted to a choice not to restore the non-breach position at all, because it had no other way of obtaining replacement crêpe de chine.

Similarly, in *The Solholt*, the claimants agreed to buy the defendant's vessel, but the vessel was delivered late and the claimants terminated the contract.[91] The defendants subsequently offered again to sell the ship to the claimants on the same terms. The Court of Appeal held that the claimants' refusal of this offer was an unreasonable failure to mitigate. However, importantly, Sir John Donaldson MR noted that 'If [the claimants] could have found a different but identical ship, clearly it would have been reasonable that they should have bought it and the price of that purchase would have established the measure of their loss. However there is no suggestion that any such vessel was available'.[92] Again, in these circumstances, the claimant's refusal of the defendant's offer amounted to a choice not to restore the non-breach position at all.

Several other 'unreasonable' refusals to deal with the defendant are also best explained in this way.[93] For example in *Wilding*, the claimant employee's refusal of the defendant's offer of re-employment was held unreasonable in circumstances where the employee 'had little prospect of obtaining other work' and 'had not applied for other jobs'.[94] In some other cases it is unclear whether there was an available market for replacement, because the judgment does not record any relevant findings.[95] However, in such cases the point remains that even if there was a market, the claimant did not attempt to avail itself of it. In these circumstances, 'it is generally reasonable to treat the [defendant], although he is

[90] Ibid 585 (McCardie J). See further discussion in Bridge, 'Mitigation of Damages in Contract' (n86) 413.

[91] *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605 (CA).

[92] Ibid 609.

[93] See eg *Ansett* (n56); *Owners of Mitera Marigo v Owners of Fritz Thyssen (The Fritz Thyssen)* [1968] P 255 (CA); *Cometson v Merthyr Tydfil CBC* [2014] EWHC 419 (Ch) [123] (Morgan J).

[94] *Wilding* (n62) [20] (Potter LJ).

[95] See eg *Brace* (n62).

in default, as one of those who constitute the market' and thereby to regard the refusal of the defendant's offer as a choice not to restore the non-breach position at all.[96]

In the second type of case, the refusal of the defendant's offer is not unreasonable because the offer would not have succeeded in restoring the claimant's non-breach position anyway.[97] The leading example is *Strutt v Whitnell*.[98] The claimant buyer sought damages in relation to the sale of a house where (in breach of contract) the property was not conveyed with vacant possession. The claimant refused the defendant's offer to re-convey the property. The Court of Appeal held that this refusal was not unreasonable. The explanation for the decision is that re-conveying the house to the defendant would not have restored the claimant to the same position as if the contract had been performed;[99] instead it would have put the claimant in the position as if no contract had been entered into.

In *Activa Europe v Pressure Seal Solutions*, the defendant, having failed to pay for goods, argued that the claimant had acted unreasonably in refusing its offer to return them.[100] Patten LJ held that the decision in *Strutt* 'seems to me to have an obvious application to this case', rejecting the suggestion in *The Solholt* that *Strutt* turned on 'its own special facts'.[101] Patten LJ correctly reasoned that 'there is an obvious difference between taking what steps are available to reduce the loss under the contract caused by the breach and in effect reversing the transaction'.[102] This important distinction is entirely obscured by the general test of whether the claimant's refusal was 'unreasonable'. Patten LJ's reasoning affirms the importance of carefully assessing the non-breach position before applying mitigation.

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[96] *Sous Secretaire d'Etat au Ministere des Travaux Publiques Charge de la Marine Marchande v Barnett* (1924) 19 Ll L Rep 120 (KB) 121 (Roche J).

[97] The claimant's refusal of the defendant's offer has also been held reasonable where the terms of the offer were unclear: *Copley v Lawn* [2009] EWCA Civ 580, [2010] 1 All ER (Comm) 890; *Manton Hire and Sales Ltd v Ash Manor Cheese Co Ltd* [2013] EWCA Civ 548.

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

[99] On the facts, the only way to restore the non-breach position would have been to negotiate the removal of the protected tenant.

[100] *Activa DPS Europe Sarl v Pressure Seal Solutions Ltd* [2012] EWCA Civ 943, [2012] 3 CMLR 33.

[101] Ibid [36], citing *The Solholt* (n91) 609 (Sir John Donaldson MR).

[102] *Activa* (n100) [36].

There are several other examples of the second type of case.[103] Such cases commonly arise in relation to contracts of employment, where the defendant employer's offer of re-employment (following wrongful dismissal) is at a lower grade than the employee's original employment.[104] The only significant outlier is *Houndsditch Warehouse v Waltex*.[105] In that case, the claimant buyer refused the defendant's offer to accept a return of defective goods. Stable J relied on *Payzu* to hold that 'In refusing the offer, lock stock and barrel … [the claimants] were not acting reasonably'.[106] However, unlike in *Payzu*,[107] the defendant's offer in *Houndsditch* would not have restored the non-breach position; it would merely have put the claimant in the same position as if the contract had never been entered into.[108] The judge's reliance on 'reasonableness' obscured this important distinction and led to the wrong decision.

6.2.1.5 *Pressing for performance*

At the other end of the spectrum, the claimant may sometimes continue to press for performance from the defendant following a breach of contract. For example, the claimant may give the defendant additional time to perform,[109] or seek to compel performance through a claim for specific performance.[110] Of course, such attempts to press for performance will not usually be regarded as a choice not to restore the non-breach position,

[103] See eg *Heaven and Kesterton v Etablissements Francois Albiac* [1956] 2 Lloyd's Rep 316 (QB); *Truk (UK) Ltd v Tokmakidis GmbH* [2000] 2 All ER (Comm) 594 (QB).

[104] See eg *Yetton v Eastwood Froy Ltd* [1967] 1 WLR 104 (QB). See further McGregor, *Damages* (n20) [9-056]; Adam Kramer, *The Law of Contract Damages* (Hart 2014) 402.

[105] *Houndsditch Warehouse Co Ltd v Waltex Ltd* [1944] KB 579 (KB). See also *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 CLC 80. This decision may be explicable on the distinct ground that the claimant's refusal was descriptively abnormal, such that the abnormality rule applied.

[106] *Houndsditch* (n105) 581.

[107] n88.

[108] In this respect, the decision in *Houndsditch* is inconsistent with *Strutt* (n98).

[109] See eg *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere SA* [1979] 2 Lloyd's Rep 98 (CA); *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm); *Lakatamia* (n25) [117] (Cooke J).

[110] See eg *Johnson v Agnew* [1980] AC 367 (HL).

because their express aim is to secure restoration from the defendant. Where the claimant has pressed for performance, damages are often said to be assessed as at the date of trial.[111] The reason why the so-called breach date rule is disapplied in these circumstances is that the restoration rule has no application so there is nothing to displace the assessment of factual loss.

Occasionally the restoration rule may apply where pressing for performance was futile.[112] In *Habton Farms v Nimmo*, the defendant wrongfully repudiated a contract to buy the claimant's horse.[113] Whilst the claimant was still pressing for performance, the horse died. Clarke LJ held that because 'the claimant acted reasonably in relying upon the "contract" … the fact that the horse was not sold during November arose out of the first defendant's breach … and was not independent of it'.[114] However, he recognised that 'There would of course come a time at which it could properly be held that the decision not to sell the horse was a market decision independent of the breach'.[115] In other words, once it becomes obvious that the defendant will not perform, the choice to continue pressing for performance instead of resorting to the market may amount to a choice not to restore the non-breach position.

The mere fact that the claimant's attempt to press for performance was ultimately unsuccessful does not itself evince a choice not to restore the non-breach position. For example, in *Suleman v Shahsavari*, the claimant pressed unsuccessfully for specific performance and in the meantime did not resort to the market.[116] Park J nevertheless concluded that the claimant 'has conducted himself entirely reasonably in seeking to obtain specific performance, for all that I have concluded that he cannot have it. He … cannot be accused of having unreasonably failed to mitigate his damage'.[117] In order to trigger the

[111] See eg ibid 400-01 (Lord Wilberforce). See also *Hickman v Haynes* (1874-75) LR 10 CP 598 (CP); *Wroth v Tyler* [1974] Ch 30 (Ch); *Malhotra v Choudhury* [1980] Ch 52 (CA).

[112] See further Kramer, *Contract Damages* (n104) 377.

[113] *Habton Farms v Nimmo* [2003] EWCA Civ 68, [2004] QB 1.

[114] Ibid [97]. See also [126]-[127] (Auld LJ). Jonathan Parker LJ dissented on the issue of damages.

[115] Ibid [100]. See also [128] (Auld LJ).

[116] *Suleman v Shahsavari* [1988] 1 WLR 1181 (Ch).

[117] Ibid 1183.

restoration rule, the claimant's decision to press for performance must have been so obviously futile that it effectively amounted to a choice not to seek restoration at all.

6.2.2 The abnormality rule

The abnormality rule applies where the claimant made a choice to act abnormally. If the abnormal conduct arose in the course of restoring the non-breach position, it is usually regarded as an issue of 'mitigation'. Any other abnormal conduct by the claimant is usually regarded as a 'supervening act'.[118] However, the underlying rule in each of these circumstances is exactly the same; this explains the often-noted overlap between mitigation and supervening causation.[119] There are three main circumstances in which the claimant may act abnormally in restoring the non-breach position. First, where the claimant refuses the defendant's offer of restoration in favour of another option. Second, where the claimant's choice of repair rather than replacement, or vice versa, is abnormal. Third, where the claimant's method of restoration is excessively costly.

6.2.2.1 *Refusal of the defendant's offer*

After the breach, the claimant may refuse the defendant's offer of replacement but instead seek to restore the non-breach position in another way.[120] For example, the claimant may prefer to resort to the market or a third party rather than accepting the defendant's offer. Although the restoration rule does not apply in these circumstances,[121] the abnormality rule may apply if the claimant's preference for the alternative mode of restoration was abnormal. The test for abnormality was outlined in the previous chapter.[122] In this context, the test is

[118] Just as with any other intervening cause, if the claimant's abnormal conduct would have occurred even but-for the defendant's breach, then it is irrelevant to the assessment of damages.

[119] See eg Burrows, *Remedies* (n86) 75, 126.

[120] This is the 'third' type of case outlined at text to n86.

[121] Cf the first type of case: text to n86.

[122] Section 5.4.2.2.

whether the claimant's rejection of the defendant's offer in favour of resorting to the market (or other alternative) was a departure from the normal course of conduct, having regard to the claimant's own circumstances, characteristics and preferences, but ignoring the defendant's potential liability.[123]

The abnormality rule will not usually apply where there is only a small difference between the market cost and the defendant's offer.[124] For example, in *Velmore Estates v Roseberry Homes*, the defendants agreed to buy property from the claimants, but later failed to complete.[125] After the claimants had terminated the original contract, the defendants made another offer to buy the property at the same price. The claimants refused the defendant's offer and instead sold the property to another buyer on the market for a reduced price. Rich J held that the claimants had not failed to mitigate.[126] Although the market sale price was around ten percent lower than the defendant's offer,[127] the claimants' conduct was not abnormal because the defendants had already shown themselves to be unreliable.

Where the alternative mode of restoration is significantly more expensive than the defendant's offer, the refusal of the defendant's offer may be abnormal. In *Clegg v Andersson*, the claimant purchased a yacht from the defendant, but the hull was heavier than specified.[128] The defendant offered to repair the hull for free, but the claimant instead sought damages for the market cost of repair. Seymour J rejected this claim on the basis that 'it was the duty of [the claimants] to permit the manufacturers … to carry out remedial

[123] Chapter Five, text to n232.

[124] See eg *UBC Chartering Ltd v Liepaya Shipping Co Ltd (The Liepaya)* [1999] 1 Lloyd's Rep 649 (QB) 671 (Rix J); *Copley* (n97) [6] (Longmore LJ).

[125] *Velmore Estates Ltd v Roseberry Homes Ltd* [2005] EWHC 3061 (Ch), [2006] 2 P & CR 10.

[126] Rich J relied on the authority of *Strutt* (n98), but this case is distinguishable because there the defendant's offer would not have succeeded in restoring the non-breach position: text to n98.

[127] The effective price difference was £120,000 rather than £300,000 because the claimants already had the defendant's deposit of £180,000.

[128] *Clegg v Andersson* [2002] EWHC 943 (QB). See also *City Axis Ltd v Jackson* (1998) 64 Con LR 84 (QB) and *Woodlands Oak Ltd v Conwell* [2011] EWCA Civ 254, [2011] BLR 365 [18]-[25] (Sir Anthony May). In both of these cases it was held that the claimant had acted unreasonably by refusing the defendant builders' offer to repair 'snagging' defects; however, this may be explained on the basis of an implied term in construction contracts granting a contractual right to repair minor defects.

work'.[129] Although the judge's prescriptive formulation was inapt,[130] the decision is correct because ignoring the defendant's potential liability to pay the claimant's expenses,[131] the claimant would normally prefer a free repair rather than paying the market cost of restoration.[132]

In *Copley v Lawn*, Longmore LJ suggested (obiter) that it may be unreasonable to refuse a defendant's offer of a free replacement where this would impose a greater burden on the defendant, even if the cost to the claimant was no different because it could obtain a free replacement from another source anyway.[133] This is incorrect. The abnormality rule can serve to protect the defendant's interests, in that the test asks what the claimant would normally have done if paying out of its own pocket rather than at the defendant's expense; this limits the defendant's responsibility for extravagant expenditure. However, it does not follow from this approach that the defendant's interests are directly relevant.[134] In *Sayce v TNT*, Moore-Bick LJ (correctly) doubted Longmore LJ's suggestion, calling it 'surprising' and 'not reflected in the leading authorities'.[135]

6.2.2.2 *Repair or replacement*

The claimant may sometimes be able to restore the non-breach position either by repair or replacement. The choice to repair rather than to replace (or vice versa) will only be

[129] *Clegg (QB)* (n128) [61]. The decision was later overturned by the Court of Appeal on the grounds that the claimants had exercised their right to reject the yacht, so the mitigation point did not arise: *Clegg v Andersson* [2003] EWCA Civ 320, [2003] 1 All ER (Comm) 721 [68] (The Vice-Chancellor).

[130] The claimants would have been entirely free to retain the yacht with the heavier hull if they had wished.

[131] Chapter Five, text to n237.

[132] In this regard it was significant that the defendants were 'a very reputable company' and could be relied upon to complete the repair effectively: see *Clegg* (n128) [61] (Seymour J).

[133] *Copley* (n97) [17], [21], [32].

[134] Contra: *Chitty* (n46) [26-092]; McGregor, *Damages* (n20) [9-076], citing *Smailes v Hans Dessen* (1906) 94 LT 492 (KB) 493 (Channel J); *Darbishire v Warran* [1963] 1 WLR 1067 (CA) 1072 (Harman LJ), 1076 (Pearson LJ).

[135] *Sayce v TNT (UK) Ltd* [2011] EWCA Civ 1583, [2012] 1 WLR 1261 [20]. See also *Manton Hire* (n97) [38] (Tomlinson LJ) (confining *Copley* to the car hire context); Kramer, *Contract Damages* (n104) 404.

'unreasonable' if it satisfies the test of abnormality.[136] The relative costs may not be decisive, because the test also takes into account the claimant's own circumstances, characteristics and preferences. For example, it has been held reasonable to repair where the property had special sentimental value[137] or was particularly suitable for the claimant.[138] In *The Legnano*, Lord Sterndale MR summarised that a decision to repair rather than to replace 'may be shown to be reasonable if there are certain special circumstances which make the ship of such great value to him that it is better for him and reasonable to spend a very much larger sum than her repaired value'.[139]

In assessing the claimant's normal conduct, it is important to disregard the defendant's potential liability. In *Darbishire v Warran*, the claimant's car was damaged by the defendant.[140] Although the replacement value of the car (in good condition) was only £85, the claimant had the car repaired at a total cost of £192. The Court of Appeal held that the claimant 'did not show that he had any special use for which this car alone was suitable'.[141] In these circumstances the decision to spend 'more than twice the replacement market value' on repair was abnormal.[142] Having regard to the claimant's own preferences, it seems unlikely that the claimant would have opted for repair if paying out of his own pocket. This feature of the abnormality test provides the best explanation for Harman LJ's reasoning that the claimant should take into account the defendant's interests.[143]

[136] The same test is now embodied by the requirement of 'disproportionality' under the Consumer Rights Act 2015, s23(3)(b).

[137] *O'Grady v Westminster Scaffolding Ltd* [1962] 2 Lloyd's Rep 238 (QB) 240 (Edmund Davies J). Cf where the property is entirely generic: *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 (CA) 473 (Widgery LJ).

[138] *Algeiba v Australind* (1921) 8 Ll L Rep 210 (PD) 210 (Hill J).

[139] *Italian State Railways (The Legnano) v Owners of the SS Minnehaha* (1921) 6 Ll L Rep 12 (CA) 13. The Court of Appeal nevertheless upheld (with some reluctance) the trial judge's decision that the repair had been unreasonable.

[140] *Darbishire* (n134). See also *The Legnano* (n139).

[141] *Darbishire* (n134) 1072 (Harman LJ). Cf *O'Grady* (n137).

[142] *Darbishire* (n134) 1076 (Pearson LJ).

[143] Ibid 1072.

Where the claimant adopts the cheapest available mode of restoration, its conduct will not usually be regarded as abnormal.[144] However, in rare cases it may be abnormal for the claimant to restore the non-breach position at all. In *Ruxley v Forsyth*, the claimant was denied the cost of rebuilding a swimming pool that had been built to the wrong specification.[145] Lord Lloyd described the decision as an application of 'the principle that a plaintiff cannot always insist on being placed in the same physical position as if the contract had been performed, where to do so would be unreasonable'.[146] The cases applying this principle have all concerned the future (or hypothetical) conduct of the claimant after the trial;[147] perhaps for this reason, the decisions are not expressed as part of the law of mitigation and thus strictly fall outside the scope of this thesis. On the other hand, the issue of the 'measure of damages' has sometimes been linked to mitigation.[148]

Although *Ruxley* was not expressed as a decision on the law of mitigation, two features of the case are relevant for present purposes. First, the only way that the claimant could have restored the non-breach position was to rebuild the pool; no cheaper mode of restoration was available. In particular, it would have been even more expensive (and obviously impractical)[149] for the claimant to have 'replaced' the pool by selling the property and buying another property with a pool of the correct specification.[150] Second, the House

[144] See eg *Dominion Mosaics & Tile Co v Trafalgar Trucking Co* [1990] 2 All ER 246 (CA); *Stephenson Blake (Holdings) Ltd v Streets Heaver Ltd* [2001] Lloyd's Rep PN 44 (QB).

[145] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 (HL).

[146] Ibid 371. See also 359 (Lord Jauncy), 361 (Lord Mustill); *Minscombe Properties v Sir Alfred McAlpine & Son* (1986) 279 EG 759, (1986) 2 Const LJ 303 (CA) 309 (O'Connor LJ): 'it may be unreasonable to insist on precise restoration where some other solution is equally effective and serviceable'.

[147] See eg *Sealace Shipping Co Ltd v Oceanvoice Ltd (The Alecos M)* [1991] 1 Lloyd's Rep 120 (CA); *Southampton Container Terminals Ltd v Schiffahrisgesellsch "Hansa Australia" MGH & Co (The Maersk Colombo)* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275; *Robot Arenas Ltd v Waterfield* [2010] EWHC 115 (QB).

[148] See eg *Radford* (n2) 1272 (Oliver J): 'No doubt the measure of damages and the plaintiff's duty and ability to mitigate are logically distinct concepts … But to some extent, at least, they are mirror images'. See also *Dodd Properties* (n2) 453 (Megaw LJ); *Lagden v O'Connor (sub nom Burdis v Livsey)* [2003] UKHL 64, [2004] 1 AC 1067 [97] (Lord Walker).

[149] See discussion at *Ruxley Electronics & Construction Ltd v Forsyth* [1994] 1 WLR 650 (CA) 654 (Staughton LJ). The trial judge's finding that there was no 'difference in value' is thus something of a red herring, because it does not refer to any market transaction that was practically feasible.

[150] *Ruxley* 371 (n145) (Lord Lloyd).

of Lords' decision was unaffected by the claimant's undertaking that he would in fact rebuild the pool if the cost of repair was awarded.[151] This aspect of the decision suggests that the result would have been the same even if the claimant had already rebuilt the pool,[152] thereby squarely raising the issue of mitigation.

This thesis does not attempt to resolve the *Ruxley* debate, but it offers an explanation for why the decision has proved so controversial.[153] The case is a rare example of a conflict between the restoration and abnormality rules, or in other words between legal and descriptive norms. On the one hand, rebuilding the pool was descriptively abnormal: even taking into account the claimant's own preferences,[154] it is very unlikely that the claimant would have rebuilt the pool if paying out of his own pocket. This consideration explains the irrelevance of the claimant's intention to rebuild *if awarded damages*.[155] It also explains why the House of Lords focused on whether the cost of repair was 'out of all proportion to the benefit to be obtained'.[156] Where the cost is disproportionate to the benefit, the claimant would not normally chose to repair if paying out of its own pocket.

On the other hand, rebuilding the pool would have restored the non-breach position. The restoration rule provides that where the claimant chooses not to restore the non-breach position, damages are usually assessed as if it had done so. In *Ruxley*, the legal norm of restoration conflicted with the descriptive abnormality of restoring the non-breach position. In other words, there are two causally significant factors pulling in opposite directions. In these circumstances, our intuitions as to the reasonableness of the claimant's

[151] Ibid 362-63 (Lord Lloyd). Cf *Tito v Waddell (No2)* [1977] Ch 106 (Ch) 183 (Megarry V-C). On the relevance of intention, see further David Winterton, *Money Awards in Contract Law* (Hart 2015) 191-99; Kramer, *Contract Damages* (n104) 132-34.

[152] Cf Burrows, *Remedies* (n86) 222: 'had Mr Forsyth already rebuilt the pool to the specified depth … he should have been entitled to the cost of cure'.

[153] Another (different) explanation for the restriction in *Ruxley* is by analogy with the restrictions on specific performance or the agreed sum: see further Stephen A Smith, 'Substitutionary Damages' in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008); Winterton (n151) 201.

[154] *Ruxley* 371 (n145) (Lord Lloyd): 'the judge, as is clear from his judgment, took Mr Forsyth's personal preferences and predilections into account. Nevertheless, he found as a fact that the cost of reinstatement was unreasonable'. See also 358-59 (Lord Jauncy).

[155] n151.

[156] *Ruxley* 365 (n145) (Lord Lloyd); 360 (Lord Mustill). See also *The Maersk Colombo* (n147) [30] (Clarke LJ).

conduct are inevitably divided.[157] This thesis does not offer a solution to this conundrum, but it highlights the relevant issue. The focus of the House of Lords on ascertaining the 'true measure of the plaintiff's loss' rather than on arguments of legal policy,[158] fits with the explanation that the problem is rooted in conflicting causal intuitions.

6.2.2.3 *Excessive cost*

The abnormality rule may apply where the claimant incurs excessive cost in the course of effecting repair, replacement or extrication. It is sometimes suggested that the rule will apply unless the claimant obtains restoration as cheaply as possible. For example, in *Thai Airways v KI Holdings*, Leggatt J referred to 'a general expectation that, where more than one option is reasonably available, the claimant will adopt the one which is or is likely to be the least expensive'.[159] Whilst this is appropriate as a general expectation, it is not a fixed rule. The test must take into account the claimant's own circumstances, characteristics and preferences, such that the normal course of conduct may not always be the cheapest, even assuming that the claimant is paying out of its own pocket.

The leading example of excessive cost is *The Borag*.[160] The claimant's ship was wrongfully arrested by the defendant. In order to secure release of the ship, the claimant was required to obtain a guarantee. However, the claimant funded the guarantee through its overdraft facility, such that it paid interest on the entire sum as though it was a loan.[161]

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[157] It has sometimes been argued that the claimant must always be entitled to the cost of cure unless a cheaper mode of restoration is available: see eg *Radford* (n2) 1284 (Oliver J).

[158] *Ruxley* (n145) 368 (Lord Lloyd). See also 357 (Lord Jauncy): 'the reasonableness of an award of damages is to be linked directly to the loss sustained'; 360 (Lord Mustill), seeking 'the loss truly suffered by the promisee'.

[159] *Thai Airways* (n51) [36]. See also *Dean v Ainley* [1987] 1 WLR 1729 (CA) 1736-37 (Kerr LJ).

[160] *Compania Financiera Soleada SA v Hamoor Tanker Corp Inc (The Borag)* [1981] 1 WLR 274 (CA). See also *The Pactolus* (1856) 166 ER 1079, 1081 (Dr Lushington); *Owners of the Georgidore v Owners of the Pacific Concord (The Pacific Concord)* [1961] 1 WLR 873 (PD) 881-82 (Lord Merriman); *Wandsworth LBC v Railtrack plc* [2001] EWCA Civ 1236, [2002] QB 756 [26] (Kennedy LJ); *Riyad Bank v Ahli United Bank (UK) plc* [2005] EWHC 279 (Comm), [2005] 2 Lloyd's Rep 409 [171] (Moore-Bick J).

[161] *The Borag* (n160) 279 (Lord Denning MR).

Templeman LJ held that 'the owners could and should have adopted a form of mitigation which was reasonable either by refusing to pay the interest charges to their bankers or by seeking a guarantee elsewhere'.[162] In the course of argument, Templeman LJ described the charges as 'unheard of'.[163] In this context it is straightforward to conclude that the expense was outside the normal course of conduct, even taking into account the claimant's own position.

In assessing whether the costs incurred by the claimant were abnormal, it is necessary to take into account the claimant's own characteristics, for better or worse. The claimant's conduct may be normal despite the fact that others in a similar position might have done better. For example, in *Thai Airways*, Leggatt J held that if the claimant had been a smaller company with less bargaining power, 'it could not seriously have been argued that its inability to negotiate a more favourable arrangement with [a third party] should be regarded as the effective cause of part of [the claimant's] loss'.[164] Similarly, in *The Hendrick*, Hewson J held that in determining whether the claimants had acted unreasonably, 'I must have in mind their lack of training in damage control and the absence of effective damage control gear on board their vessel'.[165]

Conversely, it appears that any special additional capacity of the claimant is similarly taken into account in determining whether its conduct was abnormal. This is illustrated by a series of car accident cases.[166] In *Beechwood Birmingham*, the claimant car dealer owned a large stock of cars, some of which were used by its employees.[167] When one of these cars was negligently damaged by the defendant, the claimant hired a replacement car for its employee at the market rate. The Court of Appeal held that 'the claimant had ample capacity

[162] Ibid 285.

[163] Reported by Lord Denning MR at ibid 282.

[164] *Thai Airways* (n51) [176] (Leggatt J); cf *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No2)* [1990] 1 Lloyd's Rep 441 (QB) 443 (Webster J).

[165] *The Hendrik* [1964] 1 Lloyd's Rep 371 (PD) 379 (Hewson J): 'I must have in mind their lack of training in damage control and the absence of effective damage control gear on board their vessel'.

[166] *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95 (CA) 101 (Beldam LJ); *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, [2011] QB 357 [29]-[31] (Sir Mark Potter); *Singh v Yaqubi* [2013] EWCA Civ 23, [2013] RTR 15 [39] (Pill LJ).

[167] *Beechwood* (n166).

within its own stock of cars to absorb the loss of use of the particular car without any extra expenditure or loss of profit to its business *as was its usual practice*'.[168] Consequently, Sir Mark Potter concluded that 'the resort to outside hire was a failure to take a reasonable and less costly course open to *and customarily followed by* the claimant'.[169]

The judicial reasoning in *Beechwood Birmingham* is instructive. Sir Mark Potter focused on the course of conduct that was normal for the claimant itself, rather than (for example) a 'normal road user'. He emphasised the claimant's own 'usual' or 'customary' practice, taking into account its capacity to draw on a large fleet of vehicles. This approach established that the claimant did not normally incur the expense of hiring when paying out of its own pocket. The Court of Appeal's treatment of the claimant's special additional capacity is correct because it mirrors the proposition that the claimant's unfavourable characteristics (such as lack of bargaining power or inexperience) are also taken into account. In other words, the approach is the same, whether the claimant's special characteristics are positive or negative.[170]

6.3 Legal Effect

The legal effect of the restoration and abnormality rules is counterfactual. The problems with the orthodox 'guillotine heuristic' were highlighted in Chapter Four. Instead, it was argued that where the claimant acts unreasonably, damages are assessed (counterfactually) as if it had acted reasonably. In light of the restoration and abnormality rules, it is now possible to refine this proposition further. In particular, where the claimant made a choice not to restore the non-breach position, damages are assessed as if it had restored the non-breach position. Where the claimant chose to restore the non-breach position in an abnormal way, damages are assessed as if it had adopted a normal method of restoration.

[168] Ibid [29] (Sir Mark Potter) (emphasis added).

[169] Ibid [31] (Sir Mark Potter) (emphasis added).

[170] However, a separate issue may be raised by analogy with the insurance rule: see Andrew Tettenborn, *The Law of Damages* (2nd edn, LexisNexis 2010) [5.71] and Section 7.3.2.

By contrast, where neither rule applies, the claimant will recover its factual loss in accordance with the first stage of the orthodox account of damages.

6.3.1 Where a rule of mitigation applies

6.3.1.1 *Counterfactual assessment*

Where the restoration rule applies, the court must assess what would have happened if the claimant had attempted to restore the non-breach position. Chapter Four listed several examples of this form of counterfactual assessment.[171] In *The Achilleas*, Rix LJ provided a clear explanation of the approach to non-delivery of goods, holding that the claimant is 'assumed to have mitigated his loss by buying in substitute goods at the market price. It does not matter that he chooses not to buy in or delays his purchase'.[172] In these circumstances, the claimant is awarded the hypothetical cost of buying the replacement goods at the time when it first could have resorted to the market. The claimant will therefore not be able to recover for any 'consequential loss' in fact suffered as a result of not seeking replacement, such as claims by sub-buyers or loss of business profits.[173]

The hypothetical cost of restoration is sometimes referred to as the claimant's 'direct loss'.[174] In *Dimond v Lovell*, Lord Hobhouse proposed that where the claimant's property has been damaged, 'the measure of loss is the expenditure required to put it back into the same state as it was in before the accident'.[175] This measure is a product of the restoration rule;[176]

[171] Chapter Four, text to n339.

[172] *The Achilleas (CA)* (n30) [102].

[173] Dyson and Kramer, 'There is No "Breach Date Rule"' (n2) 272-73.

[174] Chapter Four, text to n353.

[175] *Dimond v Lovell* [2002] 1 AC 384 (HL) 406. See also *Coles v Hetherton* [2013] EWCA Civ 1704, [2015] 1 WLR 160 [27] (Aikens LJ).

[176] A more precise formulation would have been: '…the same state as it *would have been in* but-for the accident', because the non-breach position is counterfactual not historical; however, this distinction is immaterial in most car accident cases.

it does not matter that the expenditure was not in fact incurred.[177] However, Lord Hobhouse was wrong to deduce that 'This loss is suffered as soon as the car is damaged'.[178] 'Direct loss' is not universally recoverable because the restoration rule only applies where the claimant made a choice not to restore the non-breach position. The cost of restoration ('direct loss') is irrelevant where the non-breach position was in fact restored, albeit without cost to the claimant,[179] or where the claimant had no choice to restore the non-breach position.[180]

Where the abnormality rule applies, the court must assess the cost that would have been incurred by the claimant if it had restored the non-breach position in a normal way. So, in *The Borag*, although the Court of Appeal held that the claimant's method of financing a guarantee was abnormal, Templeman LJ clarified that 'The reasonable expenses of obtaining a guarantee must be recoverable'.[181] Similarly, in *Darbishire v Warran*, although the claimant's choice to repair rather than replace was held unreasonable, the Court of Appeal awarded damages based on the cost of buying a comparable car.[182] Where the claimant acted abnormally by resorting to the market rather than accepting the defendant's offer, damages are assessed by reference to the cost that the claimant would have incurred if it had accepted the offer.[183]

The Pacific Concord neatly illustrates the counterfactual assessment required by the abnormality rule.[184] The claimant sought to repair its ship over the Christmas period, such that the ship was out of service for longer than if the repairs had been deferred until the New Year. Lord Merriman rejected the claim for the actual cost of repairs on the basis that the claimant's conduct had been unreasonable, but instead assessed damages as if the repairs had been deferred. In particular, he offered a detailed assessment of the costs that

[177] Section 7.2.1.

[178] *Dimond* (n175) 406.

[179] See eg ibid. *Burdis v Livsey (sub nom Lagden v O'Connor)* [2002] EWCA Civ 510, [2003] QB 36 is wrongly decided on this point: see further Section 7.2.2.2.

[180] Section 7.2.2.1.

[181] *The Borag* (n160) 284. See also 279-80 (Lord Denning).

[182] *Darbishire* (n134). See further Chapter Four, text to n162.

[183] Section 6.2.2.1.

[184] *The Pacific Concord* (n160).

would have been (but were not in fact) incurred in these circumstances, holding that 'On the hypothesis that the work would have been done early in 1957 something must be allowed for the general rise in costs, said to amount to 8 per cent per annum, and I have taken this into account'.[185]

The reason why the claimant cannot recover for its factual loss is captured by Viscount Haldane's proposition that 'if [the claimant] might reasonably have avoided any part of the damage he has suffered, to that extent the damage is not such as arises directly from the act complained of'.[186] In other words, the claimant's factual loss is not caused by the defendant according to ordinary causal principles.[187] The counterfactual effect of mitigation serves to quantify the defendant's residual responsibility for the breach; it does so by assessing the harm that would have been suffered without the claimant's causally significant intervention. The deeper explanation for this approach is hard to articulate, but appears to lie in the important relationship between attributions of responsibility and counterfactual reasoning both within and outside the law.[188]

6.3.1.2 *Evidential difficulties*

The process of counterfactual assessment inevitably raises certain evidential difficulties. However, it should not be thought that these difficulties are peculiar to mitigation. First, counterfactual reasoning is a basic and essential element of human thought,[189] reflected in the simple everyday question 'what if…?'[190] Second, any assessment of damages already

[185] Ibid 884.

[186] *Baron Vernon v SS Metagama (The Metagama)* (1928) SC (HL) 21 (HL) 27.

[187] *McKew v Holland & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 (HL) 25 (Lord Reid).

[188] See further Section 5.3.4.3.

[189] C Hoerl, T McCormack and SR Beck (eds), *Understanding Counterfactuals, Understanding Causation: Issues in Philosophy and Psychology* (OUP 2011); Riggs and Peterson, 'Counterfactual Thinking in Preschool Children: Mental State and Causal Inferences' in Mitchell and Riggs (eds), *Children's Reasoning and the Mind* (Psychology Press 2000).

[190] See generally NJ Roese, 'Counterfactual Thinking' (1997) 121 Psychological Bulletin 133; Ruth Byrne, 'Mental Models and Counterfactual Thoughts about What Might Have Been' (2002) 6 Trends in Cognitive Sciences 426.

involves counterfactual assessment, since this is prescribed by the compensatory principle.[191] The evidential difficulties faced in asking what would have happened if the claimant had acted normally (under the rules of mitigation) are no different in kind from those faced in asking what would have happened if the defendant had not breached its obligation (under the compensatory principle).[192] In this regard, as Lord Bingham put it in *The Golden Victory*, 'the difficulty of accurate calculation is not a bar to recovery'.[193]

Where the claimant chose not to restore the non-breach position, or restored it in an abnormal way, there may be a range of (counterfactual) normal responses that the claimant could have adopted instead. In this situation, as Kramer points out, 'the court must select one of the reasonable possibilities and will deem that to have been made'.[194] An analogous problem arises in applying the compensatory principle. It is very often necessary to ask what the defendant would have done but-for the breach.[195] In relation to negligent valuations where the defendant could have offered various reasonable valuations within a range, Lord Hoffmann proposed that the court should select the mean figure from the range because this was the 'most likely' figure that the defendant would have put forward but-for the breach.[196] This is the correct approach in principle; the aim is simply to establish what would have happened, based on the evidence.

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[191] Section 3.2.1. Counterfactual assessment may also be required in application of the remoteness rule: see eg *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1867-68) LR 3 QB 181 (QB); *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528 (CA).

[192] A key element of both assessments is that the court must 'adhere to reality subject only to giving full effect to the hypothesis': *Chilukuri v RP Explorer Master Fund* [2013] EWCA Civ 1307 [59] (Lewison LJ). See further HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985) 411-18.

[193] *The Golden Victory* (n19) [21]. In assessing the non-breach position, it has been said that 'this is not a question which can be considered on a mathematical basis. It has to be considered essentially, in the round, making … a "jury assessment"': *East v Maurer* [1991] 1 WLR 461 (CA) 468 (Beldam LJ), citing *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA) 169 (Winn LJ).

[194] Kramer, *Contract Damages* (n104) 354.

[195] This raises the (much misunderstood) 'minimum obligations rule', recently clarified in *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 All ER (Comm) 731 [79] (Patten LJ).

[196] *SAAMCo* (n50) 221-22. See also *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 (PC) 1445-47 (Lord Hoffmann).

The counterfactual assessment of the claimant's conduct may occasionally raise 'loss of chance' problems, just as in relation to the compensatory principle. The damages award may need to reflect the likelihood (rather than the certainty) of a particular outcome on the hypothesis that the claimant acted normally. For example, in *Symrise*, Burton J held that the claimants unreasonably chose not to continue litigation with the Mexican Tax Authorities.[197] Burton J assessed the chance that the litigation would have been successful,[198] but was content on the facts to treat its success as proved on the balance of probability.[199] In *Steel v Robert George*, Viscount Simon held (obiter)[200] that if a claimant unreasonably refused medical treatment, 'if the proposed operation can at best only work a partial cure, it does not appear to be an easy matter to fix what the reduced figure of compensation should be'.[201]

6.3.1.3 *Cost to the claimant or defendant?*

Where the claimant unreasonably refused the defendant's offer, the authorities are unsettled as to whether the counterfactual assessment should reflect the hypothetical cost to the claimant or (alternatively) to the defendant. In *Copley v Lawn*, the claimant rejected the defendant's offer of a 'free' replacement car whilst her own car was being repaired.[202] Although the replacement would have been free to the claimant, it would obviously have cost the defendant something to provide. Longmore LJ held (obiter)[203] that 'if a claimant does unreasonably reject or ignore a defendant's offer of a replacement car, the claimant is entitled to recover at least the cost which [the claimant] can show [the defendant] would

[197] *Symrise* (n15) [86].

[198] Ibid [65]-[66] (Burton J).

[199] Ibid [87] (Burton J).

[200] On the facts, the claimant's refusal of treatment was not unreasonable.

[201] *Steele* (n7) 500. See also *Houndsditch* (n105) 581 (Stable J).

[202] *Copley* (n97). See further text to n133. See also *Woodlands Oak* (n128) [24]; however, this case may be better explained on the basis of an implied term: Kramer, *Contract Damages* (n104) 402-03.

[203] The issue did not arise on the facts because the Court of Appeal concluded that the claimant's refusal of the offer was not unreasonable: see further *Sayce* (n135) [17] (Moore-Bick LJ).

reasonably have incurred; he does not forfeit his damages claim altogether'.[204] In other words, Longmore LJ's approach focused on the hypothetical cost to the defendant.

In *Sayce v TNT*, the Court of Appeal subsequently cast doubt on Longmore LJ's approach.[205] Moore-Bick LJ accepted that the effect of mitigation was counterfactual, but focused instead on the counterfactual effect on the claimant, holding that 'If the claimant had accepted the defendant's offer he would not have needed to hire a replacement vehicle and would have suffered no loss arising out of the inability to use his own car'.[206] Moore-Bick LJ expressed concern that Longmore LJ's focus on the defendant was 'not an approach that is reflected in the earlier authorities' and was difficult 'to reconcile with the principle relating to avoidable loss'.[207] However, it was not necessary to conclude this issue on the facts of *Sayce* itself,[208] so the point remains unsettled.

The approach in *Sayce* is to be preferred: the counterfactual effect of mitigation should focus on the hypothetical cost to the claimant rather than to the defendant.[209] McGregor objects that 'this result leaves the defendant paying no damages at all in respect of the car hire claim although, had the claimant acted reasonably and accepted his offer, he would have had to bear the cost to him of the substitute car'.[210] This is true, but any windfall to the defendant is not a relevant consideration in assessing compensatory damages, which aim to redress the claimant's loss not the defendant's gain.[211] In *Copley*, Longmore LJ's error arose at an earlier stage when he held that the reasonableness test involved balancing the

[204] *Copley* (n97) [32]. The brackets correct a typographical error: a similar amendment is made in *Sayce* (n135) [29] (Moore-Bick LJ). See also *Evans v TNT Logistics Ltd* [2007] Lloyd's Rep IR 708 (CC).

[205] *Sayce* (n135) [27]-[29] (Moore-Bick LJ).

[206] Ibid [27].

[207] Ibid [29].

[208] Ibid [26].

[209] The only caveat is whether a separate principle should apply in relation to offers by the defendant in settlement of the dispute.

[210] McGregor, *Damages* (n20) [9-071].

[211] See also Kramer, *Contract Damages* (n104) 404.

defendant's interests.[212] Properly understood, both the application and the effect of the avoidable loss rule are exclusively claimant-focused.

6.3.2 Where neither rule applies

6.3.2.1 *Recovery of factual loss*

Where neither rule of mitigation applies, the claimant can (subject to other legal rules)[213] recover its factual loss in full.[214] In other words, all harms and benefits that would not have occurred but-for the defendant's breach will be taken into account in assessing damages. As Viscount Haldane put it in *British Westinghouse*, the court will 'look at what actually happened, and balance loss and gain'.[215] To put the same point the other way around, 'in order to displace the balance of actual loss and gain as the applicable measure of damages, it is necessary for the defendant to show that the action taken by the claimant was outside the reasonable range'.[216] This approach reflects the orthodox account of damages: the claimant recovers damages for its factual loss unless displaced by specific rules, including the rules of mitigation.

Where the claimant actually restored the non-breach position and did so in a normal way, it will recover damages for the costs actually incurred in restoration. Even before the modern law of 'mitigation', in *Hinde v Liddell* Cockburn CJ reasoned that 'The course the plaintiff pursued was right and reasonable ... He is, therefore entitled to the damages he claimed'.[217] The court allowed the claim for the actual cost of purchasing replacement

[212] For criticism of this approach, see text to n133. In *Sayce* (n135) [29], Moore-Bick LJ acknowledged that Longmore LJ's view 'reflects the approach' that he took to application of the reasonableness test.

[213] See further Section 3.2.2.

[214] See *Thai Airways* (n51) [33] (Leggatt J); *Stephenson Blake* (n144) [159] (Hicks QC).

[215] *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL) 691.

[216] *Thai Airways* (n51) [43] (Leggatt J). See also Kramer, *Contract Damages* (n104) 347, 357.

[217] *Hinde v Liddell* (1874-75) LR 10 QB 265 (QB) 268.

goods.[218] More recently, in *Hooper v Oates*, Lloyd LJ held that in non-acceptance cases the actual resale price was used in assessing damages 'not because it represents the market value at the date of the breach, but because it shows what loss the seller has suffered, uncomplicated by issues of remoteness or failure to mitigate'.[219]

Numerous cases illustrate the recovery of the actual costs of restoration in other contexts. In a 'no transaction' case, the claimant can recover the actual costs of extrication including the transaction costs incurred in reselling.[220] The claimant can recover the actual cost of repairing damaged property even where it turns out to cost more than expected.[221] Where the claimant has been defamed, it can recover the actual costs of employing a public relations consultant to restore its reputation.[222] In all of these cases, the costs of restoration were caused by the defendant, both in the 'but-for' sense and according to ordinary causal principles. As Lord Hoffmann explained in *SAAMCo*, 'a claimant's reasonable attempts to cope with the consequences of breach does not negative the causal connection between the breach and the consequences'.[223]

Where the claimant had no choice to restore the non-breach position, it will similarly recover damages for its factual loss because the restoration rule will not apply. For example, where the claimant is unaware of defects in goods supplied by the defendant,[224] it can

[218] Ibid.

[219] *Hooper v Oates* [2013] EWCA Civ 91, [2014] Ch 287 [38].

[220] *East* (n193) 463-64 (Beldam LJ), 468 (Mustill LJ). See also *Waddell* (n63) 681 (Bramwell LJ).

[221] *Humber Oil Terminal Trustee Ltd v Owners of the Sivand (The Sivand)* [1998] CLC 751 (CA) 761-62 (Evans LJ), 765 (Hobhouse LJ).

[222] *ReachLocal UK Ltd v Bennett* [2014] EWHC 3405 (QB), [2015] EMLR 7 [52] (Parkes QC).

[223] *SAAMCo* (n50) 221.

[224] In relation to extrication in a 'no transaction' case, see also ibid 221 (Lord Hoffmann): 'it seems to me impossible to say that the loss was caused by any decision of the lenders not to go into the market … They did not know until some time afterwards that the valuations were wrong'.

recover damages for any personal injury,[225] property damage,[226] or lost profits[227] suffered through using the goods. It can also recover the cost of settling claims with sub-buyers[228] or issuing a product recall[229] suffered through reselling the latently defective goods. Similarly, where the claimant is unable to restore the non-breach position because there is no available market, 'it is the actual loss suffered, rather than the conventional market loss, which can be claimed'.[230] The same circumstances arise where the claimant is unable to access the market, either because it is 'locked-in' to a particular transaction,[231] or because it cannot afford to have resort to it.[232]

6.3.2.2 *No special rule for expenses*

The orthodox account of mitigation sometimes erects an artificial distinction between 'expenditure in mitigation' and other harm caused by the breach. McGregor confusingly suggests that 'The claimant, during his efforts to mitigate the damage, may incur further

[225] *Wren v Holt* [1903] 1 KB 610 (CA); *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC); *Godley v Perry* [1960] 1 WLR 9 (QB).

[226] *Wilson v Rickett Cockerell & Co Ltd* [1954] 1 QB 598 (CA); *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397 (QB).

[227] *Wagstaff v Shorthorn Dairy Co* (1884) C & E 324 (QB); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 (HL); *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555 (CA).

[228] See eg *Randall v Raper* (1858) 120 ER 438; *Hammond & Co v Bussey* (1887) 20 QBD 79 (CA); *Kasler v Slavouski* [1928] 1 KB 78 (KB); *Biggin (KB)* (n42); *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 (HL); *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 (HL); *Centrax Gears* (n227).

[229] *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep 379; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd's Rep 20 (QB).

[230] *The Achilleas (CA)* (n30) [109] (Rix LJ). See also *The New Flamenco (CA)* (n30) [25] (Longmore LJ). For an earlier example of this reasoning, see *Simon v Pawson and Leafs Ltd* [1932] All ER Rep 72 (CA) 78 (Greer LJ), distinguishing *Grebert-Borgnis v J&W Nugent* (1885) 15 QBD 85 (CA) on the basis that in the latter case there was no available market and thus 'the buyer was unable to prevent the damages from arising'.

[231] See eg *R&H Hall Ltd v WH Pim Junr & Co Ltd* (1928) 30 Ll L Rep 159 (HL); *Kwei Tek Chao* (n26) 490 (Devlin J); *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] 2 Lloyd's Rep 243 [21] (Andrew Smith J); *M&J Marine Engineering Services Co Ltd v Shipshore Ltd* [2009] EWHC 2031 (Comm) [30] (Field J).

[232] See eg *Dodd Properties* (n2) 453 (Megaw LJ); *Alcoa Minerals of Jamaica Inc v Broderick* [2002] 1 AC 371 (PC) 382-83 (Lord Slynn).

loss, which will often be a loss which is not in addition to, but in place of and less than, the loss which he is attempting to mitigate'.[233] Here, McGregor inadvertently uses the term 'loss' in more than one sense: first as 'factual loss', and then (roughly) as 'the harm that would have been suffered if the claimant had not acted', which by hypothesis was not in fact suffered. Where the claimant sought to restore the non-breach position in the normal way, this second type of 'loss' is irrelevant; in assessing damages, the claimant simply recovers its factual loss, which includes the expenses incurred in restoration.

In *The Borag*, Lord Denning firmly rejected the distinction between expenses and other types of harm, holding that this distinction 'fades into nothingness in most cases'.[234] Instead, 'when expenditure is incurred as a result of a wrongful act, the common law has always looked upon it as damages'.[235] By way of example, 'In a personal injury case the medical expenditure incurred is regarded as damages'; similarly, 'if you have a lorry or motor car which has been damaged and put out of action, the cost of providing a substitute is not regarded as sums expended in mitigation'.[236] Lord Denning's approach is straightforward and correct; there is no special rule for expenses. The only reason why it might look like there is a special rule is that the (hypothetical) cost of restoration can be recovered even if the claimant chooses not to restore the non-breach position, through the application of the restoration rule.[237]

Nolan recently raises the problem of 'Preventive Damages',[238] asking whether 'expenses incurred to prevent threatened damage amount to recoverable damage in so far as reasonably incurred'.[239] Although this problem focuses on expenditure incurred *prior* to

[233] McGregor, *Damages* (n20) [9-096]. See also *Compania Financiera Soleada SA v Hamoor Tanker Corp Inc (The Borag)* [1980] 1 Lloyd's Rep 111 (QB) 125-26 (Mustill J), overturned in *The Borag* (n160).

[234] *The Borag* (n160) 281.

[235] Ibid 281.

[236] Ibid.

[237] In this context, it is sometimes suggested that 'it is not the cost of the repairs that constitutes the loss; the loss is the diminution in value of the chattel': *Coles* (n175) [29] (Aikens LJ). This misconception results from a failure to appreciate the counterfactual effect of the restoration rule.

[238] Donal Nolan, 'Preventive Damages' (2016) 132 LQR 68.

[239] Ibid 68, citing Principles of European Tort Law, Article 2.104.

any other harm,[240] the question is again simply whether, in incurring the expense, the claimant either acted abnormally or made a choice not to restore the non-breach position.[241] If not, the expenses were caused by the breach and are recoverable as part of the claimant's factual loss. For claims in the tort of negligence, the problem of pure economic loss can be overcome by what Nolan terms the 'pre-emptive right rationale'.[242] This rationale holds that where the claimant was forced to incur expense in order to avoid harm to its person or property, the defendant's conduct thereby directly infringes the claimant's right to bodily integrity or property.[243]

6.3.2.3 *The reasonable attempts rule*

In his tripartite exposition of mitigation, McGregor's second rule is that 'where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing', adding that 'this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken'.[244] This so-called 'reasonable attempts rule' is not strictly incorrect, but it is entirely superfluous.[245] As Burrows points out, 'it is simpler to view [the reasonable attempts rule] as a natural consequence of there being no relevant restriction limiting the compensatory principle'.[246] In *Thai Airways*, Leggatt J correctly described the reasonable attempts rule as 'simply the non-application of any rule'.[247]

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[240] On this basis Nolan distinguishes the issue from mitigation, although he acknowledges that principles of mitigation 'may nevertheless provide helpful analogies': ibid 70-71.

[241] These two principles largely explain Nolan's list of 'limitations on recovery' in relation to preventive damages: see ibid 83-87.

[242] Ibid 89-91.

[243] See further Peter Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon 1995), 437-44.

[244] McGregor, *Damages* (n20) [9-005].

[245] Section 3.4.2.

[246] Burrows, *Remedies* (n86) 122 fn7.

[247] *Thai Airways* (n51) [33], citing Kramer, *Contract Damages* (n104) 348 fn47 with approval. See also ibid 360-61.

Why then has the reasonable attempts rule persisted despite its redundancy?[248] There are two possible reasons. First, the rule responds to the apparent peculiarity that the claimant's *actions* (in incurring expenditure) can result in an award of damages greater than if the claimant had done nothing at all.[249] But this is only peculiar if one becomes distracted by the distinction between acts and omissions,[250] whereas the relevant issue is whether the claimant's conduct (whether act or omission) departed from the normal course of events. Second, the rule responds to the apparent peculiarity that the claimant's conduct may be reasonable despite that it increased the eventual harm suffered.[251] But this is only peculiar if one becomes distracted by the *outcome* of the conduct,[252] whereas the relevant issue is the causal significance of the conduct itself.

Of course, the non-application of the rules of mitigation do not prevent other legal rules from limiting or extending recovery of the claimant's factual loss. In particular, the rules of remoteness or contributory negligence may limit damages even where the claimant's conduct was not unreasonable.[253] Conversely, the claimant may recover more than its factual loss if either the insurance or benevolence 'exceptions' apply, again notwithstanding the non-application of the restoration and abnormality rules.[254] However, these other legal rules are finite in scope, and each rule requires its own justification distinct

[248] See eg *The New Flamenco (QB)* [41] (Popplewell J).

[249] See eg GH Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) [20-119].

[250] See eg *Lagden* (n148) [78] (Lord Scott): 'Mitigation is the process whereby the injured party attempts *by some course of action* to reduce the consequential loss he has suffered or will suffer *if nothing is done*'. (Emphasis added).

[251] See eg Burrows, *Remedies* (n86) 127: 'the fact that the incurring of expense has overall augmented the loss, rather than minimised it, i.e. it has not been a success, does not mean that it was unreasonably incurred'.

[252] In some circumstances, it may not even be known whether the harm would have been greater if the claimant had not acted: see eg *Skandia Property (UK) Ltd v Thames Water Utilities Ltd* [1999] BLR 338 (CA).

[253] Section 3.2.2.

[254] Section 3.2.3.

from mitigation.[255] Where no other legal rule applies, there is no reason to displace the assessment of factual loss prescribed by the compensatory principle.[256]

6.4 Three Puzzles Resolved

The leading texts have grappled with, but so far failed to resolve, three particular puzzles arising from the law of mitigation. First, the universal and homogenous application of mitigation to every assessment of loss, is inconsistent with policy-based explanations such as self-reliance or prevention of waste. Second, the restricted temporal scope of mitigation, which only applies once the claimant has actual knowledge of the breach, is inconsistent with the descriptive focus on the reasonableness of the claimant's conduct. Third, the proposition that the reasonableness test is a question of fact has already been challenged, but a further problem is posed in explaining why and in what sense it might be thought to raise a question of fact. These three puzzles are resolved by the descriptive and explanatory account proposed in this thesis.

6.4.1 Universal application

The law of mitigation applies 'universally' to every assessment of loss. In other words, it applies every time the court is required to assess loss,[257] whatever the cause of action and whatever the defendant's level of fault. Besides compensatory damages for torts and breach of contract, mitigation also applies to statutory rights to compensation (whether strict liability or fault-based), and to claims for equitable compensation for breach of trust. The

[255] For example, in *Dimond* (n175) 400, Lord Hoffmann reasoned that 'The only way, therefore, in which Mrs Dimond could recover damages for the notional cost of hiring a car which she has actually had for free is if your Lordships were willing to create another exception to the rule against double recovery. I can see no basis for doing so'.

[256] This forms the proper understanding of the so-called '*Bwllfa* principle': see further Chapter Three, text to n36.

[257] It does not apply to the action for an agreed sum: *Abrahams v Performing Right Society Ltd* [1995] ICR 1028 (CA) 1041 (Hutchison LJ); *Jervis v Harris* [1996] Ch 195 (CA) 202-03 (Millett LJ).

rules of mitigation apply in exactly the same way regardless of the defendant's fault: they apply to the tort of conversion (a strict liability tort) just as to the torts of deceit and unlawful means conspiracy (which require intentional wrongdoing). This feature of mitigation is notable by comparison with remoteness, which does vary depending on the defendant's fault.

On the orthodox account of mitigation, the universality of mitigation presents a puzzle. If the judges' causal reasoning is really based on questions of legal policy, particularly the 'purpose' and 'scope' of the relevant liability rules, why is mitigation insensitive to the source of liability? If mitigation aims to encourage self-reliance, why is the defendant's fault irrelevant to the extent of self-reliance demanded? By contrast, if the causal explanation of mitigation is accepted, its universal application is no puzzle at all. The rules of mitigation simply form part of what it means to 'cause loss'; consequently, wherever assessments of loss are required, the law of mitigation must follow. At a deeper level, the concept of loss involves an attribution of outcome responsibility, and this task cannot be separated from the causal principles upon which the law of mitigation rests.

6.4.1.1 *Causes of action*

The rules of mitigation are exactly the same in both contract and torts. This has never been doubted, and is now well-established.[258] In *The Liverpool (No2)*, Lord Merriman clarified that 'the classic statement about mitigation of loss by Viscount Haldane … although made in an action arising out of a breach of contract, applies equally, *mutatis mutandis*, to tort'.[259] Similarly, in *Dimond v Lovell*, Lord Hoffmann approved the application of the 'avoided loss' rule to liability in the tort of negligence, confirming that 'In principle this seems to me to be

[258] McGregor, *Damages* (n20) [9-015] (avoidable loss), [9-109] (avoided loss). See also, in relation to betterment: *Voaden v Champion (The Baltic Surveyor)* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623 [83] (Rix LJ); *Thai Airways* (n51) [77] (Leggatt J).

[259] *Owners of Steamship Enterprises of Panama Inc v Owners of SS Ousel (The Liverpool) (No2)* [1963] P 64 (CA) 77-78. See also *Beoco* 151 (n3) (Stuart-Smith LJ); *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA) 1369 (Glidewell LJ); *Sayce* (n135) [20] (Moore-Bick LJ);

right: there can be no difference here between contract and tort'.[260] Where the defendant is concurrently liable in contract and tort, it has been emphasised that as regards mitigation there is no difference between the contractual and tortious measures of damages.[261]

Mitigation also applies to statutory rights of compensation, whether against private or public bodies.[262] In *Steele v Robert George*, Viscount Simon noted that the Workmen's Compensation Act 1925 did not contain any express provision for a reduction in damages where the workman unreasonably refused medical treatment.[263] However, he reasoned that 'if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity "results from the injury" within the meaning of s9 of the Act'.[264] Not only did Viscount Simon express mitigation in terms of proximate causation, his reasoning was that the rule forms an integral part of what it means for harm to 'result' from the defendant's conduct.

The position is the same where the defendant's statutory liability is strict. In *Elliot Steam Tug Co v Shipping Controller*, Scrutton LJ assessed damages under the Indemnity Act 1920 on the basis that the claimant was under a 'duty to act reasonably' after its tug boat had been requisitioned by the Admiralty.[265] More recently, in *Welford v EDF Energy Networks*, the defendant received a statutory wayleave to run cables under the claimants' land.[266] The claimant sought compensation under the Electricity Act 1989. The Court of Appeal upheld the Tribunal's decision that the claimants had 'failed … to mitigate their loss by not seeking an alternative site' once it became clear that the cables were interfering with

[260] *Dimond* (n175) 402. See also *Bellingham v Dhillon* [1973] QB 304 (QB) 308 (Forbes J); *Robinson v Maund* (CA, 20 January 1993) (Steyn LJ); *Derby Resources AG v Blue Corinth Marine Co Ltd (The Athenian Harmony) (No1)* [1998] 2 Lloyd's Rep 410 (QB) 416 (Colman J).

[261] *Gardner v Marsh & Parsons* [1997] 1 WLR 489 (CA) 505 (Peter Gibson LJ).

[262] See eg *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2015] EWCA Civ 1262, 163 Con LR 27 [33] (Vos LJ), involving a claim in damages against the Nuclear Decommissioning Authority under the Public Contracts Regulations 2006.

[263] *Steele* (n7) 499. See also *Warncken v Moreland & Son Ltd* [1909] 1 KB 184 (CA) 189 (Fletcher Moulton LJ) (Workmen's Compensation Act 1906).

[264] *Steele* (n7) 499 (Viscount Simon).

[265] *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127 (CA) 140-41.

[266] *Welford* (n15).

the claimants' business.[267] There was no suggestion that the standard of reasonableness was any higher because the defendant's liability was strict.[268]

The rules of mitigation also apply to equitable compensation for breach of trust.[269] Once it was established that equitable compensation is compensation for loss,[270] this conclusion followed inexorably. The reasoning of the Supreme Court in *AIB v Redler* is instructive.[271] Lord Reed started with the proposition that 'compensation for the breach of an obligation generally seeks to place the claimant in the position he would have been in if the obligation had been performed. Equitable compensation for breach of trust is no different in principle'.[272] The object of equitable compensation was thus 'to restore the trust fund to the position it would have been in if the trustee had performed his obligation'.[273] Both Lord Toulson and Lord Reed clarified that any difference with the approach in contract and tort merely resulted from the different content of the underlying obligations.[274]

Having adopted these premises, Lord Reed's reasoning on mitigation was impeccable.[275] He held that 'the concept of loss necessarily involves the concept of causation'.[276] From this it followed that 'the loss must be caused by the breach of trust, in the sense that it must flow directly from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach'.[277] The effect of the claimant's conduct, 'rather than being a distinct principle …

[267] Ibid [34] (Thomas LJ).

[268] Cf Lord Macmillan's reasoning in *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 (HL) 506: see further Section 4.2.2.4.

[269] In *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) 17, Millett LJ suggested that mitigation applies 'by analogy', but nothing turns on this.

[270] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) 436, 439 (Lord Browne-Wilkinson); *Bristol & West* (n269) 17 (Millett LJ); *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2014] 3 WLR 1367 [73] (Lord Toulson).

[271] *AIB* (n270).

[272] Ibid [93]. See also [64] (Lord Toulson); *Target Holdings* (n270) 432 (Lord Browne-Wilkinson).

[273] *AIB* (n270) [134] (Lord Reed). See also [64] (Lord Toulson).

[274] Ibid [76] (Lord Toulson), [137] (Lord Reed). See further Chapter Three, text to n8.

[275] See also *Target Holdings* (n270) 438-39 (Lord Browne-Wilkinson), approving *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 85 DLR (4th) 129 (SCC) 163 (McLachlin J).

[276] *AIB* (n270) [136].

[277] Ibid [135].

might be regarded as following from the requirement of a direct causal connection'.[278] The question was 'whether loss should be attributed … to the conduct of the person to whom the duty was owed'.[279] These propositions revealed 'structural similarities between the assessment of equitable compensation and the assessment of common law damages'.[280]

Remoteness was different. In this regard, Lord Reed held that 'it is common ground that equitable compensation and damages for tort or breach of contract may differ where different policy objectives are applicable'.[281] In the tort of negligence, 'the liability resulting from a failure to take reasonable care to guard against a reasonably foreseeable risk is limited to such consequences as are reasonably foreseeable'.[282] Conversely, for breach of trust, 'foreseeability does not enter into the wrongfulness of the defendant's conduct, and there is no reason why it should limit the extent of his responsibility'.[283] In other words, whereas mitigation (as an aspect of causation) applied to every assessment of loss, the remoteness rule differed depending on the purpose and scope of the underlying liability rule.

6.4.1.2 *The defendant's fault*

The rules of mitigation are also insensitive to the defendant's fault.[284] The same rules apply (in exactly the same way) to strict liability torts as to intentional torts. Again, judicial reasoning emphasises that this conclusion follows ineluctably from the assessment of loss. Nevertheless, this approach is a poor fit with the rival explanations of mitigation put forward by the leading texts. If mitigation was based on the policy of encouraging self-

[278] Ibid [87].

[279] Ibid [136].

[280] Ibid [136].

[281] Ibid [133].

[282] Ibid [92].

[283] Ibid [92]. See also: *Canson* (n275) 162 (McLachlin J), approved in *Target Holdings* (n270) 439 (Lord Browne-Wilkinson); Steven B Elliott, 'Remoteness Criteria in Equity' (2002) 65 MLR 588.

[284] McGregor, *Damages* (n20) [9-075]. Tettenborn, *Damages* (n170) [5.64]; Glanville Williams, *Joint Torts and Contributory Negligence* (Stevens 1951) 283-85.

reliance, one might expect that a victim of fraud would be allowed a wider margin of dependency than a claimant in a strict-liability case. The universality of the mitigation rules presents a similar puzzle for the remoteness explanation, given that remoteness depends on the defendant's fault.

In relation to strict liability torts, in *Uzinterimpex v Standard Bank*, Moore-Bick LJ held that 'a duty to avoid or minimise loss arises when goods are converted in the same way as in the case of other legal wrongs'.[285] Moore-Bick LJ reasoned that 'Once it is accepted that the correct measure of damages in a case of conversion is that which will provide just compensation for loss … it is impossible to ignore the claimant's own conduct in relation to that loss'.[286] He added that if mitigation did not apply, the defendant may be required 'to pay compensation for a loss that could not fairly be attributed to his wrongful act'.[287] In other words, the rules of mitigation were again regarded as part of attributing responsibility and were accordingly inseparable from the concept of loss.

Mitigation also applies to intentional torts. In *Standard Chartered Bank v Pakistan National Shipping*, Toulson J assessed damages for fraud in relation to bills of lading.[288] He concluded that 'once a plaintiff discovers that he is a victim of a fraud, the same rule about avoidable loss applies for the purpose of assessing damages in an action of deceit or conspiracy as would apply in any action for tort or breach of contract'.[289] In *British Midland Tool v Midland International Tooling*, the defendant directors of the claimant's company set up a rival company that poached the claimant's employees.[290] In assessing damages for unlawful means conspiracy,[291] Hart J nevertheless held that the defendant directors were

[285] *Uzinterimpex* (n105) [69]. See also [63].

[286] Ibid [67].

[287] Ibid [67].

[288] *Standard Chartered (QB)* (n39).

[289] Ibid 760.

[290] *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523.

[291] The unlawful means was breach of fiduciary duty.

not responsible for the losses attributable to the claimant's subsequent decision to continue trading.[292]

Doyle v Olby was the first decision to establish the application of mitigation in deceit.[293] Winn LJ's reasoning is instructive. He held that 'damage that [the claimant] seeks to recover must have flowed directly from the fraud perpetrated upon him'.[294] In this regard, 'no element in the consequential position can be regarded as attributable loss and damage if … the person deceived has not himself behaved with reasonable prudence'.[295] Mitigation was thus regarded as an integral part of determining the 'attributable loss'. This approach was confirmed in *Smith New Court*.[296] Lord Steyn held that 'it must still be shown that the entire loss suffered by [the defendant] is a direct consequence of the fraudulently induced transaction'; on this basis he clarified that mitigation 'has no special features in the context of deceit'.[297]

It is useful to compare the approaches to mitigation and remoteness in *Smith New Court*. Whereas mitigation applied equally to deceit, the House of Lords held that remoteness did not apply.[298] Lord Steyn reasoned that 'it is a rational and defensible strategy to impose wider liability on an intentional wrongdoer'.[299] In particular, the remoteness rule, 'which reflects considerations of legal policy, does not necessarily avail the intentional wrongdoer'.[300] Lord Steyn considered that this stricter approach was justified by the aims of deterring fraud and 'requiring the fraudster to bear the risk of misfortunes directly caused by his fraud'.[301] The obvious implication is that, unlike remoteness,

[292] *British Midland Tool* (n290) [245].

[293] *Doyle* (n193).

[294] Ibid 168.

[295] Ibid 168. See also 171 (Sachs LJ).

[296] *Smith New Court* (n22) 266 (Lord Browne-Wilkinson); 285 (Lord Steyn).

[297] Ibid 285.

[298] Ibid 265 (Lord Browne-Wilkinson); 269 (Lord Mustill); 282 (Lord Steyn). See also *Doyle* (n193) 168 (Winn LJ).

[299] *Smith New Court* (n22) 279.

[300] Ibid 279.

[301] Ibid 279-80.

mitigation is not subordinate to 'legal policy' aims and instead forms part of the directness enquiry itself.

6.4.2 Temporal scope

The law of mitigation does not apply to the claimant's pre-breach conduct, nor to post-breach conduct undertaken without knowledge of the breach. In relation to anticipatory breaches of contract, mitigation only applies once the claimant has accepted the repudiation; it does not apply prior to acceptance, even where the defendant has made clear that it will not perform. These features of mitigation present another puzzle for the orthodox account.[302] If the law of mitigation aims to encourage the claimant to be self-reliant, why is the claimant not required to be self-reliant all of the time? If the claimant is required to act reasonably to prevent economic waste and maximise community welfare, why would it matter whether or not the claimant has accepted the defendant's repudiation?

On the causal explanation of mitigation, these puzzles are resolved. The law of mitigation requires actual knowledge of the breach because both the restoration and abnormality rules reflect the causal significance of voluntary human conduct. Ordinary causal principles entail that conduct is only voluntary when it is informed. This explanation also shows why it is insufficient (for mitigation) that the claimant 'ought' to have been aware of the breach. In relation to anticipatory breaches, the requirement of acceptance follows from the fact that the rules of mitigation attribute responsibility for the consequences of the defendant's breach. Until the defendant's anticipatory breach has been accepted, there is no breach as a matter of law and so nothing to attribute responsibility for.

[302] Recall that the aim here is to explain the law as it is, not to evaluate whether the law is justified. One might conclude that the following questions indicate that the temporal scope of mitigation should be expanded, but this is beside the point: Section 2.2.2.

6.4.2.1 *Actual knowledge of the breach*

The law of mitigation does not apply prior to the defendant's breach. This is readily accepted by the leading texts,[303] notwithstanding that the restriction sits uneasily with the favoured explanations of self-reliance and prevention of waste. The breach requirement is so well-established that it is rarely stated expressly, although some express statements can be found.[304] In *Wright v Dean*, Wynn-Parry J held that the claimant's failure to register an option in land, which would have prevented the defendant's wrongful sale to a third party, was not a 'failure to mitigate' because there was no breach until the defendant completed the sale.[305] The breach requirement can raise difficult issues about the precise timing of the breach,[306] both in relation to actual breaches and to anticipatory breaches.[307]

Even once a breach has occurred, the rules of mitigation will not apply to the claimant's conduct before it was aware of the breach.[308] This knowledge requirement is also accepted by the leading texts,[309] although its explanation and precise scope is unclear.[310] In *Schering*, Scott LJ held that 'the duty to mitigate the consequences of a breach of contract can hardly arise until the person who is said to be the subject to the duty has become aware

[303] McGregor, *Damages* (n20) [9-020]; Tettenborn, *Damages* (n170) [5.72]; Burrows, *Remedies* (n86) 126; *Chitty* (n46) [26-087].

[304] See eg *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91 (PC) 99 (Lord Keith); *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395 (QB) 400 (Mance J); *The Liepaya* (n124) 671-72 (Rix LJ); *Bulkhaul* (n18) [24] (Smith LJ).

[305] *Wright v Dean* [1948] Ch 686 (Ch) 696.

[306] See eg *The Flying Fish* (n1), discussed in Williams, *Joint Torts and Contributory Negligence* (n284) 287. See also *Toepfer* 578 (Brandon J).

[307] On anticipatory breaches, see further Section 6.4.2.2.

[308] *Sachs v Miklos* [1948] 2 KB 23 (CA) 40-41 (Lord Goddard CJ); *East Ham Corp v Bernard Sunley & Sons* [1966] AC 406 (HL) 445 (Lord Upjohn); *Youell v Bland Welch & Co Ltd (No2) (The 'Superhulls Cover' Case)* [1990] 2 Lloyd's Rep 431 (QB) 461-62 (Phillips J); *Downs* (n31) 435 (Hobhouse LJ); *The Liepaya* (n124) 672 (Rix LJ).

[309] *Chitty* (n46) [26-087]; Treitel, *Contract* (n249) [20-115]; Tettenborn, *Damages* (n170) [5.75]; Kramer, *Contract Damages* (n104) 351. Cf McGregor, *Damages* (n20) [9-046], merely noting that knowledge of the breach is 'an important fact in assessing whether there had been a failure to mitigate'.

[310] See eg text to n321.

of the breach'.[311] More recently, after reviewing the authorities, Gross LJ concluded in *Borealis v Geogas Trading* that 'With specific regard to the question of mitigation, the linkage between the knowledge of a claimant and the reasonableness (or otherwise) of its conduct is plain'.[312] The knowledge requirement often arises in fraud cases, where the claimant may not discover the breach for some time.[313]

More specifically, the requisite knowledge is of the facts that constitute the breach and 'not of the law or the legal consequences of those facts'.[314] This was established by Hobhouse J in *Schering* and was subsequently confirmed (also by Hobhouse LJ) in *County v Girozentrale*.[315] In *Borealis*, Gross LJ agreed that 'For the chain of causation to be broken, the claimant need not have knowledge of the legal niceties of the breach of contract'.[316] Where the claimant is a corporation, the knowledge requirement can raise difficult issues concerning attribution of knowledge within the organisation.[317] Where a latent breach comes to light gradually, there may also be a difficult question as to when the claimant first acquired sufficient knowledge of the facts; the relevant time appears to be at the end of the disclosures.[318]

The orthodox account of mitigation essentially regards the knowledge requirement as a corollary of the reasonableness test.[319] As Williams put it, 'The reasonable man does not spend his time nosing out possible wrongdoing' and the knowledge requirement 'merely incorporates this proposition of fact'.[320] However, the claimant might occasionally act

[311] *Schering Agrochemicals (CA)* (n5) 16.

[312] *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep 482 [100].

[313] *Twycross v Grant* (1877) 2 CPD 469 (CA); *Dobell & Co Ltd v Barber & Garratt* [1931] 1 KB 219 (CA); *Smith New Court* (n22) 266 (Lord Brown-Wilkinson).

[314] *Schering Agrochemicals (QB)* (n3) (Hobhouse J).

[315] *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 (CA) 858 (Hobhouse LJ).

[316] *Borealis* (n312) [46].

[317] *Trebor* (n6) [67] (Tomlinson LJ): 'identification of the natural person whose knowledge is appropriate for this purpose will depend upon questions of delegation of duty within the organisation'. See also *Schering Agrochemicals (CA)* (n5) 4 (Purchas LJ).

[318] *4Eng Ltd v Harper* [2007] EWHC 1568 (Ch) [53] (Briggs J).

[319] Tettenborn, *Damages* (n170) [5.75]; Treitel, *Contract* (n249) [20-115].

[320] Williams, *Joint Torts and Contributory Negligence* (n284) 290.

'unreasonably' by failing to take steps that would have enabled it to discover the breach. This reasoning has led many of the leading texts to propose that mitigation will also apply once the claimant 'ought to have discovered' the breach.[321] Kramer calls this 'constructive knowledge'.[322] Treitel suggests that 'there is no compelling reason for holding that [the duty to mitigate] can never apply where the claimant had, but failed to take, clear opportunities of discovering the breach'.[323]

There is no judicial authority for the orthodox proposition that constructive knowledge suffices for mitigation.[324] Instead the cases establish that actual knowledge is required. In breach of contract cases, the most common judicial explanation for this approach is that the claimant is entitled to rely on the defendant's promised performance.[325] Although this reasoning might be taken to suggest that a failure to discover the breach is thus not 'unreasonable', other cases have established the requirement of actual knowledge directly. In *Schering*, Hobhouse J approved the approach of Phillips J in the *Superhulls Cover* case, which 'rejected any concept of imputed knowledge or treating a party as being in breach of his duty to mitigate because he did not inquire and so inform himself that there had been a breach'.[326]

The requirement of actual knowledge presents a puzzle for the orthodox account because the claimant may act unreasonably without awareness of the breach, or indeed even before the breach occurred. The causal explanation resolves this puzzle. Until the

[321] *Chitty* (n46) [26-087]. See also Tettenborn, *Damages* (n170) [5.75].

[322] Kramer, *Contract Damages* (n104) 351.

[323] Treitel, *Contract* (n249) [20-115].

[324] Cf *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 (KB). The insufficiency of 'constructive knowledge' should not be confused with the proposition that knowledge of the facts rather than their legal implications is sufficient: text to n314.

[325] *Mowbray v Merryweather* [1895] 2 QB 640 (CA) 644 (Lord Esher MR), 645 (Kay LJ), 646 (Rigby LJ); *Reardon Smith Line Ltd v Australian Wheat Board* [1956] AC 266 (PC) 282-83 (Lord Somervell); *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214 (CA) 227 (Beldam LJ); *Six Continents Retail Ltd v Carford Catering Ltd* [2003] EWCA Civ 1790 [22] (Laws LJ), [31] (Buxton LJ); *Flanagan v Greenbanks Ltd* [2013] EWCA Civ 1702 [37] (Rafferty LJ); *Stacey v Autosleeper Group Ltd* [2014] EWCA Civ 1551 [23] (Lloyd LJ).

[326] *Schering Agrochemicals (QB)* (n3) (Hobhouse J), citing *The 'Superhulls Cover' Case* (n308) 462 (Phillips J). See also *Trac Time Control* (n3) [182] (Grenfell J); *Pearson Education Ltd v The Charter Partnership Ltd* [2007] EWCA Civ 130 [33] (Lord Phillips).

claimant is actually aware of the breach, it cannot exercise a choice as to whether (and how) to restore non-breach position. In *Schering*, Hobhouse J reasoned that 'a failure to mitigate involves voluntary conduct; acting under compulsion or without the relevant knowledge will not amount to a breach of the duty to mitigate';[327] in *Trebor Bassett v ADT Fire & Security*, Tomlinson LJ similarly reasoned that 'the act can only be said to be voluntary or the duty to mitigate to arise if the relevant knowledge comes to the attention of the claimant'.[328] In other words, the requirement of actual knowledge follows from the choice principle.

The restricted scope of mitigation does not mean that a claimant's failure to discover the breach can have no legal consequences. As Phillips J clarified in the *Superhulls Cover* case, 'If it is not reasonably foreseeable that the plaintiff will remain in ignorance of the breach and fail to react to it so as to avoid loss, the loss may be too remote'.[329] Similarly, 'If the plaintiff negligently fails to discover the breach … the normal consequences of negligence will follow including, where appropriate, the application of the 1945 Act'.[330] However, the remoteness and contributory negligence rules have different explanations from mitigation. The basis for the reasonable foreseeability rule of remoteness is unclear but does not appear to be causal.[331] Contributory negligence is fault-based and it results in a percentage reduction in damages rather than a counterfactual assessment.[332]

In *County v Girozentrale*, Hobhouse LJ suggested that although mitigation required actual knowledge of the breach, the claimant's failure to discover the breach might break the 'chain of causation' if it was reckless.[333] This recklessness standard has been reiterated

[327] *Schering Agrochemicals (QB)* (n3). See also *County* (n315) 857 (Hobhouse LJ), holding that the claimant's conduct must be 'voluntary in the sense of being undertaken with a knowledge of its significance'; *The 'Superhulls Cover' Case* (n308) 461 (Phillips J), emphasising that the claimant's conduct must be 'voluntary' and 'deliberate'.

[328] *Trebor* (n6) [67] (Tomlinson LJ).

[329] *The 'Superhulls Cover' Case* (n308) 462. See also *County* (n315) 857 (Hobhouse LJ).

[330] *The 'Superhulls Cover' Case* (n308) 462 (Phillips J), referring to the Law Reform (Contributory Negligence) Act 1945. See also Kramer, *Contract Damages* (n104) 349.

[331] Section 4.4.3. See also Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 2: '*Hadley v Baxendale* lays down rules of policy which restrict causal rules'.

[332] Law Reform (Contributory Negligence) Act 1945, s1(1).

[333] *County* (n315) 857 (Hobhouse LJ).

(though not applied) in subsequent decisions.[334] It serves to emphasise the need for a voluntary choice to depart from the normal course of conduct in the circumstances. Accordingly the causal significance of the claimant's reckless conduct derives from the wider abnormality principle applicable where the claimant makes a choice to act abnormally.[335] However, it is distinct from the abnormality rule of mitigation because the claimant's abnormal conduct is not part of an attempt to restore the non-breach position.[336]

6.4.2.2 *Acceptance of anticipatory repudiation*

In claims for breach of contract, if the defendant acted in anticipatory repudiation of the contract prior to the date when performance was due, there are three possibilities for the timing of mitigation: first, when the defendant repudiated the contract ('anticipatory repudiation');[337] second, when the claimant accepted the repudiation ('acceptance');[338] or third, when the defendant's promised performance was due ('performance').[339] The rules of mitigation apply from the time of acceptance. In other words, mitigation does not apply until the claimant accepts the defendant's anticipatory repudiation, but this may be before the date when performance was due. This approach rests on the view that there is no breach of contract until the anticipatory repudiation has been accepted.

Several early sale of goods cases established that the claimant was not bound immediately to resort to the market upon the defendant giving notice that it would not perform.[340] Subsequently in *Shindler v Northern Raincoat*, Diplock J held that 'on a matter of

[334] *Borealis* (n312) [46] (Gross LJ); *Trac Time Control* (n3) [182] (Grenfell J); *Flanagan* (n325) [38] (Rafferty LJ).

[335] Section 5.4.2.2.

[336] Text to n118.

[337] Here 'repudiation' refers generally to conduct giving rise to a right to terminate the contract.

[338] The claimant's acceptance also has the effect of terminating the contract.

[339] This is the date when an 'actual breach' would first occur.

[340] *Leigh v Paterson* (1818) 8 Taunton 540, 129 ER 493, 494 (Dallas CJ); *Startup v Cortazzi* (1835) 2 Crompton, Meeson and Roscoe 165, 150 ER 71, 73 (Alderson B); *Phillpotts v Evans* (1839) 5 Meeson and Welsby 475, 151 ER 200, 201 (Lord Abinger CB), 202 (Alderson B). These cases predate the establishment of the doctrine of anticipatory breach in *Hochster v De La Tour* (1853) 118 ER 922.

law it cannot be said that there is any duty on the part of the plaintiff to mitigate his damages before there had been any breach, which he has accepted as a breach'.[341] The acceptance requirement is generally acknowledged in the leading texts,[342] and was affirmed by the Supreme Court in *Bunge v Nidera*.[343] Liu summarises the position as 'firmly established'.[344] The main authorities involve an available market for replacement performance, where (in accordance with the restoration rule) damages have been assessed as if the claimant resorted to the market at the date of acceptance or as soon as possible thereafter.[345]

Where the claimant did accept the defendant's anticipatory repudiation, mitigation can apply before the defendant's contractual performance was due. In *Frost v Knight*, Cockburn CJ held that the claimant 'will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss'.[346] Several other cases have affirmed this approach to mitigation in principle,[347] although damages were assessed as at the date of performance on the basis that mitigation was not applicable on the facts.[348] In summary, the law is that the rules of

[341] *Shindler v Northern Raincoat Co* [1960] 1 WLR 1038 (Assizes) 1048.

[342] See eg McGregor, *Damages* (n20) [9-020]; *Chitty* (n46) [26-090]; Burrows, *Remedies* (n86) 128.

[343] *Bunge* (n24) [17] (Lord Sumption), [83] (Lord Toulson). See also *Tai Hing Cotton* (n304) 102 (Lord Keith); *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1981] 2 Lloyd's Rep 574 (QB) 580 (Staughton J).

[344] Qiao Liu, *Anticipatory Breach* (Hart 2011) 171, citing *Frost v Knight* (1871-72) LR 7 Ex 111 (Ex Ch); *Roth & Co v Taysen, Townsend & Co* (1896) 1 Com Cas 306, 12 TLR 211 (CA); *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 TLR 716 (CA); *Melachrino* (n45). However, in each of these cases the claimant had in fact accepted the defendant's anticipatory repudiation.

[345] *Millett v Van Heek* [1921] 2 KB 369 (CA); *Tai Hing Cotton* (n304); *The Elena d'Amico* (n27); *Kaines* (n43). See also *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 (CA) 634 (Brown-Wilkinson LJ), in which the claimant did in fact resort to the market as soon as possible after acceptance and was entitled to recover the costs incurred.

[346] *Frost* (n344) 114. See also *Melachrino* (n45) 699 (Bailhache J); *Bunge* (n24) [17] (Lord Sumption).

[347] *Brown v Muller* (1871-72) LR 7 Ex 319 (Ex Ch) 323 (Kelly CB); *Roper v Johnson* (1873) LR 8 CP 167 (CP) 180-81 (Brett J), 183-84 (Grove J); *Millett* (n345) 375 (Bankes LJ), 377 (Atkin LJ); *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 (HL) 1140 (Lord Pearson).

[348] cf *Tai Hing Cotton* (n304) 104-05 (Lord Keith), where there was no fixed date for performance and damages were assessed one month after the date of acceptance (to allow time to negotiate a substitute contract).

mitigation will apply from the time of acceptance (even if performance has not yet become due), but not before.

The timing of mitigation following anticipatory repudiation presents a puzzle for some of the leading texts.[349] Burrows argues that 'the duty to mitigate should arise once there has been an anticipatory repudiation' because 'economic efficiency should override the wishes of the innocent party to hold the contract alive'.[350] The explanation that mitigation aims to prevent waste leads both Burrows and Treitel to conclude that the claimant should sometimes be compelled to 'accept the repudiation, claim damages and make substitute contracts' rather than unreasonably continue its own performance in order to earn the agreed sum.[351] Treitel appears to regard this as a descriptive claim,[352] but Burrows correctly acknowledges its inconsistency with the 'traditional approach' that 'there is no duty to mitigate, unless the claimant chooses to accept the anticipatory repudiation'.[353]

On the causal explanation of mitigation, the timing puzzle is resolved. The rules of mitigation are attributive not prescriptive; in particular, they attribute responsibility for the consequences of the defendant's breach. It follows that the rules can have no application until a breach has occurred. In relation to anticipatory repudiations, there is no breach of contract until the repudiation is accepted, such that 'breach and termination of the contract are simultaneous'.[354] Most famously, in *Howard v Pickford Tool*, Asquith LJ held that 'An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no

[349] However, it is supported by McGregor, *Damages* (n20) [9-020].

[350] Burrows, *Remedies* (n86) 128.

[351] Ibid 435-40; Treitel, *Contract* (n249) [21-013]. Cf McGregor, *Damages* (n20) [9-020], describing this argument as 'misconceived'.

[352] Treitel, *Contract* (n249) [21-013]. This description is inconsistent with the authorities cited at n340 to n345. Furthermore, the standard of conduct relevant to the so-called '*White & Carter* limitation' is much narrower than mitigation: *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 All ER (Comm) 461 [42]-[45] (Cooke J).

[353] Burrows, *Remedies* (n86) 128. Burrows' claims in relation to the timing of mitigation are evaluative rather than descriptive: ibid 440.

[354] *Heyman v Darwins Ltd* [1942] AC 356 (HL) 382 (Lord Wright).

legal rights of any sort or kind'.[355] On this view, 'An anticipatory breach was recognised as a wrong, but an "acceptance" was required to convert it into a fully-fledged breach'.[356] Without a breach recognised in law, there is nothing to attribute responsibility for.

The requirement of acceptance makes it important to determine whether, in addition to any unaccepted anticipatory repudiation, an 'actual breach' has also occurred.[357] If the defendant has already breached an obligation, and the claimant is aware of the breach, then the rules of mitigation will apply for the purpose of assessing damages for that breach. Here, mitigation does not depend on the claimant's acceptance of the breach so as to terminate the contract;[358] termination is only relevant to anticipatory repudiations where there is otherwise no breach at all.[359] However, to be clear, even when there has been an actual breach, this does not mean that mitigation applies to all of the claimant's subsequent conduct;[360] it merely means that the restoration and abnormality rules apply for the purpose of assessing the loss attributable to that particular breach.

6.4.3 Procedural matters

The orthodox account of mitigation faces two procedural puzzles. First, the ambiguity of the 'question of fact' principle has already been highlighted.[361] The application of the reasonableness test is not itself a finding of primary fact and is often successfully appealed. This presents a puzzle for the orthodox account: which aspects of a trial judge's decision on

[355] *Howard v Pickford Tool Co* [1951] 1 KB 417 (CA) 421. See also *Wilkinson v Verity* (1870-71) LR 6 CP 206 (CP) 209 (Willes J); *Johnstone v Milling* (1886) 16 QBD 460 (CA) 467 (Lord Esher MR), 472-73 (Bowen LJ).

[356] Liu, *Anticipatory Breach* (n344) 24. Although Liu is sceptical of this understanding, he accepts that 'courts seem generally to acquiesce in the rule': 28. See further 22-25, 28-30.

[357] See eg *Cerberus Software Ltd v Rowley* [2001] EWCA Civ 78, [2001] ICR 376 [15] (Ward LJ), [43] (Jonathan Parker LJ).

[358] The actual breach need not be repudiatory; mitigation also applies to the assessment of damages for breaches of warranty where there is no right to terminate.

[359] Text to n304.

[360] This view relies on the misconception that mitigation prescribes conduct.

[361] Section 4.2.2.

mitigation can be overturned? Second, although in relation to avoidable loss it is well-settled that the defendant must prove that the claimant acted unreasonably, the burden of proof is less certain in other areas of mitigation. In relation to 'built-in mitigation' under the market rule and 'avoided loss', it may be in the interests of the claimant (rather than the defendant) to displace the assessment of factual loss. This presents another puzzle: who bears the burden of proof?

The causal explanation of mitigation resolves the question of fact puzzle. The choice and abnormality principles that explain the rules of mitigation are not specifically legal; they are questions of the kind that would (according to the old division) have appropriately been left to the jury. However, the application of the restoration rule relies on a careful application of the compensatory principle to determine the claimant's non-breach position; this raises a question of law that, if wrongly applied, can be more readily interfered with on appeal. In relation to the market rule and avoided loss, the burden of proof puzzle is more difficult to resolve. The principle seems to be that the burden of proof is on the party who asserts that the assessment of the claimant's factual loss should be displaced on the grounds of an intervening cause.

6.4.3.1 *Question of fact or law*

The distinction between questions of law and fact originated in the division between the functions of judge and jury respectively.[362] Aside from the diminishing role of civil juries from the mid-nineteenth century onwards,[363] the boundary between questions of law and fact also shifted as new legal rules were developed, such that directions to the jury became more precise. In *British Westinghouse*, Viscount Haldane declared that 'The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases'.[364]

[362] McGregor, *Damages* (n20) [50-016].

[363] Discussed in *Ward v James* [1966] 1 QB 273 (CA) 290-91 (Denning LJ).

[364] *British Westinghouse* (n215) 688.

Subsequently, in *The Chekiang*, Lord Sumner held that 'Damages may be a "jury question", that is a question of fact for the jury … but they must be measured under a proper direction, as to what the law requires'.[365]

Questions of fact were the issues that the jury was left to decide after having been directed (in accordance with the law) by the judge. The jury's decision on a question of fact could only be appealed in very narrow circumstances. In particular, the appellate courts historically had no power to reassess damages (unless both parties consented),[366] and the grounds for granting a new trial were limited to: misdirection by the judge;[367] misconduct by the jury;[368] or severe miscalculation such that 'the damages are so excessive that no twelve men could reasonably have given them'.[369] Provided that the jury was properly directed as to the question of fact to be decided, its decision on the issue was effectively final. The determination of an issue as one of fact or law therefore had significant procedural importance.

In the modern law of damages, the dichotomy between questions of fact and law is obsolete. On appeal, there is 'a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged'.[370] At one end of the spectrum are decisions of primary fact;[371] at the other end are decisions of a 'purely legal nature', such as the interpretation of a statute.[372] In between, there are questions of 'mixed fact and law' that involve applying a legal standard to the facts of the case.[373] Where the question is of this

[365] *Admiralty Commissioners v Owners of the SS Chekiang (The Chekiang)* [1926] AC 637 (HL) 643. For a modern equivalent (although misconceived, given the absence of juries), see *Ruxley* (n145) 353 (Lord Bridge): 'the court, in assessing the measure of the claimant's loss has ultimately to determine a question of fact, although the law has of course developed detailed criteria which are to be applied'.

[366] McGregor, *Damages* (n20) [51-003].

[367] See eg *Hadley v Baxendale* (1854) 9 Ex 341, 355 (Alderson B).

[368] McGregor, *Damages* (n20) [51-017].

[369] *Praed v Graham* (1889) 24 QBD 53 (CA) 55 (Lord Esher MR). See also *Smith v Schilling* [1928] 1 KB 429 (CA) 440 (Greer LJ).

[370] *ST Dupont v EI du Pont de Nemours & Co* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 [94] (May LJ). See further AAS Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) [24.198]-[24.220].

[371] *Dupont* (n370) [94] (May LJ).

[372] Zuckerman (n370) [24.205].

[373] *Re Grayan Building Services Ltd* [1995] Ch 241 (CA) 254 (Hoffmann LJ).

middle kind, Hoffmann LJ has clarified that 'the vaguer the standard … the more reluctant an appellate court will be to interfere with the trial judge's decision'.[374] The important question, then, is which aspects of a trial judge's decision on mitigation are most amenable to interference by an appellate court?

This question raises a puzzle for the orthodox account of mitigation, because the reasonableness test suggests that there must be a single standard for interference in the application of the avoidable loss rule. The descriptive account of the restoration and abnormality rules instead reveals multiple issues, some of which are more amenable to appeal than others. The causal explanation of mitigation also resolves why and how the reasonableness test may have been regarded as a question of fact suitable for a jury.[375] Hart and Honoré conclude that 'All those issues which are on our analysis genuinely causal should be submitted to the jury',[376] essentially because they were not specifically legal questions. The popular idea that the reasonableness test raises a question of fact is thus explained by its reliance on ordinary causal principles.

In applying both the restoration and abnormality rules, the issue of choice is a question of fact in that it relies on ordinary causal principles to determine whether the claimant's conduct was sufficiently voluntary to be regarded as causally significant. The question whether (and when) the claimant had a 'choice' to restore the position that it would have been in if the breach had not occurred, could appropriately have been put to a jury. The conclusion that the claimant had no choice is not restricted to absolute constraints on the claimant's conduct; the decision may involve balancing the claimant's conflicting interests.[377] However, this is no different to how people think about voluntariness in

[374] Ibid 254.

[375] At the time when the reasonableness test was firmly established by Viscount Haldane's classic statement of mitigation in *British Westinghouse* (n215) 689, the role of civil juries was already significantly diminished. The point is that reasonableness came to be regarded as the type of issue that *would be* put to a jury.

[376] Hart and Honoré (n192) 428. See also *Hogan v Bentinck West Hartley Collieries* [1949] 1 All ER 588 (HL) 595-96 (Lord Normand).

[377] Section 5.4.3.

ordinary life for the purpose of attributing responsibility outside the law.[378] The issue requires no specific legal knowledge.

In applying the abnormality rule, the issue of descriptive abnormality is also a question of fact in the sense that it applies ordinary causal principles. The issue whether the claimant departed from the normal course of conduct could appropriately have been put to the jury as a question of fact. The appropriate direction would be whether the claimant acted abnormally having regard to its own circumstances, characteristics and preferences, but ignoring the defendant's potential liability to pay damages.[379] In the modern law of damages, where mitigation is applied without a jury, the appellate court should not too readily interfere with the trial judge's decisions on the issues of choice and abnormality,[380] provided that these basic directions have been followed.[381] This approach probably best explains why the reasonableness test has often been characterised as a question of fact.

The remaining puzzle is why, if reasonableness is solely a question of fact, its application has so often successfully been appealed.[382] As Lord Hoffmann pointed out in relation to intervening causation, 'the existence of numerous appeals which raise questions of causation is a symptom of some deeper malaise … If the question is one of fact and common sense, why should this be so?'[383] His conclusion was that judges often misconstrue 'the rule which provides the context in which the question of causation is being asked. They have asked the wrong question rather than got the wrong answer'.[384] This perfectly captures the sense in which the application of the restoration rule raises an important question of law. Before applying the restoration rule, the judge must carefully assess the

[378] Chapter Five, text to n251.

[379] Section 5.4.2.2.

[380] McGregor, *Damages* (n20) [9-016]: 'once a court of first instance has decided that there has been, or has not been, a failure to mitigate, it is difficult to persuade an appellate court to come to a different view'.

[381] *County* (n315) 858 (Hobhouse LJ): 'Causation involves taking account of recognised legal principles but, that having been done, it is a question of fact in each case'.

[382] Chapter Four, text to n91.

[383] Lord Hoffmann, 'Common Sense and Causing Loss' (Chancery Bar Association Lecture, 15th June 1999) 3.

[384] Ibid 6.

claimant's non-breach position. If the judge attempts to apply mitigation without engaging in this enquiry first, they risk asking themselves the wrong question.

The assessment of the non-breach position follows from the compensatory principle; it constitutes the legal concept of loss.[385] Although 'loss' (and thus 'mitigation of loss') may have many possible meanings outside the law,[386] within the law of damages this concept specifically entails a counterfactual comparison with the position as if the breach had not occurred. An enquiry into whether the claimant's conduct would have minimised its harm in some other sense involves asking the wrong question. The correct question is whether the claimant could have taken steps to restore its non-breach position; only this is 'mitigation of loss' in the legally relevant sense. It follows, as Hobhouse LJ correctly emphasised in *Downs v Chappell*, that in applying the restoration rule it is essential 'accurately to identify the wrong in respect of which the claimant is entitled to recover damages'.[387] This involves a question of law that may readily be appealed.

Once the judge has correctly identified the legal obligation that was breached and asked what would have happened but-for that breach, the remaining stages in the application of the restoration rule (including the issue of choice) are less amenable to appeal. The assessment of what steps would have restored the non-breach position as nearly as possible is essentially a question of fact. For example, in *Bulkhaul v Rhodia Organique*, the defendants repudiated their contract to hire chemical tanks.[388] To restore the non-breach position would have involved hiring out the tanks to another customer; however, on the facts, there was no available market for hire. In these circumstances, the trial judge held that the nearest alternative involved selling the tanks;[389] the restoration rule

[385] Chapter Three, text to n19.

[386] In particular, it may refer instead to an historical comparison with the position that the claimant *was* in before a particular event occurred.

[387] *Downs* (n31) 438 (Hobhouse LJ).

[388] *Bulkhaul* (n18).

[389] Ibid [21] (Smith LJ): 'It was reasonable to expect [the claimant] to make attempts to sell the tanks. That was because, if the contract had run its course, and the tanks … would have been worth nothing at the end. Thus Bulkhaul would be in no worse position if it sold the tanks than if it scrapped them at the end of the contract'.

therefore applied because the claimants had chosen not to take these steps.[390] The Court of Appeal dismissed the appeal on reasonableness.[391]

6.4.3.2 *The burden of proof*

Although mitigation is an aspect of causation, its application involves causal *attribution*, rather than a dispute about primary facts. As Hart and Honoré put it, 'The determination, on causal principles, of the limits of responsibility in a case where the sequence of events is sufficiently established does not depend on adducing further evidence but on characterizing the upshot' of that evidence.[392] The issue of proof raised in mitigation is different from proof of so-called 'factual causation', which may raise issues of evidential uncertainty regarding what has happened, will happen in the future, or would have happened but-for the breach.[393] Instead, as regards the *application* of mitigation,[394] the issue of proof concerns who should bear the burden of proving that either the restoration or abnormality rule applies; in other words, it concerns proving the case rather than proving primary facts.

In relation to avoidable loss, the leading texts widely accept (and perhaps over-emphasise)[395] that the burden is on the defendant to prove that the claimant's conduct was 'unreasonable'.[396] Although a few rogue decisions have placed the burden on the claimant to prove that it acted reasonably,[397] judicial authority on this point is now well-settled.[398] In

[390] Ibid [25] (Smith LJ).

[391] Ibid [27], [37] (Smith LJ).

[392] Hart and Honoré (n192) 407.

[393] See eg *Hotson v East Berkshire HA* [1987] AC 750 (HL); *Wilsher v Essex AHA* [1988] AC 1074 (HL); *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

[394] For evidential issues concerning the legal effect of mitigation, see Section 6.3.1.2.

[395] In relation to other limiting rules such as remoteness, the burden of proof is less prominent.

[396] McGregor, *Damages* (n20) [9-019]; *Chitty* (n46) [26-079]; Tettenborn, *Damages* (n170) [5.103].

[397] *Owners of the Temple Bar v Owners of the Guildford (The Guildford)* [1956] P 364 (PD) 370 (Lord Merriman); *Selvanayagam v University of the West Indies* [1983] 1 WLR 585 (PC) 589 (Lord Scarman), overruled on this point in *Geest plc v Lansiquot* [2002] UKPC 48, [2002] 1 WLR 3111 [14] (Lord Bingham); *Riyad Bank* (n160) [171] (Moore-Bick J).

[398] *Hill v Showell* (1918) 87 LJKB 1106 (HL) 1114 (Lord Parmoor); *Richardson* (n7) 73 (Viscount Simon), 75 (Lord Russell); *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA

short, the defendant has the burden of proving that a rule of mitigation applies. More specifically, the defendant has the burden both of adducing sufficient evidence to raise the issue of mitigation (the 'evidential burden'),[399] and also of persuading the judge that the restoration or abnormality rule applies on the facts (the 'persuasive burden').[400] Briggs LJ recently summarised that 'Where failure to mitigate is relied upon in answer to a claim for damages … it is for the defendant … both to plead and prove a case to that effect'.[401]

In relation to the market rule, which McGregor describes as 'built-in mitigation',[402] the burden is on the party seeking to displace the prima facie measure of damages.[403] This is the obvious implication of the words 'prima facie' in the provisions of the Sale of Goods Act 1979,[404] but the same approach was adopted at common law prior to codification.[405] The prima facie measure reflects an application of the restoration rule: damages are assessed as the cost of resorting to the market to obtain replacement performance, whether or not the claimant in fact did so.[406] Accordingly, where there is an available market, it appears that the burden is effectively on the party (whether claimant or defendant) who is seeking to show that the restoration rule does *not* apply.[407] McGregor and Street correctly identify that this entails a reversal of the burden of proof compared with the position for avoidable loss.[408]

Civ 55, [2001] 1 All ER (Comm) 822 [38]-[39] (Potter LJ); *Saunders v Williams* [2002] EWCA Civ 673, [2003] BLR 125 [22], [24] (Pill LJ); *Wilding* (n62) [45] (Potter LJ), [55] (Sedley LJ).

[399] For an example of the defendant's failure to discharge the evidential burden, see *Levy v Lewis* (CA, 26 November 1993) 2-3 (Steyn LJ).

[400] On the distinction between the evidential and persuasive burden, see generally *Phipson on Evidence* (18th edn, Sweet & Maxwell 2013) [6-02]. In the context of assessing the claimant's factual loss, see also *Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd* [2008] EWCA Civ 955, [2009] Bus LR 529 [37]-[51] (Rix LJ).

[401] *Anselm v Buckle* [2014] EWCA Civ 311 [24] (Briggs LJ).

[402] McGregor, *Damages* (n20) [9-036]. See further text to n20.

[403] *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 (CA) 97 (Otton LJ). See also *Garnac Grain* (n347) 1440 (Lord Pearson); *Louis Dreyfus* (n231) [25] (Andrew Smith J).

[404] Sale of Goods Act 1979, ss50(3), 51(3), 53(3).

[405] *Roper* (n347) 182 (Brett J), 183 (Grove J).

[406] See further text to n21.

[407] See also *Coles* (n175) [27] (Aiken LJ), adopting the 'reasonable cost of repair' as the prima facie measure of damages in car accident cases.

[408] McGregor, *Damages* (n20) [9-036], [30-067]; Street, *Principles* (n331) 37.

In relation to avoided loss, McGregor suggests that 'Where it appears that steps have been taken by the claimant to avoid loss … the onus is on the defendant to prove that, and also how far, loss has thereby been avoided'.[409] Although McGregor comments that 'The onus is the same for avoidable loss',[410] this comparison is misconceived because the concepts of avoidable and avoided loss are very different.[411] For avoidable loss, the burden is on the defendant to displace the claimant's *factual loss* in favour of the harm that would have been suffered if the claimant had acted reasonably.[412] By contrast, on McGregor's account of avoided loss, the burden is on the defendant to displace the assessment of the claimant's *'avoided loss'* in favour of its factual loss. In other words, the position is reversed. There appears to be very little judicial authority to resolve whether this is the correct description of the law.[413]

Although relatively little attention has been paid to the burden of proof for the market rule and avoided loss, it appears to be inconsistent with the well-settled position in relation to avoidable loss. To align the law consistently with the approach to avoidable loss, the burden would be on whichever party is asserting that a rule of mitigation applies to displace the claimant's factual loss.[414] This approach follows the general rule of evidence that 'the party who asserts must prove'.[415] However, it runs contrary to the current prima facie measure under the market rule, which presumptively applies the restoration rule. One way of explaining this discrepancy is as a simple matter of convenience. Although it is wrong to assert that the prima facie measure must always be *recoverable* in order to avoid 'extensive

[409] McGregor, *Damages* (n20) [9-110].

[410] Ibid [9-110] fn453.

[411] Section 4.3.2.3.

[412] Text to n396.

[413] Although McGregor cites *Owners of the Andros Springs v Owners of the World Beauty (The World Beauty)* [1970] P 144 (CA), this case does not support his proposition because it concerned the burden of proving factual loss. However, the proposition may be supported by *Primavera* (n29) [37], where Mance LJ asked 'whether any prima facie loss … was "mitigated" (or avoided) by the respondent's actual conduct'.

[414] Kramer, *Contract Damages* (n104) 363. In *Sony* (n400) [37]-[51], Rix LJ held that the 'legal burden' rests on the claimant to prove its factual loss, although 'the evidential burden may shift depending on the circumstances'.

[415] *Robins v National Trust Co Ltd* [1927] AC 515 (PC) 520 (Viscount Dunedin); *Phipson* (n400) [6-04].

and costly inquiries',[416] this consideration may be relevant in determining the burden of proof.

6.5 Conclusion

The aim of this chapter has been to describe and explain the law of mitigation as it applies to 'avoidable loss'. The main aim was to demonstrate the consistency of the restoration and abnormality rules with the body of precedents on mitigation. The final section also aimed to show how the causal explanation of mitigation helps to resolve some of the puzzles that have previously proved intractable under the orthodox account. At no point has this chapter sought to evaluate or propose changes to the law of mitigation; it leaves open whether the law is justified. In the next chapter, the same process is repeated for 'avoided loss'. The law relating to avoided loss can be stated very simply: the rules are exactly the same as those described in this chapter. Accordingly, the next chapter mirrors this chapter in several respects.

[416] *Joyner v Weeks* [1891] 2 QB 31 (CA) 43 (Lord Esher). See also *The Golden Victory* (n19) [20] (Lord Bingham).

7
Avoided Loss

7.1 Introduction

This chapter describes the application of the law of mitigation to 'avoided loss'. The orthodox account holds that the avoided loss rule applies where the claimant's conduct was 'wholly independent' of the breach; on this view, the effect of the rule is to 'ignore' the consequences of the claimant's actual conduct. Chapter Four highlighted several problems with this understanding.[1] Instead, this chapter argues that the vast majority of the so-called avoided loss cases can be explained as an application of the restoration rule. This rule applies in exactly the same way to benefits as to harms; the claimant is responsible for its choice not to restore the non-breach position for better or worse. The cases on avoided loss are remarkably consistent with this proposition, although inevitably a small number of outlying decisions must also be acknowledged.

7.2 The Restoration Rule

The application of the restoration rule is symmetrical. As Hart and Honoré identified, 'Voluntary conduct negatives causal connection not only with loss but with gain'.[2] More broadly, 'the responsibility that [causal concepts] serve to identify is as much responsibility for good conduct and good outcomes as bad conduct and bad outcomes'.[3] Chapter Six illustrated the application of the restoration rule where the claimant's choice not to restore

[1] Section 4.3.

[2] HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985) 137.

[3] Tony Honoré, 'The Morality of Tort Law - Questions and Answers' in *The Philosophical Foundations of Tort Law* (Clarendon 1995) 82 fn27. See also Hart and Honoré (n2) 86.

the non-breach position caused further harm; this chapter shows that the rule cuts both ways. The claimant is responsible for the outcome of its choice not to restore the non-breach position regardless of whether that choice turned out to be harmful or beneficial. Far from being 'completely different from each other',[4] the orthodox avoidable and avoided loss rules are both reflections of the restoration rule.

7.2.1 Where the rule applies

Where the claimant made a choice not to restore the non-breach position, damages are assessed as if it had done so, for better or worse. The concept of 'avoided loss' reflects the counterfactual effect of the restoration rule; it is the cost that the claimant would have incurred if it had restored the non-breach position, even though in fact it did not. The application and effect of the restoration rule was outlined in Chapter Six. The claimant's choice not to restore the non-breach position may take several forms, including a choice not to repair, replace, or extricate from the breach.[5] In each case, the restoration rule requires an assessment of: the claimant's non-breach position; the steps that would have restored the claimant to its non-breach position as nearly as possible; and whether the claimant made a choice not to take those steps.

7.2.1.1 *Choice not to replace*

Damages have been awarded for the cost of replacing the defendant's non-performance or defective performance even though in fact the claimant chose not to seek a replacement, either immediately or at all. Many such 'avoided loss' cases have arisen in the context of sale of goods or other property where the claimant had an opportunity to resort to an available market for a replacement. Where the claimant made a choice not to resort to the market as

[4] Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 329-30.

[5] To be clear, these modes of restoration are not distinct legal categories but are merely separated for convenience.

soon as possible after the breach, damages are assessed as if it had done so, even if (as it turns out) the choice reduces the harm in fact suffered by the claimant. Just as in relation to avoidable loss,[6] such cases are often expressed as an application of the market rule,[7] but they are better explained as an application of the restoration rule, which (unlike the market rule) emphasises the importance of the claimant's choice not to resort to the market.

The symmetrical application of the restoration rule was clearly explained in *The Elena D'Amico*, where Goff J reasoned that the claimant's choice not to resort to an available market for replacement performance amounts to a 'decision independent of the wrong; and the consequences of that decision are his. If he judges the market correctly he reaps the benefit; if he judges it incorrectly, then the extra cost falls upon him'.[8] In *Bunge v Nidera*, Lord Toulson similarly emphasised that where the claimant had a 'free choice whether to re-enter the market', the defendant 'is not liable to the innocent party for the adverse effect of market changes … nor is the innocent party required to give credit to the guilty party for any subsequent market movement in favour of the innocent party'.[9] In other words, 'The speculation which way the market will go is the speculation of the claimant'.[10]

Jamal v Moolla Dawood illustrates the application of the restoration rule in the context of non-acceptance of shares.[11] Rather than re-selling the shares as soon as possible after accepting the defendant's repudiation, the claimant chose to wait for two months before selling the shares gradually in several batches. In the meantime, the market value of the shares rose, such that the claimant obtained a higher price for the shares than it would have done if it had sold at the date of breach, when it first had the opportunity to do so. The defendant argued that damages should be assessed as the difference between the contract

[6] See further Section 6.2.1.2.

[7] In these cases, 'mitigation has become incorporated into the normal measure of damages': McGregor, *The Role of Mitigation* (n4) 332.

[8] *Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB) 89. See also *Gardner v Marsh & Parsons* [1997] 1 WLR 489 (CA) 507 (Peter Gibson LJ): 'The decisions to retain and subsequently sell the goods are independent of the breach'.

[9] *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082 [80].

[10] Ibid [80].

[11] *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC).

price and the actual sale prices, ie the claimant's factual loss. The Privy Council (whose panel included Viscount Haldane)[12] disagreed, instead awarding damages as if the claimant had sold the shares at the date of breach on the basis that:

> If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.[13]

Although Burrows criticises this reasoning,[14] McGregor and *Chitty* accept that the decision can be explained as an application of Viscount Haldane's second limb in *British Westinghouse v London Underground*, concluding that the subsequent sale of the shares 'was to be regarded as an independent transaction'[15] and 'does not arise from any act of mitigation'.[16] However, this explanation merely restates the *British Westinghouse* test and does not explain why the transaction in *Jamal* was independent, especially given that McGregor reaches the opposite conclusion for several other 'speculation' cases to which the so-called avoided loss rule has been applied.[17] The better explanation is that the Privy Council's reasoning reflects the application of the restoration rule and its reliance on 'speculation' further reflects the importance of the claimant's *choice* not to resort to the market.

[12] In *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL), Viscount Haldane had previously established the test that has since become known as the 'avoided loss rule': see further Section 4.3.1.

[13] *Jamal* (n11) 179.

[14] Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 218: 'This approach leaves a claimant in a better position than if the contract had been performed and therefore unjustifiably runs contrary to the avowed compensatory goal'.

[15] Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [9-129]. See also McGregor, *The Role of Mitigation* (n4) 340.

[16] HG Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [26-098].

[17] McGregor, *Damages* (n15) [9-164]-[9-174], criticising the application of the rule in *Rodocanachi, Sons & Co v Milburn Bros* (1887) LR 18 QBD 67 (CA); *Williams Bros v Ed T Agius Ltd* [1914] AC 510 (HL); *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 (CA).

The reasoning in *Jamal* was subsequently applied by the Court of Appeal in *Campbell Mostyn v Barnett Trading*, a case involving the non-acceptance of goods.[18] The claimants decided not to resell immediately and the market price subsequently rose. The Court of Appeal unanimously awarded damages as if the claimant had sold the goods at the date of breach, even though, as Birkett LJ acknowledged, 'on the facts as we now know them, the plaintiffs … suffered no loss at all'.[19] Again, the court's reasoning reflected the symmetry in the application of the restoration rule. Somervell LJ emphasised that 'if the market had gone even worse than it was on [the date of breach] [the defendants] would not have been liable to pay more than whatever sum was fixed … on that day'.[20] In other words, the claimant was responsible for its choice not to resort to the market, for better or worse.

The same approach is evident in several cases on non-delivery.[21] In *Williams Bros v Agius*, the defendants failed to deliver coal to the claimant at a price of 16s 3d per ton.[22] The market price at the date of breach was 23s 6d per ton. The claimant had already concluded a sub-sale to a third party at 19s per ton. The House of Lords unanimously assessed damages as the difference between the contract price and the market price at the date of breach, even though in fact the claimant chose not to resort to the market and simply cancelled the sub-sale without liability. Proponents of the orthodox account of damages have criticised the award on the basis that it 'wrongly overcompensated the claimant' because it exceeded the claimant's factual loss, arguing that the award should instead have been assessed by reference to the sub-sale.[23]

The reasoning in *Williams Bros* reflects the restoration rule. Lord Moulton held that the difference between the contract price and market price was 'the true measure of [the

[18] *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65 (CA). See also *Gardner* (n8) 507 (Peter Gibson LJ).

[19] *Campbell Mostyn* (n18) 69.

[20] Ibid 68.

[21] *Rodocanachi* (n17); *Williams Bros* (n17); *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm); *Oxus Gold plc v Templeton Insurance Ltd* [2007] EWHC 770 (Comm).

[22] *Williams Bros* (n17).

[23] Burrows, *Remedies* (n14) 213. See also David McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 366.

claimant's] loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled'.[24] In other words, the claimant was awarded the cost of restoring the non-breach position. Viscount Haldane expressly noted that even though this cost was not in fact incurred, the award was 'quite in harmony with what was recently said in this House in *British Westinghouse*'.[25] Viscount Haldane and Lord Dunedin also reasoned that 'if the plaintiff had sold the goods before the breach for more than the market price at that date he could not recover on that footing … it would therefore be unjust if the market price did not govern when he had sold for less'.[26]

The restoration rule also applies where the claimant chooses not to seek a replacement after receiving patently defective goods.[27] The best-known example is *Slater v Hoyle*,[28] which as McGregor puts it, 'has received much attention over the years'.[29] The claimant purchased unbleached cotton from the defendant for the purpose of bleaching and selling on to a third party for use in manufacturing shirts. Although the claimant knew that the deliveries were 'persistently of a quality not in accordance with the contract',[30] it proceeded to sell the cloth to the third party, apparently without incurring any liability under the sub-contract.[31] The Court of Appeal awarded damages based on the difference in market value between the cotton promised and the cotton actually delivered, even though (as it turned out) the claimant was able to use the cotton without suffering any factual loss.

[24] *Williams Bros* (n17) 531. See also 523 (Lord Dunedin).

[25] Ibid 520. See also 523 (Lord Dunedin): 'it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract'.

[26] Ibid 520. See also 522-23 (Lord Dunedin).

[27] Cf *latently* defective goods, as in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 (CA), discussed at text to n117.

[28] *Slater* (n17). See also *Jones v Just* (1867-68) LR 3 QB 197 (QB); *Derby Resources AG v Blue Corinth Marine Co Ltd (The Athenian Harmony) (No1)* [1998] 2 Lloyd's Rep 410 (QB) 415-16 (Colman J).

[29] McGregor, *Damages* (n15) [9-167].

[30] The headnote records that the contract specified the length, width, yarn, warp and weft of the cloth: *Slater* (n17) 12. See also 16 (Warrington LJ), noting that some of the cotton was 'persistently of a quality not in accordance with the contract'.

[31] Scrutton LJ recorded that 'The sub-buyer made oral complaints but did not reject the goods, and though at the time of the trial he was claiming on the buyers, he had not taken any actual legal proceedings': ibid 19.

The award in *Slater* been criticised by proponents of the orthodox account of damages on the basis that it 'cannot be justified on compensatory reasoning and leaves the claimant in a better position than if the contract had been properly performed'.[32] However, the Court of Appeal clearly thought that the award was compensation for loss, albeit not a factual loss. Warrington LJ and Scrutton LJ both described the difference in market value as a 'loss',[33] and Bankes LJ expressly rejected the argument that the claimants had 'suffered no loss'.[34] Scrutton LJ acknowledged that the award gave the claimants 'more if the goods were inferior than they would have got if they were sound',[35] but nevertheless concluded that 'The rules of English law do not always give exact indemnity, and in this case I think they do not'.[36]

The reasoning and result in *Slater* neatly exemplifies the application of the restoration rule. The claimants made a choice not to restore the non-breach position by selling the defective cotton and buying replacement cotton. As Scrutton LJ noted, 'the buyers were under no obligation to deliver the goods of the original contract to the sub-buyer';[37] instead they 'could supply the sub-contract by buying in the market'.[38] It followed that 'If the buyer delivers under the sub-contract the damaged goods and has to pay damages, these damages … will clearly not be recoverable';[39] this proposition is well-established in the context of avoidable loss.[40] Scrutton LJ emphasised that this reasoning cut both ways: the claimants could not recover damages for the losses on the sub-sale if they turned out to be greater

[32] Burrows, *Remedies* (n14) 215. See also McGregor, *Damages* (n15) [9-170]; McLauchlan, *Expectation Damages* 370-72 (n23).

[33] *Slater* (n17) 18 (Warrington LJ), 22 (Scrutton LJ).

[34] Ibid 14. See also 16 (Warrington LJ), rejecting the argument that 'the defendants in fact suffered no damage'.

[35] Ibid 20.

[36] Ibid 24.

[37] Ibid 20. See also 22.

[38] Ibid 21 (Scrutton LJ).

[39] Ibid 22 (Scrutton LJ).

[40] Chapter Six, text to n173.

than the cost of resorting to the market, but 'The result seems the same if they are less … [the sub-sale] cannot affect his claim one way or the other'.[41]

It must be acknowledged that the decision in *Pagnan & Fratelli v Corbisa* is inconsistent with *Slater* and the other applications of the restoration rule.[42] The defendant sellers supplied the claimant with damaged goods. The claimant initially rejected the delivery, but later repurchased the same goods (which were already in its possession) from the defendant at a reduced price. The Court of Appeal rejected a claim for damages based on the difference between the market value of the damaged goods and their value in the promised condition. Salmon LJ concluded that 'the buyers suffered no loss' because they had profited from repurchasing the damaged goods at below their market value.[43] In particular, he held that the repurchase 'formed part of a continuous dealing with the situation in which they found themselves and was not an independent or disconnected transaction'.[44]

The decision in *Pagnan* overlooks that the claimant made a choice not to restore the non-breach position. As Salmon LJ acknowledged, the claimant was not bound to repurchase the damaged goods;[45] it could have resorted to the market to purchase goods of the contractual specification. Just as in *Slater*, the claimant was responsible for its choice not to replace, for better or worse. The failure to see the connection with *Slater*, which was not cited in *Pagnan*, illustrates the pitfalls of the 'continuous dealing' test. The subsequent dealings in *Pagnan* appeared 'continuous' with the original transaction in that they involved the same parties and the same goods; however, the repurchase nevertheless involved a new choice by the claimants to make do with sub-standard goods rather than seeking conforming goods.

[41] *Slater* (n17) 22. See also 23-24.

[42] *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltd* [1970] 1 WLR 1306 (CA).

[43] Ibid 1316.

[44] Ibid 1315-16.

[45] Ibid 1315.

7.2.1.2 *Choice not to repair*

Damages have also been awarded for the cost of repairing damaged or defective property even though in fact the claimant chose not to undertake repairs. In *The London Corporation*, the claimants decided to sell their damaged ship to shipbreakers without repairing it.[46] In *Robinson v Maund*, the claimant's decided to sell their hotel without undertaking repairs required by the defendant's defective refurbishment.[47] In both cases, the Court of Appeal held that the claimants could recover the 'avoided' cost of repair even though as it turned out the subsequent sale prices were unaffected.[48] Similarly, in *Mueller Europe v Central Roofing*, the claimant manufacturers recovered damages for the cost of repairing machinery damaged in a fire started by the defendants, even though the claimants had in fact not undertaken the repairs, instead preferring to move their production to another factory.[49]

One explanation offered for these decisions is that the cost of repair is *always* recoverable regardless of the reason why it was in fact 'avoided', because this cost reflects the diminution in value of the property suffered at the time of breach. This explanation has been put forward by Stevens in his rights-based account of substitutive damages,[50] and it also has some judicial support in two recent car accident cases.[51] In *Coles v Hetherton*, Aikens LJ held that 'the claimant is not obliged to repair the chattel to recover the direct loss suffered', because direct loss 'is suffered as soon as the chattel is damaged'.[52] This concept

[46] *The London Corporation* [1935] P 70 (CA).

[47] *Robinson v Maund* (CA, 20 January 1993).

[48] *The London Corporation* (n46) 77 (Greer LJ); *Robinson* (n47) (Steyn LJ). See also, in relation to defective services: *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] CLC 1251 (CA) 1255-56 (Sir Thomas Bingham MR).

[49] *Mueller Europe Ltd v Central Roofing (South Wales) Ltd* [2013] EWHC 237 (TCC), 147 Con LR 32 [148] (Stuart-Smith LJ): 'the fact that the group has taken a decision that the facility will be partially replaced by building in the USA is immaterial'.

[50] Robert Stevens, *Torts and Rights* (OUP 2007) 69-70; Robert Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart 2009) 182.

[51] *Burdis v Livsey (sub nom Lagden v O'Connor)* [2002] EWCA Civ 510, [2003] QB 36 [84] (Aldous LJ); *Coles v Hetherton* [2013] EWCA Civ 1704, [2015] 1 WLR 160 [27]-[33] (Aikens LJ).

[52] *Coles* (n51) [27].

of direct loss is very different from factual loss because it is wholly unaffected by post-breach events.[53] The direct loss explanation holds that the claimant is entitled to substantial damages for breach regardless of the factual loss evident at the date of trial.

The restoration rule provides an alternative and narrower explanation for the awards of damages in *The London Corporation*, *Robinson* and *Mueller*.[54] In each of these cases, the claimant made a choice not to repair the damaged property; that choice was an intervening cause for which the claimant was responsible for better or worse. If the claimants had instead made a significant loss as a result of their decision not to repair, damages would still have been limited to the cost of repair;[55] the risk arising from not repairing was down to the claimant either way. Unlike the 'direct loss' explanation, the restoration rule only applies where the claimant exercised a *choice* not to repair. Where the cost of repairs is 'avoided' for a different reason, the restoration rule has no application and the claimant will be limited to its factual loss, unless another rule (such as the benevolence rule) applies.[56]

Where repairs have not yet been undertaken by the date of trial and may or may not be undertaken in the future, the absence of an intention to undertake repair does not count conclusively against an award of 'cost of cure' damages.[57] This approach can now be explained in light of the restoration rule. If damages for the cost of repairs may be recoverable even when it is already known that the repairs have not been and will never be completed, it follows that the claimant's prospective intention to undertake the repairs cannot be decisive. Of course, tricky issues remain in deciding whether or not to award damages for the cost of repairs that have not yet been undertaken, but these issues concern

[53] Ibid [27] (Aikens LJ): 'Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages', citing *Burdis* (n51) [95] (Aldous LJ). However, in *Burdis*, Aldous LJ held that damages for direct loss *could* be reduced by post-breach events 'in so far as such events are referable to the claimant's duty to mitigate his loss': [88].

[54] n46, n47 and n49.

[55] See further Section 6.2.1.1.

[56] For an outline of the benevolence rule, see Section 3.2.3.

[57] *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68 (CA) 80 (Steyn LJ); *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 (HL) 357, 359 (Lord Jauncey), 372 (Lord Lloyd); *Giedo Van Der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) [484] (Stadlen J); *De Beers Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC) [345] (Edwards-Stuart J). See further David Winterton, *Money Awards in Contract Law* (Hart 2015) 191-99.

the 'reasonableness' (or abnormality) of the proposed repair,[58] for which the claimant's actual intentions may provide relevant evidence but cannot be determinative.

The restoration rule cannot explain the handful of further cases where damages have been awarded for an avoided cost of repairs in circumstances not attributable to the claimant's own choice.[59] For example, substantial damages have been awarded where the repairs were completed but were not paid for by the claimant.[60] However, these outlying decisions are also inconsistent with the 'factual loss cap' presupposed by the orthodox account of damages, and although they fit with the direct loss explanation, that account is inconsistent with other decisions.[61] In short, no account achieves perfect consistency with the body of precedents. The restoration rule at least explains some of the cases that have awarded damages for an 'avoided' cost of repair, leaving only a small number of outliers where the claimant has recovered more than its factual loss for reasons unconnected with its own choice.

7.2.1.3 *Choice not to extricate*

Further applications of the so-called avoided loss rule arise from the claimant's choice not to extricate itself from the breach. The Court of Appeal recently noted that 'Reported cases in this field are legion',[62] and indeed a careful search of the unreported cases indicates that they are even more numerous than is conventionally acknowledged.[63] The relatively few

[58] See further Section 6.2.2.2.

[59] See eg *The Glenfinlas* [1918] P 363 (PD), where the cost of repairs was awarded even though the claimant's ship was sunk in battle before it could be repaired. However, see also the contradictory reasoning in *The Kingsway* [1918] P 344 (CA) 358-59 (Pickford LJ), 362 (Scrutton LJ).

[60] *Smiley v Townshend* [1950] 2 KB 311 (CA); *Jones v Stroud DC* [1986] 1 WLR 1141 (CA); *Burdis* (n51). These cases must also be distinguished from those in which the non-breach position was restored through the benevolence of a third party: see Section 3.2.3.

[61] See eg *Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)* [1952] AC 292 (HL); *Dimond v Lovell* [2002] 1 AC 384 (HL).

[62] *Bacciottini v Gotelee & Goldsmith* [2016] EWCA Civ 170 [34] (Davis LJ).

[63] See eg *Bondwheat Ltd v Riddington & Co* (CA, 10 July 1991); *Constantine (Tavistock Antiques) v TotalFinaElf UK Ltd* [2003] EWHC 428 (Ch). See also, in specialist reports: *Daisley v BS Hall & Co* (1972) 225 EG 1553 (QB); *Marder v Sautelle & Hicks* [1988] 2 EGLR 187 (CA); *Pankhania v Hackney LBC* [2004] EWHC 323 (Ch), [2004] 1 EGLR 135.

cases mentioned by the leading texts are written off as 'wrongly decided' on the basis that the award exceeded the orthodox 'factual loss cap' on damages; these cases have led many scholars to conclude that the application of the avoided loss rule is in a 'dreadful muddle'.[64] However, the awards are consistent with the application of the restoration rule, and the judicial focus on the claimant's choice not to extricate strongly supports this explanation.

The claimant's choice not to extricate from the breach may take one of two main forms depending on the assessment of the non-breach position. The first category of cases involve a choice by the claimant (after discovering the breach) to retain property that it would otherwise have sold but-for the breach.[65] The second category of cases involve a choice not to undo a transaction (by reselling property) that the claimant would never have entered into in the first place but-for the breach.[66] In both sets of cases, the courts have reasoned that the claimant is responsible for the consequences of its choice to retain the property, for better or worse. The claimant is awarded damages as if it had sold the property when it could have done so, even though in fact it did not. An important consequence of this reasoning is that the claimant may recover damages greater than its factual loss.

In relation to the first category of extrication cases, the Court of Appeal's decision in *Blue Circle Industries v MOD* perfectly illustrates the application of the restoration rule.[67] The defendants leaked radioactive material on to the claimant's land. If the leak had not occurred, the claimant would have sold the land to a prospective purchaser for around £10mil in 1993.[68] By the time the land became available to sell in 1994 after having been decontaminated,[69] an intervening slump in the property market had reduced its value to only £4mil. The claimant chose not to sell the land in 1994, and by the date of trial in 1996

[64] McLauchlan, *Expectation Damages* (n23) 384. See further Chapter Four, text to n276.

[65] See eg *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289 (CA); *Primavera v Allied Dunbar Assurance plc* [2002] EWCA Civ 1327, [2003] Lloyd's Rep PN 14; *Constantine* (n63).

[66] See eg *Daisley* (n63); *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 (CA); *Marder* (n63); *Hussey v Eels* [1990] 2 QB 227 (CA); *Bondwheat* (n63); *Devine v Jefferys* [2001] Lloyd's Rep PN 301 (QB); *Pankhania* (n63).

[67] *Blue Circle* (n65).

[68] Ibid 314 (Chadwick LJ).

[69] Ibid 308 (Aldous LJ), 315 (Chadwick LJ): 'The estate was unsaleable, whether as a whole or in parts, until the completion of the clean-up operation'.

the value of the land had risen to £5mil. The Court of Appeal awarded damages as if the claimant had sold the land in 1994, even though in fact the claimant did not sell the land then, or at any time prior to trial.

In reaching this conclusion, the Court of Appeal expressed the issue as one of causation.[70] Aldous LJ held that after 1994, the question 'whether or not the [defendants] would be liable for a further decrease in value or would have the benefit of an increase must depend on whether that further increase or decrease was caused by the contamination'.[71] He reasoned that 'The chain of causation will end at a particular date whether or not the value increased or decreased thereafter'.[72] The chain of causation was broken in 1994 because thereafter the claimants were no longer '"locked into" the situation produced by the contamination'[73] and were 'free once again to exercise their own choice as to the use or marketing of the estate'.[74] It did not matter that the claimants did not in fact sell in 1994, nor that the claimant's factual loss had subsequently been reduced by the rising market.

The Court of Appeal emphasised that the decision to retain the property after 1994 was one that the claimant 'was free to take in its own interests'.[75] In particular, the issue was whether the claimants made a 'choice' rather than whether it acted 'reasonably in retaining the land'.[76] Chadwick LJ expressly acknowledged a 'logical symmetry' in the application of the rule and noted that 'The symmetry has attracted the other members of this court'.[77] The questions of whether the claimants could recover for the further harm if the market fell or must give credit if the market rose, 'must be answered the same way, whichever way it is'.[78] Simon Brown LJ's concluding comments encapsulate the key

[70] Ibid 305 (Aldous LJ), 316 (Chadwick LJ), 321-22 (Simon Brown LJ).

[71] Ibid 305.

[72] Ibid 308.

[73] Ibid 308 (Aldous LJ).

[74] Ibid 315 (Chadwick LJ). See also 321 (Simon Brown LJ).

[75] Ibid 316 (Chadwick LJ).

[76] Ibid 321 (Simon Brown LJ). See also 316 (Chadwick LJ).

[77] Ibid 317.

[78] Ibid 321.

elements of the restoration rule, including its symmetrical application, its link to causation and the importance of choice:

> [The claimants'] decision here to retain their estate after December 1994 should not properly be regarded 'as part of a continuous transaction' … The loss caused by that breach of statutory duty ended once the land was reinstated and again became available to be retained or sold as [the claimants] chose. Any further loss would have been caused by [the claimants'] decision to retain the land; likewise any gain. The speculation from that point was on their own account.[79]

The same reasoning is evident in *Primavera v Allied Dunbar Insurance*.[80] The defendant failed to advise the claimant of the need to make salary contributions to a pension scheme; if the claimant had been properly advised, he would have made the relevant contributions and would have closed the fund in 1995.[81] Instead, when the claimant discovered the breach in 1995, he chose to retain the fund, which subsequently increased in value. Mance LJ identified the issue as being 'whether any prima facie loss suffered as at March 1995 was "mitigated" (or avoided) by the respondent's actual conduct' in retaining the fund.[82] The Court of Appeal assessed damages as if the claimant had closed the fund in 1995, even though in fact the fund remained open until at least 2002 and (as things turned out) the claimant was left in a better financial position than if he had been properly advised.

The Court of Appeal's reasoning was again based on causation, concluding that although 'there was a causal link between the appellants' negligence and the eventual profit … the negligence merely set the scene for that profit rather than directly causing it'.[83] The judges emphasised the importance of the claimant's choice to retain the fund. Mance LJ reasoned that 'Rather than crystallise his loss … the respondent chose to keep the pension policy and the loan in existence to their full extent. That may or may not have proved

[79] Ibid 321.

[80] *Primavera* (n65).

[81] Ibid [7] (Simon Brown LJ), [36] (Lord Mance). See especially [52] (Latham LJ), noting that 'the purpose of the original transaction … was to enable the respondent to raise a loan of £500,000 which he could redeem in 1995. The respondent had not intended the transaction to continue beyond that'.

[82] Ibid [37].

[83] Ibid [21] (Simon Brown LJ). See also [50] (Latham LJ).

beneficial overall, but it was, in legal terms, his "speculation"'.[84] All of the judges recognised the symmetry of this proposition. As Latham LJ put it, 'Had that investment decision proved disadvantageous, [the claimant] would not have had any claim for such loss against the [defendants] … The corollary is that the [defendants] are not entitled to take advantage of any benefits'.[85]

In *Primavera*, the judges also sought to relate their reasoning to the orthodox avoided loss rule. Latham LJ acknowledged that 'I was at first attracted by the [defendant's] argument, essentially based on *British Westinghouse* … that the [claimant] simply did that which a reasonable and prudent man would have done in the circumstances'.[86] However, on reflection he agreed with Simon Brown LJ's conclusion that 'the benefits accruing to the fund through its being left in place during the five and a half years in question were … not part of a continuous transaction of which that negligence was the inception; rather they were the result of a number of decisions by the [claimant]'.[87] In substance, the reason why the British Westinghouse test was satisfied was because the claimant made a free choice not to extricate from the breach, regardless of whether that decision was in some sense 'reasonable'.

The second category of extrication cases is illustrated by *Hussey v Eels*,[88] one of the best-known and perhaps most controversial instances of recovery for avoided loss. The claimants were induced to buy a house by the defendant's negligent misrepresentation that the property was free from subsidence. Upon discovering the subsidence, the claimants chose not to resell the house immediately, but instead sought planning permission to develop a second house on the same site. Two years later, after receiving planning permission, the claimants sold the property for substantially more than they had paid for it. The Court of Appeal awarded damages based on 'the difference between the price paid …

[84] Ibid [40]. See also [29] (Simon Brown LJ), [52] (Latham LJ).

[85] Ibid [52] (Latham LJ). See also [29] (Simon Brown LJ), [40] (Mance LJ).

[86] Ibid [51] (Latham LJ).

[87] Ibid [21] (Simon Brown LJ). See also [38] (Mance LJ).

[88] *Hussey* (n66).

and the actual market value of the property at the date of completion' even though the claimants had in fact resold the property at a profit.

Mustill LJ acknowledged that 'in one sense there was a causal link between the inducement of the purchase by misrepresentation and the sale two-and-a-half years later'.[89] However, applying the *British Westinghouse* test, he concluded that 'when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception'.[90] This conclusion has been criticised by the leading texts. McGregor and Burrows describe *Hussey* as a 'particularly suspect'[91] and 'controversial'[92] decision, because 'the acts of applying for planning permission and then selling upon obtaining it were designed to deal with the difficulties raised by the subsidence affecting the property' such that 'those acts arose from the consequences of the wrong and the benefit from acts taken in mitigation'.[93]

The criticisms of *Hussey* overlook the central features of the restoration rule. After discovering the misrepresentation, the claimants could have extricated themselves from the transaction by reselling the property immediately.[94] As Mustill LJ put it, the claimant's decision to retain the property whilst they sought planning permission 'represented a choice of one of the options with which the plaintiffs had been presented by the defendants' wrongful act'.[95] If this choice had proved unwise, for example if their planning application had been unsuccessful or if the property had otherwise decreased in value during the intervening period, the defendant would not have been responsible for the additional harm suffered. It follows, as Kramer correctly identifies, that the consequences of retaining and

[89] Ibid 241.

[90] Ibid 241.

[91] McGregor, *The Role of Mitigation* (n4) 399.

[92] Burrows, *Remedies* (n14) 161.

[93] McGregor, *Damages* (n15) [9-137]. See also Burrows, *Remedies* (n14) 161.

[94] Although there is no report of an express finding that the claimants would not have entered into the transaction but-for the misrepresentation, this finding can reliably be inferred from the context.

[95] *Hussey* (n66) 241. See also 233.

later developing the site are also irrelevant where they turned out to be beneficial to the claimant.[96]

Although commonly omitted from the leading texts, numerous other cases support the approach in *Hussey*. In reality, the cases acknowledged and criticised by the orthodox account are just the tip of the iceberg. Three decisions predating *Hussey* all awarded damages for avoided loss based on the claimant's choice not to extricate after being induced to purchase property by the defendant's negligent survey.[97] In each case, the court awarded damages as if the claimants had extricated by reselling the property immediately, even though in fact the claimants had not resold the property, either immediately or at all, and had not suffered any factual loss. In one of these decisions, Bristow J reasoned that 'What is sauce for the goose is sauce for the gander, and if [the claimant] would never be entitled to recover more than [the cost of extrication], it must follow that he will never be entitled to recover less'.[98]

Since the decision in *Hussey*, at least three further decisions have allowed recovery for avoided loss in circumstances where the claimant made a choice not to extricate.[99] These cases have either been overlooked altogether or dismissed as wrongly decided by the leading texts.[100] In the most recent case, *Pankhania v Hackney LBC*, the claimant property developer was induced to buy a car park on the basis of the defendant's misrepresentation that the car park was occupied under a contractual licence, when in fact the occupier held a protected tenancy.[101] Vos J awarded damages as if the claimant had resold the car park upon discovering the misrepresentation, even though in fact he chose to retain the car park and succeeded in obtaining possession from the protected tenant, thereby reducing his factual loss. Vos J reasoned that:

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[96] Adam Kramer, *The Law of Contract Damages* (Hart 2014) 54.

[97] *Daisley* (n63); *Perry* (n66); *Marder* (n63).

[98] *Daisley* (n63) 1557.

[99] *Bondwheat* (n63); *Devine* (n66); *Pankhania* (n63).

[100] See eg McGregor, *Damages* (n15) [9-154], criticising *Devine* (n66) and omitting the other two cases. Other proponents of the orthodox account of mitigation have omitted all three cases from their analysis.

[101] *Pankhania* (n63).

> the decision to retain the Properties was indeed collateral to the tort, because [the claimant] would not have bought the Properties, but for the tort. He could have been expected to sell the Properties when he found out about the Tenancies, but he chose not to in the circumstances then prevailing. That was not part of a continuous transaction of which the misrepresentation was the inception.[102]

As an application of the restoration rule, this reasoning is impeccable: Vos J started by assessing the non-breach position, clarifying that the claimant would not have entered into the transaction but-for the breach; he then reasoned that the claimant could have resold the car park (thus restoring the non-breach position) but instead made a choice not to do so. It was on this basis that the claimant's conduct was not part of a 'continuous transaction' under the *British Westinghouse* test. Vos J also noted counsel's argument that 'Things could have gone disastrously wrong for [the claimant] and he would not have been able to claim more. But if things went well for [the claimant], that is his good fortune'.[103] Although Vos J expressed the award as the 'normal measure of damages', he noted that this measure was 'intimately bound up with' questions of mitigation and causation.[104]

Two recent Court of Appeal cases also considered the application of the avoided loss rule. The facts of the two cases were similar. In *Bacciottini v Gotelee & Goldsmith*, the defendants negligently failed to advise the claimants of a planning restriction on a property that the claimants were thinking of buying.[105] After going ahead with the purchase and discovering the error, the claimants succeeded in having the restriction lifted but nevertheless claimed damages for the diminution in value of the property at the date of completion. In *LSREF III Wight v Gately*, the defendants negligently failed to advise the claimant lenders about an insolvency clause in a lease that resulted in the claimant's loan being under-secured.[106] The claimant subsequently succeeded in negotiating the removal of the clause, thereby restoring adequate security, but nevertheless claimed damages representing the diminution in value of the security at the date of the transaction.

[102] Ibid [45].

[103] Ibid [14].

[104] Ibid [22].

[105] *Bacciottini* (n62).

[106] *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359.

In both *Bacciottini* and *LSREF*, the Court of Appeal rejected the application of the avoided loss rule and held that the claimants could only recover for the costs actually incurred in removing the planning restriction and insolvency clause respectively.[107] It is difficult to say whether or not these decisions are correct, because in both cases the trial judge failed to make any findings as to what would have happened if the claimants had been properly advised.[108] The Court of Appeal was untroubled by these omissions and indeed sought to discourage such 'speculation'.[109] In *LSREF*, Briggs LJ noted that the question of what would have happened but-for the breach made 'no difference for present purposes'.[110] This approach misunderstands the legal concept of loss, because without assessing the claimant's non-breach position, it is impossible to apply either the restoration rule or the compensatory principle.

The Court of Appeal's reasoning in *Bacciottini* and *LSREF* highlights a common error in the analysis of the avoided loss cases. In both cases, the court focused on rebutting counsel's argument that damages for the diminution in value as at the date of breach were *always* recoverable.[111] This argument was rightly rejected, but it is a straw man. The so-called 'diminution in value' measure, often invoked in the context of avoided loss, is predicated on the counterfactual effect of the restoration rule. In the context of extrication, the restoration rule only applies where the claimant made a choice not to resort to the market to undo a transaction that it would not have entered into but-for the breach. It is therefore true that the claimant cannot *always* recover damages for diminution in value (as where the claimant had no choice), but it does not follow that the claimant can *never* recover on this basis.

Although there was no finding on the non-breach position in either *Bacciottini* or *LSREF*,[112] if the trial judge had found that the claimants would not have entered into the

[107] *Bacciottini* (n62) [63] (Davis LJ); *LSREF* (n106) [40]-[43] (Briggs LJ).

[108] *Bacciottini* (n62) [29] (Davis LJ); *LSREF* (n106) [14] (Briggs LJ).

[109] *Bacciottini* (n62) [69] (Davis LJ); *LSREF* (n106) [14] (Briggs LJ).

[110] *LSREF* (n106) [14].

[111] *Bacciottini* (n62) [58] (Davis LJ); *LSREF* (n106) [35] (Briggs LJ).

[112] n108.

transaction but-for the breach, there would have been a good argument that the restoration rule should have applied. This is because in both cases the claimants chose not to undo the transaction after discovering the breach. On this basis, the cases appear indistinguishable from *Hussey* and related decisions.[113] One might object that the claimants would then have recovered damages greater than their factual loss; however, this point cannot be conclusive because it is also true of the numerous other cases described in this chapter. It must also be remembered that the restoration rule cuts both ways; if the claimants' choice not to extricate had proved disadvantageous, they could not have recovered for the additional harm suffered.

On the other hand, in *Bacciottini*, the steps that the claimants in fact took were exceptionally straightforward compared with the process of undoing the transaction by reselling the house. The trial judge and Court of Appeal emphasised that the removal of the planning restriction was 'simple, obvious and cheap'.[114] In these circumstances, it may have been descriptively abnormal for the claimants to have restored the non-breach position by reselling the house. If so, this case would raise the same tension between legal and descriptive norms as in *Ruxley v Forsyth*, whereby the application of the restoration and abnormality rules conflict.[115] The same cannot be said on the facts of *LSREF*, because there the choice to negotiate the removal of the insolvency clause does not appear to have been obviously cheaper or more straightforward than extricating from the transaction by selling the under-secured loan.[116]

[113] Text to n88 and following.

[114] *Bacciottini* (n62) [59] (Davis LJ).

[115] *Ruxley* (n57). See further Chapter Six, text to n153.

[116] Although the Court of Appeal rejected the trial judge's conclusion that the renegotiation was 'complicated and potentially open-ended' (at [52]), it did not attempt any comparison with the difficulty of extrication.

7.2.2 Where the rule does not apply

The limits on the recovery of 'avoided loss' are also explained by the scope of the restoration rule. The counterfactual cost of restoring the non-breach position is only awarded where the claimant made a *choice* not to restore the non-breach position. There are two main circumstances in which the restoration rule will not apply, again for better or worse: first, where the claimant had no choice to restore the non-breach position, either because it was unaware of the breach or because it was unable to restore; and second, where the non-breach position was in fact restored, either by the claimant or a third party. In these circumstances, no intervening cause arises to displace the assessment of the claimant's factual loss: the claimant can recover for any additional harm suffered, but if the claimant obtains a benefit or reduces harm, this fact will also be taken into account in assessing damages.

7.2.2.1 *The claimant had no choice to restore*

Where the claimant was unaware of the breach, the restoration rule has no application and damages will be assessed by reference to the claimant's factual loss. This proposition explains the decision in *Bence Graphics v Fasson*.[117] The claimant purchased vinyl film from the defendant to be used in manufacturing decals for sub-sale to third parties. The vinyl contained insufficient stabiliser to protect against ultra-violet light and therefore degraded faster than promised. This defect only became apparent after the claimant had already supplied the decals to its sub-buyers.[118] The claimant sought damages based on the difference in market value between the vinyl promised and supplied, even though in fact the claimant had obtained full price for the decals and received only one complaint from amongst its sub-buyers.

[117] *Bence Graphics* (n27).

[118] Ibid 108 (Thorpe LJ), 106 (Auld LJ).

The Court of Appeal rejected the claim for difference in market value, holding that the claimant could only recover the much smaller sum representing the 'actual losses (if any) suffered by the plaintiffs under or arising from [the sub-sales]'.[119] The leading texts regard this decision as impossible to reconcile with the earlier Court of Appeal authority in *Slater*.[120] Bridge concludes that 'The *Slater* and *Bence* cases display radically different philosophies of damages assessment'.[121] The decision in *Bence* is preferred over *Slater* by proponents of the orthodox loss-based account of damages,[122] whereas proponents of the rival rights-based account have criticised *Bence*.[123] These analyses of *Bence* and *Slater* reflect the conventional split between those who think that damages greater than factual loss are *never* available, and those who think that they are *always* available.

Both *Slater* and *Bence* are consistent with the application of the restoration rule. The key distinction between the cases is that in *Bence* (unlike in *Slater*), the defect was latent. The claimant only discovered that the vinyl was faulty after it had already been supplied to the sub-buyers;[124] it had no choice to restore the non-breach position by resorting to the market to purchase replacement vinyl of the contractual specification. In these circumstances, the so-called 'difference in value' measure of damages is irrelevant. In the absence of any intervening cause, the defendant is responsible for the actual consequences of the breach, for better or worse. This symmetry was expressly recognised by Otton LJ, who noted that he would have reached the same decision if the claimant's factual loss on the sub-sales had instead turned out to be greater than the difference in value rather than less.[125]

[119] Ibid 91 (Otton LJ). The sub-sale losses amounted to £22,000 in respect of returned stock, whereas the difference in value was £564,328.

[120] n17.

[121] Michael Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 LQR 404, 417.

[122] Burrows, *Remedies* (n14) 215; McGregor, *Damages* (n15) [9-170]; McLauchlan, *Expectation Damages* (n23) 370-72.

[123] Stevens, *Damages and the Right to Performance* (n50) 179-80.

[124] n118.

[125] *Bence Graphics* (n27) 101.

This explanation of the decision in *Bence* is consistent with Treitel's analysis.[126] Treitel argued that where the claimant 'had (legally) no choice as to the disposal of the goods', then damages should be measured by reference to the actual losses under the sub-sale rather than the difference in value.[127] This reasoning, often evident in 'string contracts', aptly reflects the scope of the restoration rule. However, Treitel went on to conclude that *Bence* was wrongly decided because there the claimants were not contractually obliged to use the vinyl supplied by the defendants for their sub-sale.[128] Although Treitel's reasoning is correct as a matter of *legal* choice, it overlooks the fact that the claimants did not have any *practical* choice because they were unaware of the breach. The award of damages for 'avoided loss' has similarly been rejected in other cases involving a latent breach.[129]

Kennedy v Van Emden is often cited in favour of the orthodox loss-based account of damages.[130] The defendant solicitors negligently advised the claimant in relation to a lease. The claimant would not have entered into the lease but-for the breach.[131] By the time the error was discovered, the problem had been corrected by legislation such that the claimant suffered no factual loss. Nourse LJ held that 'Compensation is a reward for real, not hypothetical, loss. It is not to be made an occasion for recovery in respect of a loss which might have been, but has not been, suffered'.[132] This reasoning is plainly too broad, because it excludes all instances of counterfactual assessment. The decision is better explained on the narrower basis that the breach was latent. The difference in value of the lease at the date of breach was irrelevant because the claimant had no choice to restore the non-breach position by extricating from the transaction at that date.

[126] GH Treitel, 'Damages for Breach of Warranty of Quality' (1997) 113 LQR 188.

[127] Ibid 192.

[128] Ibid 193.

[129] *McKinnon v E Surv Ltd* [2003] EWHC 475 (Ch), [2003] Lloyd's Rep PN 174 (Ch); *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, [2012] 2 CLC 747 [133]-[136] (Rix LJ). See also the reasoning in *Gardner* (n8) 507 (Peter Gibson LJ).

[130] *Kennedy v Van Emden & Co* [1996] PNLR 409 (CA).

[131] Ibid 414 (Nourse LJ).

[132] Ibid 414.

There is one outlying decision where the claimant was awarded damages for an avoided loss even though the relevant benefit was obtained whilst the claimant was still unaware of the breach.[133] In *Needler v Taber Financial Services*, the claimant was the victim of a pensions mis-selling.[134] Prior to discovering the breach, the fund benefited substantially from a demutualisation. Sir Andrew Morritt VC held that 'the benefit was not caused by and did not flow, as part of a continuous transaction, from the negligence'.[135] This conclusion is inconsistent with the restoration rule because (unlike in *Primavera*)[136] the claimant was unaware of the breach.[137] There was no intervening cause and the benefit should therefore have been taken into account, just as any additional loss to the fund would have been so long as the breach remained latent.

The restoration rule also has no application where the claimant had no choice to restore the non-breach position because there was no available market for restoration. Again, in the absence of a choice by the claimant, there is no intervening cause; the defendant is thus responsible for the actual consequences of the breach for better or worse. For example, in *The New Flamenco*, the defendant charterers wrongfully repudiated a charterparty by redelivering the vessel two years early.[138] At the date of termination, there was no available market for substitute hire of the vessel.[139] Instead, the claimant owners sold the vessel. The claimant sought damages for the loss of profits that would have been earned under the remainder of the charterparty, even though in fact it had profited significantly from selling the vessel earlier than it would otherwise have done. The Court of

[133] See also *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] 1 All ER (Comm) 999 [36]-[38] (Longmore LJ), but this decision is explicable on the distinct ground of 'reflective loss'.

[134] *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501 (Ch).

[135] Ibid [26].

[136] See text to n80.

[137] Cf Burrows, *Remedies* (n14) 159-60.

[138] *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)* [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep 383. For a more detailed analysis of the decision, see further Andrew Dyson, 'Choice, Benefits and the Basis of the Market Rule' [2016] LMCLQ 202.

[139] This finding is recorded in [3], [23] and [60] of the Arbitration Award. See *The New Flamenco (CA)* (n138) [24]-[25] (Longmore LJ) and [49]-[50] (Clarke LJ), discussing the significance of this fact.

Appeal concluded that this profit should be taken into account in the assessment of damages.

The Court of Appeal emphasised the claimant's absence of choice. The court upheld the arbitrator's decision that because there was no available market for hire, the sale of the vessel was a 'necessity'[140] and 'clearly caused by the breach'.[141] Longmore LJ reasoned that by selling the vessel, the claimant was 'not speculating on the market as he would be if there was an available market [for hire] of which he chooses not to avail himself'.[142] Instead, where the claimant had no choice to secure substitute hire, 'The doctrine of mitigation may … sometimes require an owner to sell the vessel'.[143] In these circumstances, the reason why sale of the vessel is not an independent decision is that there is 'no alternative form of mitigation available'.[144] Longmore LJ also emphasised the symmetry of this conclusion, holding that by selling, the clamant 'may make additional losses or additional profits but, *in either event*, they should be taken into account'.[145]

The same reasoning applies where the claimant was unable to access the market. Just as the claimant can recover damages for any harm suffered whilst it remained 'locked in' to a transaction that it would not have entered into but-for the breach,[146] any benefits must

[140] Arbitration Award [70].

[141] The arbitrator's findings are reported by Longmore LJ at *The New Flamenco (CA)* (n138) [11]: see Arbitration Award [60].

[142] Ibid [25] (Longmore LJ). See also [49] (Clarke LJ).

[143] Ibid [31] (Longmore LJ). See also [25] (Longmore LJ): 'it will not usually be reasonable for the shipowner to claim [loss of profits under the charterparty] if he is able to mitigate that loss by trading his vessel if opportunities to trade that vessel arise', [50] (Clarke LJ): 'the reasonable thing to do is to sell the ship'.

[144] Ibid [29] (Longmore LJ), citing *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2010] EWHC 903 (Comm), [2011] 2 Lloyd's Rep 360 [63] (Steel J). For further applications of this principle see eg *Glory Wealth Shipping Pte Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819 (Comm), [2012] 1 All ER (Comm) 402 [25] (Blair J); *Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814 (KB) 820 (Atkin J).

[145] *The New Flamenco (CA)* (n138) [25] (emphasis added). On this basis the defendants conceded that: 'if the sale market had risen substantially during that time, the Charterers would be liable for the Owners' inability to take advantage of that rise in the market': ibid [30] (Longmore LJ).

[146] See eg *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL). See further Chapter Six, text to n231.

also be taken into account.[147] The decision in *Wapshott v Davis Donovan* may be doubted on this basis.[148] The defendant solicitors failed to identify a defect in title to property purchased by the claimants. The claimants were unable to resell the property until the defect was cured. The Court of Appeal awarded damages based on the difference in value of the property at the date of breach, even though in fact the claimants had profited from the rise in property prices whilst the property remained unsaleable. This benefit should have been taken into account in the assessment of damages because the claimants had no choice to sell earlier.

Finally, the decision in *Wertheim v Chicoutimi Pulp* is also commonly cited in support of the orthodox 'factual loss cap' on damages.[149] It is true that the Privy Council's reasoning appears to adopt this understanding; Lord Atkinson held that it would be 'against all justice' if the claimant was 'permitted to make a profit by the breach of … and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position'.[150] However, the outcome of *Wertheim* is broadly consistent with the scope of the restoration rule.[151] On the facts, restoration of the non-breach position was impossible because the breach consisted of *delayed* delivery, which cannot be undone or corrected. This distinguishes *Wertheim* from the non-delivery cases such as *Williams Bros*,[152] in which the claimant made a choice not to obtain replacement goods at all.

[147] For example, where the claimant benefits whilst being locked in to a 'string contract' for the sub-sale of identical goods: *Slater* (n17) 15 (Bankes LJ, obiter); Treitel, 'Damages for Breach of Warranty of Quality' 192-93.

[148] *Wapshott v Davis Donovan & Co* [1996] PNLR 361 (CA).

[149] See further Section 3.2.3.

[150] *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (PC) 308.

[151] The explanation for the precise award in *Wertheim* is unclear and does not appear to have any supporters in the leading texts: see eg Burrows, *Remedies* (n14) 217; McGregor, *Damages* (n15) [9-171]. See also Stevens, *Damages and the Right to Performance* (n50) 183, concluding that the award 'neither reflects the value of the right nor the loss suffered'.

[152] Lord Atkinson also gave judgment in *Williams Bros* (n17), and expressly distinguished *Wertheim* as a case about delay rather than non-delivery: 529. See also ibid 522 (Lord Dunedin).

7.2.2.2 *The non-breach position was restored*

Where the non-breach position was in fact restored (either by the claimant or a third party) the restoration rule again has no application. As Viscount Haldane clarified in *British Westinghouse*, in these circumstances the court must simply 'look at what actually happened, and balance loss and gain'.[153] Both the costs and benefits of successful restoration must be taken into account.[154] The vast majority of cases given in support of the proposition that claimants can never recover damages greater than their factual loss are explicable on the narrower basis that the relevant benefit was obtained through the claimant's own steps to restore the non-breach position. As Viscount Haldane further clarified *in Hill v Showell*, it does not matter that the claimant 'may have gone somewhat out of his way to make fresh efforts',[155] provided that the efforts involved steps taken in restoration.[156]

British Westinghouse itself exemplifies that the orthodox avoided loss rule will not apply where the benefit in question resulted from steps taken by the claimant to restore the non-breach position.[157] In purchasing the replacement turbines, the claimant was merely restoring the position (as nearly as possible) as if the defendant had supplied turbines of the correct specification; both the costs and benefits of the replacement were therefore properly taken into account.[158] The earlier authorities cited in *British Westinghouse* are similarly explicable. In *Staniforth v Lyall*, the relevant benefit was the profit on a substitute charter undertaken by the claimant following a wrongful repudiation by the defendant

[153] *British Westinghouse* (n12) 691.

[154] See further Section 6.3.2.1.

[155] *Hill v Showell* (1918) 87 LJKB 1106 (HL) 1108.

[156] The only exception may be if the steps were descriptively abnormal given the claimant's own circumstances, characteristics and preferences: see further text to n193.

[157] *British Westinghouse* (n12). This explanation of *British Westinghouse* is reflected in *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The Fanis)* [1994] 1 Lloyd's Rep 633 (QB) 636 (Mance J) and McGregor, *Damages* (n15) [9-116].

[158] The argument for taking into account the cost but not the benefit was doomed to fail: see Chapter Four, text to n232.

charterers.[159] In *Erie County National Gas v Carroll*, the benefit resulted from the claimant's use of its own gas supply in substitution for the gas promised by the defendant.[160]

Several subsequent decisions can also be explained on this basis.[161] For example, in *Bellingham v Dhillon*, the claimant driving instructor was negligently injured by the defendant.[162] The claimant sought damages for loss of profits in operating a driving simulator that he would have purchased but-for his injury. In assessing damages, Forbes J took into account the fact that the claimant had subsequently made a saving by purchasing the simulator at a significant discount. Forbes J reasoned that 'The action of the plaintiff was that of a reasonable and prudent man of business. It was his duty to mitigate his damage by buying this equipment'.[163] The purchase involved actual restoration of the non-breach position and was therefore correctly included in the assessment of damages, even though it took place long after the breach.[164]

There is one outlying decision in which the claimant was awarded damages for avoided loss even though the benefit resulted from the claimant's own steps taken to restore the non-breach position. In *Mobil North Sea v PJ Pipe & Valve*, the defendants supplied latently defective valves that were subsequently used by the claimant in its building project.[165] Upon discovering the defect, the claimant took steps to settle claims made against it by the main contractor on the project. The Court of Appeal held that any benefit to the claimants from this settlement was to be ignored. Although Rix LJ concluded that the settlements were 'an entirely independent and collateral matter arising not in the context

[159] *Staniforth v Lyall* (1830) 7 Bing 169, 131 ER 65 (CP).

[160] *Erie County Natural Gas & Fuel Co Ltd v Carroll* [1911] AC 105 (PC). See especially Lord Atkinson's reasoning at 117. Lord Atkinson also noted by way of symmetry that 'It may well be that if several reasonable but abortive attempts had been made to procure this gas the cost of these would have been properly treated as part of the cost of ultimately obtaining it': 119.

[161] See eg *Hill* (n155); *Nadreph Ltd v Willmett & Co* [1978] 1 WLR 1537 (Ch); *Gregory v Shepherds* [2000] Lloyd's Rep PN 724 (CA); *The Kildare* (n144) [67] (Steel J).

[162] *Bellingham v Dhillon* [1973] QB 304 (QB).

[163] Ibid 309.

[164] *Hussey* (n66) 236-38 (Mustill LJ)

[165] *Mobil North Sea Ltd v PJ Pipe & Valve Co Ltd* [2001] EWCA Civ 741, [2001] 2 All ER (Comm) 289.

of mitigation at all',[166] this conclusion is may be doubted because the steps taken to minimise liability to third parties were part of an attempt to restore the non-breach position.

Where the claimant's non-breach position is restored by a third party without cost to the claimant, the restoration rule has no application and the benefit will be taken into account in the assessment of damages. The leading example is *Dimond v Lovell*, where following a car accident, the claimant obtained a hire car without paying for it due to an unenforceable credit agreement with a third party.[167] The House of Lords rejected a claim for the reasonable cost of hire on the basis that it was not actually incurred. Lord Hoffmann held that 'the only way … in which Mrs Dimond could recover damages … is if your Lordships were willing to create another exception to the rule against double recovery. I can see no basis for doing so'.[168] This reasoning reflects the correct starting point. Unless either the insurance, benevolence or restoration rule applies, there is no reason to displace the assessment of the claimant's factual loss.

There are a handful of cases in which substantial damages have been awarded despite the fact that the claimant's non-breach position was restored without cost to the claimant. The Court of Appeal's decision in *Burdis v Livsey* is inconsistent with the House of Lords' reasoning in *Dimond*.[169] The facts of *Burdis* were identical to *Dimond* except that the credit agreement pertained to repair rather than hire. The Court of Appeal held that the cost of repair was recoverable even though it had not in fact been incurred by the claimant.[170] Aldous LJ reasoned that the cost of repairs reflected a 'direct loss' whereas hire costs were distinguished as a 'potential future loss'.[171] This distinction between different types of harm

[166] Ibid [30].

[167] *Dimond* (n61).

[168] Ibid 400 (Lord Hoffmann).

[169] *Burdis* (n51). See also *Jones v Stroud* (n60).

[170] *Burdis* (n51).

[171] Ibid [87] (Aldous LJ). This distinction was originally advanced by Harvey McGregor QC as counsel for the claimant: [78] (Aldous LJ).

was not properly defined; the correct approach (reflected by the insurance, benevolence and restoration rules) is instead to distinguish between different types of post-breach event.

Gardner v Marsh & Parsons also wrongly awarded damages for avoided loss.[172] The claimant purchased a long lease in a property following the defendant's negligent failure to warn of serious structural defects requiring repair. The Court of Appeal awarded damages based on the difference in value of the lease at the date of breach, even though in fact the landlords had subsequently undertaken the repair at no cost to the claimant. For the majority (Peter Gibson LJ dissenting), Hirst LJ relied on *Phillips v Ward* in support of the proposition that the difference in value measure was always recoverable.[173] However, this measure is predicated on the counterfactual effect of the restoration rule where the claimant made a choice not to extricate from the breach; it had no application in *Gardner*, where the claimant was initially unaware of the breach,[174] and restoration was undertaken by a third party.[175]

7.3 Other 'Avoided Loss' Cases

The previous section addressed a small number of outlying decisions that were said to be inconsistent with the restoration rule and wrongly decided. In addition to these outliers, there appear to be two further types of case in which damages for avoided loss have been awarded. These cases are sufficiently numerous and internally consistent that they must be accommodated within a descriptive account of the law, although not necessarily within the law of mitigation. First, there are other 'independent' decisions by the claimant taken in addition to restoration of the non-breach position; these cases may be explained as an extended application of the restoration rule. Second, there are also cases in which the

[172] *Gardner* (n8).

[173] Ibid 496 (Hirst LJ).

[174] Ibid 491 (Hirst LJ).

[175] Although the trial judge failed to reach a firm conclusion as to what would have happened but-for the breach, it can be inferred that the claimant would probably have gone ahead with the transaction but would have negotiated for the repairs to be undertaken prior to completion: ibid 492, 497 (Hirst LJ).

claimant may be said to have 'earned' the benefit; these cases may be explained by analogy with the insurance rule, distinct from the causal principles that underlie the law of mitigation.

7.3.1 Independent decisions

The claimant may choose to take steps that, although not part of an attempt to restore the non-breach position, nevertheless would not have been undertaken but-for the breach. For example, suppose that the claimant is injured by the defendant and whilst recovering in hospital, he uses his spare time to set up a business or buy a lottery ticket. The business profits or lottery winnings are not taken into account in the assessment of damages.[176] This proposition is accepted by proponents of the orthodox account of damages, even though the benefit would not have arisen but-for the breach.[177] In relation to the lottery ticket example, Burrows concludes that the 'benefit should not be deducted because it was too indirectly related to the tort or breach of contract'.[178]

The best-known example from the cases is *Lavarack v Woods of Colchester*.[179] The claimant was wrongfully dismissed. He subsequently took employment with a rival company and also purchased shares in another rival company called Ventilation. Neither of these steps could have occurred but-for the breach, because both were prohibited during the course of his original employment The Court of Appeal held that although the remuneration from the substitute employment was to be taken into account in assessing the claimant's loss, the benefit of the investment in Ventilation was not. Lord Denning MR reasoned that although 'the plaintiff was only at liberty to invest in Ventilation because his

[176] Law Commission, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (Law Com No 262, 1999) [10.4].

[177] Burrows, *Remedies* (n14) 157-58.

[178] Ibid 158.

[179] *Lavarack v Woods of Colchester* [1967] 1 QB 278 (CA). See also *Hill* (n155) 1115 (Lord Parmoor); *Jewelowski v Propp* [1944] KB 510 (KB); *The Fanis* (n157).

employment was terminated … nevertheless the benefit from that investment was not a direct result of his dismissal. It was an entirely collateral benefit'.[180]

The decision in *Lavarack* has been supported by the leading texts on the basis that 'while the profit on the Ventilation shares was a compensating advantage, it should not be deducted because it was too indirectly related to the breach, as it did not follow from action taken to avoid its consequences'.[181] Although this 'directness' reasoning hints that the decision is concerned with the application of causal principles, the test itself is too vague. In *The Fanis*, Mance J articulated a more specific test based on whether 'the profit was an element or consequence of the *substitute*' for performance.[182] For example, in *Lavarack*, the claimant's choice to purchase the Ventilation shares was not part of his attempt to secure substitute employment; similarly, the decision to purchase a lottery ticket whilst in hospital is not part of a claimant's attempt to treat his injury.

The substitute performance test articulated by Mance J reflects a further application of the restoration rule. So far it has been argued that the restoration rule only applies where the claimant made a choice *not* to restore the non-breach position. However, even where the claimant did restore the non-breach position, it may *also* choose to take steps that are not part of the attempt at restoration (or 'substitute' performance). The reason why these steps are regarded as 'indirect' or 'independent' even though they would not have arisen but-for the breach is that they are voluntary and not part of an attempt at restoration. Again, this rule cuts both ways and applies to costs as well as to benefits;[183] for example, the claimant cannot recover for the cost of buying the lottery ticket if he does not win, any more than his winnings are taken into account if he does.

Of course, it may not always be entirely straightforward to determine whether any of the steps actually taken by the claimant were distinct from the attempt at restoration. *Chitty*

[180] *Lavarack* (n179) 290. See also 300 (Russell LJ).

[181] Burrows, *Remedies* (n14) 158. See also McGregor, *Damages* (n15) [9-123].

[182] *The Fanis* (n157) 637.

[183] See eg Hart and Honoré (n2) 158: 'For a man who has suffered a serious injury owing to defendant's negligence it may be natural to decide to take a holiday, and it may be probable that he will do so, but it does not follow that he can charge the tortfeasor with the cost of it'.

gives an indication of this issue in acknowledging that 'the courts have seldom taken [the claimant's] benefit into account where the alternative use chosen by the claimant was substantially different from his promised performance under the original contract'.[184] But by contrast, 'Where the alternative use has a similar goal (e.g. the earning of profits or wages), the courts have been more likely to take it into account in assessing damages'.[185] In other words, although the line may be difficult to draw precisely, the aim is to distinguish steps taken in restoration from steps that serve some different purpose altogether.

7.3.2 Earned benefits

There are several cases awarding damages for 'avoided loss' where the claimant took advantage of an opportunity to restore the non-breach position at a lower cost than expected. The best-known example is *The Mediana*, in which the claimant's lightship 'Comet' was negligently damaged by the defendant.[186] The claimant sought to restore its non-breach position by providing a temporary replacement for the lightship during the period of repair. However, rather than hiring a replacement lightship, the claimant was able to make use of its spare lightship 'Orion', which it had maintained ready for emergencies. The claimant recovered damages (in an amount agreed by the parties) for 'loss of the use of the Lightship "Comet" or hire of the services of the Lightship "Orion"',[187] even though the claimant was in fact able to deploy the Orion without incurring any out-of-pocket expense.[188]

[184] *Chitty* (n16) [26-101].

[185] Ibid [26-101].

[186] *Owners of the Steamship Mediana v Owners of the Lightship Comet (The Mediana)* [1900] AC 113 (HL). See also *The Elena d'Amico* (n8) 90 (Goff J).

[187] *The Mediana* (n186) 114, where the headnote refers to the pleadings. Cf James Edelman, 'The Meaning of Loss and Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 216, suggesting that the amount equated to the cost of maintaining the spare. Edelman's analysis cannot be correct because Lord Shand noted (at 121-22) that the cost of maintaining the spare was £1000 per annum, equating to £203 pro rata for the 74 days of deprivation, whereas the agreed sum was £311.

[188] See also *Erie County* (n160), where the claimant was able to use its own gas reserves rather than resorting to the market, following the defendant's failure to supply the gas.

Other cases appear to raise similar issues. In *Jebsen v East & West India Dock Company*, the claimants transported passengers by steam-liner from Norway to America.[189] In breach of contract the defendants detained one of the claimants' ships in their port, such that its voyage was delayed. The claimant recovered damages (in an amount assessed by the jury) that included the loss of fares that would have been earned from passengers due to travel on the ship,[190] even though the claimants in fact managed to reallocate most of the passengers to other ships within its fleet.[191] More recently, in *Coles v Hetherton*, the claimant recovered damages for the 'reasonable cost' of repairing its car 'assessed by reference to the position of the individual claimant',[192] even though in fact the claimant had arranged the repairs through its insurer at a cheaper rate.

The rules of mitigation do not appear to explain these decisions. In principle, the abnormality rule could apply to saved expenses ('avoided loss') just as to excessive costs ('avoidable loss'), in circumstances where the claimant made a choice to restore the non-breach position in an abnormal way.[193] However, the cases on avoidable loss clarify that descriptive abnormality relies on an agent-level rather than population-level norm.[194] In other words, the claimant's conduct must have been abnormal for that particular claimant, not merely abnormal for most claimants in that position. On the facts of the cases highlighted, the steps taken by claimant (for example, making use of a spare ship within the claimant's own fleet) do not appear to have been abnormal in light of the claimants' own circumstances, characteristics and preferences.

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[189] *Jebsen v East & West India Dock Co* (1874-75) LR 10 CP 300 (CP). Cf *Platt v London Underground Ltd* [2001] 2 EGLR 121 (Ch), where on similar facts Neuberger J rejected a claim for loss of profits.

[190] *Jebsen* (n189) 300, where the headnote refers to the loss of 'passage-money payable by certain emigrants'.

[191] This award was approved by Viscount Haldane in *British Westinghouse* (n12) on the basis that 'what was relied on as mitigation did not arise out of the transactions the subject-matter of the contract': 690.

[192] *Coles* (n51) [16] (Aikens LJ). See also *Bee v Jenson* [2007] EWCA Civ 923, [2007] 4 All ER 791, raising the same issue in relation to hire charges.

[193] *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [176] (Leggatt J). See further Section 6.2.2.3.

[194] See eg *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, [2011] QB 357, where a car dealership was held to have acted unreasonably by hiring a spare vehicle when it could have deployed a spare. See further Chapter Six, text to n167.

An alternative explanation involves applying the principles underlying the insurance rule. In *Parry v Cleaver*, Lord Reid held 'that the real and substantial reason for disregarding [insurance pay-outs] is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the [defendant]'.[195] This reasoning explains why the insurance rule only applies where the claimant (rather than the defendant or a third party) paid the premiums on the insurance policy.[196] The House of Lords has established that the same rule extends to pension payments, provided that the claimant made the contributions.[197] The rule thus applies generally to earned benefits rather than merely to insurance pay-outs specifically.

The decisions in *The Mediana*, *Jebsen* and *Coles* can all be explained by applying the insurance rule to saved expenses, by analogy with the receipt of benefits. In *The Mediana*, Smith LJ (giving judgment in the Court of Appeal) expressly drew an analogy between the claimant's decision to maintain a spare for emergencies and contributions to an insurance policy, holding that by maintaining a spare, the claimants 'stand for the purpose their own insurers'.[198] In *Jebsen*, Denman J relied on the decision in *Bradburn v Great Western Railway*, the leading authority on the insurance rule.[199] In *Coles*, Aikens LJ reasoned that 'what the insurer can obtain on the open market … is irrelevant, because the position of the insurer is, as a matter of law, irrelevant'.[200] In this way, all of the decisions reflect the application of the insurance rule.

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[195] *Parry v Cleaver* [1970] AC 1 (HL) 14. See also 31 (Lord Morris), 35 (Lord Pearce), 39 (Lord Wilberforce), 49 (Lord Pearson); *Forgie v Henderson* (1818) 1 Murray 410, 418 (Lord Chief Commissioner Adam); *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514 (HL) 528 (Lord Bridge); *Shearman v Folland* [1950] 2 KB 43 (CA) 46 (Asquith LJ).

[196] *Hussain* (n195) 527 (Lord Bridge); *Hodgson v Trapp* [1989] AC 807 (HL) 819 (Lord Bridge); *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 WLR 963 (CA) 970 (O'Connor LJ).

[197] *Parry* (n195); *Smoker v London Fire and Civil Defence Authority* [1991] 2 AC 502 (HL) 543 (Lord Templeman); *Hopkins v Norcros plc* [1994] ICR 11 (CA).

[198] *Owners of the Steamship Mediana v Owners of the Lightship Comet (The Mediana)* [1899] P 127 (CA) 137. See also *The Mediana* (n186) 122 (Lord Shand) ('instead of waiting for an emergency suddenly occurring, they have thought fit to have a ship ready'), 123 (Lord Brampton).

[199] *Jebsen* (n189) 305, citing *Bradburn v The Great Western Railway Co* (1874-75) LR 10 Ex 1 (Ex Ch).

[200] *Coles* (n51) [37]. See further [34]-[42].

The insurance rule is distinct from the law of mitigation and ordinary causal principles. First, it does not rely on the choice principle; the claimant may 'earn' the benefit even though its contributions (for example, to an insurance policy or pension) were compulsory. Second, the claimant's contributions need not be descriptively abnormal; it does not matter that everyone takes out insurance. Third, the insurance rule applies to action taken by the claimant prior to breach. Although Hart and Honoré give some indication that they regard the insurance rule as causal, they also rely on the more general proposition that it would be 'unjust' to deprive the claimant of the benefit.[201] In *Parry v Cleaver*, Lord Pearce expressly rejected causal reasoning and instead concluded that the insurance rule was based on considerations of 'fairness and justice and public policy'.[202]

7.4 Conclusion

The explanation of the avoided loss cases put forward in this chapter provides a third alternative to the existing 'loss-based' and 'rights-based' accounts of damages. The orthodox loss-based account, outlined in Chapter Three, holds that the claimant can *never* (subject only to anomalous policy-based exceptions)[203] recover damages greater than its factual loss. In complete contrast, the rights-based account developed by Stevens holds that the claimant can *always* recover 'substitutive damages' regardless of its factual loss.[204] The restoration rule provides a 'middle way' between these loss-based and rights-based accounts, by showing when and why the claimant can *sometimes* recover damages greater than its factual loss. In summary, damages for 'avoided loss' are recoverable where the benefit in question was causally attributable to the claimant's own choice not to restore the non-breach position.

[201] Hart and Honoré (n2) 160.

[202] *Parry* (n195) 33, 37.

[203] Section 3.2.3.

[204] Stevens, *Torts and Rights* (n50) ch4; Stevens, *Damages and the Right to Performance* (n50).

8
Conclusion

> The reported decisions on many branches of this subject have become so numerous as to tend to obscure the general principles which underlie them. They may be compared to the leaves of a tree; when a tree is in full foliage the numbers of its leaves frequently hide from view the form and development of the trunk and branches which support them.[1]

8.1 Contribution to Scholarship

This thesis is the first monograph on the English law of mitigation. The lack of existing scholarship on mitigation is remarkable for two main reasons: first, the doctrine has existed in roughly its current form for over a century; and second, mitigation can now plausibly lay claim to being the most heavily litigated doctrine in all of private law. Existing scholarship on mitigation is almost exclusively confined to the practitioner texts; whilst these texts provide a useful catalogue of judicial decisions on mitigation, their analyses have tended to suffer from a failure to see the wood for the trees. This thesis puts forward a new descriptive and explanatory account of the law of mitigation. It draws directly from the cases and differs from the orthodox account established by the leading texts. The main arguments of each chapter of the thesis are outlined in Chapter One,[2] and an overview of the new account is outlined in Chapter Five.[3] This section aims to highlight the main contributions of the thesis to existing scholarship.

The most ambitious contribution of the new descriptive account is to supplant entirely the orthodox exposition of the avoidable and avoided loss rules. The thesis proposes that the law of mitigation is best described by the restoration and abnormality

[1] MD Chalmers, *The Sale of Goods: Including the Factors Act 1889* (Clowes 1890) iii. Chalmers was referring specifically to the sale of goods cases, but the metaphor is apt for the law of mitigation.

[2] Section 1.3.

[3] Section 5.4.

rules; in other words, it is contended that these rules are more consistent with the reasoning and results of the judicial decisions on mitigation. A key difference between the orthodox account and the new account concerns the symmetrical application of the restoration rule, which almost entirely explains the application of the orthodox avoided loss rule.[4] The restoration rule provides that where the claimant made a choice not to restore the position that it would have been in but-for the breach (the 'non-breach position'), damages are assessed as if it had done so, for better or worse. Mitigation is thus not merely a 'limitation' on damages, but can also explain the recovery of damages greater than the claimant's factual loss.

A further contribution of the new descriptive account is to refine the orthodox understanding of the avoidable loss rule. Although commonly framed in terms of reasonableness, the relevant test is whether the claimant made a *choice*, not whether it acted with good reason.[5] Where the claimant chose not to restore the non-breach position at all, it will be held to have acted 'unreasonably'.[6] Where the claimant did attempt to restore the non-breach position but did so in an abnormal way, the new account clarifies that the claimant will be held to have acted unreasonably if its conduct was abnormal having regard to its own circumstances, characteristics and preferences.[7] The new account also contributes to the orthodox understanding of mitigation by revealing the counterfactual effect of the avoidable loss rule, thereby dispensing with the misleading 'guillotine heuristic' adopted by the leading texts.[8]

In relation to the new explanatory account of mitigation, the most ambitious contribution of the thesis is to contend that the law of mitigation is explained by the ordinary causal principles used by people outside the law.[9] The thesis reflects but also

[4] Section 7.2.1.

[5] For criticisms of the reasonableness test, see Section 4.2.2. On the meaning of choice, see Section 5.4.3.

[6] Section 5.4.2.1 and Section 6.2.1.

[7] Section 5.4.2.2 and Section 6.2.2.

[8] Section 4.2.3 and Section 6.3.1.

[9] Chapter Five.

significantly refines the judicial explanation of mitigation as an aspect of causation. In particular, the new account draws on the ordinary causal concepts first identified by Hart and Honoré in their seminal work on *Causation in the Law* and substantiates these concepts by reference to more recent empirical research.[10] The thesis contributes to existing scholarship by providing renewed support for the proposition that, both within and outside the law, causal reasoning extends beyond the rudimentary 'but-for' test of counterfactual necessity. The new account accordingly has important implications beyond the doctrine of mitigation.[11]

One may disagree with the conclusion that the law of mitigation is explained by 'causal' principles, yet accept the broader contention that mitigation serves to *attribute responsibility* for the outcomes of the claimant's post-breach conduct. This alone marks an important contribution to existing scholarship. In particular, it establishes the distinctive view that mitigation is a backwards-looking doctrine; the doctrine does not seek to prescribe how citizens should (prospectively) behave.[12] By contrast, nearly every one of the leading texts on damages currently adopts an instrumental explanation of mitigation based on the encouragement of self-reliance or the prevention of economic waste.[13] The new explanation is not only more consistent with judicial reasoning than the orthodox explanations, but it also helps to resolve several puzzles faced by the orthodox account, including why the mitigation rules apply universally to every assessment of loss and also why the rules are temporally limited to the claimant's post-breach conduct.[14]

Finally, the thesis also seeks to make a broader contribution to private law scholarship by presenting a new methodological framework for scholarly analysis of the common law.[15] The thesis rejects the trend towards 'interpretive' accounts of private law,

[10] HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985). See further Section 5.3.

[11] See further text to n36.

[12] Section 4.2.1.

[13] For criticism of these explanations, see Section 4.4.

[14] Section 6.4.

[15] Chapter Two.

which (at least superficially) purport to observe criteria of both 'fit' and 'justification'. Chapter Two argued that it was legitimate, and indeed often preferable, for private lawyers to describe and explain common law rules without seeking to evaluate (or 'justify') them.[16] This thesis describes and explains the law of mitigation, but does not seek to justify it. The reader may conclude that in practice this methodology does not look much different from conventional private law scholarship. If so, this reinforces the contention that many or indeed most private lawyers are already engaged in 'mere' description and explanation of the law, even where they label their enterprise as 'interpretive'. Justification is an optional extra in private law scholarship.

8.2 Further Implications

The thesis has three main implications beyond the law of mitigation. First, the new account also explains other legal rules within the law of damages, including the doctrines of 'supervening acts by the claimant' and 'betterment'.[17] Where the claimant made a choice not to restore the non-breach position, its conduct has sometimes been expressed in terms of supervening causation rather than mitigation.[18] The supervening act doctrine has also commonly been invoked where the claimant's conduct was descriptively abnormal.[19] Where the claimant's conduct formed part of an attempt to restore the non-breach position, it is conventionally referred to as a 'failure to mitigate', whereas outside this context it is instead classified as a 'supervening cause'. This distinction has no legal significance and the

[16] Section 2.2.3.

[17] The 'market rule' is also explained as an application of the restoration rule: see Section 6.2.1.2 and Section 7.2.1.1. See further Andrew Dyson and Adam Kramer, 'There is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 LQR 259.

[18] See eg *Farr v Butters Bros* [1932] 2 KB 606 (CA); *Simon v Pawson and Leafs Ltd* [1932] All ER Rep 72 (CA); *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370 (CA); *Lambert v Lewis* [1982] AC 225 (HL).

[19] See eg *Adams v Lancashire & Yorkshire Railway Co* (1868-69) LR 4 CP 739 (CP); *Cutler v United Dairies Ltd* [1933] 2 KB 297 (CA); *McKew v Holland & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 (HL); *Arkin v Borchard Lines Ltd* [2003] EWHC 687 (Comm), [2004] 2 CLC 242. The claimant's conduct must also be voluntary: see eg *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884 [16] (Lord Bingham), [42] (Lord Walker).

doctrine of supervening acts by the claimant could be subsumed entirely within the rules of mitigation.[20]

The doctrine of betterment applies where the claimant made a choice to *supersede* its non-breach position, or in other words to put itself in a *better* position than if the breach had not occurred. It is thus a reflection of the restoration rule of mitigation.[21] Where betterment applies, damages are assessed counterfactually as if the claimant had restored (rather than superseded) its non-breach position with a direct equivalent.[22] Again, the element of choice is essential.[23] Where the claimant had no choice but to supersede, because restoration of a direct equivalent was unavailable, the betterment doctrine has no application and the claimant will recover for its factual loss, for better or worse.[24] This assessment of factual loss will include any expenses incurred in the attempt at restoration, but it must also take into account any 'real pecuniary advantage' obtained as a result of superseding the non-breach position.[25]

The second further implication of the thesis concerns the rights-based model of damages developed by Stevens.[26] This model seeks to 'distinguish between damages

[20] As Burrows puts it, 'both the duty to mitigate and intervening cause can be regarded as denying damages for exactly the same reason': Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 75. See also Andrew Tettenborn, *The Law of Damages* (2nd edn, LexisNexis 2010) [5.62].

[21] As Kramer puts it, 'The rule of betterment is the flip side of the principle of mitigation': Adam Kramer, *The Law of Contract Damages* (Hart 2014) 137.

[22] See eg *Dimond v Lovell* [2002] 1 AC 384 (HL) 402-03 (Lord Hoffmann) (obiter); *Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* [2013] EWHC 463 (TCC), 147 Con LR 105 [37] (Edwards-Stuart J); *Stevens v Equity Syndicate Management Ltd* [2015] EWCA Civ 93, [2015] 4 All ER 458 [39] (Kitchin LJ).

[23] *Lagden v O'Connor (sub nom Burdis v Livsey)* [2003] UKHL 64, [2004] 1 AC 1067 [34] (Lord Hope); *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [71] (Leggatt J).

[24] See eg *The Gazelle* (1844) 2 Wm Rob 279, 166 ER 759; *The Pactolus* (1856) 166 ER 1079; *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 (CA); *Dominion Mosaics & Tile Co v Trafalgar Trucking Co* [1990] 2 All ER 246 (CA); *Lagden* (n23).

[25] *Voaden v Champion (The Baltic Surveyor)* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623 [85] (Rix LJ); *Thai Airways* [81] (Leggatt J). See also the explanation of *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)* [1912] AC 673 (HL) on this basis: *Hussey v Eels* [1990] 2 QB 227 (CA) 236 (Mustill LJ); *Thai Airways* (n23) [76] (Leggatt J).

[26] Robert Stevens, *Torts and Rights* (OUP 2007) ch4; Robert Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart 2009); Robert Stevens, 'Rights and Other Things' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011).

awarded as a substitute for the right infringed and consequential damages as compensation for loss'.[27] Substitutive damages are said to value the infringement of the claimant's right,[28] and 'are available even where the claimant is not factually worse off at all'.[29] Crucially, 'the time for the assessment of the value of the right is the moment of infringement',[30] such that substitutive damages can never be affected by post-breach events. The rights-based model of damages has been subjected to several forceful criticisms.[31] Burrows concludes that 'it would be a fundamental mistake to give up on working through [the difficulties with compensatory damages] in favour of the superficially attractive, but ultimately flawed, substitutive damages analysis'.[32]

The new account of mitigation heeds Burrows' injunction. The prime attraction of the rights-based model of damages lies in its ability to explain awards of damages greater than the claimant's factual loss. But the restoration rule provides an alternative explanation for the majority of cases relied upon by Stevens in support of his substitutive damages thesis.[33] The explanation put forward by the new account of mitigation can be accommodated within the loss-based model of damages, albeit that the relevant concept of loss requires some refinement and differs from the orthodox concept of factual loss.[34] An important implication of the thesis is thus its potential to bridge the gap between the existing loss-based and

[27] Stevens, *Torts and Rights* (n26) 60. Stevens argues that the failure to distinguish between these two types of damages 'leads to confusion and muddle': Stevens, *Damages and the Right to Performance* (n26) 172.

[28] Stevens, *Damages and the Right to Performance* (n26) 171, 195. Stevens has emphasised that what is valued is the *infringement* of the right, not the right itself: Stevens, *Rights and Other Things* (n26) 126-27.

[29] Stevens, *Torts and Rights* (n26) 78.

[30] Ibid 60. See also 69, 138.

[31] Andrew Burrows, 'Damages and Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 277-80. See also James Edelman, 'The Meaning of Loss and Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 218-221.

[32] Burrows, *Damages and Rights* (n31) 290.

[33] Section 7.2.1.

[34] See further text to n39.

rights-based models of damages by showing when and why claimants can *sometimes* (but not always) recover damages greater than their factual loss.[35]

The third further implication of the thesis concerns the role of ordinary causal principles in other areas of the law. Chapter Five of the thesis revives, refines and provides new empirical support for Hart and Honoré's theory of causation in ordinary language.[36] It also pre-emptively defends the theory against some possible objections. Although *Causation in the Law* remains widely studied and cited within both private law and criminal law, it is fair to say that it has not succeeded in supplanting the dominant 'causal minimalist' view in either of those fields.[37] This thesis provides fresh impetus for the 'common-sense' theory of causation. In particular, it marks the first attempt by a lawyer to engage with empirical research into ordinary causal concepts from the cognitive sciences.[38] As such, the thesis also has the potential to illuminate judicial recourse to causal reasoning in areas of the law besides mitigation.

8.3 Further Questions

Two main questions are left unanswered by this thesis. The first concerns the legal concept of loss and its relationship to the restoration rule. Where the claimant chose not to restore the non-breach position, and that choice turned out to be beneficial to the claimant, the counterfactual effect of the restoration rule may be to award damages greater than the claimant's factual loss. Can such awards be regarded as 'loss-based'? On the one hand, they put the claimant in a better position than if the breach had not occurred, taking into account all events up to the date of trial.[39] On the other hand, judges frequently refer to such awards

[35] For an explanation of the cases where the claimant was *not* allowed to recover more than its factual loss, see Section 7.2.2.

[36] Section 5.3.

[37] For an outline of this view, see Section 5.2.2.

[38] Section 5.3.3.

[39] Accordingly they are at odds with the orthodox concept of factual loss: see further Section 3.2.1.

as loss-based, using labels such as 'direct loss', 'immediate loss' and 'prima facie loss'.[40] Furthermore, the orthodox concept of factual loss is itself just a legal construct in that it rests on a counterfactual comparison with the claimant's non-breach position.[41]

An abstract answer to this question is not essential to the aims of the thesis. As a matter of description, we know that awards of damages greater than factual loss may be recoverable where the restoration rule applies, irrespective of whether such awards are appropriately classified as compensation for loss.[42] However, it is possible to sketch an argument that such awards can be regarded as loss-based. In short: just as the orthodox concept of factual loss relies on the application of the but-for test of 'factual causation', the concept of loss yielded by the application of the restoration rule similarly relies on the application of ordinary causal principles. In other words, events that were not factually caused by the defendant are irrelevant to the assessment of factual loss; the restoration rule merely provides a further hurdle for attributing responsibility that excludes from the legal concept of loss any harms or benefits that were not caused by the defendant according to ordinary causal principles.

The second unanswered question is whether the new account of mitigation is justified. In other words, what are the normative reasons in favour of the English law of mitigation as described and explained in this thesis? Chapter Two argued that it was unnecessary, and perhaps inadvisable, for private lawyers to attempt the task of justification.[43] The basis for this contention essentially rested on a division of labour: the skills required to evaluate whether a particular rule makes for good or bad law (all things considered) may be quite different from those required to provide a description and explanation of the law as it is. In short, private lawyers may not be best-placed to offer justifications of the law.[44] Whether this is so in relation to any particular legal rule depends

[40] Chapter Four, text to n353.

[41] Chapter Three, text to n47.

[42] Section 7.2.1.

[43] Section 2.2.3.

[44] Chapter Two, text to n108.

on the skills of the lawyer in question and the types of normative reason with which one might be expected to engage given the subject matter of the rule.

In relation to the new account of mitigation put forward in this thesis, the issue of relative expertise is particularly acute. The thesis argues that mitigation is explained by ordinary causal principles used outside the law. Of course, it does not follow from this that the account *must* also be justified on the same basis (if it can be justified at all); for example, the rules of mitigation may instead be justified on grounds of economic efficiency, or ideas of corrective or distributive justice. Nevertheless, it seems plausible that the law of mitigation may be justified *because* it reflects ordinary causal principles. This argument would require a justification for why the law should reflect the same causal principles as those used by ordinary people, and ultimately a justification for why ordinary people should use the causal concepts that they do.[45] These are interesting questions, but not ones with which this thesis can reasonably be expected to engage.

[45] Philosophers and cognitive scientists have engaged with normative theories of causation: see eg Christopher Hitchcock and Joshua Knobe, 'Cause and Norm' (2009) 106 Journal of Philosophy 587, especially 607-612; Neal J Roese and James M Olson, 'Counterfactual Thinking: A Critical Overview' in Roese and Olson (eds), *What Might Have Been: The Social Psychology of Counterfactual Thinking* (Erlbaum 1995).

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