CHAPTER - 3
FAIRNESS AND REASONABLENESS IN THE MEASUREMENT OF DAMAGES

INTRODUCTION

A contract is considered to be a correlative set of rights and obligations for the parties which would be of no value, if there are no remedies to enforce the rights arising there under. The Latin maxim ‘Ubi jus, ibi remedium’ denotes where there is a right, there is a remedy. If theoretically seen, one finds that there is a distinction between a right and a remedy in law.\(^1\) A right (in the sense of a cause of action) is considered to be a precondition to a remedy. This is the reason, it has been said that there is a remedy for every right. Moreover it can be said that the remedies are viewed as the “ends” and procedure, the “means”, for achieving those ends.\(^2\) When a breach of contract takes place, instantly, the remedy of ‘damages’ is the one that comes into the mind of the parties instantly, as the consequence of breach. The aggrieved party may seek compensation from the party who breaches the contract.

In other words, one can say that the rights are considered as the primary obligation, whereas the remedies are the secondary one. If the parties have failed to perform the primary obligation under a contract, then it is known as breach of contract, while in case of failure to perform the secondary obligation, the parties are held liable to pay the damages.\(^3\) The function of the law is to facilitate rights to be justified and to provide remedies when duties have been breached. The fundamental basis of contractual damages was to compensate ‘for pecuniary loss naturally flowing from the breach’.\(^4\) The fundamental rule governing the award of damages at common law is that they are compensatory in nature.\(^5\) The most common rule governing the assessment of compensatory damages in both contract and tort is that the plaintiff

\(^1\) Covell & Lupton, “Principles of Remedies”, (2008), Lexis Nexis, at.p.3.
\(^2\) Ibid, at.p.6.
\(^3\) Photo Production Ltd. v Securicor Transport Ltd. (1980) AC 827 at 849; as per Lord Diplock.
\(^5\) Johnson v. Perez (1988) 166 CLR 351 at.p.355; as per Mason CJ.
should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the wrongful conduct of the defendant.\textsuperscript{6} While the general principle is the same in both contract and tort, the rules governing its application in the two areas may differ in some circumstances. In the beginning, it must be noted that the awarding of damages in contract is largely a practical exercise and is not subject to any hard and fast rules.\textsuperscript{7} The strict rules must be such that can give way in particular cases to solutions best adapted in giving an injured plaintiff that amount in damages which will most reasonably compensate him for the loss he has suffered.\textsuperscript{8} In some cases it is difficult to determine the precise amount of loss or damage that has been suffered in a given case. The test of remoteness in contract is said to be narrower at least where damages are based on negligence. Remoteness is considered to be the means by which courts can limit the damages that are payable by a defendant to the plaintiff. Sometimes to determine the precise amount of loss or damage will involve some estimation falling short of certainty. The court will seek as much accuracy as the subject matter reasonably permits.\textsuperscript{9} In fact, sometimes it may be largely a matter of impression on the material available. In spite of these matters, the plaintiff must at the barest minimum establish a rational basis for a proper assessment of damages.\textsuperscript{10}

When an aggrieved party claims damages as a consequence of breach, the court is duty bound to take into account the provisions of law and the circumstances attached to the contract, in this regard. Moreover, the amount of damages depends upon the type of loss caused to the aggrieved party by the breach. In that case, the court would first make out the losses caused and then assess their monetary value.

The discussion of the measure of damages in contract will be given more importance as the law of contract is always considered as the heart of commercial affairs. Thus basically, the following elements must be established in order to recover damages for breach of contract:-

\textsuperscript{6} Commonwealth v. Amman Aviation Pty Ltd. (1991) 174 CLR 64 at.p.116; as per Deane J.
\textsuperscript{8} Supra note 5; Johnson v. Perez (1988) 166 CLR 351 at.p.355.
\textsuperscript{9} Placer (Granny Smith) Pty Ltd. v Thiess Contractors Pty Ltd. (2003) HCA 10 at.pp.37-38; (2003) 196 ALR 257; as per Hayne J.
\textsuperscript{10} Griffiths & Beerens Pty Ltd. v. Duggan (2008) VSC 201, at.pp.173- 200; as per Pagone J.
• A breach of contract has occurred;
• Causation i.e., breach committed by the defendant has caused a loss to the plaintiff;
• The loss suffered by the plaintiff is the direct result of the breach and is not too remote; and
• The plaintiff has acted reasonably in mitigating his or her loss.

If the burden of proof is talked about in relation to the first three elements, it lies on the plaintiff and for the fourth element (the failure to mitigate) it is on the defendant to prove his case. The standard of proof need not to be so strict, where loss cannot be easily measured such as loss of chance, but generally, it depends on the balance of probabilities.\(^{11}\) A plaintiff bears the burden of establishing only the extent of his loss or injury on the balance of probabilities. To satisfy the requirements of this rule, if the plaintiff wants to recover more than a nominal amount in such an action, then he must affirmatively establish damages which can be assessed, means loss or injury which is capable of being measured in monetary terms.\(^{12}\) It has been held by the court in a case\(^ {13}\) that the most common ruling principle, with respect to damages at common law for breach of contract, is that which has been mentioned in the case of Robinson v. Harman,\(^ {14}\) as: “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.”

In this chapter, a practical discussion is done on fairness and reasonableness in the measurement of damages in a range of commercial contexts, including:

• The measure of damages in contract;
• The assessment of equitable compensation for breach of duty and other claims;

\(^{12}\) Supra note 6, at.p.118. Commonwealth v. Amman Aviation Pty Ltd. (1991) 174 CLR 64 at.p.116; as per Deane J.
\(^{14}\) (1848) 1 Exch 850 at 855; (1848) 154 ER 363 at 365: as per Parke B.
The rules in relation to causation, remoteness, mitigation of damages in contract;

- Liquidated damages and penalties;
- Damages for loss of money;
- Interest pursuant to statute;
- The proof of damages in different contexts.

THE PERIOD OF EVOLUTION FROM PAST TO PRESENT

When the earlier law of damages is considered, the word “discretion” seems to provide the key to its philosophy. The amount which was given as damages was only in the discretion of the jury. The word ‘damages’ was defined as: “which were enquired by the jurors”\(^{15}\), or as “the compensation that is given by the jury”\(^{16}\) and the heading “damages” in the old texts and abridgements was used as a catalogue for miscellaneous bits of information for which there was no definite category. This convenient practice is very much known even today. There were no guiding principles for the jury and the courts for the exercise of their discretion; instead dependence was there, on various mechanisms to check the abuse of discretion. From all these mechanisms, gradually, the new law emerged. Certain factors are felt responsible for its growth and by extreme the most important, both directly and indirectly was the new trial procedure. It is indirectly, because it gave the court control over the information that reached to the jurors. Actually, the model of law of evidence which we have today was in fact formed by the new trial procedure, and during the 18\(^{th}\) century the court came into full control over the mechanism of proof. Apparently, the connection between evidence and damages is considered as very close and crucial, e.g., in a situation, in 1741, the sheriff on the execution of a writ for enquiry of damages, admitted inappropriate evidence given by the defendant, whereby the damages were lessened; the court ordered the investigation to be set aside and allowed the plaintiff leave to carry out a new summons for inquiry. It means that if the court can make such rules and enforce its ruling that the evidence as to a certain head of damages is to be excluded from the consideration of the jury, it has definitely


\(^{16}\) Sir Edward cokes, Institutes, part IV. (1836), at.p.257.
removed these issues from the sphere of discretion, and has in fact given effect to the rule of the substantive law of damages. But the court did not even realize while doing all this, that its decision would impact the litigants and in future they can request a ruling, or a direction to the jury in cases of similar nature.

Moreover, by the new trial the directions of the court to the jury got greater importance. If the directions were found to be incorrect and the jury followed them, the court could rule allow a new trial. And if the directions were found to be correct and the jury did not obey them, then again the decision could be set aside. The trial judges had become more sure as they were in the past as to the fact that the advice to the jury had relevance and conceded weight. Slowly but surely, by the use of this new power judges used to put forth a greater control over the quantum of recovery.

Straightforwardly it can be said that in that scenario the transition had become more direct. It can be easily explained by Smee v. Huddlestone, in this case, the plaintiff and defendant entered into a contract for the sale of quantity of the tea. But the defendant refused to take the delivery. The plaintiff disposed of the tea at a public auction, obtaining $ 200 less than the price, the defendant had contacted to pay. The jury was directed to assess the damages at $ 200, and a judgment was given for that amount. The contention of the plaintiff was that the judgment should have been given for the contract price and the court agreed to his contention and stated that the sum given was correct, in spite of the fact, whether the ‘absolute sale’ had taken place or not. Wilmot C.J., considered it as an executed contract and stated that “he found no reason in support of the fact that the plaintiff should recover damages to a greater amount than he sustained by the non-performance between what the defendant had contacted to pay for the tea, and what it was afterwards sold for.” In this way, the concept of justice which was given by the courts, unconstrained by precedent, crystallized into a rule of law.

During 18th century, the test of certainty was adopted in the matter of damages which mean that the rules of damages for the breach of contract would develop more quickly in the courts; and in fact a good number of rules had been well established by the end of this century. The change which had come, found its past effect in the rules

regarding the ordinary commercial transactions, which were naturally those most often brought to the attention of the courts.

When a suit was filed for the non-payment of money, the interest was also granted in that case. This practice was extended during the 18th century and it was held by the court in a case that when under an agreement between the parties money is made payable, and a time has been given for the payment of the same, this is known as a contract to pay the money at a given time. Thus, in such a case the rule is that the interest is paid for it from the given day, in case of failure of payment on that day.\(^\text{18}\)

But this liberal rule had not been fully accepted. Later on, the Court of Common Pleas followed the broad rules laid down by Lord Mansfield\(^\text{19}\) in a case, in 1800. Lord Ellen Borough had also accepted the same rule but to a limited extent and stated that the giving of interest should be confined to bills of exchange and like instruments.\(^\text{20}\)

Very soon, this rule had become so established\(^\text{21}\) that even the House of Lords was also inclined to follow these rules in a leading case Lyand C&D Rly. Co. v. S.E. Rly. Co.\(^\text{22}\)

In this case, the decision was given with substantial inclination and the impact of this decision was that even the legislature was strongly urged to establish a more liberal rule.

There were certain cases in which recovery was granted for breach of contract of sale but only on some restricted basis. Thus, where the aggrieved party has option to get his remedy in damages whether it is by choice or by necessity, then one may expect the measure of damages can be calculated as:

- The difference between the contract price and any higher price the buyer would have to pay in the market for similar goods, in addition to

- Compensation for disbursements necessarily made in the formation of such a contract, in addition to


\(^{19}\) Mountford v. Wiles, (1800) 2 B&P 337.

\(^{20}\) Gordon v. Siran, (1810) 12 East 419.


\(^{22}\) (1893) AC 423; affirming (1892) 1 Ch 120, CA.
• Any other special losses, resulting from the breach, of which the seller had sufficient knowledge.

There was a case in which a right to rent arising from a leasehold house had been bought in an auction by the plaintiff, by paying deposit. The defendant was not able to make good the title and offered the plaintiff to return the deposit with interest and costs. However, the purchaser claimed for recovery of the loss of his bargain, and the jury accepted his contention and awarded such damages in a suit filed by the purchaser. But this was not accepted and a new trial was granted. D.E. Grey C.J. had remarked that the loss of bargain of ‘imaginary goodness’ should not be compensated. Moreover, Blackstone J. had also opined that “these types of contracts are based merely upon those conditions which are frequently expressed, but actually these are always implied.” It means that impliedly it is considered that the seller has a good title.

This case was just a case of first impression. No further precedents were cited and no widespread logic was given. With the passage of time very strong difference of opinion was developed regarding the merits of this rule. The critics of this rule did not point out the effect of the decision on the particular type of interest involved therein but the good faith of the seller was made the point of critical analysis.

In a very famous case it was held that the restrictions which are laid down in Flureau’s case, could be applied only in those circumstances where the seller was ignorant of the defect of his title at the time of making the contract; but if he knew that the title had engrossed with the defect, he had to pay substantial damages. The justification given in Flureau’s case could be seen in the fact that due to the complexity of the law of real property rendered, it would be inequitable to put the whole burden of a law regarding title on the seller.

This justification was found nowhere when the defendant entered into a bargain knowing the fact that there was a defect in the title of the plaintiff and caused loss to the plaintiff by such bargain. Later on, this view was accepted in many cases.

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23 Flureau v. Thornhill, (1776), 2 W. Bl 1078; 96 ER 635.
25 Supra note 23.
However, in Fothergill’s case, the House of Lords overruled the rule laid down in Hopkins case and upheld the Flureau’s case, by stating that the rules laid down in this case must be accepted without any exception. The rule which was settled can be explained as: in case of contract for sale of a real estate, if a person enters into such a contract, knowing the fact that neither he has any title to it nor there is any means of acquiring it, the purchaser by an action for breach of contract, cannot recover damages beyond the expenses he has incurred; he can only obtain the damages by an action for fraud.

After the rules settled in Flureau’s case, the next problem which was faced was regarding the determination of the types of expenses for which the plaintiff was to be allowed damages. It was almost settled that the purchaser would not be allowed to recover for any expenditure made after he had acquired knowledge of the defect in the title. But the problem was regarding those expenses which were incurred when the purchaser still relied on the validity of the title. In the earlier cases, the damages or recovery was allowed only for the amount of deposit paid to the seller, with interest altogether with the expenses if any incurred in investigating the title. For any other expenditures (however reasonably incurred), the compensation was denied. Earlier the cases had been decided probably on the title value as precedent. But this rule was accepted only up to the time when the modern theories of remoteness had developed. In that scenario, one could easily assume that the problems faced by the court were solved by the principles laid down in Hadley v. Baxendale and the cases following it.

During that period, the damages for breach of contract for sale of goods were limited. But the old law of condition had been changed by the passage of time and the courts

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27 Bain v. Fothergill, (1874) LE 7 HL 158.
28 Supra note 24.
29 Supra note 23.
30 B.A. Hastings Sydney, “A treatise on torts: and the legal remedies for their redress”, (1885), as per Lord Chelmsford, at p.207.
31 Supra note 23.
32 Pounsett v. Fuller, (1856) 17 CB 660; Sikes v. Wild, (1861), 1 B&S 587.
33 De Bernales v. Wood, (1812), 3 Camp 258.
36 Keen v. Mear, (1920), 2 Ch. 574, the court allowed recovery for the expense of insuring the property.
37 (1854) 9 Exch. 341: 23 LJ Ex. 179.
were ready to allow the measure of recovery which corresponded with the realities of the situation. In case, if the buyer refused to take delivery, the seller was expected to dispose of the goods elsewhere, if the amount so accessible was less than the sum which the buyer had promised to pay, “the difference” was granted as damages. In the same way, if the buyer did not receive delivery and who had not paid in advance, had to purchase the goods from somewhere else by paying any additional sum in order to purchase the goods of similar description, then he was allowed to recover that sum. But at that time some points were not settled like: whether the calculation of damages after a breach by the seller was to be made on the basis of market price at the date of breach or at the price on the date of the promised delivery. In case, these dates were same, there was no problem, but in case the dates were not same, there was confusion regarding: which date should be considered as final for the calculation of damages? The solution to this problem was given by the common law when it was provided that the assessment is to be made as of the time fixed for delivery; if no time was fixed, then the date of the refusal to deliver would be considered.

The rules which were laid down regarding the damages for breach of contract for non-delivery or non-acceptance of courts were considered as reasonable and objective; and there was no doubt regarding the fact that these rules were accepted in the majority of cases. The significance of these rules can be seen in the fact that the modern law is basically the same and perhaps it is a sufficient indication that the needs of commercial community have been well served by these rules. Later on, it was suggested by the House of Lords in 1849 that it would not be reasonable to follow the rule of granting additional compensation for the trouble and inconvenience caused by the breach to the plaintiff. The main relaxation of the modern objective rule was to allow recovery for special losses but those losses should be within the contemplation of the parties to the contract. The law today with regard to the damages for non-payment of money or for the breach of contract for the sale of land is almost the same. In case if there arose any conflict between the rules and the general principle of law of


41 Beckham v. Drake, (1849), 2 HLC 579, at.pp. 607-608; as per Erle J.

42 Sale of Goods Act, 1893, Sec.50, Sub-Sec.2. Sec.51, and Sec.54, was declaratory of the result reached at common law. Chalmers, “Sale of Goods Act, 1893, ed.9” (1922), at.pp.118-131.
damages, then they were not necessarily to be condemned on that account. Because
the general principles were developed later on and imposed on mechanism which was
designed with a different purpose? The main aim of the courts has remained to create
such rules which can easily be applied and can set a definite limit upon the liability
resulting from the breach of an ordinary contract. In the allocation of risks of business
it is the promisor (who is generally the entrepreneur) has always been favoured. But it
is up to the parties, if they would like to make some other arrangements in these
mercantile transactions, they can do so. It is generally considered that in mercantile
transactions, it is the part of wisdom to sacrifice consistency and theory in favour of
definiteness and expediency.

Before going into the detail discussion of measurement of damages, one must know
regarding the basis on which the liability for breach of contract depends. So, here it is
necessary to mention the foundation of liability for breach of contract.

**FOUNDATION OF LIABILITY FOR BREACH OF CONTRACT**

The fundamental basis of each and every action for damages in case of breach of
contract is the result or the outcome of the breach. Apparently, it can be said that such
breach is always a wrongful act on the part of the defendant, in the eyes of law and
always remain the subject matter of different kinds of remedies. One of those
remedies is “damages” for breach of contract. As per the maxim mentioned above
also i.e., *ubi jus ibi remedium*, the English law as well as Indian law considers one and
the same thing i.e. there can be no wrong without a remedy, and the remedy which is
by way of an action for damages, is one of the most trendy and important remedy
amongst the other remedies. Therefore, when the breach of contract is committed by
any party and that breach is proved in the court or apparently the cases made out that
the breach is committed, in that situation the law allows some damages to the plaintiff
for the wrongful act committed by the defendant. There are different ways in which
liability in breach of contract may be imposed on the parties:-

- When a person is under a legal duty to do an act, and if he omits to do it,
  liability may be imposed on him as a legal consequence. Moreover, liability
can be imposed upon a person as the legal consequence of the act or omission
on the part of another person also (but he must stand in some special
relationship such as the contract between the employer and employee).
There are certain situations in which liability may be based upon fault of the party; (generally negligence is sufficient but sometimes an intention to injure is required to impose the liability). There are certain other cases, which are known as to liability cases where liability is independent of fault.

In most of the cases, there is a requirement of proof of damage caused to the plaintiff by the conduct of the defendant and moreover, it should not be a remote consequence of the conduct of the defendant, whereas in few cases there is no requirement of the proof of actual damage.

**INJURY ATTRACTS DAMAGE**

In a case, 43 C. J. Holt has made very good remarks in this regard by stating as: “each and every injury attracts damages.” Damages are not just pecuniary, but an injury attracts damage even in a situation where a legal right of a person is hindered thereby. So many examples can be cited here for the better understanding of the concept like:-

- One can file a suit for slanderous words though a person does not lose a single penny by reason of the words spoken about him, yet he shall have an action; or
- A person can file a suit against another for riding over his land though it does not cause him any damage; but as it is considered an incursion on his property and the other has no right to come there; or
- If a person gives another a blow on his ear, though it costs him nothing, yet he can file a suit for his personal injury etc.

**Violation of rights, actionable per se**

It is not easy to give a precise definition of the subject of the cause of action for recovery of damages as it is wider in scope. Thus, it is very tough to prescribe the limits within which an action for damages lies. With the increasing complications of modern civilization, conflict of rights must certainly become more common and subsequently new infractions of established rights are bound to occur. That is why, it

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is necessary here to explain certain well-established rules, which establish the relation between cause of action and damages. These rules are as follows:-

**Definition of cause of action**

It is not easy to define precisely “the cause of action” but the Court of Appeal in England tried to define these terms in a case as: “Every fact which it would be necessary for the plaintiff to prove, if navigate, in order to support his right to the judgment of the court, is the cause of action.” It is further explained by Fry, L.J. in the same case that every fact which if not proved gives the defendant an immediate right to judgement must also be considered as the part of the cause of action. This definition has been adopted by the various High Courts in India in a number of cases and now it is considered as a well settled definition. And the expression ‘cause of action’ means that “a bundle of essential facts which are necessary for the plaintiff to prove before he can succeed in his case.” It has nothing to do with the defence which is set up by the defendant and moreover it does not depend upon the relief which is prayed for by the plaintiff. It is basically connected with the grounds set up in the plaint by the plaintiff as the cause of action. In other words it can be said that it is that medium upon which the plaintiff claim from the court a decision in his favour. The cause of action which is alleged by the plaintiff can be seen only within the plaint. But the plaintiff cannot be attached to the date of the accrual of the cause of action mentioned in the plaint, for the Court is entitled to determine the date on which the cause of action arose from the facts alleged and proved.

**Situations where cause of action may arise**

Usually, a cause of action is said to be arisen when a breach of plaintiff’s right occurs and he applies for the relief to the proper court or tribunal. However, as per the definition of cause of action it is required that it should be alleged and proved the facts necessary to establish a right and the conditions and circumstances in which the

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45 Ibid.
violation of right took place. Thus, when a plaintiff establishes a perfect right and which is violated by the defendant, a cause of action arises in the favour of the plaintiff and for which he is entitled to bring an action. Moreover, the plaintiff has to mention those facts in his plaint upon which the right is based and the way in which it has been violated. In case of contract, it is essential that the contract must be the legal one, e.g. if a contract is illegal from the very beginning like due to the unlawful consideration and if that contract is breached; then it does not afford a cause of action for damages. Even a subsequent promise based upon such a transaction cannot be appeared as a valid contract.

FUNDAMENTAL PRINCIPLES

*Injuria abseque damnum (Injury without legal damage.)*

Injuria abseque damnum is based on the maxim “ex injuria sine damno oritur actio”, which means an action arises from a wrongful act of the party, although no pecuniary loss has taken place. In this maxim the word injuria denotes wrongful act and damage denotes the invasion of a legal private right, however, slight the infliction of actual loss or damage.

Violation of legal right actionable

According to Broom\(^5\) :- “*Injuria abseque damnum* is said to be unfamiliar to our law.” If there is an act or omission on the part of the party which is deemed injury by law, it can be presumed that some damage has been suffered by the party injured.\(^5\)

Thus, to maintain an action for the violation of a legal right, it is not required to prove an injury from the infraction of the right. Moreover, the injured party, whose right has been encroached, is entitled to a remedy, whether any damage has accrued or not.\(^5\)

Even the Privy Council has made it very clear in a case\(^5\) that “there may be a situation, where a right is interfered with, and in such a situation “Injuria sine damnum” can be considered as sufficient to file a suit for breach of legal right.”

In so many cases,(mentioned-below) the courts had taken different views taken into consideration the concept of breach of contract, although there appeared no actual

\(^5\) Broom’s Legal Maxims, ed.8th, (1882), at.p.182.


\(^5\) Mahadeo Sahu v. Sarju Prasad Tewari AIR 1926 All 308.

damages suffered by the parties to the contract. In a very well-known case,\textsuperscript{55} it was held by the court that the plaintiff is entitled to maintain an action against the bank because the bank had sufficient funds and in spite of this fact the plaintiff was refused to cash his cheque. Thus, in this case although there appeared no actual damage suffered by the party, but his legal right was infringed. The same principle was followed in one more case and it was held by the courts that an action can be maintained against the owner who had built an obstruction into the stream for the purposes of interfering with the flow of water, although no actual or immediate damage was proved to have occurred.\textsuperscript{56} One more case can be cited here in which it was held that the person who was prevented from performing his turn of worship on a specified day gives him a right to sue for damages, although there was no loss occurred to the plaintiff.\textsuperscript{57} It was held by the court again in a case that where a person was refused to provide board and lodging without reasonable cause or excuse, by the manager of a hotel, it was considered a violation of a right based upon common law and is actionable and moreover there was no requirement of strict proof of damage.\textsuperscript{58}

On many occasions the court awarded only nominal damages for want of proof of special damage, on the basis of broad principle that their recovery would be sufficient to maintain plaintiff’s right.

\textit{Damnum Absque Injuria (damages without injury)}

It is said that the term “injure” has an accurate meaning well-known to the law gathered no doubt from its origin, in which case\textsuperscript{59} it is said: “The word comes from the Latin words ‘in’, meaning against, and ‘jur’, meaning a right and signifies something done ‘against the right’ of another person, producing either nominal or substantial damages.” With reference to the phrase “\textit{damnum absque injuria},” it is said:-

“The idea contained in the phrase is expressed more explicitly in the maxim, \textit{ex damno sine injuria non oritur actio}.” Then in a case\textsuperscript{60} it is quoted as follows: “It is an ancient maxim, that damage to one, without an injury does not lay the foundation of

\textsuperscript{55} Supra note 52.
\textsuperscript{57} Debendranath v. Odit Churn, (1876) I.L.R. 3 Cal. 390.
\textsuperscript{58} Constantine v. Imperial London Hotels Ltd., (1944) 2 All. E.R. 171 (Q.B.D.)
\textsuperscript{59} Krom v. Antigo Gas Co., 154 Wis. 528, 140 N.W. 41, 143, N.W. 163, 164.
\textsuperscript{60} Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 303, 82 L.Ed. 374,
an action; because if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain.” There must be at least two persons for the formation of a valid contract. It means one cannot enter into a contract with oneself. The fundamental nature of a contract lies in the fact that both the parties are bound to perform their part in its entirety, it means that breach of that contract by one gives the other party right to claim for damages according to the nature and subject matter of the contract, not by the reason of any express stipulation in the contract itself but by the reason of law.\(^{61}\) Therefore, when the parties are asking for damages, the relief cannot be asked for every species of loss which the injured party might sustain by the act of other party. A party cannot be held liable merely because his act has caused loss or damage to another under the head of “Damages for Breach of Contract”. There must be a corresponding right in that other, the infraction of which is sustained it is not occasioned by anything which law deems an injury. Such damage is termed as “\textit{damnum Absque Injuría}” and maxim “\textit{Ubi Jus Ibi Remedium}” has no application in such a case.

There was a very landmark judgment\(^{62}\) in which the schoolmaster who opened a rival institution which attracts the scholars from the plaintiff’s school which was already established in that locality, can be put here as a best example of this principle. Every person has some undoubted rights and if in the legitimate exercise of that right another person interferes and caused damage to the other person, the damage so sustain is called \textit{damnum absque injuria}. The same principle is followed in case if an owner of the property exercises his right with ordinary prudence and in a reasonable manner and still another sustains damages it is called “\textit{damnum absque injuria}”.

In a case, a trader acquired the business enjoyed by the other traders by intensive actions but legal means, the damage caused was so considerable but no relief was given because the damage occurs in the course of the legitimate exercise of a right recognized and protected by the law.\(^{63}\) Thus, the \textit{injuria} cannot be considered in a case\(^{64}\) where a person who by lawful means induced a servant to determine lawfully his conduct of service or not to enter into a contract of service. Similarly, the person was not held liable for damages caused to the plaintiff on account of the price of the

\(^{62}\) In re Gloucester, Grammar School, (1411) Y.B. 11.
\(^{63}\) Moghul Steamship Co. v. Mc Gregor, (1892) A.C. 25.
\(^{64}\) Allen v. Flood, (1899) A.C. 1.
food unconsumed because of their absence although he accepted an invitation to an entertainment at the house of the plaintiff but through no intensive action.

In one more case a pleader was not allowed to sue a magistrate for damages for not allowing him to appear for a complainant in an inquiry under Sec. 180 of the Code of Criminal Procedure of 1861, because a pleader has no right to appear in such an inquiry and, therefore, by reason of the refusal of permission, he suffered no injuria. Similarly, in another case a plaintiff, was held not entitled to sue for damages for the loss of those presents, or even for an injury to his character and reputation, on the ground that there is no injuria damnum, although he was entitled as a member of a particular caste, to receive certain presents on the occasion of a funeral ceremony, and he was omitted from the recipients. In a suit by the plaintiff, who was prevented from parading a bull on a certain day, was not considered actionable. In the same way, accidentally inflicting personal injuries without negligence or intention is not considered actionable. in case where there is no proof of wrongful act or omission on the part of the party and moreover the party does not owe any duty regarding the other party, he cannot be held liable for any damages caused to the other party. If any statutory body causes damages to others while exercising their powers conferred by the statute, it is a case of damnum sine injuria for which no action lies without to proof of negligence. But in case of damages caused due to the breach of duty imposed upon them they have no protection under the law.

In case the defendant is not able to discover the defect or the danger and it caused the damage by accident like sudden fall of the tree, it would be difficult to imagine that the defendant had knowledge of the danger and he omitted to perform the duty of care to prevent its fall. In such situation it would be very difficult to establish a relationship between the statutory authority and the plaintiff who is a remote user of the footpath or the street by the side of which the trees were planted. Unless or until the defendant was aware of the condition of the tree that is likely to fall, he could not be held liable.

for the accident or cause of death because admittedly there was no perceptible sign regarding the fact that the tree is affected by some disease. The tree had fallen due to immobile circumstances of the weather.  

**PROOFS OF SPECIAL DAMAGES ARE REQUIRED**

In every case of breach of contract, apart from the legal damages, which the law assumes in every case of violation of right, the plaintiff is required to prove substantial actual pecuniary or other losses or damages, which are resulted from the wrongful act of the defendant. “If in any case there is no substantial losses sustained by the plaintiff and there is only denial of a legal right which is justified in an action, thus, there being no pecuniary damages sustained, so only nominal damages are awarded and no pecuniary compensation is allowed in such a situation. But in case substantial losses has been occurred and consequences of the wrongful act of the defendant, the plaintiff is allowed to have compensation for the losses.”  

Therefore, it has been held by the court that a plaintiff is entitled to sue for damages if he is being wrongfully obstructed in exercise of his legal right of making collection because in this case the plaintiff has an exclusive right of collection. In a case, it was held by the court that if the master of the ship refused to sign the bill of leading otherwise than with an endorsement as to the damages claimed is considered to be a wrong that may be fully compensated and damages. The suit of the plaintiff cannot be dismissed in totality only on the ground that the plaintiff alleges substantial losses but is unable to prove the same, and he should be allowed to recover at least nominal damages. The same principle is followed in those cases where the plaintiff is not able to prove the actual damages.  

Generally the principle which is applicable to the actions for breach of contract is that the plaintiff should never be denied from recovering ordinary damages only because he fails to prove them. It has been already observed that in that situation he should be allowed nominal damages unless the special damages are the substance of the

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73 Williams v. Peel River Land and Mineral Co. Ltd. (1886) 55 L.T. 689: 3 T.L.R. 76 (C.A.), as per Bowen, L.J.  
75 Feize v. Thompson, (1808) 1 Taunt 121: 127 E.R. 778.  
action. However, in case the special damages are found to be the substance of the action and the plaintiff is unable to prove the same, it may disentitle him to recover any damages. Basically it means that if substantial damages are the gist of an action then it must be proved by the plaintiff. Thus, if a plaintiff wants to succeed in his case or make his case good either for damages or for injunction, then damages must be proved.

**REQUISITION OF AN ACT OF INTERFERENCE WITH CONTRACTUAL OBLIGATIONS**

The act of interference with contractual obligations requires the defendant to act in such a manner as would result in the plaintiff being precluded from performing his contract. He has not only been precluded from performing his contract but from taking any benefit under the contractual right, which exists in his favour.

**Acquiring breach of contract**

The Court of Appeal in England reviewed the law governing breach of contract in a very famous case and stated that intentionally and without lawful excuse to provoke a person to break his contract with another, should be considered as a specific breach. Further this principle was upheld by the Queen’s Bench in another case. Later on, more than hundred years ago, the rule has been reaffirmed by the House of Lords in some other cases also. Thus, the rule was explained by Lord McNaughton in the following terms: “A violation of legal right committed deliberately is a cause of action. It is a violation of legal right which interfere with contractual relations recognized by law, if there be no sufficient justification for the interference.

The brief fact of that case in which the entire law governing the breach of contract was reviewed is necessary to be discussed here for the better understanding of the governing principle. The facts of this case are as follows: “There was a firm (plaintiff)
of printer and publishers in this case and all the employees of the firm were required to sign an undertaking that they would not join any other trade union. But some of the employees disobeyed the undertaking and joined the National Society of operative printers and assistants. The firm therefore decided to terminate the employment of one of those who disobeyed the undertaking, but he appealed to the union. The union called out on strike in retaliation to those employees who were still working with the plaintiff and also sought the help of other trade unions (who were concerned in supplying the raw material to the plaintiff). Bowater’s Sales Ltd., (who were suppliers of raw materials to the plaintiffs) having consequently expressed their unwillingness to deliver any material to the plaintiff, the company resolved not to press their employees to co-operate in the deliveries, with the result that the supplies from that company ceased to go to the plaintiff resulting in breach of the contract between the company and the plaintiffs. The company told the plaintiff that “Their Co. is precluded from performing their contract by the action of the trade unions which has put a stop to any of your paper being loaded at and delivered from Bowater’s Mersey Paper Mills, Ellesmere Port. The Co. anticipate that this pressure will continue and may increase, and until withdrawn and they shall be unable to make deliveries under the contract. ” Therefore, the plaintiffs has sought an injunction against the officials of the union restraining them from causing or procuring a breach from Bowater’s Sales Ltd., and for damages, and applied for interlocutory relief. The Trial Judge, Upjohn, J., has refused to grant an injunction by holding that there had never been any evidence regarding the direct action by the defendants or their agents with the object of persuading or causing Bowater’s Company to break their existing contracts with the plaintiff. The action of the trade unions in causing the employees of the company to break their contract of employment by refusing to load supplies to the plaintiffs, was a lawful act, although the natural consequence thereof might be to compel the Bowater’s Company to break their contract with the plaintiffs, such an action was, therefore, considered to be insufficient to constitute or inducing a breach of contract. The Court of Appeal consisting while upholding the order of Upjohn, J., reviewed the case-law on the question and laid down the following principles:-

“Apart from a conspiracy to injure acts of a third party which are lawful in themselves do not constitute an action interference with contractual rights, even if done with the object and intention of bringing about such a breach. It makes no difference that such
acts are done out of malice or ill-will. Acts which are lawful in themselves are not rendered unlawful merely because the doer of them was motivated by malice or had bad intention." Thus, the essential ingredients of the breach of obligation procuring a breach of contract can be explained as:

In a situation, when a third party, with the knowledge of the contract and with the intention to procure the breach of it, directly induces or procures one of the parties to the contract to break it, it means the third-party is procuring a breach of contract.

There can be a situation, in which a third party with the knowledge of the contract and with the intention to bring its breach, not by directly hitting on the mind of the contract breaker but by physically detaining the party or otherwise makes it impossible for him to perform his contract e.g., by breaking his necessary tools and machinery which are required to perform his contract. In such a situation, it can be easily inferred that the third party is procuring the breach of contract.

One more situation can be discussed here in this regard i.e. in case a third party entered into a contract with the contract breaker in such a manner which the third-party knows to be inconsistent with the contract, this means that the third-party is procuring the breach of the obligation, e.g. when X pays for and takes the delivery of a new bike from Y, knowing that it is offered to him in breach of a covenant against the resale of a new bike the inconsistent contract in which they entered may even start without the knowledge of the third-party of the contract but if it continued even after the fact came into the knowledge of the party then it is considered that it is an actionable interference.

If an actionable interference is committed with the contract by the third-party with the knowledge of the contract, against the will of both the parties and

86 Supra note 81.
88 De Francesco v. Barnum, (1890), 45 Ch.D. 430.
without the knowledge of either, then it is considered that the third-party has acted in such a manner that would result in a breach.\footnote{99}

When the servant of one of the parties is definitely and clearly persuaded, induced to obtain the breach of his contract of employment by a third-party with the knowledge of the contract and intent to break his contract, provided that the breach of contract forming the alleged subject of interference in fact ensues as a necessary consequence of the breach of contract of employment.\footnote{90}

**LIABILITIES OF DIFFERENT PERSONALITIES FOR BREACH OF CONTRACT**

There are certain personalities like agents or managing directors of the companies, which are not considered liable for the breach of contract. The position of managing directors or managing agents is just like the position of an agent. This position was broadly stated in a very famous case\footnote{91} and it was held by the court that “a person who wrongfully interprets the relations subsisting between the parties to the contract, during the continuance of a contract of personal service, by procuring one of them to commit a breach of contract and if one of the parties to the contract suffers damages, then the other is liable to the injured party for damages. It is immaterial in such a situation whether a contract is executory or not.”\footnote{92} So many cases\footnote{93} can be referred here in this regard where this rule was applied and affirmed by the courts. The result may be different where the servant or agent acts mala fide and outside the course or scope of authority given to them under employment.\footnote{94}

**MALICE IMMATERIAL IN CONTRACTS**

Guilty intention in case of damages for breach of contract is totally immaterial except in case of breach of contract of marriage. Bad intentions have nothing to do with cases of breach of contract, e.g. if X has entered into a contract with Y for the delivery of certain quantity of mustered oil, and in such a case ‘X’ has a to pay ‘Y’ the money due under a bond executed by him, the consequences are the same which means it is a breach of contract but whether the failure to deliver or to pay is the result of an
accident or a deliberate action of the parties is immaterial. The intention of the defaulting party is totally ignored in such cases because the amount of damages is limited to the direct pecuniary loss resulting from the breach of the contract.

**Malice is not acknowledged in breach of contract**

The evidences of guilty intention or bad motive of the party who is guilty of breach is totally irrelevant in actions for breach of contract and only the existence of delinquency on the part of the guilty party cannot modify the rule of law by which damages for breach of contract are to be measured.\(^95\) As observed in a case\(^96\) by Baron Alderson, L.J., in following words: “The damages in actions for breach of contract are ordinarily confined to losses which are capable of being appreciated in money, with the exception of the case of breach of promise of marriage; damages that are not capable of being so estimated, such as, injury to feeling or displeasure are not allowed. The principle is, that if the party does not perform his contract, the other may do so for him as near as may be and charge him for the expense incurred in doing so”. But where the elements of fraud, violence or bad intention exist, the alternative remedy of filing a suit in tort is always open to the injured party and he may then adduce evidence of those matters, which entitled him to claim damages on a different footing.\(^97\)

After the above discussion, here it is necessary to discuss the essentials of the basis of the liability for breach of contract for the more clarity on the subject.

**FUNDAMENTALS OF THE FOUNDATION OF LIABILITY FOR BREACH OF CONTRACT**

There may be some situations, in which a specific condition of duty to take care is specifically mentioned, so in that case the “duty to take care” should not be considered only an element which can be ignored but it should be considered as an essential element which the parties are duty bound to fulfil on the part of their obligation. Strictly speaking, the breach of contract means more than neglectful or careless behaviour of the party. It is irrelevant whether the nature of the act or conduct is omission or commission. It accurately signifies the complex concept of breach of duty, and damage suffered by the person to whom the duty has owed. A very clear

\(^95\) Supra note 32.

\(^96\) Hamlin v. Great Northern Rly. Co., (1856) 1 H. & N. 408.

\(^97\) Ibid. at para 12.
view is taken by the Privy Council with regard to this concept in a case. Thus, the three essential components of the basis of liability for breach of contract can be considered as follows:

1. The defendant always owes a legal duty towards the plaintiff to exercise reasonable care in his conduct within the scope of the duty provided under the contract.

2. The second essential element which formed the basis of liability for breach of contract is the breach of that duty which is mentioned above and moreover which is agreed upon by the parties to the contract;

3. Thirdly, breach of duty that causes damages to the plaintiff. It is required here that the damages must be the result of breach of same duty which is agreed upon by the parties to the contract.

The extent of the duty of care
The duty which we are talking about must be a legal duty and not merely a moral or religious duty. There is a legal duty to take care regarding the plaintiff himself and not to any other, and if that duty is breached only then the liability for breach of contract arises, not in any other circumstances. The duty is not owed to the world at large because there is nothing like general duty to be careful in case of contracts. All that is required for the establishment of actionable claim for breach is just to define the exact relationship between the parties from which one can easily figure out the duty to take care.

Rule of propinquity with regard to the duty to take care
The law of breach is clarified and given extensive effect in case of Donoghue. This is the case which extends the scope of liability not only to the parties to contract but to some imaginary person who may not be in the contemplation of the parties but the parties are required to be careful to them also in such a way that they should not be harmed or injured by the parties at all. This concept was more broadly observed by Lord Atkin by refereeing the observation of A.L. Smith, L.J. in a very famous case.

Grant v. Australian Knitting Mills, AIR 1936 P.C. 34 at pp. 41-42.
Warren v. Calvert, (1837) 7 Ad. & El. 143.
Best v. Samuel Fox & Co., (1952) 2 All ER 394.
Donoghue v. Stevenson, (1932) UKHL 100.
Le Lievre v. Gould, (1893) 1 Q.B. 49 at p. 50; Candler v. Christmas, 91951) 1 All ER 426.
in the following words: “A duty to take care may arise when the person or property of one was in such propinquity to take person or property of another that, if due care is not taken, damage might be done by one to the other, ” and said, “I think this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would be directly affected by the careless act .”

The rule of ‘propinquity’ which is referred in the above passage has been criticised. While criticising this rule Lord Wright\(^{103}\) went on to the extent of saying that this rule is enough to mislead the people. He further explained it in his own words: “The word ‘proximity’ or ‘propinquity’ are often subject to certain objections because if the term ‘propinquity’ is used and applied in the cases of contracts than it can only be used in a narrow sense not in a broader sense. Narrow sense here means it can be used only in those cases where there is want of care and injury are the essence of the contract and these are directly and closely connected with each other. The term ‘propinquity’ can exactly be used to exclude only the element of remoteness or of some intervening difficulties between the want of care and the injury. Moreover the term like ‘privity’ may mislead when it comes to the idea of aliens. However, Goddard, L.J. has made it very clear in a case\(^{104}\) that the rule of propinquity has already been qualitatively laid down by the House of Lords and Donoghue’s case\(^{105}\) and the inclination of modern trend is to enlarge it and not to restrict the scope of that duty.

**Foresight of ordinary prudence person and the concept of standard of care**

Generally, it can be said that the care is always considered as a matter of degree. So, it is not so easy to define the precise legal standard of care which is required in all cases of contract. The fundamental thing regarding this is the standard of conduct of the parties which is considered as the basis of the law of contract is to be determined by balancing the risk by taking into consideration all the social values of the interests of the parties and all the possibilities and extent of the harm which can be caused to the parties to the contract. That is why, the standard of care is considered to be a question

\(^{103}\) *Supra* note 98.

\(^{104}\) Hanson v. Wear mouth Coal Co., (1939) 2 All.E.R.47, at.p.54.

\(^{105}\) *Supra* note 101.
of fact depending upon the circumstances of each case.\textsuperscript{106} And whenever there is a matter regarding the determination of this standard before the courts, the courts consider how reasonably an ordinary prudence person would behave under the given circumstances. In another case,\textsuperscript{107} Lord MacMillan has explained more accurately the term “reasonable man and his foresight” in the following words: “The standard of foresight of a reasonable person in one sense is somewhat one can call an unfriendly test. Because this test may abolish personal equations of the person whose conduct is in question. Some persons are excessively fearful by nature and make every path best with Lions; whereas there are some other persons who are of more strong temperament who generally fail to predict or who indifferently ignore even the most apparent dangers.”

Thus, a reasonable person is presumed to be free from over-anxiety and from over-confidence. A reasonable person is one who takes care of the pros and cons of his action. He is so cool that he is able to take precautions for his own safety even in case of emergency. The word ‘prudence’ denotes here that he is a man of sufficient understanding which is motivated by self-interest and having foresight, vigilance and good judgment. He cannot be compared with a “man on the road”. But one cannot expect perfection in his behaviour from him.\textsuperscript{108} Lord Reid explained the qualities of a reasonable man, in a case\textsuperscript{109} in the following words: “The qualities of reasonable person are left on the perception of the courts and the flexibility of the standard would be more weak by the over elaborated rules. He further explained that only rigid rules can work to avoid injustice. Thus the simple rule (what would a reasonable man in the shoes of the defendant have done?) should be followed. But there are certain limitations on this test which should also be followed because there may be some cases in which it will not be practicable and in many cases it is for one reason or another undesirable to make which a reasonable man would do as a legal obligation.”

**Reasonable Foresight**

The standard of care mentioned above, is limited by reasonable foresight. It means that reasonable and ordinary prudence person must use reasonable care to avoid the situations which can cause damages if there occurs any breach (which can be

\begin{itemize}
  \item Glasgow Corporation v. Muir, (1943), A.C. 448 at.p. 457.
  \item Jones v. Barclay Bank, (1949) W.N. 196 (C.A.).
  \item London Graving Dock Co. Ltd v. Harton, (1951) 2 All. E.R.1 at.p.29;(1951) 10 A.C. 737.
\end{itemize}
reasonably foreseen). He is only bound to take care of those acts or omissions which comes within the ambit of “reasonable foresight”. The law on the subject can only compel an ordinary prudence person to take care of only those consequences which are probable and not against those which are merely possible. It means that an ordinary prudence person must watch the reasonable probabilities not the fantastic possibilities.110

IN SUITS FOR BREACH OF CONTRACT: PARTIES WHO MAY SUE?

Remedies for Breach Contract:

For a valid contract, there must be at least two parties i.e., the promisor and the promisee. The basis on which they enter into a contract is that both the parties are bound to perform their part in its entirety. It means that the non-performance on the part of one gives the other a right to sue either for specific performance or for the damages or for both according to the nature and subject matter of the contract. This right is given to the party by reason of law not by the reason of any expressed relation in the contract itself.111

Damages, as a personal remedy

The purpose behind filing a suit for damages for breach of contract is to seek personal redress against the defendant who stands in a certain relationship (whether contractual or otherwise) with the plaintiff. Thus, usually personal action or what one can say an action in personam is taken in case of breach of contract. The parties in such a suit are: one who has suffered the injury, and the other who has committed the wrongful act. In such a suit, the plaintiff claims for the recovery of the loss suffered by him for the breach of contract or for the violation of right from the defendant.

Difference between the remedy of damages and the relief of specific performance

The breach of contract is the cause of action whereas the relief of specific performance is merely a relief not a cause of action. That is why; the relief of specific performance may be granted or refused. It is entirely a matter of discretion of the concerned court whether to provide the relief by way of specific performance or not.112 There are two different views with regard to recovery of damages i.e. On one

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111 Rajeshwar Prasad v. Chuni Lal, AIR 1942 Pat. 269.
hand, it can be said that for the recovery of damages for breach of contract the first requirement is that the plaintiff must prove his readiness and willingness to perform his part of contractual obligation. It means that readiness and willingness to perform his part is always remained condition precedent to the plaintiff’s right to recover damages for the breach of contract. If he does not follow this condition then he will not be considered as entitled to recover any damages for the breach of contract.\textsuperscript{113} Whereas on the other hand, the relief of damages is a remedy provided under common law, and is open to any party who has suffered losses on account of the non-performance or breach of a contract by the other party. The relief of specific performance, which is in English law, an equitable remedy is regulated in India by the Specific Relief Act, 1963 and is beyond the scope of this work. As per the language of Sec. 73 of the Indian Contract Act 1872, the party who suffers by a breach is entitled to recover from the party who has broken the contract, compensation for any loss or damage caused to him thereby.

Both the remedies are not cumulative but are alternative for each other. The remedy of specific performance is a superior type of remedy and a plaintiff in a suit for specific performance of the contract cannot be denied to recover compensation for its breach along with the specific performance, but in the suit for recovery of damages, the plaintiff cannot ask for specific performance of the contract. The remedy of damages for breach of contract is considered to be the universal remedy and only in special cases, the court grants specific performance with the purpose of doing absolute justice with the plaintiff. Thus, it can be said that every breach of contract gives rise to an action for damages or for specific performance.\textsuperscript{114} With the above distinction, it may be broadly said that the proper person to sue for damages is the person whose right to call for the performance of the contract has been violated.\textsuperscript{115}

\textsuperscript{114} Nagendra Chandra Mitter v. Kishan Soondaree Dabee, (1907), 19 W.R. 133.
Plaintiff must be legally innocent

A party who is suffering from loss due to the breach of contract by the other party must also be legally innocent only then he can sue for damages for the breach of contract. These principles are considered as the fundamental principle of law:

- The plaintiff who files a suit for damages must have performed his part of obligation; or
- He must express his readiness and willingness to perform his part of the contract; and
- He must not have been contributed to the breach in respect of which he is suing.

The ultimate sufferer of breach of contract must be the “Plaintiff”

The person who is the ultimate sufferer of the breach of contract by the other party has a right to file a suit for damages for the breach of contract. Although, now it is well settled that a suit can be filed on the instance of a third party or who is not a party to the contract. It is also well established principle that no action can be brought except for the breach of contractual right, and the person, who sustains the damages, i.e. whose legal contractual rights are violated, is the person who can bring an action for the damages against the person who is responsible for the breach of contract.

The question here arises as to whether a right to sue for damages exist in a person who stands in a certain natural or contractual relationship with the person injured?

Position of legal representative and Suit for damages

Although, it is not necessary to elaborate the rights of the legal representative of a deceased to sue for damages but a brief mention is required for the clarity on the subject. The position was very much clear in a case by Lord Avinger in the following words: “The rules regarding the position of legal representative to file suit for damages are so well established that a representative of the deceased may sue not only for all the debts due to the deceased but also for all the contracts which are broken in his lifetime. The legal representatives are allowed to file suit for damages.

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119 Raymond v. Fitch, (1835) 5 L.J. Ex. 45.
because these actions are considered as choses-in-action and are the part and parcel of the personal estate in respect of which the executor or administrator represents the person of the testator and is in law the testator’s assignee.”

No rules are prescribed under Indian contract act 1872 as to the extent to which the other person than the original promisee may become entitled to sue. The general rule is that the representatives of the deceased person may enforce the subsisting contracts with him for the benefit of the estate.\footnote{120} There are certain cases where the nature of the contract is such in itself or maybe made by the intention of the parties that the obligation is determined by the death of the promisee, e.g. the contract to marry is such a contract that the nature of contract itself determines the obligation of the parties and legal representatives cannot do anything in such cases because these are based on personal volition of the parties. Moreover, one can take the example of those cases where performance by the deceased was not completed in his lifetime and the nature of the contract is such that the contract is based on personal qualification of the promisee, thus in such cases legal representative cannot be equated with the promisee. Thus, one should not forget the fact that in this kind of relationship the express intention of the parties would be considered as prevailed.\footnote{121}

But if the money had been earned and had accrued due to the deceased in a case, though for service was of a confidential and personal kind, they were considered as the part of his estate and his representative would succeed in the recovery of that amount.\footnote{122} Moreover, the right to sue can be availed by the legal representative in the cases of conventional damages or penalties. It means those damages which have been stipulated or agreed upon between the parties during their lifetime as a compensation for the breach of contract of a purely personal in nature or for the personal injuries arising from the negligence in the performance of the contract.\footnote{123}

**Position of minor and Suit for damages**

When the position of the minor is talked about, then the first question comes into the mind is whether a minor can be party to the contract? The law on this point is very clear and sound, as agreement with a minor is considered to be void. The question here arises is: when a minor cannot be party to the contract then whether he can sue

\footnote{120}{Pollock and Mulla’s, “Contract Act”, ed.6th., at.p.261.}
\footnote{121}{Ibid.}
\footnote{122}{Stubbs v. Holy Well Ry. Co., (1867) 2 Exch. 311.}
\footnote{123}{Beckham v. Drake, (1849) 2 H.L.C. 579: 81 R.R. 329.}
for damages for breach of contract entered into by him or by his guardian? It is relevant to mention here the case of Mohori Bibee, which has cleared all the doubts regarding the minor’s contract. The Privy Council in this case has established that one cannot enforce a contract against a minor. But again there is a question whether being a promisee, he has a right to sue the promisor for the breach of agreement? The answer to this question depends upon the fact whether the whole of the consideration purporting to have been received from the minor has been executed and there remains no obligation on his part to perform the contract. Moreover, it depends upon whether the agreement is entered into for the benefit of the minor or not. Thus, in a situation, where the whole of the consideration has been received from the minor and the benefit of the contract has also been enjoyed by the promisor and where everything which remains to be done is actually for the benefit of the minor, there appears no reason to refuse the minor to sue for the damages for breach of contract. Because, it is being refused then it would be a grave injustice with the minor. On the other hand, if a minor is allowed to bring into question of validity of the transaction in respect of which he has received the whole consideration is totally for weakening the ends of justice. It was observed that the minority is a personal privilege of which no one can take advantage but the minor himself may repudiate his contract and it binds the other party. Actually, minority is considered as incapacity instead of being an advantage to him and it might in many cases turn greatly to his disadvantage.

After a very detailed discussion in a case it was held that minor can sue for the enforcement of a mortgage executed in his favour if the mortgagee has received the consideration. In the same court, in an earlier case, the court has stated that a minor can be the payee under a promissory note and he can sue for the recovery of the money due thereunder. It must be noted here that there is no provision under the Indian contract act, 1872, under which a minor can be prevented from entering into a contract and if a minor, at the request of the promisor, pays money, or does some service or refrains from doing any act whether it is of value or not, that would be sufficient consideration for the promise which can be enforced by the minor by way of damages or by specific performance. In case a minor enters into a contract of

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125 Chitty on Contract, ed.23rd, (1968), at.p.182.
service and renders his services then certainly he can sue for the wages due to him. The same principle is applicable in case of breach of marriage contract; in such situation a minor may sue an adult person for the breach of the promise,\textsuperscript{128} although the adult party cannot sue the minor on such a promise.\textsuperscript{129} All these principles were applied in a case where it was held that the minor was entitled to file a suit for damages for breach of contract of marriage made by the father of the minor during his or her minority.

In such cases, the right of the father or the guardian of a minor, to enter into a contract of apprenticeship or marriage, is being recognised. But in these cases, both the parties must enter into a contract for the welfare of the minor; only then these contracts will be considered as valid. It was observed in a case that the minor cannot be compelled to carry out his or her part of the contract against his or her wishes, neither in case of a contract for personal service nor in case of a contract of marriage, and the court cannot order for the specific performance of such contracts. But in case, if the contract is enforceable one, then the other results would be the same like damages would be the liability in case of breach of contract.\textsuperscript{130}

**Position of lunatics and Suit for damages**

As per the terms of the Indian Contract Act, 1872 the rule of law applicable to minor is also applicable to lunatics and other persons of unsound mind. So far as the contractual obligations are concerned, the decision given by the Privy Council in case of Mohori Bibee\textsuperscript{131} is considered to be a complete code in itself. But later on in a case,\textsuperscript{132} it was held by the court that if a lunatic enters into a contract, the contract will be considered as void and unenforceable. Therefore, all the transactions by lunatics are absolutely void, and a lunatic stands in the same position as a minor and applying the analogy of cases in which sales against minors without their being properly represented have been held to be void, it was held that sales against lunatics who have not been properly represented are void, and that there is no necessity for setting aside the sales; it is open to the defendant to plead that as the sale was void no property passed to the plaintiff and that he is not entitled to recover possession. But there are

\textsuperscript{128} Holt v. Ward, (1732) 93 E.R. 954.
\textsuperscript{129} Hale v. Ruthven, (1869) 20 T.L.R. 404.
\textsuperscript{130} Supra note 112.
\textsuperscript{131} Supra note 124.
\textsuperscript{132} Machaima v. Usman Beari, 17 M.L.J. 78; Lakhya Dasya v. Umdkanto 2 Ind. Cas. 818: 14 C.W.N. 256.
certain persons, who, though they have no beneficial interest in the contract, by virtue of that legal position, some time allows to sue upon it.

**Position of agents and Suit for damages**

When a person enters into a contract as an agent, it means he is employed to do any act for the principal or to represent him in the dealing with the third-party. The original party will remain the principal; he is the person who is really interested in the performance of the contract. The principal is the person in which rights to sue really vests. But the agency is coupled with the interest, which means, when the agent is entered into a contract and if he has any interest in the subject matter of breach or he has special property or interest then, even though he contracted for a principal, he can sue in his own name. It was observed\(^\text{133}\) and held by the court that in a situation where an agent enters into a contract and if he has any interest in the contract, then he can file a suit for damages for breach of contract in his own name. In such cases, an agent is considered to be the principal to the extent of his interest. But in those cases\(^\text{134}\) where an agent is supposed to act under a contract with the defendant as a mediator for the sale and purchase of goods, but actually he acted as a principal without the knowledge and consent of the defendant, he will not be entitled to sue for recovery of damages caused to him, by the defendant.

There are certain forms of contracts e.g., F.O.B (Free On Board) contracts, in which an agent enters into a contract with the other party, but his position in that contract is that of a principal, although he was acting as an agent for the purchaser. If the seller with whom the agent has contracted to purchase for his constituents fails to perform the contract, the right of action for damages arises in his favour, and he is entitled to recover the damages.\(^\text{135}\)

**Position of benamidar and Suit for damages**

The benami transactions, i.e., purchase of the property in the name of some of the persons were governed by the provisions of s. 82 of Indian Trust Act, 1882. According to the aforesaid provisions, the benamidar holds the property in a fiduciary


capacity, i.e., for the benefit of the person paying or providing the consideration. In law, the legal ownership vested in the person who paid the consideration for purchase of the goods. The effect of this provision was considered by the Hon’ble Supreme Court in a case.\textsuperscript{136} According to the observations of the Supreme Court in this case, it can be said that a person who purchased the property in the name of other person was the legal owner and the benamidar was holding the property for the benefit of real owner.

The Privy Council has recognised the rights of a benamidar to sue for damages for breach of contract without the consent of the real owner.\textsuperscript{137} Because benamidar is the person who has no interest in the property, he is not a real owner. He is not liable for anything. But he acts in the transaction like an actual contracting party, which can be sued for the breach of the contract.

\textbf{Position of official assignee and receiver and Suit for damages}

There may be the cases where due to the breach of contract, both the property and the person are injured. In such cases, the official assignee or the receiver can file a suit for damages caused to the property, or the person and such right of action will be divided between the official assignee or the receiver and the insolvent. However, in those matters which are based on personal qualification, the official assign or the receiver is not entitled to ask for the performance of the contract or cannot sue for the breach of contract.\textsuperscript{138} But in case, the breach of contract has occurred before the insolvency, then the official assign or the receiver has a right to sue for damages thereof.\textsuperscript{139} Those matters, where the insolvent is discharged and entitled to sue for damages in his own name can be briefly mentioned as follows:-

- Matters where an injury is caused exclusively to his property or person, and damages in respect of a breach of contract are claimed;
- Where the matter under consideration is for the damages for injury to his person, although a breach of contract results in the injury to both the property and the person;

\textsuperscript{138} Baily v. Thompson & Co., (1903) 1 K.B. 137.
\textsuperscript{139} Beckham v. Drake, (1849) 2 H.L.C. 579.
Where a contract for personal service has been entered into before insolvency and remained unexecuted at the date of insolvency and the damages are claimed for breach after insolvency.

Position of executors and administrators and Suit for damages

So far as the right to sue, which vests in an executor or administrator, one can refer section 306 of the Indian Succession Act. As per this provision, all the rights which are existed in favour of a person at the time of his death survive to his executor and administrators, except the right of an action for defamation, assault, or other personal injuries where the relief sought could not be enjoyed or granting it would be of no value, after the death of the party. That is why, it can be said that suit for damages for breach of contract is clearly of personal nature and executor or the administrator is not entitled to sue for the breach arising out of the breach of contract. Except for the above and similar cases, in all other cases of breach of contracts the executor or the administrator can sue for the recovery of damages for breach of contract.

Position of a stranger and Suit for damages

Dunlop Pneumatic Tyre Co Ltd. v. Selfridge & Co Ltd. is a landmark judgement in the matter of liability of stranger to contract. In the law of England certain principles are fundamental in this regard. One is that the only person who is a party to a contract can sue on it. Law does not know anything regarding rights conferred on a stranger to a contract as a right to enforce the contract. The second principle is that if a person with whom a contract has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the request of the promisor. Although, both the principles are logically consistent, but at times, they lead to unfair results e.g., even those contracts cannot be enforced by the stranger to contract, which are entered into for the benefit of the stranger. But under the Indian contract act, 1872, one part of this difficulty was removed. Thus, the rule of privity of contract is made applicable in India; however, the requirement that the consideration must move from a party to a contract is unable him to claim benefit is dispensed with. A contract does not create a right or liability in a person, who is

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141 (1915) UKHL 1, (1915) AC 847.
143 Id.at.p.142.
not a party to a contract or privy to it, but there are certain exceptions to this rule like trust, family settlement, etc.

**Position of a third party who has incurred expenses**

A third party can sue the party to the contract for those expenses which he has incurred for taking care of the goods of the plaintiff for which the plaintiff is entitled to recover. The third party can recover the amount of expenditure only when the plaintiff has legal liability in respect of that expenditure to the third-party and when it is reasonable to pay for that expenditure.

From the above discussion, one thing is very clear that the rule that every injury imposes damages is under English Law and very widely accepted in case if the action is based upon a contract. Generally, it is said that every breach of duty arising out of a contract gives rise to an action for damages without proof of actual loss. If Indian law is compared with English law on the subject of damages for breach of contract, one will find that the rules in India on the subject are entirely different because one cannot be entitled to sue for nominal damages in actions for breach of contract in India.\(^{144}\) In case if the party fails to perform the contract and the plaintiff finds that he has suffered no actual losses by the failure of the defendant to perform, the court will enquire whether the party complaining of the breach has suffered any damages, and if so what is the extent of those damages and if after enquiry the court finds that the plaintiff has suffered no losses due to the breach by the defendant, the court will refuse to give any relief to the plaintiff. For instance, if the defendant entered into a contract with the plaintiff to serve him in India for a specified period and after the expiry of that period, he had to return England, but he stayed in India, by committing breach of the covenant, in such situation, it was held by the court that the mere fact that the defendant’s stay in India, although constitutes a breach of contract, but no damages has taken place, that is why the plaintiff is not allowed to ask for damages in such cases.\(^{145}\) The same principle is followed in those cases where the buyer has sued the seller for damages for non-delivery of the goods agreed to be sold at the date fixed in the contract, and if the price of the goods has fallen on the due date, the plaintiff (although he’s a sufferer from the breach of the contract) is actually a gainer and that is why he is not entitled to claim even nominal damages in India. In the absence of

\(^{144}\) Pontifex v. Bignold, (1841) 3 M. & G. 63.

\(^{145}\) Oakes & Co. v. Jackson,(1876), I.L.R.1 Mad. 134.
any concrete material to show the extent of damages suffered by the plaintiff, resort will have to the maxim of nominal damages. The observation made in this case was as follows: “Merely because the plaintiff failed to produce evidence sufficient to ascertain the extent of the damages he has suffered, he could not be denied damages. As technically, the law requires no damages, but an injury or wrong upon which judges may base their judgement for the plaintiff and therefore an injury, although without loss or damages would entitle the plaintiff to a judgement.”

This is a reason that Sec.73 of the Indian contract act, 1872, is there to clear all the doubts regarding nominal damages. As per this section, if a contract has been broken, the party who suffered by such breach is entitled to receive from the party who has broken the contract, compensation for any losses or damages caused to the plaintiff. It has been made clear that for the recovery of damages for the loss suffered, the burden is on the plaintiff to prove the losses and to prove the extent up to which he has suffered losses. But it is not obligatory on the part of the plaintiff to prove specific damages. Therefore, in a case, it has been held that though every breach of duty arising out of a contract gives rise to an action for damages without proof of actual damage, the amount of damages recoverable is, as a general rule, governed by the extent of the actual damages sustained in consequence of the act of the defendant. But the rule mentioned under Sec.74, is different from Sec.73. Sec.74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. The rule mentioned under this section provides that when the parties have mentioned in the agreement, the amount of compensation to be paid in the event of breach, the injured party is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named in the contract. This is the rule regardless of the fact whether the sum agreed to be paid is by way of liquidated damages or penalty. Basically, it means that the amount of compensation, if pre-determined by the parties, is the maximum which the injured party can receive. Merely by specifying the amount of compensation, does not entitle the plaintiff to

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147 Ibid.
148 Sec.73 of the Indian contract act, 1872.
149 Frederick Thomas Kingsley v. Secretary of State, AIR 1923 Cal. 49, at.p.50.
151 Id.at.p.305.
claim that sum, but the actual amount is to be determined by the court. The court, however, cannot award higher damages than agreed upon.152

LEGAL PROVISIONS RELATED TO “DAMAGES” UNDER INDIAN CONTRACT ACT, 1872

A contract is not a property.153 It is only a promise supported by some consideration upon which either the remedy of specific performance or that of damages is available.154 Parties come together in a contract for an equal exchange. Therefore, the monetary equivalent is usually adequate compensation for a breach. As a principle, it is best not to force the parties to what they had undertaken to do under the contract. When the party is specifically required by the court to perform the contract, this remedy is known as specific performance of the contract, the courts award, specific performance only in rare cases. In most of the cases, a monetary relief is given as compensation. Law of contract has emerged to deal with disputes among the traders and businessmen. These people are generally interested only in the monetary value of the things. Thus, the money is usually considered as an adequate remedy. But in those cases where the contract between the parties has stated specifically that, in addition to the actual damages and additional sum should be paid as a penalty in case of breach of contract, the question arises whether the penalty should be enforced or not. As it is the right of the state to demand a desired conduct from its citizens at that threat of punishment and penalty, so in this case, whether it would be right behaviour of the parties of imposing penalties on each other. This would amount to usurping the power of the state. This cannot be allowed. Thus, in a contract, parties only have the right to be compensated for damages. They do not have the right to impose penalty on the other party or to take the benefit from the breach. The broad principles on the compensation can be summarized as follows155:

1. Specific performance of the contract is awarded only in those transactions which are dealing with immovable property.

2. In most of the cases monetary equivalent is provided to compensate the innocent party for the breach of contract.

155 Supra note 142, at.p.350.
3. Compensation is not a penalty. It is only aimed at putting the parties in the same position as they would have been in if the contract had been performed and not breached.

It is necessary here to mention the observation of Ruxley’s case156 for the clarity of the concept. The observation was made in the following words: “Damages for breach of contract must reflect, as accurately as the circumstances allow the loss which the claimant has sustained because he did not get what he has negotiated for. There is no question of punishing the breaker of the contract. Given this basic principle, the court, in assessing the measure of loss of claimant, has ultimately to determine the question of fact. Since the law relating to damages for breach of contract has developed almost exclusively in a commercial context, this criteria normally proceed on the assumption that the interest of each contracting party in the contract is purely commercial and that the loss resulting from a breach of contract is measurable purely in economic terms.”157

When a party fails to perform his part of obligation under the contract, there is a breach of contract, and every breach of a term of contract entitles the innocent party to claim for compensation. The party who is injured by the breach of a contract may bring an action for damages.158 “Damages” mean compensation in terms of money for the loss suffered by the injured party. Burden of proof lies on the injured party to prove his losses.159 Every action for damages raises two problems, these are:

I. Remoteness of damages.

II. Measure of damages.

I. REMOTENESS OF DAMAGES

The extent of measure of damages in an action for breach of contract is basically very limited. The judges or the decision making authorities have to decide the measure of damages for breach of contract within the four corners of the contract. Basically, the

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157 Supra note 155.
158 This is the only remedy which the contract act affords. Some other remedies are afforded by the Specific Relief Act 1963, e.g., an injunction to prevent breach or specific enforcement of the contract, i.e., an action for specific recovery of the thing promised to be sold, P.R. & Co. V. Bhagwandas, ILR (1909) 34 Bom 192.
losses sustained by the promisee can in almost every case the very nearly measured in pecuniary terms. Thus, it can be said that damages in actions for breach of contract are only to compensate the party injured. It is not a profit-making issue.

But this theory of compensation is limited by law and that is why it is considered as inadequate. Basically, the limitation which is set upon the theory of compensation is only the approximate and direct consequences of wrongful act which are necessarily arising out of breach of contract are taken into account while deciding damages. The judges are not bound to take into account the indirect consequences of breach of contract. In other words, it can be said that only the primary and immediate result of breach of contract are taken into consideration, not the indirect consequences of the breach of contract.\textsuperscript{160} Although the general rule, which is repeatedly upheld by the courts that the purpose behind compensating a party is that the party who has sustained losses by reason of breach of contract, with respect to damages is required to be placed in the same position as he would have been in, if the contract has been performed.\textsuperscript{161} As this principle is only theoretically proved and academically applicable, but practically, it can be said that it is not possible to restore the party who has suffered losses due to the breach of contract by the other party to status quo ante.

\textbf{DEVELOPMENT OF GENERAL RULES BEFORE THE RULE IN \textsc{Hadley v. Baxendale} CASE\textsuperscript{162}}

The emerging body of rules governing the assessment of damages in particular factual situations are multiplied by decisions and a stage was set for an attempt to formulate some general unifying principles. By the passage of time, the number of those cases had increased, where the problem of assessment of damages was presented, which cannot be easily settled by the application of the rules discussed above. The history of damages shows that there was enough material for the study of methods and processes by which the law is made subject to the condition of growth in particular factual situations. The efforts had been made in the middle of nineteenth century for reaching up to some effective generalization with regard to the measurement of compensation. The most important phase of these efforts took the form of an attempt to shape, to explore and to afford a practical solution for the problem of remoteness of damages.

\textsuperscript{160} Hadley v. Baxendale, (1854) 9 Ex. 341.
\textsuperscript{162} \textit{Supra} note 160.
This problem can hardly be said to have got any substantial judicial attention before the 19th century.

For a very long time, the theory of “real damages”, governed the actions on contract on the basis of unliquidated sums. According to this theory, the judges were empowered to award the plaintiff full compensation for any consequential injury, which the plaintiff could prove sufficiently. Thus, in a situation where the defendant had promised to deliver the goods. But he failed to do so; the plaintiff could recover loss of profit, on the re-sale of the goods made after the formation of the contract.\(^\text{163}\) There was a case\(^\text{164}\) in which the defendant had contracted to let the plaintiff certain iron mill for a period of six months, the plaintiff had to pay $100 for the privilege which was a fair rate. But the defendant made a breach of contract and a suit was filed by the plaintiff on the breach of contract. The amount of $500 was given to the defendant as damages by reason of the stock lay in. This judgment was also approved by the court on the ground that the court was duty bound to find as a factor, the full extent of the loss, where the defendant was deceived as to the liability, he was undertaking.\(^\text{165}\) But this was later on corrected in a case.\(^\text{166}\)

A similar vision of lines of future development may be noted in another case,\(^\text{167}\) where the plaintiff and the defendant had contracted to send timber to the house of defendant and later on the place for destination for its final delivery was to be decided. The plaintiff brought the timber but six hours delay was done by the defendant in the appointment of the place of destination. But meanwhile the horse of the plaintiff died, and the plaintiff sought for his full loss. An exceptional judgment was given by the King’s Bench on the ground that the plaintiff might have taken his horse out of the cart and put down the goods anywhere in the surrounding areas for taking care of the goods.

Such Cases repeatedly came before the courts in the beginning of 19th century.\(^\text{168}\) From these cases, one can get a clear-cut idea regarding what the courts were trying to

\(^\text{163}\) Norwood v. Norwood & Read, (1558) 1 Plowd 180.
\(^\text{164}\) Nurse v. Barns, K.B. 77 (1664): as per Sir T. Raym.
\(^\text{165}\) Keurig v. Eagleton, (1649) Aleyn 93.
\(^\text{167}\) Vertue v. Bird (1678), 121 S.Ct. at.p.433.
realise through these cases. Thus, in a very important case, in which the parties had contracted to supply certain goods for the use in China trade, but the defendant had sent the goods of another kind, which were of no use or value to the plaintiff. Lord Ellen Borough had made an observation in this case, i.e. the judges should consider the effect of those goods which are of no use or value in China. Thus, the buyer was held entitled to recover all the losses which were sustained by the breach of contract. The amount which was allowed as damages was just like allowing full profit of the trade. In one more case, the court allowed the business profits, which would have been made if the contract had been performed by the defendant. The court had begun to formulate the underlying principles, by the second quarter of the 19th century. The court awarded such damages, as were held to have necessarily resulted from the breach in a case. Moreover, as per Tindal C.J. “the company should be allowed for the necessary and natural consequences of the breach.” He further mentioned that if the sum which was too remote, were allowed, then it would not be safe for the common people. There were certain other cases also, in which the rule of necessary consequences was applied.

The above cases itself shows that the Court of Exchequer seems to have been seeking some general principles of remoteness, in contracts. First of all, the case of Startup v. Cortazzi, is needed to be discussed here. In this case, the parties had entered into a contract for the delivery of certain goods, but after the portion of purchase price had been paid, goods were not delivered. The plaintiff filed a suit against the defendant and claimed the profits which he might have been earned from the goods if being delivered. In general terms, the court was instructed not to allow speculative or vindictive damages. This sum, which was paid, was held to be sufficient and on a motion for a new trial, the full-court refused to disturb the judgment. Certain interesting propositions were made by the two of the judges in this case. One of the observations was made by Lord Avinger C.B. in the following words: “He was of the opinion that there is nothing like estimating damages for speculative profits,

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169 Bridge v. Wain, (1816) 1 Starke 504.
171 Boorman v. Nash, (1829) 9 B&C 145. (Even those losses were allowed to be recovered, which had been restrained due to the refusal of purchaser to accept the goods).
172 Walton v. Fothergill, (1835), 7 C&P 392.
173 ld. at.p.395.
175 (1835) 150 ER 712 C. M. & R. at.p.165.
moreover, he was of the opinion that the interest on the money advanced should be claimed.” Another observation was made by Alderson B., as follows: “He had also believed that the loss which the plaintiff has sustained arises from having been kept out of their money. That was a matter which had to be calculated by the interest on the money up to the time when by the courts of practice, the money could have been obtained out of the court.” The judgement might be given on certain other grounds also but the important point which should be focused here is that these observations with regard to the interest were full of potential.

This principle can be seen to have been repeated into two famous cases in the Common Pleas, namely: Fletcher v. Tayleur,176 and British Colombia Saw mills Co. v. Nettleship.177 In Fletcher’s case,178 Willes J. had made very good remarks with regard to the measure of damages. He pointed out that the measure of damages for the breach of contract for the delivery of a chattel might conveniently be held to be the average profit made by the use of such a chattels; whereas Jervis C.J. stated: “It may be noted that the breach of a mercantile contract may be inclined to estimation, as per the average proportion of commercial profits.” In British Colombia saw mills’ case,179 there was a contract of the company with the carrier who had knowledge regarding the number of boxes which he was transporting containing machinery and he failed to deliver one of them, due to that the plaintiff was delayed for a year in putting up a saw mill. The plaintiff claimed for the full losses, but the court refused to allow such losses on the ground that the defendant had no knowledge of the special circumstances. Further, the court held that the expenses necessarily incurred in replacing and the cost of the machinery at the destination, with interest on that sum for the time of a year. Although, there was not a direct application of these suggestions, but it could be considered as a step ahead towards the concept of interest. Most likely, it can be considered that the full utility of the concept of interest has not been still realised. If one goes backward to the Court of Exchequer, then the case of Black v. Baxendale180 is worth mentioning here. Thus, it is very important to discuss the facts of this case in brief. In this case certain goods were delivered by the plaintiff

176 (1855) 17 CB 21: 25 LJPC 65.
177 (1868) LR 3 CP 499.
178 Supra note 176.
179 Supra note 177.
180 (1847) 1 Ex 410, 154 ER 174.
to a carrier to be sent to the town of B. The intention of the party was to sell the goods in the market on the coming Saturday and the goods were supposed to have arrived before that time, although the carrier was not informed of this fact. When the clerk of the plaintiff went to B for taking charge of the goods on Saturday, he came to know that the goods had not been arrived and the goods arrived on Monday. The clerk took the goods to the town of the plaintiff and disposed of the goods there. In this case, the plaintiff sued for the expenses he had incurred, i.e. the cost of transporting the goods to his town and the expenses which he had incurred in engaging the clerk for this special job. The court, however, was instructed that these expenses might be compensated if the court deems fit. The claim of the plaintiff was allowed. The observation made by Pollock .C.B. is very important to be mentioned here. He stated: “In this case, if the carriers had knowledge of the fact that the goods were supposed to be delivered at a particular time, they could have been held liable for those expenses, for which, they would not be otherwise liable if the fact was not in their knowledge; but whether any particular class of expenses are reasonable or not, would depend upon the facts and circumstances of each case. Moreover, it is a question for the jury to decide what would be the reasonable expenses in a particular case. This statement was considered to be very important in its entirety. The new point which was invented in this case was “notice of special circumstances”. This was the case, in which for the first time this concept was explicitly introduced.

But this decision would not go very long as an authority as it was reinforced in 1853 by the outstanding case of Waters v. Tower. In this case, there was a contract between the parties regarding the completion of certain machinery within a reasonable time. The plaintiffs claimed damages for being prevented from completing the contract with the firm consisting of two of their own members. This contract was considered as unenforceable at law because of the Statute of frauds. One additional claim was also made by the plaintiff for the loss of time, work, and people which was allowed without any discussion. In this case very important observation was made by Alderson B as follows: “If the defendants had undertaken the liability to perform the contract within reasonable time and failed to do so; and if the plaintiff claimed that they should be allowed to have the profits which they might have been made if the contract had been performed; then, by reliable evidence adduced in support of the

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182 Id. at p.187.
claim, the damages could be assessed and granted accordingly. The liberal attitude of
rule of damages can be understood by the following words which are the invention of
the above cases: “The rule mentioned in these cases, if persistently followed, would
provide the plaintiff with damages for all losses which are in fact the result of a
particular breach, however doubtful, however unpredictable they would be”. Looking
at the liberal attitude towards the plaintiff, a strong need was felt that there must be
certain limitations as to the rules of damages. In the field of damages it became dire
need for the defendant or all the concerned or affected parties that some limitation
should be introduced in this regard.

There are various remedies available to an innocent party where there has been a
breach of contract, which are already discussed in the previous chapter under different
headings. The main remedy is damages, which basically can be discussed under two
main heads:-

A. Unliquidated Damages.

B. Liquidated Damages.

Thus, a detailed discussion on the above two heads is required in this chapter, so that
one can get a clarity on the subject.

A. Unliquidated Damages

Unliquidated damages are those damages which are assessed by the court and are
designed to compensate the innocent party for any losses incurred as a result of a
breach of contract. However, when the plaintiff is unable to prove the loss, he will
only be entitled to claim nominal damages. There is an important authority\textsuperscript{183} in this
regard, which is required to be discussed here. In this case, plaintiffs had been aware
of the breach but did not seek injunctions or specific performance. Instead they raised
an action for damages. They sought an amount that might have been obtained from
defendant in return for a modification of the covenant so as to authorise the more
profitable development. The defendant accepted they were in breach of the covenants,
but said that plaintiffs could only recover nominal damages on the basis of following
contentions:-

The correct approach regarding the measure of damages is that which the plaintiff would have received if covenants had been performed. The court should look only at Council’s loss, and not the extra profit made by the defendant.

Moreover, the councils had not suffered loss and were not entitled to recover substantial damages.

On the basis of above contentions it was held by the trial court that only nominal damages could be granted to the plaintiffs. Further, the appellate court held that the purpose of granting damages is that the innocent party could be placed, so far as money could do so, in the same position as if the contract had been performed. Damages may include profit which the injured party had lost, but not to award to the injured party the profit which the defendant had gained. In this case, the plaintiffs had not suffered loss; therefore damages awarded was only nominal. Dillon L.J. further held that since the plaintiff wishes to be modest in putting forward a somewhat revolutionary development of the law of damages, they can claim such part of the profit as would reflect the premium they would have to pay to relax covenants for increased development. Moreover, the common law remedy of damages for breach of contract was to compensate the injured party for those losses which he has sustained, not to transfer to the victim the benefit which the wrongdoer had obtained.\(^\text{184}\) As held by the court in a case, that compensation could be paid, only for pecuniary loss naturally arising out of the breach.\(^\text{185}\) The damages are compensatory in nature, the purpose of which is to place the plaintiff in the same position as if the contract had been performed.\(^\text{186}\) This case can be contrasted with another case\(^\text{187}\) where the court awarded damages to the claimant for the loss of a chance to win a competition. This was considered a leading authority for the principle that some harm = liability = duty to assess some compensation. It is necessary here to mention the brief facts of this case. The facts of this case are as follows: “In this case the claimant was one of 50 ladies selected for interview in respect of 12 contracts available to theatre actresses. She was unable to attend on the only day fixed for interview and sought damages in

\(^{184}\) Chitty on Contracts ed.31\(^{\text{st}}\), (2013), at.p.405: Vol.1 (General Principles) & Vol.2 (Specific Contracts) with 1st Supplement.
\(^{185}\) British Wasting House Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. (1912) AC 673.
\(^{186}\) Johnson v. Agnew (1979), 1 All ER 883 at.p.892.
\(^{187}\) Chaplin v. Hicks, (1911) 2 KB 786.
respect of the lost opportunity of being selected for employment. It was held that she had not been afforded a reasonable opportunity of presenting herself for selection and damages were assessed at £100. The defendants appealed alleging amongst other things that the damages were “so contingent as to be incapable of assessment.” So far as the impossibility of assessing the damages was concerned Vaughan Williams L.J. said that: “He does not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. He only wishes to deny with emphasis that, because accuracy cannot be arrived at, the jury has no function in the assessment of damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.”

The overriding principle on assessment may be expressed as follows: “Where the claimant has proved some harm then, regardless of the difficulty in question, the duty of the court is to make the best estimate which it can, in the light of the evidence, of the amount which the claimant has, on balance of probabilities, incurred as a result of the breach.”

One more case is necessary to be discussed here in which, the dismissed employee was awarded damages for the loss of employment opportunities and for hurting her feelings by the false accusation of the employer that she was a thief.

A recent case in this regard is worth mentioning here. As the Court of Appeal held in this case that the contract was not too uncertain which can be deemed to be unenforceable. The contract, which was entered into between the parties have contained sufficient terms to determine the measure of performance of the airline. It was totally unnecessary to imply a question regarding how many flights the airline should have made from the airport. While deciding the case, the question which the court had to decide was whether the airline had in a real and genuine sense been flying the aircraft from the airport? The Court of Appeal held that as per the stipulation made in the contract, the level of damages should be the money the airport would have received had the airline remained at the airport for a period of further

188 Ibid.
eight years. Along with the number of assumption the court assumed the fact that the airline would have performed the contract in its own interest.

Thus, it can be said that unliquidated damages are not a means by which a defendant is to be punished and punitive damages are not to be awarded for a breach of contract. These are also not a way to recover any gain made by the defendant as a result of a breach.

Loss includes any harm or damage to the claimant themselves or any of their property, including any reduction of value of such property caused by the breach of contract. However, in calculating the loss and awarding damages, if the claimant has obtained any benefit from the breach the court will not usually allow the claimant to be put in a better position than they would have been had the breach not occurred. Therefore, any benefit received must be set off against the loss. There are three ways of calculating losses and which one should be used in a particular case will depend upon the type of loss incurred and which one will be best suited for the claimant depends upon the facts and circumstances of each case. These three ways are as follows:-

- Expectation Loss;
- Reliance loss;
- Restitution.

**EXPECTATION LOSS**

When a party breaches a contract, a court will often award damages to the other party. Expectation loss is the conventional basis upon which damages are assessed and is designed to put the claimant in the same position they would have been had the contract been performed. This is also known as loss of bargain. Expectation damages are a common form of legal remedy for a breach of contract. These are awarded for an actual, concrete and definite loss. Expectation damages are awarded to cover the amount that the innocent party reasonably anticipated under the contract. This amount is often speculative. The court uses the rule of the expectancy to calculate the innocent party’s expectation damages. This calculation has three steps:

1. First, the court will determine what the innocent party would have gained had the contract been performed.
2. Secondly, the court will determine what the innocent party lost and where the innocent party now stands.

3. Thirdly, the court will calculate what it would now take to bring the innocent party from where the party now stands, to where that party would be had the contract not been breached.

Courts have a strong preference for awarding damages measured by the expected value of the promise or the contract. The object of awarding expectation damages is to put the party in the same position he would have been in if the contract was performed as expected. This includes both the value of expenses incurred and expected profits.

The formula which was adopted by Professor Farnsworth† for calculating expectation damages is:

\[
\text{General Damages} = \text{Loss in Value} + \text{Other Loss} - \text{Cost Avoided} - \text{Loss Avoided}
\]

- **Loss in value** means the difference between the values to the injured party of the performance he should have received and that of any performance he did receive. A subjective standard has been adopted for the calculation of loss in value, if defective service was rendered. In such situation, the loss in value is the difference between flawless service and the value of the defective service. The value here means the value to the plaintiff as it is a subjective criteria for the calculation of loss in value.

- **In the category of other loss** two types of damages are involved: incidental and consequential. Incidental costs are incurred in a reasonable attempt to avoid loss, even if unsuccessful, whereas consequential costs are injury to persons or property resulting from breach of the contract.

- **Cost avoided** here means to prevent the plaintiff from performing further.

- **Loss avoided** means the loss which is avoided by the retrieving or reallocation of resources that would have been devoted to performance.

- **Cost of completing the Performance**‡: It means damages are awarded to the plaintiff for the cost, which the plaintiff has incurred for the completion of

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† Professor Farnsworth, “Computing the Value of Expectations”, Restatement (Second) of Contracts § 347.

‡ Id. at p.348.
the rest of the work which is pending due to the breach of the contract by the defendant.

- **Reduction in value or Benefit of the bargain**: It means damages are to be calculated as the difference between the value of the complete work and the value of the defective performance of the defendant. This method is generally used by the courts when the cost of completing the performance is totally disproportionate to the probable loss in value resulting from the defective work or incomplete work.

While deciding, which method should be used from the above methods, various factors are to be taken into account including:

- The basis for the performance;
- The effect of the attempts of the claimant to mitigate their losses; and
- Whether the court considers that the claimant will meet the cure if awarded on this basis.

There are certain categories of cases where expectation damages are generally claimed:

- Sale of goods contracts.
- Sale of land contracts.
- Employment contracts.
- Construction contracts etc.

One can easily understand the implication of expectation damages by the decision given in these two cases: In the first case, there was a contract for the sale of land which required a wall to be built to separate the land from that of the claimant. The claimant genuinely wanted the wall to be built and was entitled to recover the cost of building a wall from the defendant. It was considered irrelevant that the land had not reduced in value. Oliver J said: “In the instant case, the plaintiff said in evidence that he was ready to carry out the work on his own land and therefore there were three questions that he had to answer:-

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193 Radford v. De Froberville (1978) 1 All ER 33 (Ch.D): (1977) 1WLR 1262; as per Oliver J.; Tito v. Waddell (No 2) (1977) Ch 106.
194 Id.at.p.1283.
Whether he was satisfied on the evidence that the plaintiff had a genuine and serious intention of doing the work?

Whether the carrying out of the work on his own land was a reasonable thing for the plaintiff to do?

Whether it makes any difference that the plaintiff is not personally in occupation of the land but desires to do the work for the benefit of his tenants?”

He explained the rule in his own words as: “If he contracts for the supply of that which he thinks serves his interests, be they commercial, aesthetic or merely eccentric, then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.”195 Whereas in the second case196 the court refused to award damages to the claimant to replant land after a mining company had failed to do it because they were not convinced that the claimant intended to use the money for this purpose. Therefore, damages were assessed on the basis of the difference in value of the land. Although specific performance would lie to enforce the replanting obligation, yet it would not be decreed since all relevant landowners were not presented before the court. That is why; plaintiffs were limited to compensation and damages, which would be nominal since they had failed to prove that their loss was the cost of replanting as opposed to diminution in the value of the land. While deciding this case, the court had made an observation which is very relevant to be mentioned here i.e. “If the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages.”197

195 Supra note 193, at.p.1270.
196 Supra note 193.
There are a number of limitations on the principle of expectation damages such as:

- Foreseeability;
- Certainty;
- New-business Rules;
- Type of loss;
- Mitigation;
- Causation.

**Foreseeability**\(^{198}\)

It is generally applied to consequential and incidental losses. The damages must be foreseeable to the breaching party at the time the contract was made, not at the time of breach. A loss is foreseeable if it naturally follows from the breach or if the breaching party had actual notice that such a loss would result from a breach.\(^{199}\)

**Certainty**\(^{200}\)

It is another limitation on the expectation damages. It means that a party must establish with reasonable certainty the amount of its loss and the fact that it would have avoided the loss but for the breach. Some types of damages are generally considered to be uncertain, such as lost profits or lost publicity.

**New-business Rules**

While assessing the damages the courts are not very friendly to allow the claims for lost profits made by new businesses that have no prior history of profitability. But a court will consider such claims in light of the plaintiffs experience in the industry and the attentiveness of his efforts in running the business.

**Types of loss**

The courts must take into consideration the types of losses sustained by the plaintiff. Pecuniary loss is the usual ground upon which damages are awarded for breach of contract. However, damages for non-pecuniary loss are sometimes awarded in certain circumstances, such as:

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\(^{198}\) *Supra* note 191. Rest. 2d. § 351; UCC § 2-715.

\(^{199}\) *Supra* note 160.

\(^{200}\) *Supra* note 191, at.p.352.
- Physical inconvenience\textsuperscript{201};
- Damage to a commercial reputation;
- Pain and suffering as a result of a physical injury,\textsuperscript{202} and
- Any distress caused to the claimant.\textsuperscript{203}

**Causation:**

The court must take into consideration the fact that the breach of contract which occurs must have caused and preceded the loss. It is possible for the chain of causation to be broken by a third party, but only if it is unforeseeable. There was a case\textsuperscript{204} in which the defendant, who was a valuer, negligently advised the plaintiff (his client bank) that the property which it proposed to take as a security for a loan was worth more than its actual market value. Plaintiff sued not only for losses attributable to the deficient security but also for further losses attributable to a fall in the property market. The court held the defendant liable only for the losses related to the deficient security. He was not held liable for any losses suffered by the lender as a result of a fall in the market since such a loss was not a foreseeable consequence of the negligence of the valuer in providing inaccurate information.

**Mitigation\textsuperscript{205}**

The injured party is not compensated for damages resulting from a breach that the non-breaching party could have reasonably avoided. The claimant is under a duty to mitigate their loss, but only once there has been a breach of contract. Where a claimant has not managed to avoid any losses, they cannot recover damages for that. Compensation will be granted if an unsuccessful, but reasonable, effort to avoid the loss was made.

**Comparable Alternatives**

If there exists a comparable opportunity then the plaintiff is duty bound to accept it and use it to mitigate damages caused by the defendant’s breach. If the plaintiff fails

\textsuperscript{201} Hobbs v. London and South Western Railway Co., (1875) LR 10 QB 111.
\textsuperscript{202} Addis v Gramophone (1909) AC 488; Godley v Perry Burton & Sons (1960) 1 WLR 9: 1 All ER 36; Baltic Shipping Company v Dillon (1990) 1 Lloyd's Rep 579 and (1993) 176 CLR 344.
\textsuperscript{203} Jarvis v. Swans Tours Ltd. (1972) EWCA Civ 8.
\textsuperscript{204} South Australia Asset Management Corp. v. Montague Ltd., (1997) AC 191.
\textsuperscript{205} Supra note 191, at.p.350.
to do so, the court can refuse him the damages that could have been avoided. Criteria for comparability include location, type of services, hours of work, status, etc.

**Incomparable Alternatives**

Unless or until the existence of incomparable alternatives is not accepted by the plaintiff the damages could not be reduced. Money earned at a new opportunity will be used to mitigate the damage award if the party in breach proves that the plaintiff would not have accepted this opportunity but for the breach. (This is more likely to occur if the contract was for the personal services of the plaintiff). In those cases where the plaintiff shows that he could have accepted both opportunities; the court will make no reduction of damages.

The burden of proving that the plaintiff failed to mitigate and that a comparable opportunity existed lies on the party at breach. In case if a seller breaches a sale contract, the buyer must try to “cover” by buying substitute goods. If the buyer has an opportunity to do so and he commits breach, the seller does not have a duty to mitigate. He may choose from a number of remedies.

The famous principle of measuring damages was set in a case where it was held that “as far as possible, the party who has proved a breach of a bargain to supply what he has contracted to get is to be placed, as far as money can do it, and as good a situation as if the contract had been performed. Therefore, the primary basis is to compensate for the pecuniary losses naturally arising out of the breach of the contract; but this principle is qualified by a second principle i.e., the law imposes a duty on the plaintiff of taking all reasonable steps to mitigate the losses on the breach and prevent him from claiming in respect of any part of the damages, which is due to his negligence and taking such steps.”

**RELIANCE LOSS**

Reliance loss damages means a reimbursement for loses or expenses that one party suffers in reliance on the contractual promise of other party that has been breached. Where damages are awarded in respect of the expenses incurred in reliance on the presumption that the contract would be properly performed. Reliance loss is where

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206 Supra note 185.  
207 www.Uslegalform.com  
208 Ibid.
one party in reliance on the promise of another applies his money. As a general rule damages may be recoverable on the basis of reliance loss when:

- There is no way of quantifying the expectation loss; or
- No profit will be made on the contract.

**The basis of recovery of reliance loss**

The recovery of damages on the basis of reliance loss is not available if the defendant can prove that the plaintiff had entered into such a losing contract that even if the defendant had performed all his/her obligations, he would not have been able to recover the expenses.

**No profit will be made**

When a party, who did not expect to make a profit but was not going to make a loss, he will be entitled to recover wasted expenses. There was a very famous case\(^{209}\) on this point, in which the court held that the amount of loss, which was recoverable only be reduced if it was proved that the plaintiff had entered into such a losing contract that the plaintiff should only recover the wasted expenditure they would have recovered, if the contract had been performed.

**The onus of proof**

In the case\(^{210}\) mentioned above. It was held by the court that the onus of proof was on the defendant. In case if the defendant has failed to prove that the contract was a losing one which was entered into by the plaintiff, then, the plaintiff will be entitled to have all wasted expenses.

**No other way to quantify**

It was held in a case\(^{211}\) that if the only means to determine the losses suffered as a result of the breach, wasted expenditure will be recoverable, but only when if there is no way to quantify expectation loss and reliance loss.

**Recovery rules of Expectation and Reliance Loss**

The observation made in Anglia TV v. Reed,\(^{212}\) is important to be discussed here. It has been observed that a plaintiff cannot claim both expectation and reliance loss as

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\(^{209}\) Supra note 6.

\(^{210}\) Ibid.

\(^{211}\) McRae v. Commonwealth Disposals Commission, (1951) 84 CLR 377.
this would create a double recovery. Reliance loss and expenditure loss are recoverable in the same action where the lost expenditure forms part of the profit expected to be made on the contract, e.g. where a contract is terminated when a building contractor has finished half of the work for which the contract price is Rs.2,00000 expenditure is Rs.60,000 and expected profit is Rs.80,000, the contractor may recover:

- Expenditure actually made in performing or preparing to perform (Rs.60 000); and
- The profit which would have been made on the completion of whole of the contract (Rs.80 000).

**Only Net Loss can be recovered**

To avoid double compensation while awarding recovery of reliance or expectation damage, the court must have taken into account the following:-

- The value of any asset of the plaintiff must be explained.
- If the plaintiff is under obligation to render his services under a contract, then the expenditure in the course of the contract must be taken into account.
- When the plaintiff has purchased a machine for the purposes of making profit and a warranty is given for the performance of the machine and the same is breached, then the residual value of the (if any) machine must be taken into account while calculating the losses.
- If the plaintiff is claiming lost profit on a further sale future saved costs must also be taken into account.

**Date of Assessment**

Usually, damages are assessed from the date of breach. However, if it is necessary to give appropriate compensation, they may be assessed from the date of judgment.\(^2\)\(^{13}\)

The court, while assessing the measure of damages considers certain events like:-

- Which have occurred at the date of breach, including the market values at the date; and

\(^{212}\) (1971) 3 All.E.R.690.
• Whether the loss is capable of mitigation.

Thus, those damages which occur after this date are considered as irrelevant. It was held in a case\textsuperscript{214} that those losses, which have occurred after the breach can be recovered e.g., lost income acquired after breach caused by the breach.

**Anticipatory Breach**

If the rule that damages should be assessed from the date of breach, then in the case of anticipatory breach, there are two possible dates:-

1. The date of termination by the innocent party; or
2. The date of performance in the normal course.

But the general rule regarding the assessment of damages is that the calculation will take place from the date of performance in the normal course.

**RESTITUTION**

The courts in England in 17\textsuperscript{th} century first developed the doctrine of restitution as a contractual remedy. The concept migrated to courts in the United States, and it has since expanded beyond its original contractual roots. Courts now apply restitution in the areas of maritime, criminal law, and torts.\textsuperscript{215} In law the term “restitution” is used in three senses:-

(i) Return or restoration of some specific thing to its rightful owner or status;
(ii) Compensation for benefits derived from a wrong done to another;
(iii) Compensation or reparation for the loss caused to another.

Restitution literally means “restoration”. It is based on the noble principle that a person should not be allowed to unjustly enrich himself at the expense of another. The loss is measured with regard to the value of the actual benefit as opposed to the claimant’s loss, but will only be permitted if there is a serious breach and a total failure of consideration. The purpose of a claim under this heading is to put both parties into the position they would have been in had the contract never been entered into, although in some situations the claimant may be placed in a better position. The claimant is entitled to choose the basis upon which to make their claim, but there are certain restrictions. Where the claimant has made a ‘bad bargain’ they will not be entitled to claim

\textsuperscript{214} Wenham v. Ella (1972) HCA 43; (1972) 127 CLR 454, at.p.466.
damages for a reliance loss, putting them in a better position than they would have
been in had the contract been performed. In any event, it is for the defendant to prove
that the claimant has made a bad bargain.

**APPLICATION OF RESTITUTION THEORY**

The principle of restitution is generally applied in the following circumstances:-

I. When a contract becomes void, all parties who have received benefit under the
contract must restore it back to the person from whom it has been received.

II. The principle of restitution also applies where an agreement is void ab- initio but
the fact is unknown to both the parties, e.g., mutual mistake regarding existence of
the subject-matter.

There are certain circumstances where the doctrine of restitution is not applicable:-

- When an agreement is void or *void ab initio* like: where an agreement is for
some impossible act to do or where it is illegal to the knowledge of both the
parties from the beginning impossible, the doctrine of restitution will not be
applicable in such situation.

- The principle of restitution is also not applicable where the party (who has to
return the benefit) is a person incompetent to enter into a contract.\(^{216}\) However,
the court may ask the minor to restore the benefit where he has misrepresented
his age, but only on equitable grounds because the law cannot allow, or give
any license or liberty to the minor to cheat others.

- The principle of restitution, does not apply where a party is required to give
some earnest money which serves as a security that the depositor will perform
his part. Such deposit will not be refunded if the depositor fails to perform his
promise.

Thus, reasonable compensation will have to be paid to make good the loss of the other
party in those situations where restitution of the same benefit is not possible. In a
case\(^ {217}\) the claimant had hired a garage for 6 months and it was agreed that any
improvements would be the property of the defendant. When the defendant breached

\(^{216}\) *Supra* note 124.

\(^{217}\) C and P Haulage V. Middleton (1983) 1 WLR 1461 (CA)
the contract, the claimant sued for the cost of the improvements. The court held that even if the contract had not been breached, the expenditure would have been wasted.

In case of Bank of Rajasthan Ltd. v. Sh. Pala Ram Gupta, it held that when at the time of entering into a contract both the parties knew that it was unlawful and therefore, void, there was no contract but only an agreement and it is not a case, where it is discovered to be void subsequently. Nor it is a case of the contract becoming void due to subsequent happenings. Therefore, even Sec. 65 of the contract act cannot be applied.

There are certain situations where it may also be possible to recover twice for the same loss under the various bases as outlined above, as long as the loss itself is not duplicated. In general though, the claimant will seek damages assessed on the expectation basis as this usually proves to be more profitable.

Thus, it can be said that restitution is available to a party to an agreement where he performs services for the other believing that there is a binding contract. In order to grant restitution, plaintiff must prove that defendant received a benefit, that by receipt of that benefit he was unjustly enriched at the expense of the plaintiff, and the circumstances were such that in good conscience defendant should make compensation. A benefit may be of any type of advantage, including that which saves the recipient from any loss or expense. The restitution should be applied in the void contracts regardless it is void ab initio. This system will stop the minor from taking benefit of void contract as well as to restore disadvantaged party.

Only this much of discussion is sufficient here on this point because there is a full chapter on this topic in this thesis, where the doctrine of restitution is discussed in detail.

**Concept of Remoteness of damages**

From a contract, parties have so many expectations to be fulfilled. But the breach of that contract can disturb those settled expectations of the injured party. In such situation the injured party may feel the consequences for a long time and in a variety of ways. For example, a shopkeeper entered into a contract for the supply of pure olive oil, but he changes the quality of the oil, which is a breach. Later on the oil is

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218 A.I.R 2001 HC Delhi, at.p.58.
219 Supra note 153.at.p.450.
seized by the police and destroyed. The shopkeeper is arrested by the police, prosecuted and convicted. He not only suffers the loss of oil, but the loss of profit to be earned on selling the oil, the loss of his prestige and of business reputation. Some other things which are not talked about here are time and money and energy which are wasted on defence and the mental agony and torture of the prosecution.²²⁰

The one general principle, which spread through the law of damages, is that no damages can be allowed for those losses which are remotely connected with the wrongful act complained of. It must be remembered that the purpose of law of damages is not to afford complete compensation for the injury or the loss sustained by the plaintiff, but it is for the division of loss between the party at default and the injured party for the determination of the that portion of the loss which is to be borne by the party at breach and which portion should be borne by the injured party. There are unlimited variety of those effects which are the result of cause of actions, but to hold the author of the initial cause responsible for all the facts in the series is to introduce a great obstruction in the way of peace and systematic progress of the society. Therefore, only those consequences are allowed to be compensated, which are direct and other damages, which are remotely resulting from the breach of contract are refused to be compensated. Thus, the consequences which are not considered by the courts and rejected, have to be borne by the injured party and are known as remote damages and sometimes as consequential damages. But one thing should be considered that these two terms are not interchangeable. That is why, it can be said that all remote damages are consequential, but all consequential damages are not remote.

Thus, the consequences of a breach may be endless, but there must be an end to liability. The defendant cannot be held liable for all that follows from his breach.²²¹ A limit must be set on the liability and beyond that limit the damage is said to be too remote and, therefore, irrevocable.²²² The problem is where to draw the line. Every

²²¹ Supra note 153.at.p.451.
breach would lead to several consequences. A contract is a law made by the parties themselves. However, there are certain questions which are to be answered:

- Where should one stop?
- Should one have to go by what has actually been agreed to, among the parties?
- What could they have been planning?
- What had been their shared horizons within which the contract had been made?

If the parties have already decided at the time of making the contract that in case of a breach specified amount would be payable, then there is no problem regarding the award of damages. But the important concern here is the determination of the boundaries up to which the consequences of a breach of contract can extend. One can summarise this in following words:

- If a stipulation is provided in the contract by the party itself regarding the consequences or the amount which would have been paid in case of any breach occurs in future, then simply the stipulation would be applied, e.g., The manager of the hotel may provide that the hotel is not responsible for any losses caused during the stay in the hotel and the parties staying in the hotel will themselves be responsible for any kind of losses.

- In case nothing has been provided regarding the consequences of a breach, the only thing one can go with is what had impliedly been agreed between the parties would prevail.

There was a case in which an observation has been made by a division bench of the Kerala High Court as: “There is no difference in the rule as to remoteness of damage, whether the damages are claimed in action of contract or tort. Evans, P., in H.M.S. Landon, called in settled law. No doubt, there is a body of authority which disputes the truth of so general statement. It is submitted that in spite of a body of authority to the contrary, the statement of method of delivery Evans, P., that there is no substantial difference between the rules as to remoteness of damages in torts or contract is

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223 Supra note 142.at.p.351.
224 Ibid.
correct.”226 By the majority of the Supreme Court decision was taken in a case227 relying on Sec.212, by which an agent was held to be liable to his principle for the direct consequence of his negligence and an approval has been given to the distinction between direct and remote damages drawn in Re Polemis,228 where Patanjali, J., while giving his dissenting opinion considered that the rules as to the measure of damages laid down in Secs. 73 and 212 were the same.

It was considered that it is necessary for the award of damages under this section that the loss or the damage must have arisen in the usual course of things from the breach of contract.229 One more case230 can be explained as it is relevant here i.e. there was a contract between the plaintiff and the defendant that the defendant had to build a wall within 15 days. But the defendant had failed to do so. The result of which was that the portion of plaintiff’s house adjoining the wall had been affected adversely by the elements and had cost him considerable amount to put it right. The court held that the damages claimed by the plaintiff were too remote and indirect that these could not be allowed. Similarly, in another case,231 it was held that the law will not allow to award damages for collateral or consequential damages arising from delay in the receipt of money.

In a case, there was a contract of lease between the parties and both the parties rescinded the contract, the measure of damages would be the money which was spent by the plaintiff in ploughing the fields, and interests on the whole, from the dates on which the payment and expenditure were made.232

With regard to this, there was a case233 in which there was a contract of hiring of machinery. The contract gave the right to the owners of the machinery, even after the termination of hiring contract, to claim the damages in addition to the arrears of rent due on the date of the termination of the hiring for breach of the agreement. The arrears of fine accrued due till the date of plaint and future hire or damages were

228 (1921) 3 K.B. 500.
claimed by the plaintiff. The court held that the agreement between the parties was a hiring agreement with an option to purchase and that the proper basis for the assessment of damages for use of the machinery not delivered up to the owner in pursuance of a demand was the amount of the hire agreed upon in the agreement.\textsuperscript{234}

One more case\textsuperscript{235} is relevant here to be mentioned as it is also related to the consequences of the breach of contract. In this case, the contract was for the sale of land which was breached by the defendant. The real measure of damages in this case was considered not the value of the land, but the value of the land at the time of the contract minus the contract price. If the seller, ignoring the contract, filed this suit against the vendee on title, then the costs which are incurred by the vendee in such suit should not be allowed because these costs are not considered as the direct result arising out of the breach of contract itself.\textsuperscript{236} It has been observed by the court that the aggravations of the normal consequences cannot be considered while assessing the damages unless or until the circumstances to which they are due, were the ordinary probable circumstances which might be expected to attend or follow upon the breach of obligation.\textsuperscript{237} However, there is an exception to this rule, i.e. if the defaulting party had entered into a contract in which those special circumstances were considered, which would affect the consequences of a breach, and moreover, he accepted those circumstances, then he would be liable for any special loss which may have resulted from the breach.\textsuperscript{238} But in those cases where a purchaser who has agreed to pay off the creditors of the seller, and he made delay in the payment as the fact of the existence of an agreement between the seller and his creditors was not in his knowledge, in which the condition was that if the debt was paid within a specified time, his creditor would remit the debt partially. The purchaser in such cases is not held liable to the seller for the loss of the expected remission.\textsuperscript{239}

From the above discussion, one thing is very clear that we have to begin our journey with remoteness of damages. Those cases in which the parties have not mentioned a

\textsuperscript{234} Ibid.
\textsuperscript{236} Ibid.
\textsuperscript{237} Ma Hla Po v. Ma Sein Nu, A.I.R. 1940 Rang. 146 at.pp.147-48.
stipulated the sum as damages are governed by the principle, which has been settled in 1854 in the case of Hadley v. Baxendale.\textsuperscript{240}

The Indian provision is fundamental integration of the general rule for determining damages as enunciated by Alderson.J., in the above-mentioned case.\textsuperscript{241} It is a well-known fact that the position in India and England in this regard is governed by similar rules, thus various decisions, both Indian and English, are being discussed to see the application and the interpretation of the rules applicable in such cases.

**THE RULE IN HADLEY V. BAXENDALE CASE\textsuperscript{242}**

The above discussion makes it very clear that somewhere in between 1840 to 1850, the courts, the jury and other decision making bodies felt the need to frame some straight jacket formula to make a balance between the parties to the litigation. This must have been the idea of the courts, the jury and other decision making bodies which has cleared all the doubts regarding damages and has decided the suitable, legally recognized, appropriate and proportionate damages for the breach of contract. Basically, the problem was to draw a line of difference, which was very thin, between those damages which naturally arise from the breach of contract and those which would not arise in a usual course of things from a breach of contract, but which do arise in some peculiar circumstances and in some particular cases. But this difficult task was successfully done in a very short time in the landmark decision of Hadley v. Baxendale. This decision has proved to be a limestone in the history of law of damages. All decided cases before this case have been no compelling authority any more. This is the case, which has been considered the base, which the framers of laws has used for codifying and modifying the law of contract. As far as the law regarding breach of contract, law of damages and those circumstances in which damages can be awarded to the injured party and moreover, the quantum of damages is concerned, up to what extent the injured party can recover the damages from the defaulting party, is being cleared in the famous case popularly known as Hadley v. Baxendale\textsuperscript{243} by the court of England. This is the reason why the facts of this case must be discussed.

\textsuperscript{240}\textit{Supra} note 160.
\textsuperscript{242}\textit{Ibid}.
\textsuperscript{243}\textit{Ibid}. 
FACTS of the CSAE

The facts of the above-mentioned case are as follows:-

Hadley operated a flourmill at Gloucester that was driven by a steam engine. A crankshaft of the engine broke, and the mill had to be shut down. The engineers who had made the steam engines were based at Greenwich. It became necessary to send the shaft to them to serve as a pattern for making a new one. It was sent with the carriers, Pickford and Co., represented by Baxendale. The carriers promised to deliver the shaft at Greenwich the next day and collected two pounds for the job. However, the delivery got delayed by one week because the carriers sent it by canal rather than by rail. As a result, the new shaft was delivered late. Meanwhile the mill had to stay closed. Hadley claimed $ 300 as loss of profit for five days.

The criterion of the court for awarding damages was to find out what were the exact intentions, purposes and awareness of the parties. The judge noted that the only communication that had taken place between the parties at the time of the contract was that ‘the article to be carried was broken shaft of the mill and the plaintiffs (Hadley) were the Millers of that mill’. The actual situation had not clearly been planned by or known to the parties since Hadley had not told Baxendale about the circumstances under which the shaft was being sent and the carrier had not explicitly agreed to the terms of being responsible for the closure of the mill on account of any delays. There had been no special arrangements of this kind. In the absence of any explicit communication, the court had to infer from the parties’ actions. The court reasoned that the carriers had no way of knowing that Hadley would lose profits if the shipment was delayed. For all they knew, the mill had a spear shaft that they would put into service. Also, the mill could have been shut down for reasons other than the broken shaft. One can, of course, imagine any sequence of the events. Ordinarily people anticipate things that usually happen. As the court put it:

“But it is obvious that, in the great multitude of cases of Millers sending of broken shafts to third person by carrier under ordinary circumstances, such consequences would not, in all probability have occurred.” The court thus inferred: “It follows, therefore, that the loss of profit here cannot reasonably be considered such a

244 Supra note 142. at.pp.351-52.
consequence of the breach of the contract as could have been fairly and reasonably contemplated by both the parties where they made this contract.”

The same principle can be expressed by another way i.e., “where two parties have entered into a contract, and if that contract has been broken by one of them, the damages, which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself”.

Thus, to explore the intention and plans of the parties, one should look for any unequivocal or special agreement, if there is any between the parties. If there finds no special agreement or stipulation mentioned in the contract, then one should look at the practice as these happen naturally in a majority of cases. The principle formulated in this case has been applied to all cases on compensation since.

**Analysis of the case**

The rule laid down in the above case consists of two parts. On the breach of a contract such damages can be recovered:-

1. **General Damages**.
2. **Special Damages**.

**General Damages:** General damages here mean those damages as may fairly and reasonably be considered a rising naturally i.e., according to the usual course of things from such breach. In other words, it can be said that the defendant is liable for all those consequences which naturally arise in the usual course of things after the breach.²⁴⁵

**Special Damages:** Special damages here mean those damages, as may reasonably be supposed to have been in the contemplation of both the parties at the time of making the contract. They usually arise on account of unusual circumstances affecting the plaintiff. These damages cannot be recovered, unless the special circumstances are brought into the knowledge of the defendant, so that the possibility of the special loss would remain in the contemplation of the parties.

²⁴⁵ George T. Washington, “Damages in Contracts, and common Law” 48 LQR 90 (1932); FE Smith, “The rule in Hadley v. Baxendale, 16 LQR 275(1900); Shriram Pistons and Rings Ltd. v. Buckeye Machines (P) Ltd., A.I.R. 2007 NOC 1844 (Del), damages can be claimed for breach of contract is not completed, even within the extended period. Extension of time is not a waiver of all rights.
So far as practicable, “a person with whom a contract has been broken, has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly.  

It is even his duty to take all reasonable steps to mitigate the losses consequent on the breach; and then the effect in actual diminution of the loss, he had suffered may be taken into account apart from the question whether it was his duty to act or not.  

“The question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances,” and one test is “what a prudent person”, i.e. not having a claim for compensation or indemnity or anyone, “would do under the same circumstances.”  

It is not a reasonable thing, for example, to hire a special train to save an hour or so of time when there is no particular reason for being at one’s destination at a certain hour; and expenses so incurred cannot be recovered as damages.  

In English law, if a buyer disappointed of his goods can buy in the market as a sum equal to or less than the contracted price, he has suffered no loss and can recover only nominal damages.

The principle upon which damages are assessed is founded upon that of rendering compensation to the injured party. This important subject is well treated by Sedgwick.  

And this particular branch of Law is discussed where, he says: “It is sometimes said, in regard to contracts, that the defendant shall be held liable for those damages only which both parties may fairly be supposed to have at the time contemplated as likely to result from the nature of the agreement, and this appears to be the rule adopted by the writers upon the civil law.” In a subsequent passage he says: “In cases of fraud the civil law made a broad distinction” and he adds, “In such cases the debtor was liable for all the consequences.” It is difficult, however, to see what the ground of such principle is, and how the ingredient of fraud can affect the question. For instance, if the defendants had maliciously and fraudulently kept the shaft, it is not easy to see why they should have been liable for these damages, if they

247 Supra note 4.
248 Le Blanche v. L. & N.W.R. Co., (1876) 1 CP Div. 286, 309,313; approved by the judicial committee in Erie County Natural Gas, etc., Co. v. Carroll, (1911) AC 105.
249 Ibid.
250 Erie County Natural Gas, etc., Co. v. Carroll, (1911) AC 105.
252 Ibid.
253 Ibid.
254 Id.at.p.296.
are not to be held so where the delay is occasioned by their negligence only. It can be considered that the above principles are those by which the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contract in the non-payment of money, or in not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. It must be remembered that both the parties must be aware of that well-known rule and these cases must be more properly classified under the rule mentioned above as to the cases in which special circumstances are known because it is considered that both the parties may have reasonably contemplated the estimation of the amount of damages, according to the conventional rule.

Now in the above-mentioned case, if the principles laid down above are applied, then it is found that the only circumstances, communicated in this case by the plaintiff to the defendant at the time of making the contract were that the article to be carried was broken shaft of the mill and that the plaintiff were the millers of that mill. But these circumstances do not itself prove that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person. If for the time being it was considered that the plaintiff had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineers who made it; it is quite clear that this would be in consistency with the above circumstances, and yet it can be said that unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill or again as it was thought that at the time of delivery to the carrier, the machinery of the mill had been in other respects defective, then also the same result would follow. Actually, the truth was that the shaft was sent back only for the purpose to serve it as a model for a new one and that the desire for the new one was not the only cause of the stoppage of the mill and the loss of profits really not arose from not sending the new shaft in proper time. But it is observable that in a number of cases of millers sending broken shafts to the third person by a carrier under ordinary circumstances, it is not necessary that such consequences would in all probability have occurred and these special circumstances were here never communicated by plaintiffs to the defendants.

Basically, it means that the loss of profits in this case cannot be reasonably considered such a consequence of the breach of contract, as could have been fairly and
reasonably contemplated by both the parties when they have entered into this contract, because such loss was neither naturally arose from the breach of this contract in the ordinary circumstances, nor the special circumstances were known to the defendants, which could have made it a reasonable and natural consequence of such breach of contract. Therefore considering the facts of this case, the judges ought to have told the jury that they ought not to take the loss of profit into consideration at all, while calculating the damages.

The unique concept which was founded by the courts was popularly known as “remoteness of damages”. This case was followed in later cases regularly, which made it must to court here the relevant passage of this case as it is. Along with the aforesaid passage of the judgement, the general rule upon which this was based was enunciated by Alderson B in delivering the court’s judgement.

The landmark passage dictated by Alderson B., itself shows the proper rule laid down in this case was as follows: “Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which the jury might be guided in estimating the damages arising out of any breach of contract. Accordingly, the Court rejected the claim on the ground that the facts, which
the defendants were held to know were not sufficient to show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person.”

The phraseology used in the said judgment by the court can be broadly divided into three parts. Those three parts are considered as three golden rules to measure damages arising out of breach of contract. From the above passage itself one can easily make out those three different situations, which provide three golden rules. Those rules can be summarised as follows:-

- Damages naturally arising from a breach of contract according to the usual course of things, can always be recovered.

- Damages which do arise from a breach of contract, but not in the usual course of things, but from circumstances peculiar to the special case, cannot be recovered unless the special circumstances are known to the person who has broken the contract.

- Where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damages complained of arises naturally from the breach of the contract in those special circumstances, such special damage must be supposed to have been contemplated by the parties to the contract and are recoverable.

What should be considered as the source of these views? The previously decided cases254 gave very little guidance in this regard. The law of France and Scotland guided the judges of Court of Exchequer while deciding the above-mentioned case. It means the judges sought the guidance from the laws of aforesaid countries also.

Robert Joseph Pothier, who was a French jurist, was of very great influence during that period255 and the decision in Hadley v. Baxendale256 must be regarded as one of the most striking evidence of the respect in which his work was considered.257 The

254 The extent to which Hadley’s case broke with the past was indicated by the remarks of Lord Esher M.R. in Hammond v. Bussey, (1887) 20 QBD 79, at.pp.87, 91: 57 LJQB 58, at.pp.61, 63. It is noticeable, too, that not a single earlier case was cited in Alderson B.’s opinion, on the principle point.


256 Supra note 160.

257 Pothier developed the contemplation theory at.p.1, C.2, Art. III, Ss. 159-172. In the English edition of 1806, the translator, in a note to these passages (i.90) says: in reviewing the distinctions of Pothier, he seems to allow, in many cases, a higher scale of compensation than would be probably admitted by the English courts. He was evidently referring to such rules as that in Flureau v. Thornhill, (1776) 2 W. Bla 1078: Wilson v. L.& Y. Ry. Co., (1861) 35 LJ Ex. 97, as per Pollock C.B. at.p.103.
Scottish law\textsuperscript{258} was in harmony with Pothier, which was totally different from English law. This difference could be seen in the case of Dunlop,\textsuperscript{259} which was decided six years before Hadley’s case, where, in an appeal to the House of Lords from a Scottish court Lord Cottenham C. had criticised the English law, as it was then understood.

It can be assumed that these criticisms had much weight with the Court of Exchequer. One must also give credit to two leading text writers Joseph Chitty and Kent. Joseph Chitty said in his own words: “The rule seems to be, that only such damages are recoverable as naturally incident to the non-performance, or at least was pointed out to the contracting party at the time the contract was made, as a certain result of his breach. He cited a number of cases after the statement, which hardly supported it.”\textsuperscript{260}

Kent in his commentaries,\textsuperscript{261} said: “Damages for breaches of contract are only those which are incidental to and directly caused by, the breach, and may reasonably be supposed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses.”

It can be presumed that these writers may have derived the idea from Pothier and the Napoleonic Code of 1804\textsuperscript{262} and stated as a settled rule. The decision of Hadley’s case was at once acknowledged as a leading authority in this branch of law and it still maintains its position.\textsuperscript{263} Even Polemis’ case\textsuperscript{264} did not affect the position of the decision mentioned above. The House of Lords certainly indicated with sufficient accuracy that if a Procrustean bed (A Procrustean bed is an arbitrary standard to which exact conformity is forced.) is being prepared; it will not be the decision of Hadley, which will suffer.\textsuperscript{265}

\begin{itemize}
  \item Dunlop v. Higgins, (1848) 1 HLC 31 at.p.404. This decision was not, of course, directly binding on an English court; more was the point raised off a nature directly to suggest the rule in Hadley’s case. The dissatisfaction expressed with the law of England could hardly fail to have its effect. The law of the two countries on this point seems now to be the same. Stroms Bruks Aktie Balag v. Hutchison, (1905) AC 515: 74 LJPC 130.
  \item James Kent, “Commentaries on American Law-Of the Contract of Sale”, (1826-31), V. ii, at.p.480.
  \item Cf. Smith (Lord Birkenhead) The rule in Hadley v. Baxendale, 16 LQB 275, at.p.278.
  \item It was followed by the Queen’s Bench in Smeed v. Ford, (1859) 1 El & El. 602: 28 LJQB 178; and by the Common Pleas in Flether v. Tayleur, (1855) 17 CB 21: 25 LJCP 65.
  \item In re Polemis and Furness, Withy & Co., (1921) 3 KB 560.
  \item Hadley’s case followed in Hall v. Pim, (1928) 33 Com Case 324, HL and in Clauton & Waller Ltd. v. Oliver, (1930) AC 209 HL.
\end{itemize}
However valid was the case of Polemis as a case in tort,\(^{266}\) but it could not impinge on the influence of Hadley v. Baxendale case in the field of contract. Here the question arises: whether the latter case mentioned above, laid down a principle which is sufficient to reply every question of damages in contracts? The answer to this question is definitely in negative because the problem of remoteness is not one of the damages or compensation at all, but it is basically related or one can say more closely related with the more fundamental question of the existence of a cause of action.

Thus, while deciding the case of Hadley, the court had decided that considering all the facts, the plaintiff would not be held entitle to maintain a claim for loss of profits. If such claims were allowed to be maintained, the problem of calculation of damages to be recovered would still remain the same. The questions of estimations, flexibility and of mitigation are among those problems related to damages, which were not figured out by the rule laid down in the above mentioned case.

The older common law did not recognize the existence of these questions, that is why; the extension of these questions would not fall within the scope of this thesis.

The problem of firmness although was considered as the first instance from the critical point of view, but it was not sufficiently dealt with until 1911.\(^{267}\) Thus, if the plaintiff is one of a large number of persons who has a chance of winning a prize contest, and the defendant’s breach destroys the plaintiff’s chance of winning and caused the loss to the injured party? Such types of questions have only been considered recently. The concept of mitigation represents the development which mainly took place during the two generations after the case of Hadley, although the word itself seems to be the old one. For a very long time, it was used to mean the act of decreasing or reducing the action of the court in balancing down a judgment was often described in this way. The jury was then getting used to, in most of the actions

\(^{266}\) In re Polemis has not received sufficient attention as a decision in the field of bailment. The facts of the case seemed to place it in close relationship to such decisions as from which the general rule is derivable that if a bailee, in possession of the bailed article, deals with it in a manner inconsistent with the terms of the bailment, he is liable for all ensuing damage of which his act is a \textit{causa sine quous}. The original contention of the defendants, in the Polemis’ case, that they were not bailees, was not directly dealt with by the lower court, and was not pressed on appeal. It is perhaps sufficient that Sankey J. makes the fact that the defendants were in actual possession and control of the vessel a major premise of his reasoning. Thus, in considering Sharp v. Powell, (1872) LR 7 CP 253; Greenland v. Chaplin, (1850) 5 Ex 243; and Cory & Son, Ltd. v. France, Fenwick & Co., Ltd., (1911) 1 KB 114, he points out that none of these cases involved possession, and that they were thus distinguishable from the principal case 26 Com Cas 281: 37 TLR 696.

\(^{267}\) \textit{Supra} note 187. The earlier cases of Richardson v. Mellish, (1824) 2 Bing 229, and Watson v. Amber gate Ry. Co., (1851) 15 Jur. 448 had also contributed, but very little contribution was that.
to take all the circumstances into consideration while allowing the recovery of the damages. Consequently, it can be said that the courts was feeling free on many occasions as regard to the enforcement of technicalities against a defendant, where the jury thought that if the rule is not followed, then the real justice would not have occurred.\textsuperscript{268}

During the 18\textsuperscript{th} century damages in contracts came to be more and more strictly controlled by the court. The equitable powers of the jury were largely removed. As Street, explained in his own words that: “The principles which underlined the law of damages are even more complex and multiform than the principles which determine liability. That these difficulties have not been fully explored not to the absence, but to our convenient habit of leaving hard things to the jury.”\textsuperscript{269} The field of mitigation is one of those concepts which is recently under the process of exploration.

Certain limitations were then recognized, which were imposed upon the direct application of the rule and Hadley’s case. At the same time, one must take into consideration the other point of view of the case, which replicates and represents a very sound policy of law. As per the policy, an objective standard (the legal standard of a reasonable person) was adopted while deciding the fact of intention of the parties and the interpretation of that intention. There were certain theories like theory of frustration, of the construction of agreements, of implied contracts, etc. also revealed the same fundamental principle that the law will set its own standard by not considering the expectations of the particular promisee or promisor, in every case, but will establish an impersonal criterion.

Before Hadley’s case, it was the rule that “whenever any party to contract 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. Although there was a time when this rule was fully accepted, this has become one of those liberal hopes which the law does well to put but sparingly into practice. The objective behind the policy of law laid down in Hadley’s case must be an equitable apportionment of risks. Basically the aim of law while awarding damages for breach of contract is neither to punish, because morality is not a controlling factor in such cases, nor is there an attempt to restore to the plaintiff the benefits he has given up by

\textsuperscript{268} Hurriod v. Pile, (1615) Cro Jac, at.p.483.
reason of his entrance into the contract. The efforts made by law are just to compensate the injured party, insofar as it is possible for the losses caused and the benefits prevented by the breach. The essential questions of this field of law are difficult to define, except in terms of the functions of the courts and the jury.

Thus, it was the duty of the court, to set a benchmark, by drawing a circle definitive, the scope of the rights of the plaintiff; it was the duty of the jury to produce that circle into a container, the height of which shall represent an estimate of the quantum of the loss of plaintiff within the specified field. The rules of law directing and organizing the exercise of these functions were found, and were capable also in so far as they are based on the customs and practices of commerce and the experience of those engaged in the common business of life.

From the above discussion, it is very clear that the rule in Hadley v. Baxendale can be categorized into two branches. These can be discussed under following heads:-

**FIRST BRANCH**

**I. Damages arising in the usual course of things**

The damages, which can be claimed under this heading, are those which arose in the usual course of things from the breach of contract. Special losses do not fall within the ambit of this branch of rule. There are certain cases, which are very important and necessary to be discussed here. These are as follows:-

- Victoria Laundry (Windsor ) Ltd. v. Newman Industries Ltd.;\(^{270}\)
- J.K. Enterprises v. State of M.P.\(^{271}\)

**Analysis of the Facts of the above Cases**

In the first case,\(^{272}\) the defendants, an engineering firm, contracted to sell and deliver to the plaintiff’s on a certain day a large boiler for their works. This, however, was damaged in the course of removal and was delivered five months after the agreed date. The defendants were aware of the nature of the plaintiff’s business and they were informed that the boiler was required for use as soon as possible. Consequently, the plaintiffs lost the profits which they would have earned and, in particular, highly lucrative dyeing, contracts, which they could have obtained with the government. The

\(^{270}\) (1949) 2 KB 528.
\(^{271}\) A.I.R. 1997 M.P. 64.
\(^{272}\) *Supra* note 270.
plaintiffs sued the defendants to recover these losses. It was held that the defendants knew at the time of contract that the plaintiffs were laundrymen and dyers and required the boiler for immediate use in their business. From their own technical experience and the business relations existing between them, they must be presumed to have anticipated that some loss of profits would occur by this delay. But without special knowledge on their part, the defendants could not reasonably foresee the additional loss suffered by the plaintiffs because of their inability to accept the highly lucrative dyeing contract with the government.\textsuperscript{273}

This case was distinguished from Hadley v. Baxendale, by Treitel.\textsuperscript{274} The defendants in both the cases were judged by applying the criterion of the reasonable man and from the facts known to them and he pointed out that the loss of profits, could be recovered in the Victoria Laundry case because the defendants knew that the boiler was required for the immediate use, whereas in Hadley’s case defendants were not aware of the fact that the delay in delivery of the shaft would keep the mill close. The second opinion given by him was that in Hadley’s case, the defendants who were the carrier were not so capable to foresee the effects of delay, then the defendants in the Victoria Laundry case as they were qualified engineers and knew more than the uninstructed layman of the purposes to which such boilers were put.

In the second case,\textsuperscript{275} there was a contract for the sale of Tendu leaves, which was entered into after the acceptance regarding the tender given by the respondent. The petitioners failed to perform the contract. The second auction sale had to be organized, due to which the respondent suffered losses. Consequently, the respondents forfeited the earnest money deposited by the petitioners, and also blacklisted the petitioners for three years. It was held by the court that the forfeiture of earnest money was justified. But the blacklisting of the petitioner in respect of government contracts for three years, which was done without giving any opportunity of hearing to the petitioner, was not justified. The blacklisting of petitioner was quashed.

\textsuperscript{273} Supra note 246. at.p.225.


\textsuperscript{275} Supra note 271.
To the same effect there was another decision of House of Lords\textsuperscript{276} i.e., there was a British vessel chartered in April 1939, by British company for carrying cargo of soyabeans from Manchuria to a port in Sweden. But owing to delay caused by the vessel’s unseaworthiness, she did not reach that port before the outbreak of war between Great Britain and Germany. Subsequently, the ship was prohibited from going to its destination and ordered to discharge at Glasgow. The plaintiff, who needed soya beans for their business as they were not locally available, incurred expenses in forwarding them in neutral ships. It was held by the court that the loss was due to unseaworthiness of the ship and the defendants were liable for it, because, in view of the international situation, they should have foreseen that was may turn breakout and cause loss of drivers and of the vessel.\textsuperscript{277}

**Cases where delay in carriage of goods meant for sale**

In those cases where a delay is caused by the carrier in delivering the goods at the destination, he can be made liable to pay the difference between the prices prevailing on the agreed date of delivery and that date on which the goods are actually delivered, because the loss arising on account of difference in prices on different dates can be considered to be arising naturally, i.e., according to the usual course of things from the breach.\textsuperscript{278}

In Wilson’s case,\textsuperscript{279} a consignment of clothes for manufacturing caps was given to the defendant for carriage by the plaintiff who was a manufacturer. A delay was made by the defendant in the delivery of the clothes at the destination. The plaintiff could not execute the orders for the caps as the season for the same had passed away. The court held that the plaintiff could claim only the difference between the value of the clothes between the agreed date of delivery and the actual date of delivery of the consignment. The plaintiffs, however, were not entitled to recover, the compensation for the loss of profits, due to the delay in making the caps on time and not being sold.

There was another important authority with regard to the damages i.e., the case of Koufos.\textsuperscript{280} The respondents, who were a firm of sugar merchants, charted a ship, Heron II, belonging to the appellant for carrying sugar from Constanza to Basrah. 

\textsuperscript{276} Monarch SS Co. Ltd. v. Karlshamns Oljefabriker (A/B), 1949 AC 196: (1949) 1 All ER 1 (HL).
\textsuperscript{277} Supra note 153. at.p.455.
\textsuperscript{278} Supra note 150. at.p.289.
\textsuperscript{279} Wilson v. Lancashire and Yorkshire Railway, (1861) C.B. (N.S.) 632.
delivery of the cargo was delayed due to the negligence of the appellant. Meanwhile, the price of sugar had fallen. The respondents claimed a sum of $3800 by way of compensation, that amount being the difference between the price of sugar when it ought to have been delivered and when it was actually delivered. The House of Lords held that the appellant was presumed to know the prices of such articles were liable to fluctuating price and therefore the respondents were entitled to recover compensation claimed by them.281

**Cases where compensation for mental injury is claimed**

Ghaziabad Development Authority’s case282 is relevant to be mentioned here because in this case, the Supreme Court has held that mental injury cannot be a head of damages for breach of ordinary commercial contract. The brief facts of this case are as follows: - The Ghaziabad development authority had announced through advertisements schemes for the allotment of developed plots. The authority made an unreasonable delay in completing the scheme for the development of plots. On the basis of ground of unreasonable delay, it was held by the court that the purchaser could claim the loss of profit, which occurred due to the delay by the seller of the plots. It was further held that the buyer of the plots could not claim any compensation for mental injury caused by the delay in the performance of the contract.

**Cases where compensation is not an adequate relief**

In Sandy Cement (P) Ltd. v. Union of India,283 there was a contract between the petitioner and the Railway Co., according to which the petitioner transported coal through the respondent’s Railway. But 13,320 metric tons of coal, which was transported in one of the wagons was not delivered at the destination. The consignment consisted of “mineral coal” was considered as a scarce commodity and not easily available in the market. It was held by the court that the monetary compensation in this case would not be an adequate relief and a writ of Mandamus was issued directing the railway administration to deliver the goods in kind.

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281 *Supra* note 150. at.p.290.
283 A.I.R. 1990 Guj. 140.
**Cases where the injury to feelings and disappointment has caused**

There are certain cases, and which party makes a breach of promise to marry which results in to the injury to the feelings and disappointment. In such cases, only exemplary damages may be claimed. Prema’s case\(^{284}\) is an important authority in this regard. In this case, the Gujarat High Court held that just like in England, in India also the general rule of damages being compensatory in nature does not apply in case of a breach of promise to marry. So in this case, only exemplary damages were allowed to the plaintiff, Ms.Prema, in the action against the defendant Mushtak Ahmed. It was also held that merely because the parties had also illegitimate cohabitation would not make the legal and valid cause of action illegal and immoral.\(^{285}\)

In Lakshminarayan v. Sumitra,\(^{286}\) a girl engaged with a boy and after the engagement the would-be husband continued to promise to marry the girl and on this pretext he had sexual intercourse with her, consequently, she became pregnant. Later on, he refused to marry her. It was held by the court that she was entitled to damages on various grounds, such as physical pain, agony, indignity, chances of marriage becoming dim and social stigma. Moreover, it was further held by the court that mere acquittal of the boy and others in criminal cases, would not disallow an action for damages under the law of torts. Therefore, the lower court awarded Rs. 30,000 in this case as a compensation, which was later on, affirmed by the M.P. High Court.

**Cases where claim is made by stranded passengers**

In a case\(^{287}\) due to the negligence of the defendant railway Co., the plaintiff and his family were sat down at a wrong railway station. Neither any nearby hotel audition nor any conveyance was available to them, and they had therefore they had to walk on their feet to a long distance which caused inconvenience to the family. His claim for cold got by his wife and consequential losses on the account of medical expenses incurred for her treatment and loss of service in the business, was rejected by the court. The cold to the wife was considered to be too remote. That is why the rejection of claim for cold to the wife appears to be justified.

\(^{284}\) A.I.R. 1987 Guj. 106.
\(^{285}\) Supra note 150. at p.291.
\(^{286}\) A.I.R. 1995 M.P. 86.
\(^{287}\) Hobbs v. L & S.W. Ry., (1875) L.R. 10 Q.B. 111.
As it is the duty of the carrier, to take a person up to his destination, and if he fails to do so, the passenger may also be allowed to claim hotel charges and also the expenses incurred on the alternative conveyance. It means a stranded passenger can claim expenses for ordinary conveyance and not a special costly conveyance, unless there is urgency in his reaching the destination as it happened in the case of a doctor.

**Cases where damages are claim for pre-contract and wasted expenditure**

There may be certain contracts in which due to the breach of contract, the expenditure incurred by one party to the contract before the contract was entered into is wasted. The fact that it was in the contemplation of the parties that in the event of breach of contract, the pre-contract expenditure would be wasted, then in such situations such contemplation entitled the injured party to claim for the same. The same effect can be seen in Anglia’s case. In this case, the plaintiffs Anglia Television Ltd. wanted to make a film of a play for television. They entered into a contract with the defendant in which the defendant, Robert Deed, agreed to play the leading role. But the defendant breached the contract. The plaintiff, in this case, had incurred expenditure in arranging for the place where the play was to be filmed and in engaging a director, designer and a state manager, before entering into the contract with the defendant for playing the said role. The plaintiffs claimed not for any loss of profits, but for the recovery of compensation for the wasted expenditure amounting to $ 2750, by an action for damages. In this sum both the pre-contract as well as the post-contract expenditures were included. Moreover, the defendant did not deny his liability for the breach of contract, but contended that his liability was limited to the expenditure incurred after the contract was entered into. But the court held that the plaintiff was entitled to recover the whole of the amount irrespective of the fact that a substantial portion of it had been incurred before the contract was entered into. The ground on which this decision was taken by the court was that it was within the contemplation of the parties that on the breach of the contract, the expenditure incurred in respect thereof would be wasted and that could be claimed by an action for damages.

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289 Le Blanche v. L&N. W. Ry., (1876) 1 C.P.D. 286.
SECOND BRANCH

II. Damages arising from the Special Circumstances

If the plaintiff has suffered losses due to the breach of contract, but those does not arise naturally, but arises due to some special circumstances, the person making the breach of contract can be made liable for the same. But there are certain limitations on this, these can be classified into two categories, these are as follows:-

1. When special circumstances are not known: No recovery of special damages.

2. When special circumstances are already within the knowledge of the contract breaker: Recovery of special damages can be done.

When special circumstances are not known: No recovery of special damages

Recovery of special damages can be prevented due to the lack of knowledge of special circumstances. The important case, which should be mentioned here, is Horne v. Midland Railway Co.,\(^{291}\) in which the plaintiffs, a firm of shoe manufacturers, contracted with a firm in London to supply a quantity of shoes to them for the use of the French army at an unusually high price. The date of delivery was fixed third of February. For this purpose, they consigned the shoes with the defendant railway Co., telling them that the consignment must reach by the 3\(^{rd}\) Feb., but there was nothing exceptional in the contract. The consignment was delayed and the consignee refused to accept it. The plaintiffs had to sell them in the market at about half of the contracted price. The plaintiffs brought an action against the defendant for the delay in delivering the shoes. The defendant paid into the court a sufficient sum to cover ordinary losses suffered thereby, but the plaintiffs further claimed that they should be paid the difference between the price at which they had contracted to sell the shoes and the price which they ultimately obtained. The court held that this was a damage of an exceptional nature and it could not be supposed to have been in the contemplation of the railway Co., when it was contracted to convey the goods by 3rd February. Thus, the loss of profits could not be recovered by the plaintiffs. It means for the recovery of loss of profits, it was must for the plaintiff that they must have told the special circumstances of their contract to the defendant.

\(^{291}\) (1873) LR 8 CP 131.
There was another case\textsuperscript{292} in which, on the same grounds the loss of profits, was not allowed to be recovered. In this case, the parts of a saw mill machinery, packed in cases, were given to the defendant, a carrier, for carriage to Vancouver. One of the cases was lost due to the negligence of the defendant and consequently a complete mill could not be erected and operated. The plaintiff sued the defendant to recover damages, not only in respect of the parts of the machinery lost, but also for the loss of profits, he could have earned if the mill had been installed in time. The court allowed only the cost in Vancouver of the articles lost. The loss of profits to be made from the intended use of the mill was held to be too remote. The ground on which the decision was based was that the defendant was a mere carrier, who had no knowledge of the purpose to be served by the goods to be transported by it, this, he could not be held liable for the loss of profits claimed by the plaintiff and his liability was held to be limited to pay the damages to cover the cost of the parts of machinery lost.

Willes J gave the following illustration\textsuperscript{293} in support of his conclusion:-

“He said that we can take the example of a case in which a barrister on his way to practice at the Calcutta bar, where he may have a large number of briefs awaiting him; due to the default of the peninsular and Oriental company which is detained in Egypt or in the Suez boat and consequently sustained loss; is the company was held to be responsible for that, because they happened to know the purpose for which the Traveler was going?”\textsuperscript{294}

Willes J. Further pointed out that special damages are recoverable only when the special purpose of the contract “is brought to the knowledge of the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions attached to it.”

The similar view was taken in case of Dominion of India v. All India Reporter Ltd.,\textsuperscript{295} Where the plaintiff sent a consignment of three volumes of Indian digests through the defendant railway. Due to the negligence of the defendant, the same lost in transit. An

\begin{footnotesize}

\textsuperscript{293} Supra note 153. at.p.453.

\textsuperscript{294} Corresponding to illustration (r). This is not applicable when the contract is for sale of goods, Kandappa Mudaliar v. Muthuswami Ayyar, ILR (1927) 50 Mad 94: A.I.R. 1927 Mad. 99.

\textsuperscript{295} A.I.R. 1952 Nag. 32.
\end{footnotesize}
action was taken against the defendant to recover the value of the whole set (8 volumes) of the Indian digests on the plea that the loss of three volumes had rendered the whole set useless. The court found that, at the time of consignment, it was not brought to the knowledge of the defendant railway that those three volumes constituted a part of one and their loss would render the whole set entirely useless. It was held that the plaintiff was entitled to claim the cost of three volumes only because that is the loss which is deemed to arise naturally in the usual course of things. Since the goods were described only as a bundle of books without any indication of the importance of a volume.

Recovery of special damages when special circumstances are already within the knowledge of the contract breaker

There has been an important authority in this regard, which has put the light on the rule of recovery of special damages when these are already within the contemplation of the contract breaker i.e., Simpson v. London and North Western Railway Co.\textsuperscript{296} In this case,\textsuperscript{297} the plaintiff was in the habit of exhibiting samples of his implements at cattle shows. He delivered his temple to the defendant company for consignment to the show grounds at New Castle. Although it was mentioned in the consignment note as: “must be at New Castle on Monday certain” But the intention of placing the goods in the exhibition was not mentioned by the party. Due to the negligence the goods reach at the destination only after the show was over. The court held that if the special circumstances are already within the knowledge of the party breaking the contract, the formality of complicating them to him may not be necessary. As the company was already aware of the object of carrying the goods there, the plaintiff was held entitled to recover not only the loss of freight, but also the profits which he would have made by placing the goods at the show. In this case Cockburn CJ observed: “The principle is now well settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or the circumstances are known to the carrier, from which the object ought in reason to be inferred, so that the object may be taken to have been in the contemplation of both the parties, damages may be recovered for natural consequences of the failure of that object.”

\textsuperscript{296} (1876) 1 QBD 274.
\textsuperscript{297} Ibid.
Similarly, in another case, the defendant (respondent) entered into a contract with the plaintiff (appellant) in July 1952 for the sale of certain quantity of scrap iron for which controlled price was fixed. The defendant did not know, nor was he told, that the scrap iron was required by the plaintiff for sale to Export Corporation for export. At the time of making the contract even the plaintiff also did not have knowledge that he would subsequently contract with the Export Corporation to sell them scrap iron. The defendant failed to supply the scrap iron; plaintiff sued him for damages for breach of contract. It was held by the court that the loss which could have naturally arise and in the usual course of things from the breach of contract by the defendant would be nil upon non-delivery of scrap iron as the plaintiff could have purchased the scrap iron from market at the same controlled price. Moreover, the defendant was not informed by the plaintiff when they had entered into a contract in July 1952, that the plaintiff was purchasing the scrap iron for export, thus, the defendant was not held liable for the consequent losses suffered by the plaintiff.

One more case is important to be discussed here i.e., B.P. Exploration & Co. Ltd. v. Hunt (no. 2). In this case, a fragmentiser was purchased by the plaintiff under a hire purchase agreement. Before normal life, its rotor broke down. The plaintiff had no means to replace it at cash price. He had to arrange it again at a hire purchase price and claimed the same as damages. The defendant contended that the plaintiff had to pay higher purchase price because of his lack of means. But his contention was rejected. It was held by the court that the fact that in present scenario of economy, business has to depend upon hire purchase system and it was held to be within the contemplation of the parties.

Re-evaluation of the relationship between the above two rules

In Victoria Laundry’s case, the relationship between the rules was re-examined. The facts of this case have already been discussed above. The observation made by the court in this case was that the plaintiff was not entitled to include in its measure of damages, the loss of any business profits during the period of delay. But the plaintiff went in appeal and the decision was reversed. Asquith LJ, delivering the judgment of

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299 Ibid.
301 Supra note 153, at.p.454.
302 Supra note 270.
the Court of Appeal, pointed out that the defendant knew before, and at the time of making of the contract, that Victoria was a launderer and dyer and required a boiler for immediate use in its business. He further stated that from the technical experience of the defendant and from the nature of the business relationship existing between the parties, the defendant must be presumed to have anticipated that some loss of profits would occur by reason of its delay. But in the absence of special knowledge on its part, the defendant could not reasonably foresee the additional losses suffered by Victoria’s inability to accept the highly lucrative dying contracts. This was the reason that this case was therefore referred to an official referee for a reassessment of damages.

In Hadley’s case, although there are two branches to the rule, but in essence they both form a part of a single general principle, and this was made clear by Asquith LJ, in the Victoria Laundry’s case, as he used the terminology of loss being reasonably foreseeable, rather than reasonably contemplated. He observed that: “the general principle, which governs both branches of the rule, is that the aggrieved party is only entitled to recover such part of the loss actually resulting from the breach as well as at the time of contract reasonably foreseeable as liable to result from the breach. What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. For this purpose, knowledge ‘possessed’ is of two kinds: ‘Imputed and Actual.” Everyone as a reasonable person is taken to know the ‘ordinary course of things’ and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the first branch of the rule. But to this knowledge, which are contract breaker is assumed to possess whether it is actually possessed or not, there may have to be added in a particular case, knowledge which the claimant actually possesses, of special circumstances outside the ‘ordinary course of things’, of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a situation attracts the operation of the second branch of the rule and makes this additional loss recoverable. Under neither branch it is necessary that the

303 Ibid.
305 Ibid. knowledge of special circumstances may, however, in some situations be such as to lead the parties to believe that the loss will be reduced: See also, Biggin Co. Ltd. v. Permanite Ltd., (1951) 1 KB 422, 436; Koufos v. C Czarnikow Ltd., The Heron II, (1969) 1 AC 350.
contract breaker should actually have asked what loss is liable to result from the breach. It is sufficient that, if the issue had been considered, the contract breaker would as a reasonable person have concluded that the loss in question was liable to result.306

Consequently, one can say that this judgment has emphasized that both the rules are based upon the principle of “foreseeability”. Moreover, it can be concluded that this gives a “new look for Hadley v. Baxendale”. Diplock L.J. has observed in Koufos’ case: “That there are not two rules formulated in Hadley v. Baxendale, but only two different instances of the application of a single rule.” A similar view has been given by Salmon, LJ, as follows: “any damage actually caused by a breach of any kind of contract is recoverable, provided that when the contract was made such damages was reasonably foreseeable as liable to result from the breach.”

Similarly, the House of Lords observed in Monarch’s case.307 In this case,308 a British vessel was charted in April 1939, by a British company for carrying cargo of soyabean from Manchuria to a port in Sweden. But due to delay caused by the vessel’s unseaworthiness, the ship did not reach that port before the outbreak of war between Great Britain and Germany. Consequently, the ship was prohibited from going to its destination and ordered to discharge at Glasgow. The plaintiff, who needed soyabean for their business as they were not locally available, incurred expenses in forwarding them in neutral ships. It was held by the court that the loss was caused only due to the unseaworthiness of the ship and the defendants were held liable for it because in view of the International situations, they should have foreseen that war might break out and cause loss or diversion of the vessel.309

Again, in Jackson’s case,310 it was stressed by the House of Lords that the contract remoteness test looks at the knowledge of the defendant at the date when the contract was made and not at the date of the breach of the contract; and, as has been already observed in The Heron II, that this is because it is the date when the contract was made, on which the party have the opportunity to draw attention to special

306 Supra note 304, at.p.546.
307 Monarch SS Co. Ltd. v. Karlshamns Oljefabriker (A/B), 1949 AC 196: (1949) 1 All ER 1 (HL).
308 Ibid.
309 Supra note 153, at.p.455.
circumstances outside the ordinary course of things and to limit your liability, not the date of breach of contract.

**Innovative vitality of two rules has been restored by the House of Lords**

The expression “contemplation of the parties” has been replaced with “reasonable man’s foresight” by the Court of Appeal in Victoria Laundry case. The same has remained the principle in the law of tort also. Hardly, there remained any difference between the tort and contract principle relating to the remoteness of damages. But the House of Lords have restored the distinction by emphasizing upon the expression “contemplation of the parties” in case of Heron II. Lord Reid, as stated by emphasizing that the rule laid down in Hadley’s case have been used for determining the remoteness of damages for over a century and it should not be subjected to an interpretation which would lead to a contrary decision of that case. He further emphasized upon the fact that in that case, the loss of profit was caused due to the delay, but even then, the defendant was not held liable. The reason for that was not the loss was not foreseeable but it was because as Alderson B had pointed out: “it is obvious that, in the great multitude of cases of Miller’s sending off broken shafts to the third persons by the carrier under ordinary circumstances, such consequences would not, in all probability, have occurred…”. By stating this, he was not distinguishing between results which were foreseeable or unforeseeable. But he clearly meant that a result which will happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility would happen only in a small minority of cases should not be regarded as having been in their contemplation. 311 Lord Reid has applied this test to the facts in hand and concluded that, having regard to the knowledge available to the ship owner when he made the contract, any reasonable person in his position would have realized that such loss was sufficiently likely to result from the breach of contract, thus making it proper to hold that the loss followed naturally from the breach or that the loss of that kind would have been within his contemplation. 312

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311 *Supra* note 153, at p.456.
But the law on remoteness, so far as set out, has arguably been altered by the House of Lords in The Achilleas’ case. The brief facts of this case are required to be mentioned here for the better understanding of the concept, these are as follows:

Under a time charter, the defendant charterers should have redelivered the ship to the claimant owners by 2 May 2004. By making the breach of contract, they did not deliver to the owners until 11th of May. The owners had entered into a follow-on time charter (referred to as a follow-on ‘fixture’). Under which they were bound to deliver the ship to the new charterers by 8th of May. But due to the breach of contract by the defendant, they were unable to do so. So the owners renegotiated the follow-on fixture and because the rates had fallen, they agreed to reduce the rate of hire on that follow-on fixture from $ 39,500-$ 31,500, a loss of $ 8000 per day. In this case, although the defendants accepted that they were liable for the damages of the difference between the market price and the charter rate for nine-day overrun period between 2nd May to 11th of May. That came to $ 1,58,301. However, the owners sought damages to the cover the loss of $ 8000 a day for the whole period of the follow-on fixture. That came to $ 1,364,584. The House of Lords held that the damages of the owners were limited to $ 1,58,301, and the rest of the losses were considered as too remote.

The reasoning given by Lord Rodger and Baroness was totally different from that of Lord Hoffmann and Lord Hope.

Lord Rodger and Baroness pointed out by applying the conventional remoteness test that has been mentioned above that the question which had to be decided, was whether it was reasonably contemplatable as a serious possibility at the time of contracting that, in the event of breach by late delivery, a follow-on fixture might be lost? The answer given was ‘no’ so that the losses could be held to be too remote.

Although Lord Hoffmann and Lord Hope has also reached to the same result, but the reasoning given by them was significantly different from the reasoning given above. Lord Hoffmann was of the opinion that the charterers had not accepted liability for the loss because the understanding of the shipping industry was that charterers were only liable for the loss during the overrun period. Whereas Lord Hope had given the reasoning that the charterers had not accepted liability for the loss because it was out

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of their control and unquantifiable. These additional requirements emphasized by Lord Hoffmann and Lord Hope have created confusion regarding the law on remoteness in contract. It would not be wrong to say that there have long been the doubts about whether merely informing the claimant of the special risks involved is sufficient in all circumstances to make a defendant liable for the loss under the second branch of the rule in Hadley’s case. But this was not considered the issue in The Achilleas. Although no clear distinction had been made between them, but the facts clearly indicated that the case was concerned with the first branch of the rule in Hadley’s case, not with the second one. The problem with the reasoning of Lord Hoffmann was that it was based on a mistaken understanding of the law.

The law of remoteness is well illustrated by the first important case since The Achilleas. The Court of Appeal while deciding that a settlement reached by the party was reasonable or not, has stated that while Hadley’s case remains the standard rule and is grounded on policy, it can be displaced if, on examining the contract and the commercial background, the loss in question was within or outside the scope of the contractual duty. In other words, it can be said that the approach in The Achilleas might displace the standard rule by making loss that would be recoverable under Hadley’s case as too remote or by making loss that would be non-recoverable under Hadley’s case as not too remote. As per the facts of this case, although it was unlikely that the loss by flooding would occur as a consequence of the defendant’s breach in failing properly to install a float valve in a fire sprinkler water storage system. Because normally the drains would have taken the overflow water, but here the drains were blocked. This would be the reason that the loss was thought not to be too remote because it was within the scope of the installer’s duty.

Although this decision is very helpful in clarifying that Hadley v. Baxendale basically remains good law and is the standard rule, but it does show that it is far from what triggers the displacement of that standard rules.

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314 Supershield Ltd. v. Siemens Building Technologies FE Ltd., (2010) EWCA Civ. 7(2010) 1 Lloyd’s Rep 349. (The ‘assumption of responsibility’ approach in The Achilleas to be confined to exceptional cases where the orthodox approach would result in unquantifiable, unpredictable, disproportionate liability for a result, contrary to clear market understanding and expectations.)
315 Supra note 304, at p.549.
316 Ibid.
317 Ibid.
POSITION IN INDIA

CONCEPT OF REMOTENESS IN INDIAN CONTRACT ACT, 1872

Chapter VI of the Indian contract act deals with the consequences of breach of contract. Section 73 of Indian contract act, 1872 deals with the concept of remoteness, which is basically founded upon the principles formulated in the Hadley v. Baxendale case. The principle laid down under section 73 is the general principle, which governs all the cases of breach of contract, resulting in loss of damages to one of the contracting parties (who is considered as an innocent party), whereas section 161 (responsibility of bailee when goods are not duly returned) deals with only specific kind of breach of contract. In brief, it can be said that section 73 basically deals with the genus while section 161 deals with a species. That is why, section 161 should be considered only an expansion or illustration of section 73, and there is no need to repeat the condition in the later one. In Kishan lal Shrilal Patwa v. Union of India, it was held by the court that if compensation can at all awarded, then the discussion would be considered only about the condition mentioned in section 73.

Compensation for loss or damages caused by breach of contract

Section 73 of the Indian contract act provides:

“when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation, resembling those created by contract has been incurred, and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person has contracted to discharge it and has broken his contract.”

319 This section is declaratory of the common law as to damages. Jamal v. Moola Dawood Sons & Co., (1916) 43 IA 6, 11: 43 Cal 493, 503.
320 See Anirudh Kumar v. Lachhmi Chand, (1928) 50 All 818: AIR 1928 All 500.
Explanation: - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying these inconvenience caused by the non-performance of the contract must be taken into account.

**Appraisal of Section 73**

Where a party performing a contract does not do so to the standard (the standard may be strict or may require only the exercise of reasonable care) required by the contract for within the timeframe set, that parties will breach the contract. Damages for breach of contract are normally designed to compensate for the damage, loss or injury the claimant has suffered through that breach. Commercial losses are the most frequent subject of actions for breach of contract. However, damages for breach of contract are not necessarily limited to compensation of financial losses alone. Damages may also be awarded, in contracts to compensate for physical damages to the person or property, for the loss of an attribute of property (such as comfort or privacy). Even where this has not affected its value, for inconvenience, and in certain circumstances, for disappointment.

Section 73, contemplates those situations where compensation for loss or damages caused by breach of contract is to be paid. When a contract has been broken, the party who has suffered by such breach is entitled to receive from the other party (who has broken the contract), compensation for any losses or damages caused to him thereby, which naturally arose in the usual course of things from such breach. As it is mentioned above that this section is declaratory of the common law as to damages, so it can be considered that the law imposes an obligation, or implies the terms that upon breach of the contract, damages must be paid. Moreover, it can be said that this principle is provided in simple terms under this section. This section is applicable only when there is a breach of contract; it means that the breach of contract has to be proved for setting about the question of damages. If the court finds that no breach has occurred, it will not award any damages merely on the ground that there was a breach of contract.

Moreover, it is required that any person who is claiming damages for breach of contract has to satisfy the court that he would have performed or he was ready to perform his part of the obligation arising under the contract, if the breach was not committed by the other party. It is considered that the fundamental principle of
damages for breach of contract is that the damages are awarded only to place the
injured party in the same position in which he would have been, had he not sustained
injury of which he complains. The word “damage” may sometimes be defined as the
disadvantage which is suffered by person as a result of the act or default of another.
To be more specific, it can be said that “damages are compensation for natural and
probable consequence of breach i.e. which could reasonably be foreseen”. The
functions of damages are compensatory in nature and not retributive, this principle is
applicable to torts as well as contracts.321 Until the court has determined that the party
complaining of breach is entitled to damages, no pecuniary liability will arise. Firstly,
the court must decide that the defendant is liable and then it should proceed to assess
what that liability is, but, till that determination; there is no liability at all upon the
defendant.322

There is an explanation attached to this section, which seems explanatory in itself. It
brings out the principle that a plaintiff claiming damages must do his best to mitigate
the losses or damages.323

In case of State of Rajasthan v. Nathu Lal,324 it was held by the court that this section
declares that compensation is not to be given for any remote or indirect loss or
damages sustained by reason of the breach. It means that the right of action depends
upon the proof of breach. There are certain other cases325 in which it was held that this
section provides that the same principle will be applicable where there has been a
breach of quasi-contractual obligation. The plaintiff has to prove his losses and where
loss is not provable, reasonable compensation is awarded on the basis of the material
before the court.326

Thus, the principles of Hadley v. Baxendale are found in the first two paragraphs of
this section. The principle has two parts in limiting consequences of the breach. In the

324 AIR 2006 Raj.19, the recovery of amount for breach of contract without taking decision on the fact of breach is not proper.
325 State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC 160: AIR 1987 SC 1359, the contract provided that damages would be assessed by the government and it was held that the government was not the proper party to determine whether a breach had taken place or not. To the same effect, Vairappa Thevar v. Tehsildar, (1989) 1 MLJ 387; P.C. Rajput v. State of M.P., AIR 1993 MP 107: (1994) 1 MPLJ 387.
326 English Electric Co. of India Ltd. v. Cement Corp. Of India Ltd., 1996 AIHC 1875 (Del).
same way, this section also lays down two rules. It is mentioned under this section that compensation is recoverable for any loss or damage:-

A) **Arising naturally in the usual course of things from the breach; or**

B) **Which the parties knew at the time of contract as likely to result from the breach.**

It means that firstly, if the parties have in express terms or impliedly provided for the consequences, these should be followed. One can infer from the conduct of the specific parties regarding their negotiations and dealings. The law cannot throw up its hands despair if the parties do not provide for themselves. That is why a boundary is required to be drawn for the consequences somewhere. The law attributes to the contract in such a way that the contracts usually happen in the practices. Thus, the second option is to take the contract and its breach to be as it usually happens in the general practice.

The Supreme Court referring to the common law principles and section 73, in Pannalal case noted: “Although the contract act make separate provision for the consequences in each case, the rule laid down as to the measure of damages is the same, namely, the party in breach must make compensation in respect of the direct consequences flowing from the breach and not in respect of the loss or damage indirectly or remotely caused, which is also the rule in English common law. The rule is based on the broad principle that the party who has suffered the loss should be placed in the same position, as far as compensation in money can do it, as if the party in breach has performed his contract or fulfilled his duty.

The Supreme Court in Ashling’s case held that reputation by one party puts an end to the contract, although the right to sue for damages survives. Accordingly, the disqualification by virtue of a government contract of holding an office of profit under the State would and as soon as the contractor gives up the contract.

Therefore, it can be stated that the first rule is “objective” and the second rule is “subjective” one. Because the first rule makes the liability to depend upon a reasonable man’s foresight of the loss that will naturally result from the breach of the contract, whereas as per the second rule, the extent of liability depends upon the

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327 *Supra* note 142, at p.354.
328 *Supra* note 227.
329 Ibid.
knowledge of the parties at the time of the contract about the probable result of the breach. Moreover, the burden of proof lies on the plaintiff to show that damage has been sustained and what shall be the measure of converting the loss into money. A claim for damages becomes liable to be rejected where this burden is not discharged. Compensation under Section 73 can be recovered for loss or damage:

1. that arose in the usual course of things from such breach; or

2. Which the party knew at the time they made the contract as likely to result from such breach.

1. **USUAL COURSE OF THINGS**

If there is no agreement between the parties regarding the consequences of breach, then one has to go by the way things are usually done and understood. Thus, to decide the extent of the liability in ordinary cases, the criteria is “what may be foreseen by a reasonable man”, and which arises naturally in the usual course of things. However, no criteria, no test has been prescribed to judge whether a particular thing is a natural result of another. To call a thing the natural result of a particular act or omission is to say that it is produced in the normal course of events without the aid of adventitious accidental circumstances. Lord Sumner in one of his fine judgement has made it clear in a very simple manner by stating that “everything that happens, happens in the order of nature, and should therefore be considered as natural.” He considered that the only way one has to approach the question is to see whether according to the judgment of a reasonable man a particular result would have occurred as a direct consequence of which the complaint of a grievance is being made before the court by the aggrieved party in circumstances which are not peculiar in themselves. Therefore, the first rule in Hadley v. Baxendale is only considered as specification of simple

331 Murray Pickering, “The Remoteness of Damages in Contract”, (1968) 31 Mod LR 203, where the learned writer considers the decision of the House of Lords in the Heron II, the Koufos v. C Czarnikow Ltd., (1969) 1 AC 350; (1967) 3 WLR 1491; (1967) 3 ALL ER 686 (HL) and traces the “objective” and “subjective” nature of the rules in Hadley v. Baxendale. In Food Corporation of India v. Babulal Agrawal, (2004) 2 SCC 712, agreement to provide premises on lease for three years after construction, refused to do so, Held breach actionable in damages. Ex-Servicemen Security Bureau v. Tamil Nadu Electricity Board, AIR 2003 NOC 13 (Mad), security personnel were provided by the plaintiffs (bureau) to the defendants (SEB). One of the terms was the plaintiffs would be liable for any loss due to the involvement of the personae. Theft took place. No allegation of involvement of personnel. No FIR is against them. The plaintiffs were entitled to their security charges.


cases, whereas under the second, for the natural and ordinary consequences of an event are always assumed to be in the contemplation of reasonable man and he is not allowed to take an excuse for that situation in which he can say that he failed to think reasonably or did not think at all.\textsuperscript{334}

Here arises a need to draw an attention to the thin line difference between those cases in which court held that though admittedly the damages caused to plaintiff as a direct result of the conduct of the defendant, and still the plaintiff should not qualify for the compensation. In such situation, the court asked the question, in what kind of damage, the plaintiff should be considered entitled to recover compensation? The problem is that the damage of most terrible and unusual nature may ensue from the breach of contract, but on the practical grounds, the law takes the view that these cases should fall under the category where a line must be drawn and the plaintiff’s claim for recovery of damage is required to be rejected. Lord Wright, while explaining the aforesaid concept stated as below:

“The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because it is not possible for the law to judge the ‘cause of causes’, or ‘consequences of consequences’. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic, but simply for practical reasons”.\textsuperscript{335}

\textbf{KNOWLEDGE REGARDING NATURAL OR ORDINARY CIRCUMSTANCES}

Damages for breach of contract committed by the defendant are compensation to the plaintiff for the damage, loss or injury he has suffered through that breach. An action for damages is always available as a matter of right when a contract has been broken, as against the relief of specific performance, which lies in the discretion of the court.\textsuperscript{336} Therefore, whenever there is a breach of contract, the innocent party is required to be compensated by the party at fault for the losses, which are really due because of the breach committed, by the other party. The party committing a breach is not allowed to take shelter under the roof of words that “he failed to think reasonably

\textsuperscript{335} Liesbosch Dredger v. SS Edison, (1933) A.C. 449, at p. 460.
\textsuperscript{336} Specific Relief Act, 1963, Ss. 10-24, particularly, Ss. 10 and 20.
or did not think at all” as the law presumes that the natural and ordinary consequences of an event are always assumed to be in the contemplation of reasonable prudent person. A person who has suffered loss from a breach of contract is also bound to take reasonable steps that are available to mitigate the extent of the damage caused by such breach.

The simple cases, which fall under the first rule, are generally the ordinary cases of :-

- Non-payment of money; and
- Non-delivery of goods; and
- Delay in delivery of goods.

Whenever there is a case of non-payment of money, the innocent party is entitled to be compensated for the loss of contrast and other reasonable expenses of recovering the amount because the assumption of law is that he can obtain the money elsewhere on payment of interest.

Whereas in case of non-delivery of goods and delay in delivery of goods, the plaintiff is expected to go into the market and purchase the goods, and if he is to pay a higher price than the agreed amount between the parties, then he is entitled to recover as compensation the difference which he has to pay and the price which he agreed to purchase as per the contract, agreed-upon by the parties. As per the market rules, the price of different articles changes according to the demands of the season and the plaintiff may not have suffered any loss if the price he has to pay is less than the contract price.

Here, the case of Govind Rau337 is relevant for discussion. In this case, the plaintiff, who was a tailor, delivered a sewing machine and some clothes to the defendant railway Co. to be sent to a place where he expected to carry on his business with special profits by reason of the forthcoming festival. Due to the fault of the servants of the company, the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. In this case, the plaintiff had not given any notice to the company regarding special-purpose. Still, he claimed the expenses of

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337 Madras Railway Co. v. Govinda Rau, ILR (1898) 21 Mad 172. Damages cannot be recovered by person who does not do his duty under the contract, e.g., a person whose electricity supply is suspended for non-payment of bills. Patel Dadubhai Narsibhai v. Gujarat EB, (1990) 1 Guj LR 673. But the damages were allowed where there was a long delay in restoring supply after all requirements were fulfilled. Gujarat Electricity Board v. K.R. Patel, (1988) 2 GLH 169.
travelling up to the place of festival and overstaying there and the loss of profit, which he would have earned, as damages. But the court held that he’s not entitled to claim such damages as they were too remote.

Thus, the claim for profits is which would have been made by the plaintiff cannot be allowed if the plaintiffs special-purpose is not within the knowledge of the defendant.\textsuperscript{338} In case the goods are lost in transit, the carrier is not liable for the loss of profits, which would have been made by selling the goods at their destination.\textsuperscript{339}

**Proof of loss is necessary**

If the plaintiff wants to claim general damages than he has to assert that he has suffered some loss, but for the purpose of claiming special damages, specifically he has to plead and prove that he has sustained such special loss. In a claim of compensation for damage to consignment, no details as to loss were mentioned in the plaint. It is necessary that some loss should be shown by evidence. The mere fact that the carrier, admitted damage was held to be not sufficient to entitle the consignee to any decree for compensation without the proof of actual loss.\textsuperscript{340} Even when the plaintiff is able to prove his loss, damages may not necessarily be a full recompense for his loss; it must be remembered that the rules as to damages can only be approximately just in the nature of things.\textsuperscript{341}

From the above discussion, it can be inferred that the loss, which arises to the plaintiff, is the natural result of the defendant’s breach and it is a loss, which the defendant may reasonably be supposed to have contemplated. In a landmark judgment the above mentioned concept is very nicely analyzed in the following words: “The measure of general damages is pecuniary difference between the state of plaintiff upon the breach of contract and what it would have been if the contract would have been performed, in other words, it is the value of the performance of the plaintiff and not the cost of the performance to the defendant.”\textsuperscript{342}

\textsuperscript{338} Union of India v. Hari Mohan Ghosh, AIR 1990 Gau. 14: (1990) 1 Gau LR (NOC) 31, Railway Administration held not liable for trader’s expected profits for the loss of his consignment when the administration was not aware of the object of his dispatch.

\textsuperscript{339} Union of India v. Hari Shankar Gauri Shankar, 2005 All LJ 2200, The cargo was damaged due to the percolation of rain water into the wagon. It showed that the wagon was defective. Railway could not be absolved of its liability.

\textsuperscript{340} Shipping Corp of India v. Bharat Earth Movers Ltd. (2010) 2 MWN (Civ.) 1.

\textsuperscript{341} Rodocanachi v. Milburn, (1886) 18 QBD 67, at.p.78. As per Lindley, L.J.

2. AGREED BETWEEN THE PARTIES

The above discussion makes it very clear that the first rule provides for usual losses. But under the second rule additional losses are also provided. The words “likely to result” are used in this section deliberately. It is not necessary to be proved upon a given state of knowledge, which the defendant, as a reasonable man would foresee that the breach must necessarily result in the loss. It will be sufficient if the defendant could foresee that it was “so likely to result”. Basically, the criterion adopted under the second rule is “not what was bound necessarily to result” but “what was likely or liable to result”. And moreover, it must be ensured that this foreseen knowledge must be there at the time of entering into the contract.

The Supreme Court has recognised that section 73 codifies the judgement given in Hadley v. Baxendale and in Pannalal’s case, and it observed as follows: “The rule stated by Alderson B has consistently been accepted as correct; the only difficulty has remained in its application. The distinction drawn between damages arising naturally (which means in the normal course of things), and cases where there were special and extraordinary circumstances beyond the reasonable provision of the parties. This type of distinction is usually described in English law, as that between general and special damages; the latter are such that if they are not complicated. It would not be fair or reasonable to hold the defendant responsible for such losses which he could not be taken to contemplation as likely to result from his breach of contract.” The application of this principle is found in a case, where the plaintiff boucle consignment of artificial silk ready-made garments. The consignment was lost. The plaintiff claimed the value of the goods as well as the loss of profit. But the court disallowed loss of profit and noted: “The loss of profit is not loss or damage which naturally arose in the usual course of things from the breach. In a case of non-delivery of goods such loss would be just the value of goods and the like but not damages due to the loss of profit. The plaintiff could be entitled to damages due to loss of business, if he had made known to the railway when the goods were booked that such loss was likely to result from the breach of it.”

343 Supra note 227.
344 Ibid.
346 Ibid.
An attempt is made in State v. K. Bhaskaran, to unify the above-mentioned two principles in Section 73 on remoteness of damages. In this case, the question before the court was regarding the award of damages for breach of contract by the government, because in this case the government awarded a work contract, but later on unlawfully terminated it. The court held: “The defendant is liable only for ‘natural and proximity consequences of a breach or those consequences which were in the contemplation of the parties at the time of making the contract.’ The phrases used here are the words of art and usually represent two ways of expressing a single requirement. Approximate and natural consequences are those that flow directly or closely from the breach in the usual and normal course of events; those which a ‘reasonable man’ or a person of ordinary prudence would foresee, when the bargain is made, as expected results of later breach. The terminology “in the contemplation of the parties” here simply means in the reasonable contemplation of the defendant. Therefore, if considered carefully, it has got only the same meaning as the companion phrase “natural and proximate”. One should not go by the words, but should consider the gist of the meaning. Thus, it can be said that the defendant is liable only for reasonably foreseeable losses- those and ordinary prudence person, standing in his place for assessing a information when contracting would have had reason to foresee as probable consequences of the future breach.”

It would not be easy to avoid the traditional phrases or to join the two principles in a master one because in the first one has to assess the communication, express and implied, between the parties from a reasonable person’s point of view, whereas in the second one has to avoid completely, the communication between the parties and has to draw out the reasonable expectation of the parties in those categories of the contract. Basically, the problem, which the courts are facing, is not regarding the formulation of the principle or their meaning, but it is regarding the application of this criterion in a case of prospective profits and consequential losses. In India, the cases on remoteness of damages have abated as all commercial contracts have a clause stating: “Neither party shall be liable to the other party for indirect or consequential losses.”

347 AIR 1985 Ker. 49.
348 Ibid.
349 Supra note 142, at.p.357.
To sum up, it can be said that in most of the cases, a monetary equivalent is provided to compensate the innocent party to put him in the position as he would have been if the contract had been performed. As it is clear now that damages are compensatory in nature, so a party is only compensated for the loss and is not allowed to impose a penalty or to make a gain from the breach. Basically, the conclusion is: For every breach of contract, the innocent party has the right to get damages from the party at fault. Although, the consequences of a breach, are limited by what the parties have expressly or impliedly provided, or the way the class of contract is normally conducted. This is the reason that in the transactions, dealing with immovable property, generally, specific performance is awarded.

Up to here, the discussion has revolved around two things: damages can be awarded for the losses which occur in the usual course of things and which are agreed between the parties. But the problem arises when damages are claimed for those losses which are the result of those breaches which occurs in some special circumstances. Therefore, a detailed discussion is required on this principle.

**DAMAGES ARISING OUT OF SPECIAL CIRCUMSTANCES**

The second para of section 73 deals with those circumstances where compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. It simply means that a party cannot claim any remote or indirect losses sustained due to the breach of contract, but if the losses arises out of special circumstances and those circumstances are within the knowledge of the parties, then those damages can be recovered by the party. If the loss on the breach of contract does not arise naturally, but it arises due to some special circumstances, the person making the breach of contract can be made liable for the same provided that those special circumstances were brought to his knowledge at the time of making the contract. If he had no knowledge of the special circumstances which resulted in a particular loss, he cannot be made liable for the same. It means that in any case, the plaintiff can recover damages arising under special circumstances only if the special circumstances are known to the person who is guilty of the breach of contract.

There are certain important questions, which are required to be answered before the special damage claim can be held recoverable, in order to apply the second rule which is mentioned above. These questions are as follows:
Whether the breach of contract falls under some special circumstances and, if so, what are those?

Whether the damages actually resulted from the breach of contract, if so, what are those damages?

Whether there has been a common knowledge on the part of both the parties at the time of making the contract? If yes, then what is that common knowledge? And

What may the court reasonably presume to have been in the contemplation of the parties as the probable result of a breach of the contract assuming the parties to have applied their minds to the contingency of there being such a breach?350

All these questions can be replied and understood under one heading i.e. Special damages.

SPECIAL DAMAGES IN SPECIAL CIRCUMSTANCES

Those damages which are exceptional in their character, and therefore they must be claimed specifically, and provided strictly, are generally known as “special damages”. The nature of these damages is such that the law cannot infer them from the nature of the act, as these do not follow in the ordinary course of things. Thus, special damages are those damages which arise on account of the unusual circumstances affecting the plaintiff. They are not recoverable, unless the special circumstances are brought to the knowledge of the defendant, so that the possibility of special loss could be there within the contemplation of the parties. It means there can be no recovery of special damages where the defendant has no knowledge of the special circumstances. It is necessary on the part of the plaintiff that he must inform special circumstances (which are involved in a contract) to the defendant against whom special damages are claimed.

KNOWLEDGE OF SPECIAL CIRCUMSTANCES IS ESSENTIAL

The rule of legal jurisprudence is that the person must have intention or knowledge for the wrong he is committing to hold him guilty for that particular wrong. Thus, the mandatory rule is that the “knowledge” of the special circumstances under which the

contact is made, is must and moreover, it can be said that it is *sine qua non* for claiming special damages. But the crucial question here is, whether, mere knowledge of circumstances lead to the liability to pay damages which arose under those circumstances upon which the party who commits the breach of the contract agreed between the parties?

The answer to this question was very nicely given by Justice Willes in the landmark judgment of British Columbia Saw Mill Co. case. The observation of Justice Willes was as follows: “The mere fact of “knowledge” cannot increase the liability. It means that a mere communication of special circumstances without acceptance of such condition may not create responsibility. Knowledge on the part of carrier is important only when it forms part of the contract. Knowledge, in fact can only be evidence of fraud or of an understanding by both parties that the contract is based upon the circumstances which is communicated. ”

While drafting clauses, terms and condition of the contract, the framers of the contract were very vigilant. Those contracts contain the express clause for breach of contract, consequences for breaches of contract, sometimes more specifically a clause for special damages which can be asked for in special circumstances of breach. Such cases create no difficulty at all or little less difficulty at the time of mitigating the exact amount of damages for breach of contract or for determining the extent of liability of the defendant when the special circumstances are within his knowledge.

Mayne’s point of view in this regard is very important to be discussed here. He pointed out as follows: “The law considers that everyone who breaks a contract shall pay for its natural consequences and in most cases, states what those consequences are? The point of grave concern is: Can the other party, by merely acquainting him with a number of further consequences which the law would not have impliedly elarged his responsibility to the full extent of all those consequences which are not found within the ambit of any contract between the parties? To answer this question, frankly, it can be said that the defendant has power to have expressly refused such responsibility. But the onus of making a contract might lie upon him, who merely seeks to restrain his own liability within its original limits rather than on

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351 Supra note 292.
352 Id. at.pp.508-09.
the party who seeks to extend the liability of another. This reasoning was accepted, and applied with full force to those cases in which a common carrier, was certainly unable to decline the duty which was thrust upon him, and might even be unable to accept any additional remuneration for performing it.”

The problem of this rule is that it assumes most erroneously a constant uniformity in the naturalness of the consequences, whereas there is no such uniformity in fact. Because, in one set of circumstances, the consequences of the same act may be natural, while in another it may not be. That is why; this argument seems to ignore the rational of the rule “everyone who breaks the contract shall pay for its natural consequences” completely. Therefore, it can be stated that if special circumstances are not expressly provided in the terms of the contract, the damages sometimes might be assessed on the basis of an implied knowledge of special circumstances, which the defendant may be presumed to know.

A detailed discussion has already been done on this point in this chapter. So no further discussion on this point is required here. Directly coming to the next point i.e. from a reading of section 73, it can be held that third para of this section deals with compensation for failure to discharge obligations resembling those created by contract. It simply means that this para talks about quasi-contracts. The relations resembling contracts are known as contract implied in law. It is not a real contract, or as it is called, a consensual contract based on agreement of the parties. These obligations come into existence by fiction of law. This is the reason that it may become necessary to hold one person responsible to another, even without any agreement between them, only on the ground that otherwise he would be retaining money, or some other benefit which has come into his hands to which the law regards the other person as better entitled, or on the ground that without such accountability or responsibility the other party would unjustly suffer losses.

As there is a full chapter on this topic, in this thesis, so there is no need to discuss here this concept in detail. Therefore, the explanation of Section 73 is required to be discussed here, as any explanation attached to any section is considered as the part and parcel of the section.
ANALYSIS OF EXPLANATION TO SECTION 73

The explanation to Section 73 provides as follows: “In estimating the loss or damage arising from a breach of contract, the means which existed of remediying this inconvenience caused by the non-performance of the contract must be taken into account”.

This explanation has caused considerable difficulty in practice; the words “which existed of remediying the inconvenience” have seemed obscure. This explanation connotes that the injured party has to make reasonable efforts to avoid the losses resulting from the breach, so that his loss is kept to be minimum. The application of the rule mentioned under this explanation is most commonly found in contracts for sale or purchase of goods, e.g. if the buyer refuses to take the delivery, then, the seller should try to resell the goods at the prevailing market price and he may then recover from the defaulting buyer as damages, the difference between the price he realized and the price he would have received under the contract. Basically, this explanation provides for the duty to mitigate damages. In case, the seller does not resell the goods and his loss is aggravated by the fall of the market or by any other reason, then he is not entitled to recover the enhanced loss. There is a very renowned authority in this regard i.e. A.K.A.S. Jamal v. Moolla Dawood Sons & Co. the observation of judicial committee in this case will be worth noted here. The observation made by the judicial committee is as follows: “It is undoubted law that a plaintiff who sues for damages owes the duty to take all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the law is ascertained regarding the loss at the date of the breach. If at that date, the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.”

In another case, the goods were sold in a crashing market, four and half months after the breach. The court held that it cannot be considered as reasonable and F.C.I. was

354 Supra note 246, at.p.228.
357 Supra note 354.
allowed to recover only nominal damages. Moreover, the forfeiture of the earnest money of Rs. 1000 was considered to be more than sufficient.\textsuperscript{358}

The same rule is applicable on the buyer also in those circumstances where a seller refuses to perform the contract, the buyer should purchase the goods if they are available from any alternative source, and if he does not do so, he cannot recover any further loss that may be due to his own negligence.\textsuperscript{359}

The phrase “mitigation of damages” is just like an umbrella term, which is applied to a number of matters some of which are related and some of which are completely unconnected. Although these differences have not been fully analyzed in English law; yet it is vital for a better understanding of the issues to separate the various meanings of this term.

**DIFFERENT MEANINGS OF THE TERM “MITIGATION”**

**Primary meaning**

**Basically, there are three rules with regard to the prevention of the consequences of a breach**

The principal meaning of the term “mitigation”, with which this topic deals, concerns with the avoiding of the consequences of a wrong arising out of breach of contract, and forms probably the only exact use of the term. Even if the subsidiary or residual meanings enumerated below cannot strictly be called incorrect, it would be well if the use of the term “mitigation” in connection with them was qualified, if not completely discarded, as matters are only confused by employing one term to describe different concepts. The primary meaning it consists of three different rules (although closely interrelated). These three rules are as follows:

- The first and most important rule is the rule of reasonable care. It means that the plaintiff must take all reasonable steps to mitigate the loss caused to him due to the wrong of defendant and moreover, he cannot recover damages for any such loss which he could thus have avoided but has failed, due to the

\begin{footnotesize}
\textsuperscript{358} Bismi Abdullah & Sons v. F.C.I., AIR 1987 Ker. 56; Gujarat SRTC v. Kay Orr Bros., AIR 2000 Guj. 313, the government purchased the wreck widget machinery almost one year after the failure on the part of the tenderer. The government was allowed. The difference between the rates of the tenderer whose quotation was accepted, and that of the next higher tenderer.

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unreasonable action or inaction, to avoid. More specifically, it can be said that the plaintiff cannot recover those losses which can be avoided.

- The second rule is the outcome of the first one, i.e. where the plaintiff takes all the reasonable steps to mitigate the loss caused to him due to the wrong of defendant, he can recover those losses which he incurred in doing so, and moreover these damages should be such that if the mitigating steps had not been taken, resulting damage could be even greater than it has occurred. Precisely, it can be stated that the plaintiff can recover those losses which he has incurred in the reasonable attempts to avoid losses.

- The third rule is that where the plaintiff has taken steps to mitigate the loss caused to him due to the wrong of defendant, but those steps are proved to be unsuccessful, the defendant is entitled to the benefit accruing from the action of the plaintiff and is liable only for those losses which are now lessened. Briefly, it can be said that the plaintiff cannot recover for avoided losses.

**Different Ancillary or Residual meanings**

Although ancillary or residual meanings of the term “mitigation” have no connection with the three rules mentioned above, because these are not concerned with the avoiding of the consequences of the defendant’s wrong, but they come into play:

- Firstly, in those cases where the conduct, character and circumstances of the plaintiff and the defendant affect the assessment of the damages; and

- Secondly, where both the plaintiff and the defendant are the defaulting party.

In certain breach of contract, the conduct, character and circumstances of both plaintiff and defendant may affect the measure of damages. Therefore, it can be said that the damage is most commonly intensified, and the damages respectively increased, by the bad motives or wilfulness of the defendant; the leading example of this is the case of defamation where one of the principal elements in estimating the damages is the malice of the defendant. The damage may also be aggravated by reason of the good character and reputation of the plaintiff, but there are rare examples of these situations because commonly no evidence can be introduced to show the good character of the plaintiff unless his character is not in question in

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360 M. Nanjappa v. Muthuswami, AIR 1975 Kant. 146, at.p.149.
evidence by the defendant. On the other hand, the damage may be mitigated, and the damages consequently, may be reduced, either by the defendant’s bona fides or by the bad character and reputation of the plaintiff.

This meaning of the term “mitigation” simply deals with particular items which basically show that the injury is not as immense as would prima facie appear. Thus, there should not be any question of subsequently lessening the loss arises. Actually, in all such cases it is significant to observe what the actual injury is, and it is quietly separate from subsequent steps taken by the plaintiff, and if it is shown to be less than the normal, the measure of damages will be less than the normal measure in that particular kind of case. That’s why there appears no need to say that the damages are mitigated by the amount by which they are less than the normal measure. The particular cases, both as to mitigation and as to aggravation, are therefore best dealt with when dealing with the particular wrong, which give rise to them.

In the second point mentioned above, both the parties to the contract are at breach, in such situation, the plaintiff while suing the defendant for committing breach of contract, is also himself a defaulting party and the loss caused thereby, to the defendant may in certain cases go in mitigation or reduction of the amount, which the plaintiff could recover in his action. Such cases are likely to arise when the suit of the plaintiff is not for damages for breach of contract, but is for money payable by the terms of a contract, such as the price or value of goods sold,\textsuperscript{362} of services rendered,\textsuperscript{363} or of a combination of the two.\textsuperscript{364}

The above discussion makes it very clear that the term “mitigation” deals with the manner in which damages resulting from a breach of contract by the plaintiff can be subtracted from the claim made by the plaintiff in respect of that contract. It is equivalent to the cases of contributory negligence in which both parties are at fault and a subtraction is made while assessing the damages: nevertheless a reduction of damages on the ground of contributory negligence is not referred to as “mitigation”. The only question that arises in these contract cases is a matter of procedure and of pleading, namely whether the defendant can claim the damages for the breach of the

\textsuperscript{362} Parsons v. Sexton, (1847) 4 C.B. 899.
\textsuperscript{363} Chapel v. Hicks, (1833) 2 Cr. 7 M. 214.
\textsuperscript{364} Allen v. Cameron, (1833) 2 Cr. & M. 832.
plaintiff in full or in part with or without pleading the matter as set-off or counter claim.

THE RULES AS TO AVOIDABLE LOSS: NO RECOVERY FOR LOSS WHICH THE PLAINTIFF OUGHT TO HAVE AVOIDED

Every person against whom wrongs have been committed are duty bound not to sit idle and to wait for suffering losses, which could be avoided by reasonable efforts, or to continue an activity unreasonably so as to increase the loss. This well-established rule finds its most convincing appearance in the speech of Viscount Haldane L.J. in a leading case\(^3\) where he observed: “The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect in taking such steps.”\(^3\)

At this stage, there are a few general principles regarding the concept of “mitigation”, which may expediently be brought together and which the courts have to take into consideration, while assessing the damages for breach of contract. These principles are as follows:-

- Application of “Concept of Mitigation” on contract;
- The question of obligation;
- The question of burden of proof;
- A question of fact or a question of law;
- Necessity to mitigate before contractual breach;
- Necessity to mitigate by discontinuing contractual performance.

A brief discussion on the above mentioned points is required here.

I. Application of “Concept of Mitigation” on contract

As far as the application of the concept of mitigation is concerned, it can be said that it is equally applicable to pecuniary and non-pecuniary losses. Although, Viscount

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\(^3\) British Westinghouse Electric and Manufacturing Co Ltd. v. Underground Electric Railways Co. of London Ltd. (1912) AC 673.

Haldane L.J. talked about only pecuniary losses but most probably the reason was that he was dealing with a breach of contract case. There is no doubt in saying that, most of the cases do certainly stem from contract and concern the mitigation of pecuniary loss; but, on the other hand, it is also correct to say that it is equally applicable to both type of losses mentioned above. For example, where a person who having been physically injured, fails to take reasonable steps to obtain medical aid and thereby fails to reduce his pain and suffering resulting from the injury, is also considered at fault, and while assessing the damages for his pain and suffering, the fact that he has not taken reasonable steps to reduce his pain and suffering, is also being considered by the court.

II. The question of obligation

The common and convenient way of stating the mitigation rule which was adopted by Lord Haldane could be seen in his words when he stated that the plaintiff is duty bound to mitigate the losses. However, there is no “obligation or duty” which is actionable or which is owed to anyone by the plaintiff. Rather, he himself cannot owe a duty. This position can be compared to that of the plaintiff, whose damages are deducted or reduced because of his contributory negligence. A proper analysis regarding the “question of obligation” has been done by Pearson L.J. in a case, when he said: “It is important to appreciate the true nature of the so-called “duty to mitigate the loss” or “duty to minimize the damage”.

Basically, the plaintiff is unable to adopt any method to mitigate the losses, but these should be reasonable. What is reasonable is a question of fact. Precisely, it can be stated that the plaintiff is not entitled to charge the defendant on the pretext of mitigating the losses, with any greater sum than that which he reasonably needs to spend for the purpose of making good the losses. Moreover, he is fully entitled to be as extravagant as he pleases, but not at the cost of the defendant.

Thus Sir John Donaldson M.R., has re- emphasised this in his own words as follows: “A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase “duty to mitigate”. He is completely free to act as the judges to be in his best interests. One the other hand, a defendant is not liable for all losses

367 Supra note 365.
369 Wallems Rederij A/S v. Wm H Muller & Co. (Batavia) (1927) 2 K.B. 99, KBD.
suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff’s loss as is properly caused by the defendant’s breach of duty.”

III. **The question of burden of proof**

On the issue of mitigation, the burden of proof lies on the defendant. In case, he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the ordinary rules of the law of evidence will be applicable. This has remained the prevailing practice since very long time after the decision of Roper v. Johnson,\(^\text{371}\) which was later on confirmed by the House of Lords in another case.\(^\text{372}\) However, in Selvanayagam v. University of the West Indies,\(^\text{373}\) it was held by the Privy Council that in case if physically injured plaintiff had refused to undergo medical treatment to alleviate his injury, then, the burden of proof was on him to prove that he had acted reasonably and had taken all reasonable steps to mitigate the losses.

In two authoritative decisions\(^\text{374}\) of the House of Lords, it was laid down that the burden of proof lies on the defendant in the particular case of the refusal of medical treatment. Whereas a passage from Lord Merriman’s judgment\(^\text{375}\) there was prayed in aid in support of their Lordships’ confident assertion that they “had no doubt” that the plaintiff had the burden of proof and that this was “well established”, Lord Merriman was dealing not with mitigation at all but with remoteness, where there had been a substantial degree of controversy on burden of proof with the better view favouring a plaintiff’s burden. One can only conclude that the decision of the Privy Council was against the entire weight of authority. Certainly, this was the reason that its conclusion appears to have been sensibly ignored in subsequent cases\(^\text{376}\) by the Court of Appeal.

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\(^\text{370}\) Sotiros Shipping Inc. v. Sameiet Solholt (The Solholt), (1983) 1 Lloyd’s Rep 605, CA; as per Sir John Donaldson M.R.

\(^\text{371}\) (1873) L.R. 8 C.P. 167.

\(^\text{372}\) Garnac Grain Co. v. Faure & Fair Clough, (1968) A.C. 1130.

\(^\text{373}\) (1983) 1 W.L.R. 585, P.C.


\(^\text{375}\) In re Mordaunt case, (1874) 2 Sc. & D. 374; as per Lord Merriman P.

IV. A question of fact or a question of law

In so many cases, the question of mitigation of damages was considered to be a question of fact. Whether a loss is avoidable by reasonable action on the part of the plaintiff is a question of fact not of the law and the same was decided in Payzu’s case. One of the reasoning given in this case was that once the court of first instance has decided that there has been, or has not been, a failure to mitigate, it is very difficult to persuade the appellate court to come to a different point of view. The decision of The Solholt has been considered to be very good example of it. In the above-mentioned cases, basically, the focus was on a particular point i.e. whether a plaintiff, required to take all reasonable steps to mitigate his loss if he is to recover for that loss, has or has not failed to do so. In such a situation, if the court has to decide whether a question is a question of law or fact, then the court has to consider whether there is a need to mitigate in the first place, in the particular circumstances? If the answer to this question is in affirmative, then this will be considered as a question of law.

V. Necessity to mitigate before contractual breach

There arises no need to take reasonable steps for the mitigation of losses until unless a wrong has been committed against the plaintiff. Where a party to a contract repudiates the contract, the other party has an option to accept or not to accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. Whereas on the other hand, if the repudiation is accepted, this would result in an anticipatory breach of the contract in respect of which a suit can be brought immediately for the damages. Although the assessment of damages is done from the date when the defendant ought to have performed the contract, and the amount assessed is subject to being reduced if the plaintiff fails to mitigate after his acceptance of the repudiation.

Thus, where a person who has agreed to buy goods at a future date declares that he will not accept them when that date arrives, the seller who accepts the breach may be under a duty to sell the goods at the first opportunity, if that is the course which a

378 Supra note 370.  
379 Supra note 377.  
380 Supra note 370.
reasonable businessman who desired to mitigate the loss would take. The loss must not be increased by any act which, the plaintiff ought not to have done, or by the omission to do any act which, the plaintiff ought to have done. The standard required of the injured party is not a strict one; his duty is only not to act unreasonably: the wrongdoer has no right to expect from the man whom he has wronged the utmost amount of diligence, the utmost amount of skill and the most accurate conclusion in the matter of judgement.

The position may be different, however, where the injured party declines to accept the breach as putting an end to the contract. Here, there may be no duty to mitigate. In another case, the defendants had contracted to buy coal at 16s. a ton from the plaintiffs, to be delivered in February. On February 16th the defendants repudiated the contract; but they procured and communicated the plaintiffs and they got an offer from a third party to buy the coal for only 15s. a ton. The Court of Appeal, reversing Phillmore L.J., held that the plaintiffs were entitled to damages amounting to 1s. a ton. The reputation, not having been accepted as such, was in nullity and there was no breach of contract until the expiration of the time for the delivery of the goods.

Somewhat similarly in a case where the contract provided for two years’ notice or for payment in lieu of notice, the summary dismissal of the employee was held not to constitute a breach of contract so that the employee was entitled to the payment in lieu without any need to mitigate by taking alternative employment during the two years. By summarily dismissing the plaintiff the defendant was not breaking the contract but electing between two modes of performance, namely serving notice or paying money. His election of the latter meant that the money was due as a debt under the contract and no question of mitigation arose.

VI. **Necessity to mitigate by discontinuing contractual performance**

The above discussion has already made it clear that there seems no need on the part of the plaintiff to take steps to mitigate the loss, even after the performance of the contract by the defendant, which he has repudiated, falls due, by accepting the repudiation and suing for the damages. Instead, he may perform his part of the

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382 Dunkirk Colliery Co. v. Lever, (1840) 41 L.T. 633, as per James L.J.
contract (where he can do so without the assistance of the defendant) and he may claim in debt for the contract price. The plaintiff is not required to mitigate the losses by accepting the repudiation and suing for damages, even if it involves incurring expenses in the performance of the contract (which in face of the defendant’s repudiation is rendered useless). The House of Lords, by a majority, held in a case\textsuperscript{386} that the plaintiffs were entitled to carry out the contract and claim in debt for the price, and were not obliged to accept the repudiation and sue for damages.

This decision was pursued in Anglo-African Shipping Co.’s case.\textsuperscript{387} The brief discussion on the facts of this case is required here. The facts are as follows: The plaintiffs in New York agreed with the defendants in London to act as a confirming house in respect of an order for the purchase of goods by the defendants from American suppliers, and as the defendants’ shipping agents in procuring shipment of the goods to the defendants in London. It was further agreed that the defendants, in addition to paying a commission, would reimburse the plaintiffs the price of the goods paid by them under their confirmation of the order and all expenses incurred by them as the defendants’ agents. After the plaintiffs had contracted personally with the suppliers to pay them the purchase price of the goods the defendants cancelled their order and then refused to pay the plaintiffs. The suppliers having delivered the goods to the plaintiffs for shipment, the plaintiffs proceeded to ship them to the defendants in London and successfully sued the defendants for the price, expenses and commission. It was held that the plaintiffs were under no duty to mitigate by not shipping the goods once the defendants had said that they did not propose to accept them.

The duty of mitigation cannot impose upon the plaintiff burdens of unusual nature. In a case,\textsuperscript{388} there was a transfer of a part of a plot of the land, the transferee undertaking to construct a boundary wall, which wall would have been increased to the value of the seller’s remaining land. The buyer failed to construct the wall. In an action against him, the measure of damages would have been the cost of constructing the fall. He contended that if the wall had been constructed by the plaintiff as soon as there was the breach, the cost would have been much less; the plaintiff waited till the decision in the case and in the meantime, inflation had escalated the cost. The defendant

\textsuperscript{386} Supra note 383.
\textsuperscript{388} Supra note 193.
contended that he should not be held liable for the increased cost. The court felt that it was reasonable for the plaintiff to wait as long as his right to damages was disputed and there was no injustice to the defendant, if the result of inflation was to increase the pecuniary amount of its ultimate liability.

The “Mitigation Rule” and its relationship to the normal measure of damages

There are no well-known authorities, which can explain that those losses (which can be mitigated) are not recoverable, except for the cases in which the plaintiff’s opportunity of mitigating has arisen through the possibility of further negotiation with, and in particular through an offer made by, the defendant himself. One can explain it by saying that either the court has held that the plaintiff has not failed to mitigate the loss so that he recovers in respect of the whole damage, or probably the issue has never reached the point of litigation because generally the plaintiff would have taken all necessary steps to mitigate the loss in his own interests. In fact the way of mitigation in many cases is very clear and certainly this may be the reason that it often tends to become incorporated into the normal measure of damages. Whenever such thing happens, the mitigation rule loses its distinctiveness and this may be the reason that it does not expressly appear as a separate issue. Particularly the comparison, which can be done between the normal measures of damages where the goods sold are not delivered due to the breach of contract and of the normal measure where the goods are misappropriated, is informative one. Therefore, in the cases of sale of goods, the buyer must go into the market for a replacement, or at least cannot hit back on a rising market and then claim damages on the basis of race price: but no such steps are required to be taken towards the replacement by the victim of a misappropriation.

This situation has been made more clear in a case where it was established by the court that a plaintiff suing in the form of detinue was entitled to claim the market price at the time of the judgement, in the absence of return of the property; that is why any rise in the market price between the detention and the judgement was at the risk of the defendant. But in case if the plaintiff unduly delayed his action on a rising market.

389 Simon v. Pawsons & Leafs Ltd., (1932) 38 Com.951 per Greer L.J.
391 Rosenthal v. Alderton, (1946) K.B. 374; (1946) 1 All ER 583.
market, then it will be considered as the failure to sue within the reasonable time. And moreover, it would be considered as a failure to mitigate and the damages would be less than the market price at the time of the judgement. In such a situation, detinue will be superseded by conversion, although the result would be the same, but through a different road. The normal measure is taken to be not the value of the goods at the time of judgment but their value at the time of conversion, and to this there is added as consequential loss any market increase in value between then and the earliest time that the action could have been brought to trial.

The Court of Appeal has established the proposition for conversion in a case,\(^{392}\) in which the court permitted a plaintiff to recover the market value of the goods converted near the beginning of the war, at the end of the Second World War caused loss, and the prince of goods has been greatly increased during the years. The plaintiff was permitted only because he neither knew nor ought to have known of the conversion during that period and also because there was no undue delay in bringing an action after getting the knowledge. However he must accept the delivery of the goods if offered by the defendant during the trial provided the goods are still in the same condition. He can merely be compelled to take specific restitution in lieu of damages.\(^{393}\) Even in contract a plaintiff should not be restricted in his damages by reason of an assumption of replacement of the goods if he has already paid the contract price for them to the defendant.

The question here arises is whether the step of mitigating losses has indeed cut down the losses? The answer can be that there are certain cases in which such cutting down is only apparent and not the real one, especially in those cases where the defendant has in breach of contract failed to accept goods which the plaintiff has sold to him. Hamilton L.J. has categorically stated in a case\(^ {394}\) that “the fallacy is in supposing that the second customer was a substituted customer, that, had all gone well, and makers would not have had both customers, both orders, and both profits”. On the other hand, the state of the market or the state of the defendant’s manufacturing facilities was such that demand exceeded supply, the contract made with the third party would be a substituted contract, the loss would be avoided and damages would therefore be

\(^{393}\) Fisher v. Prince, 9 (1762) 3 Bur. 1363.
\(^{394}\) In re Vic Mill, (1913) 1 Ch. 465, C.A.
nominal. The same position was found in Charter’s case,³⁹⁵ which signifies the converse of the decision in Thompson’s case.³⁹⁶

**Standard of conduct which the plaintiff must attain when assessing what steps should have been taken by him:**

Although a plaintiff must act, keeping in mind the interest of defendant as well as his own interest,³⁹⁷ yet the only requirement is to act reasonably and moreover, the standard of reasonableness should not be high in the view of the fact that the defendant is an admitted wrongdoer. The situation has been made clear in a case³⁹⁸ by Macmillan in his own words, as follows: “Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps, which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.”³⁹⁹

The plaintiff has acted reasonably or not is always a question of fact, not of the law. As far as the practical aspect is concerned, there have been so many cases, which shows what the plaintiff need not do in order to come up to the required standard: this in itself suggests that the standard is not a demanding one. Nine such rules can be extorted from these cases. These are as follows:-

³⁹⁸ Banco de Portugal v. Waterlow & Sons Ltd., (1932) A.C. 452.
1. A plaintiff need not risk his money too far.\textsuperscript{400}

2. A plaintiff need not risk his person too far in the hands of surgeons. The House of Lords and Judicial Committee of the Privy Council, in so many cases\textsuperscript{401} held on the facts before them that the refusal of a physically injured plaintiff to undergo a dangerous and risky surgical operation did not constitute a failure to mitigate.

3. A plaintiff need not have an abortion to end an unwanted pregnancy.\textsuperscript{402} In another case,\textsuperscript{403} the decision to have the child rather than undergo an abortion was not considered to be a failure to mitigate.

4. A plaintiff needs not to take the risk of starting an uncertain litigation against a third party.\textsuperscript{404} Moreover, it was held by Harman J. in a case that “the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party.”\textsuperscript{405}

5. A plaintiff need not destroy or sacrifice rights or property of his own. A common practice at common law is to recover, I.) Net profits lost; II.) Standing charges which have reasonably to be incurred and which are not made up by profits by reason of the action of the wrongdoer. In other words, in a case of temporary loss of a chattel, gross profits lost are recovered so far

\textsuperscript{400} Jewelowski v. Propp, (1944) K.B. 510, where the plaintiff was induced by the defendant’s fraudulent misrepresentation to advance money on a debenture to a company which later went into liquidation, it was said that he could not be required to buy the company’s assets so that, by reselling them afterwards at a higher amount than he paid for them, he would reduce his loss. Lewis J. said that a plaintiff “cannot be called on to spend money to enable him to minimize the damages”; this would be “going far beyond the rule”. Tucker v. Linger, (1882) 21 Ch.D. 18; McAuley v. London Transport Executive, (1957) 2 Lloyd’s Rep. 500, C.A.


\textsuperscript{402} Emeh v. Kensington Area Health Authority, (1985) Q.B.1012, C.A., Slade L.J. said that “save in the most exceptional circumstances, I cannot think it right that the court should ever declare it unreasonable for a woman to decline to have an abortion in a case where there is no evidence that there were any medical or psychiatric grounds for terminating the particular pregnancy”.

\textsuperscript{403} Allen v. Bloomsbury Health Authority, (1993) 1 All ER 651.

\textsuperscript{404} Pilkington v. Wood, (1953) 1 Ch. 770.

\textsuperscript{405} British Racing Drivers Club Ltd. v Hextall Erskine & Co., (1996) 3 All ER 667; (1996) BCC 727; (1997) 1 BCLC182; (1996) PNLR 523, Ch D.
as expenses of earning them reasonably continue; and the reasonableness is from the point of view of the owner of the chattel. The expenses cease if their amount is set off against the gross profit otherwise lost.\textsuperscript{406}

6. A plaintiff need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him. This is an undoubted principle: indeed without such a principle it would have been impossible for the legislature to make provision for contribution and indemnity.\textsuperscript{407} Harman L.J., while delivering the judgment, pointed to the analogy that “it has never been the law that a creditor having a security against a third party for his debt must give credit for that when proving in the bankruptcy”\textsuperscript{408}.

7. A plaintiff need not prejudice his commercial reputation. This principle was based on a judgment given in a case,\textsuperscript{409} “where the plaintiffs had bought goods for August shipment to them by the defendants and had resold them on different terms, the contract of resale, unlike the contract of sale, providing that the date of the bill of lading should be conclusive evidence of the date of shipment. The goods were not shipped by the defendants until September, but the bills of lading bore an August date. The plaintiffs could have wiped out their loss by forcing the goods on their sub-buyers, but to enforce their legal rights in the circumstances would have injured their commercial reputation, and they refused to do so. It was held that their refusal was reasonable and not a failure to mitigate.”

8. A plaintiff need not act so as to injure innocent persons.\textsuperscript{410}

9. A plaintiff will not be prejudiced by his financial inability to take steps in mitigation. Megaw L.J. said: “Once it is accepted that the plaintiff was not in any breach of any duty owed by him to the defendant in failing to carry out repairs earlier than the time when it was reasonable for the repairs to be put in

\textsuperscript{406} Elliott Steam Tug Co. v. Shipping Controller, (1922) 1 K.B. 127, C.A.
\textsuperscript{408} Ibid.
\textsuperscript{409} Finlay v. Kwik Hoo Tong, (1929) 1 K.B. 400, C.A.
\textsuperscript{410} Supra note 398.
hand, this becomes, for all practical purposes, if not in theory, equated with a plaintiff’s ordinary duty to mitigate his damages.”

RECOVERY FOR LOSS INCURRED IN ATTEMPTS TO MITIGATE THE DAMAGE

If it is seen on a general parlance, the comment made by Winn L.J. in a case, which is worth mentioning here, where he opined that “he was not aware of any express statement in the cases, but it is implicit in the principle, that if mitigating steps are notwithstanding the reasonable decision to take those steps, then that will be in addition to the recoverable damage and not a set-off against the amount of it.”

The first case which can be cited as an example of this situation was Jones v. Watney, Combe, Reid & Co. In this case, there was an action for personal injury, where the defendant contended that he was not liable in damages for the aggravation to the injury to the plaintiff’s foot by reason of her walking on the foot too soon after the accident. Lush J. had given directions to the jury: “To consider all the circumstances of the case, the medical advice received the need for action, the usual or extraordinary character of what is actually done, and the precautions taken during the doing of it. The injured person need not act with perfect knowledge and ideal wisdom, but upon the other hand cannot claim damages for such injuries as are really due to wanton, needless, or caress conduct on his own part. If what is done reasonably and carefully augments the injuries, that may be regarded as natural consequence of the accident.” The jury held the defendant liable for the total injury.

Under English law, it is very hard to find clear illustrations of unsuccessful mitigating action which was not instigated by the defendant. The general principle, as stated, may be said to be analogous to, and even a part of the rule, met with the remoteness of damages, that a plaintiff’s intervening act reasonably taken to safeguard his interests, whether taken in the “agony of the moment” or not, does not relieve the defendant of his liability for the resulting loss. The principle was recognized by Lord Atkinson in a case, where he observed as follows:

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413 (1912) 28 T.L.R 399.
414 Jones v. Boyce, (1816) 1 Stark. 493.
“If one man inflicts an injury on another, the resort by the sufferer to reasonable means for the bona fide purpose of counteracting, curing or lessening the evil effects of the injury done to him, does not necessarily absolve the wrongdoer, even though the sufferer’s efforts should in the result, under singedly aggravate the result of the injury.”

The plaintiff may incur further losses when he takes reasonable steps to mitigate the damages. This loss will be considered as a loss, which is not in addition to, but in place of and less than, the loss which he is attempting to mitigate. Exactly, this is so, in case of expenses. Therefore, the expenses which are incurred by the plaintiff (as a result of the breach of contract for which recovery is allowed) are generally those expenses which are incurred to avoid or minimize a loss. In such situations, the plaintiff has spent money in acquiring or hiring a substitute. These situations, may be explained as follows:-

- Where the property of the plaintiff is damaged, destroyed or misappropriated;\(^{417}\)
- Where the plaintiff has incurred medical expenses to improve his physical injury caused by the defendant;\(^{418}\)
- Where the defendant has infringed the plaintiff’s trade mark and the plaintiff has to spent upon advertisements to offset the effect of that;\(^{419}\) or
- Expenditure upon far-reaching inquiry to detect the extent of the defendant’s unlawful scheming in inducing breaches of contract and in conspiracy.\(^{420}\)

These various examples may be considered as examples of steps taken in mitigation of damage, but some of them are so common, like medical expenses in personal injury cases, are such that they tend not to be thought of specifically from this point of view only.\(^{421}\) Whether regarded specifically as mitigation or not, the rule allowing recovery for such expenses is at base the corollary of the rule refusing recovery for loss that could reasonably have been mitigated. Browne-Wilkinson L.J., has rightly pointed out

\(^{418}\) S. v. Distillers Co. (Biochemical’s), (1970) 1 W.L.R. 114.
\(^{419}\) Spalding v. Gamage, (1918) 35 R.P.C. 101, C.A.
\(^{420}\) British Motor Trade Association v. Salvadore, (1949) Ch. 556.
that: “In addition to the basic damages Metelmann is entitled to be compensated for the additional damage flowing from the attempt to mitigate.”422

APPRAISAL OF EXPLANATION TO SECTION 73: “THE RULE OF MITIGATION OF DAMAGES”

In fact, it is true that the legislature cannot envisage all the situations, which would arise in future. But the framers of the Indian Contract Act, 1872, while drafting the provisions of breach of contract were alert, careful and cautious enough for the language used in Section 73. That is why, in India, the duty to mitigate the damages is in case of breach of contract has been thoroughly recognized and laid down in the explanation attached to Section 73 of the Indian Contract Act, 1872 and illustration (b) attached to it. It was endorsed therein that “in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.” No practical application of the language of the explanation is to be found under English law. Although the expression “the means which existed of remedying this inconvenience” is not happily worded, yet various high courts of the country have tried to interpret it to mean that it lays a duty upon a person complaining of breach of contract, by using common intelligence and prudence, and take all natural and obvious steps available to diminish the loss arising from the breach. Moreover, Section 73 of the Indian Contract Act speaks of compensation for breach of contract. Under explanation to Sec. 73, the burden is always on the plaintiff, who has proved the breach of the contract, of further establishing that he has taken all reasonable steps to mitigate the loss, consequent on the breach of the contract. If that is so, it was his duty to plead how he tried to mitigate the damages. Under the Indian Contract Act, 1872, there is a duty on a person claiming damages on account of breach of contract to mitigate the damages.423

If the legal position of India on the point of “mitigation of damages” is compared with the law of England, then no remarkable difference is to be found in this regard. The only hair line difference, which can be quoted, here, is that the rule in the explanation to section 73 of the Indian contract act, 1872, is applied with great care and caution. It

can be analysed that it is applied in more stringent and rigid manner than that is in England.

APPRAISAL OF SECTION 73: “DAMAGES FOR BREACH OF CONTRACT”

To evaluate, it can be said that Hadley v. Baxendale\textsuperscript{424} defines the kind of damage i.e. appropriate subject of damages and excluded all other kinds as being too remote. The decision in this case was exclusively concerned with what exactly the remoteness of damages is? This decision has given clarity on the point that the expression “remoteness of damages” is reserved for those cases where the defendant denies his liability for certain consequences that has arisen from his breach, then it will be conducive. The other important question which concerns the principle upon which damages could be evaluated or quantified in terms of money was appropriately called as the question of measurement of damages. The principle of \textit{restitutio in integrum} was applied by the courts in many cases dating back to at least 1848. It means that if the plaintiff has suffered losses which are not too remote, he must, so far as the money can do it, be restored to that position in which he would have been in, if that particular damage had not occurred.

The above discussion has made it very clear that what is awarded under the heading of “damages for breach of contract” is, the loss which the plaintiff has suffered, and not the profit which the plaintiff can earn if the breach of contract has not occurred. Although, the terminology of the judgement of Hadley v. Baxendale\textsuperscript{425}, on many occasions has been criticised, particularly the expression “arising naturally” and “probable consequences” by Lord Sumner, yet the term “direct consequences” has achieved a certain trend in contract.\textsuperscript{426} But one thing is very clear that this term is only properly applicable to causation aspect of the remoteness.

In fact, many of the suggested alternatives have themselves been criticized. there was also a tendency that first to regard the rule established by the judgment as three rules, and then as two rules, the first dealing with the ordinary case and the second dealing with the case where there were known special circumstances. These two factors, namely the abundance of phraseology and the breakdown of the rule into parts, led to confusion, and a restatement of the rule for modern conditions became a real need.

\textsuperscript{424} Supra note 160.
\textsuperscript{425} Ibid.
\textsuperscript{426} Weld-Blundell v. Stephens, (1920) A.C. 956, at.p.983.
This restatement came up with the Court of Appeal decision\textsuperscript{427} in 1949 in such a way that today the intervening discussions of phraseology and classifications of the rule are only a matter of history. This research work is basically concerned with awarding damages for the breach of the contract, and therefore, the suit for damages both in the Indian law and England law, will have to be based on the principle enunciated by the court from time to time. Specifically, “remoteness for breach” and the “Measure of Damages” would have to be picked out from the fact that the damages are compensatory in nature and not penal.\textsuperscript{428} In India, the first rule mentioned under section 73 is ‘objective’ while the second rule is ‘subjective’. The section also provides that the same principles will apply where there has been a breach of \textit{Quasi-contractual} obligation. Thus, the extent of liability in ordinary cases is what may be foreseen by ‘the hypothetical reasonable man’ one of its examples is the decision of the Madras High Court in Govinda Rao’s case.\textsuperscript{429}

As far as the Indian law is concerned, it has developed its law of damages merely on the basis of English Law but now the courts in India have to interpret provisions of Section 73 of the Indian Contract Act which are discussed and analyzed in detail in this chapter. The measure of damages is based on either liquidated or unliquidated damages. Thus, a detail discussion is required on liquidated damages and penalty also. Hence, the next chapter deals with the same.

\textsuperscript{427} \textit{Supra} note 270.
\textsuperscript{428} \textit{Supra} note 424.
\textsuperscript{429} Madras Rly Co. v. Govinda Rao, (1898) I.L.R. 21 Mad. 172.