AN EQUITABLE EXPORT — LORD CAIRNS' ACT IN CANADA

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The party in breach "shall be liable according as the Court thinks reasonable in the circumstances".[1]

The daily appreciation of that simple maxim by the courts in contract litigation poses problems for thoughtful judges in their pursuit of justice and for practicing lawyers seeking to advise clients of their rights and potential liabilities. It also puzzles academics whose concern has been expressed constructively in the question: must equity remedy contract damages?[2] It is the purpose of this comment to examine some of the problems raised by the evolution of the general principle and to canvass some of the solutions adopted by our courts.

A preliminary list of questions comprises the following:[3]

(a) Are equitable damages different from common law damages or are they merely deviant forms of damages indistinguishable from the types of compensation worked out under the *Hadley v. Baxendale*[4] doctrine?[5]
(b) Do equitable damages encompass aspects of punitive damages aimed at defendants who have fallen inexcusably into default as to their obligations?[6]
(c) Are equitable damages an attempt to do complete justice by granting total, as opposed to reasonable, compensation?[7]

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[1] Cooke, *Remoteness of Damages and Judicial Discretion*, 37 CAMB. L.J. 288, at 300 n. 39 (1978).

[2] Reiter & Sharpe, *Wroth v. Tyler: Must Equity Remedy Contract Damages?*, 3 CAN. BUS. L.J. 146 (1979).

[3] Several of these have already been posed by Professors Brenner and Percy in D. PERCY, CONTRACTS: CASES AND COMMENTARIES 722 (C. Boyle, D.R. Percy eds. 1978).

[4] 9 Exch. 341, 156 E.R. 145 (1854). This is now the opinion of the Law Lords. Johnson v. Agnew, [1979] 2 W.L.R. 487, at 498-99.

[5] Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd., [1949] 2 K.B. 528, [1949] 1 All E.R. 997 (C.A.); Koufos v. C. Czarnikow Ltd., [1969] 1 A.C. 350, [1967] 3 All E.R. 686 (H.L.).

[6] By implication *per* Buckley C.J. in Johnson v. Agnew, [1978] Ch. 176, at 193, [1978] 3 All E.R. 314, at 323 (C.A. 1977).

[7] Biggin v. Minton, [1977] 1 W.L.R. 701, [1977] 2 All E.R. 647 (Ch. 1976).

(d) Is there a duty on the petitioner for equitable damages to mitigate his losses as the common law demands, and can that petitioner set up a plea of impecuniosity to excuse his failure to mitigate?[8]

(e) Can equitable damages be given in lieu of specific performance, when the giving of the decree itself is impossible, and may the petitioner elect not to seek specific performance and ask solely for damages in lieu?[9]

In order to answer these questions effectively, it is necessary not only to identify the policy or policies of the law in the awarding of equitable damages, but also to chart a path through the mechanical rules and conventions which guide the judges in their everyday decision-making. This requires the identification of the discrete interests to be protected and a description of the discretionary powers of the courts to award damages, particularly equitable damages.

Professors Reiter and Sharpe, reflecting the American approach, have diagnosed our present difficulty as one of failing to identify those interests which deserve protection. In their view the purposes of damages are to protect reliance or expectation interests, to prevent unjust enrichment and to punish the advertant reneger. They argue further that the right to equitable damages should be restricted to "private" contractors with special interests. This would exclude the commercial partner who, given his experience and concern for profits, will protect his financial interests from the consequences of breach.

By contrast, Professor Jolowicz recently described the history of equitable damages in English law.[10] He concluded:

> As a result of the Act the courts have wide ranging powers to find the right remedy for the particular case before them: they may grant the injunction or decree of specific performance asked for by the plaintiff, they may refuse the assistance of equity altogether, or they may compromise and still dispose finally of the case by awarding damages under Lord Cairns' Act.
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> For a time the Act seemed to have fallen into disuse and the valuable discretionary jurisdiction it creates to have been misunderstood. The handful of cases decided since *Redland Bricks Ltd. v. Morris* indicates a revival of interest in the opportunities it creates for disposing justly of cases in which the common law is inadequate and yet the grant of full equitable redress is either impossible or undesirable in the circumstances.[11]

His study is invaluable for teachers, students and practitioners in Canada and the United Kingdom who seek to understand this renascent remedy.[12]

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[8] As opposed to the common law positions determined in Liesbosch Dredger v. S.S. Edison, [1933] A.C. 449, 102 L.J.P. 73, which held that losses due to impecuniosity were too remote for compensation.

[9] *See, e.g., Biggin, supra* note 7; *Horsnail, infra* note 18.

[10] Jolowicz, *Damages in Equity — A Study of Lord Cairns' Act*, 34 CAMB. L.J. 224 (1975); Harris, Ogus & Phillips, *Contract Remedies and the Consumer Surplus*, 95 L.Q.R. 581 (1979); Note, 42 MOD. L. REV. 696 (1979).

[11] Jolowicz, *id.* at 251-52.

[12] *See* MacIntyre, *Equity—Damages in Place of Specific Performance — More Confusion About Fusion*, 47 CAN. B. REV. 644 (1969).

The central idea of Lord Cairns' Act[13] was to give the courts of equity the power to award damages. This was adopted legislatively by the provinces of Alberta, Manitoba, Ontario and Saskatchewan, and by the Northwest Territories and the Yukon Territory.[14] Other common law provinces did not specifically enact that Victorian statute but chose to receive it through their English law reception acts.[15] Although this remedy was readily adopted in Canada, it cannot be pretended that its application has been any freer from confusion than its English counterpart. Indeed the courts still question whether or not equitable damages really differ from common law damages[16] and, consequently, little guidance has been given to the Bar as to the modes of assessment. As yet the Supreme Court of Canada has not offered much guidance,[17] so litigators continue to debate fundamental questions, even in recent cases.

Therefore, if we are to assist those in the front line, let us accept the interests theory, along with the historical description of the powers given to the courts in the 19th century, and examine the questions posed at the outset.

(a) *Are equitable damages different from common law damages?*

Equitable damages are distinct in that by statute they can be awarded only where the court has jurisdiction to entertain applications in equity. The enabling legislation gives no aid to their assessment. However, insofar as they are statutory, equitable damages are of a different genus since the principles and rules of assessment of common law damages have been judicially determined and refined over centuries. This

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[13] Chancery Amendment (Lord Cairns') Act, 1858, 21 & 22 Vict., c. 27.

[14] *See, e.g.*, The Judicature Act, R.S.O. 1970, c. 228, s. 21; The Judicature Act, R.S.A. 1970, c. 193, s. 34(11); The Queen's Bench Act, R.S.M. 1970, c. C-280, s. 60; The Queen's Bench Act, R.S.S. 1980, c. Q-1, s. 45(9); Judicature Ordinance, R.O.N.W.T. 1974, c. J-1, s. 19(i); Judicature Ordinance, R.O.Y.T. 1971, c. J-1, s. 19(i)(*i*).

[15] *See, e.g.*, Arbutus Park Estates Ltd. v. Fuller, [1977] 1 W.W.R. 729, at 738-39, 74 D.L.R. (3d) 257, at 265 (B.C.S.C. 1976), where Toy J. held that Lord Cairns' Act was law in B.C. by virtue of the English Law Act, R.S.B.C. 1960, c. 129, s. 2. *Cf.* Bell, *English Statutes in New Brunswick*, 28 U.N.B.L.J. 195 (1979).

[16] Cull v. Heritage Mills Devs. Ltd., 5 O.R. (2d) 102, 49 D.L.R. (3d) 521 (H.C. 1974).

[17] Brownscombe v. Public Trustee of Alta., [1969] S.C.R. 658, 5 D.L.R. (3d) 673; Asamera Oil Corp. v. Sea, Oil & Gen. Corp., [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1 (1978); A.V.G. Management Science Ltd. v. Barwell Devs. Ltd., [1979] 2 S.C.R. 43, 92 D.L.R. (3d) 289 (1978). But, in Dobson v. Winton & Robbins Ltd., [1959] S.C.R. 775, 20 D.L.R. (2d) 164, the Court did turn away from the rule in Lavery v. Pursell, 39 Ch. D. 508, 57 L.J. Ch. 570 (1888), which held that equitable damages must be denied if specific performance is deemed impossible. *Contra* Pearson v. Skinner School Bus Lines (St. Thomas) Ltd., [1968] 2 O.R. 329, 69 D.L.R. (2d) 283 (H.C.), which made no reference to *Dobson* in upholding *Lavery*. *But see* Davies v. Russell, [1971] 2 O.R. 699, 19 D.L.R. (3d) 23 (H.C.), which applied *Dobson*.

distinction has been blurred since the courts have conveniently overlooked the threshold criterion of jurisdiction to achieve the just remedy. As early as 1921, the British Columbia Court of Appeal,[18] faced with a defendant who had sold the property in dispute, proceeded to award presumably equitable damages in lieu of the order which of itself was impossible to grant. In other words, it was possible to argue on authority that the court had no jurisdiction to entertain the application for specific performance. Fifty-five years later, a judge of the English Queen's Bench, having granted forfeiture of a deposit, also ordered the vendor to resell and in addition reassessed equitable damages in lieu of specific performance.[19] Clearly the first two branches of the application of specific performance spoke of the party's acceptance of termination of the contract which is quite at odds with the claim for performance of the obligation under the contract. The court did not have jurisdiction under the statutory provision.

The lesson to be derived from these decisions, disparate both in time and jurisdiction, is that the courts were prepared to subvert the strictures of the respective enactments in order to protect the reliance interests of the petitioners. It is that willingness which leads to easy comparisons with more recent cases in which courts have recognized the non-pecuniary or intangible interests of contracting parties in the assessment of common law damages.[20] The same desire to protect the reliance interest has compelled the successes of disappointed contractors of widely differing status and expectations — all of this under the guise of extending the established common law rule of foreseeability.[21]

Of course it may be argued that while intangible awards are appropriate to almost every type of contract, equitable damages can only be given whenever the contract in dispute is of a kind amenable to a petition of specific performance. However, the very interest protected by the equitable remedy of specific performance (and by damages in lieu) is that which has been recognized in the cases involving sentimental damages — where the contractor had a unique and subjective expectation of enjoyment of complete performance.

> Thus a Court of Equity decrees specific performance of a Contract of Land, not because of the real nature of the Land but because Damages at Law, which must be calculated upon the Money-Value of Land, may not be a complete remedy to the Purchaser, to whom the Land may have a peculiar and special value.[22]

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[18] Horsnail v. Shute, [1921] 3 W.W.R. 270, 62 D.L.R. 199 (B.C.C.A.).

[19] *Supra* note 7.

[20] *See* Veitch, *Sentimental Damages in Contract*, 16 WESTERN ONT. L. REV. 227 (1977); Veitch, *Punitive Damages in Canada — A Neighbour's Experience*, 55 N. CAROLINA L. REV. 181 (1977).

[21] Hobbs v. London & S.W. Ry., L.R. 10 Q.B. 111, 44 L.J.Q.B. 49 (1875).

[22] *Per* Sir John Leach in Adderly v. Dixon, 1 Sim. & St. 607, at 610, 57 E.R. 239, at 240 (1828).

Whether one characterizes the loss as subjective damage, equitable evaluation or consumer surplus, the task of the courts remains the same — an assessment in extension of the traditional common law formula.

(b) *Are equitable damages punitive in purpose?*

The adjective punitive is better replaced by the descriptive term regulatory in this context. The idea is one often championed by Professor (now Mr. Justice) Linden with regard to the function of the law of tort.[23] In the field of contract, the courts have sought to establish the principle that advertant breach of contract must not pay. That much is evident from the English decision of *Wroth v. Tyler*,[24] which itself revived interest in the possibilities of the equitable award. One of the western decisions[25] illustrates comprehensively the use of the threat of escalating equitable damages in order to coerce performance by a status-protected defendant; another expresses the judicial response to "flagrant" breach.[26] The similarity of reasoning and statements of purposes in these equitable cases, in some of the contract suits involving intangible losses and in the tort actions giving rise to punitive sanctions, cannot be avoided.

(c) *Is the purpose of equitable damages total restitution?*

In recent decisions in personal injuries cases,[27] the Supreme Court of Canada has told us that notions of perfect compensation must give way to the interests of the defendant and society as a whole.[28] Over a longer period we have been accustomed in contract suits to the limitations on recovery expressed in the phrases "only financial loss is compensable", and that only if "caused" by the defendant and then only if "foreseeable". While it is true that non-financial losses are being increasingly recognized by pushing back the bounds of foreseeability, nevertheless ideas of what was or ought to have been contemplated rule

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[23] Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155 (1973). *See also* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1975-76).

[24] [1974] Ch. 30, [1973] 1 All E.R. 897.

[25] Calgary Hardwood & Veneer Ltd. v. C.N.R., [1977] 4 W.W.R. 18, 74 D.L.R. (3d) 284 (Alta. S.C.).

[26] *Arbutus Park Estates*, *supra* note 15.

[27] The triad decided at the same time were: Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; Thornton v. School District No. 57 (Prince George), [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; Arnold v. Teno, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

[28] *Per* Dickson J. in Andrews v. Grand & Toy Alberta Ltd., *supra* note 27.

[29] Cull v. Heritage Mills Devs. Ltd., *supra* note 16; Rombough v. Crestbook Timber Ltd., 55 W.W.R. 577, 57 D.L.R. (2d) 49 (B.C.C.A. 1966); *Biggin*, *supra* note 7.

us daily in our calculations. However, recent cases,[29] taken together with disputes in which the judges have proved willing to vary the dates of assessment,[30] betray a desire to compensate beyond the former objective rules of reasonableness in order to reflect a subjective concern for *de facto* restitution. The temptation for plaintiff's counsel is overwhelming. He must argue that equitable damages in lieu of an equitable order must be assessed at the value placed on the property by his client who has reluctantly surrendered his rights to its beneficial use.[31]

(d) *Is there a duty on the petitioner to mitigate his losses?*

Professors Reiter and Sharpe have argued that a petitioner is not required to mitigate so long as he acts with celerity[32] and on a prima facie case.[33] There is Canadian authority, beginning with *Horsnail v. Shute*[34] in 1921, which runs to the contrary[35] and which is based on English authority of the 19th century.[36] However the writers are on surer ground when they propound the view that equitable damages, based on the facts of the petitioner's situation rather than presumptions of the common law, permit the taking into account of the petitioner's inability to mitigate. Indeed, mitigation in a non-pecuniary sense is quite impossible in any contract in which the injured contractor has invested an intangible interest; for example, the acquisition of a scarce resource, participation in a unique event or purchase of a select dwelling. This avoids the awkwardness of the common law decisions which hold that any damages resulting from inability to mitigate are not recoverable because they are not perceived to be "caused" by the conduct.[37]

In short, the plaintiff's claim to be relieved from the obligation to attempt to mitigate is directly linked to the strength of his case for specific performance. That in turn will be determined by the nature of the

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[30] Metropolitan Trust Co. of Canada v. Pressure Concrete Servs. Ltd., [1973] 3 O.R. 629, 37 D.L.R. (3d) 649 (H.C.); *Re* 140 Devs. Ltd. v. Steveston Meat & Frozen Food Lockers (1973) Ltd., 59 D.L.R. (3d) 470 (B.C.S.C. 1975); Schweickart v. Thorne, [1976] 4 W.W.R. 249 (B.C.S.C.); *Calgary Hardwood*, *supra* note 25.

[31] Wrotham Park Estate Co. v. Park Side Homes Ltd., [1974] 1 W.L.R. 798, at 815, [1974] 2 All E.R. 321, at 342 (Ch. 1973).

[32] Kaunas v. Smyth, 15 O.R. (2d) 237, 75 D.L.R. (3d) 368 (H.C. 1976).

[33] *Asamera Oil*, *supra* note 17.

[34] *Supra* note 18.

[35] The list includes *Schweickart*, *supra* note 30, and *A.V.G. Management*, *supra* note 17.

[36] Robertson v. Dumaresq, 11 Moo. P.C. (N.S.) 66, 15 E.R. 827 (1864); Shepherd v. Johnson, 2 East. 211, 102 E.R. 349 (1802); Harrison v. Harrison, 1 Car. & P. 412 (1824); Owen v. Routh, 14 C.B. 327, 139 E.R. 134 (1854); Day v. Singleton, [1899] 2 Ch. 320, 81 L.T. 306; Gainsford v. Carroll, 2 B. & C. 624, 107 E.R. 516 (1824); Shaw v. Holland, 15 M. & W. 136, 153 E.R. 794 (1846).

[37] Freedhoff v. Pomalift Indus. Ltd., [1971] 2 O.R. 773, 19 D.L.R. (3d) 153 (C.A.). Proof of causation permits recovery. Trans Trust S.P.R.L. v. Danubian Trading Co., [1952] 2 Q.B. 297, [1952] 1 All E.R. 970 (C.A.).

interest he seeks to protect. But again the judgments have not always followed that logic, as the judges themselves observe.[38]

(e) *Can damages be given when the decree of specific performance is impossible?*

Reiter and Sharpe pose this question and respond to it by arguing that the defendant's act in rendering performance impossible should not affect the nature of the plaintiff's remedy. This is certainly the view of the Supreme Court of Canada,[39] of at least one provincial court of appeal,[40] and of some trial courts.[41] But the brevity of reasoning of the former and the vulnerable logic of the latter would benefit from a clarifying statement.

If the purpose of the remedy is to protect the reliance interest of the petitioner, then it must surely follow that adjectival rules governing such issues as jurisdiction[42] and mutuality[43] must be consigned to the role of handmaidens to the policies of the substantive law. These considerations prompt the final question: can the petitioner elect between specific performance and damages in lieu?

In remedial law, generally, the plaintiff's right of election is often limited[44] and on occasion is denied by the courts.[45] The equitable case law here discloses two judicial policies — predicating the remedy to the conduct of the parties,[46] and ensuring that the remedy is made available whenever the "type" of contract so demands.[47] In addition, some judges have taken the position that the remedy must be fashioned in response to such external events as inflation.[48]

The most recent English *dictum* on the doctrine of election bears examination.

> In my opinion, the argument based on irrevocable election, strongly pressed by the appellant's counsel in the present appeal, is unsound. Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity.[49]

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[38] *Pressure Concrete*, *supra* note 30.

[39] *Brownscombe*, *supra* note 17.

[40] *Horsnail*, *supra* note 18.

[41] Barlow v. Williams, 16 Man. L.R. 164, 4 W.L.R. 233 (Full Ct. 1906). Johannson v. Gudmundson, 19 Man. L.R. 83, 11 W.L.R. 176 (C.A. 1909).

[42] *Biggin*, *supra* note 7.

[43] Price v. Strange, [1977] 3 W.L.R. 943, [1977] 3 All E.R. 371 (C.A.).

[44] DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973).

[45] Capital & Suburban Properties Ltd. v. Swycher, [1976] 1 Ch. 319, [1976] 1 All E.R. 881 (C.A.).

[46] *Asamera Oil*, *supra* note 17.

[47] *Id.* at 665-66, 89 D.L.R. (3d) at 25-26; *Price*, *supra* note 43; *Biggin*, *supra* note 7.

[48] *See* Hechter v. Thurston, [1978] 1 W.W.R. 695, 80 D.L.R. (3d) 685 (Man. Q.B. 1977), citing Vendsel v. Tennyson (unreported, Man. C. A., Dec. 16, 1976).

[49] *Johnson*, *supra* note 4, at 497.

To paraphrase Lord Wilberforce, when the petitioner realizes that the contract is dead, then an alternative petition for damages makes both common and equitable sense.

The factors of conduct, the nature of the obligations undertaken and the concept of fairness with respect to external circumstances, mirror the very consideration which caused litigants in the fourteenth century to petition the King to review the decisions of his common law courts. Those same considerations persuaded the Chancellor's courts to issue their remedies in equity. It may be then that the difficulties spoken to by judicial officers, practitioners and academic lawyers, stem from their forgetfulness of the origins of the courts of equity, of the import of the Chancery Amendment Act and its successors in Canada. And that in turn may speak to inadequacies in our law school teaching over an extended period.

However, it is to be hoped that students, teachers, advocates and judges will respond to the initiative of Chief Justice Laskin in pursuing rational, rather than traditional justifications for damage calculations.[50] This approach can serve to lessen the consternation prompted by unthinking reliance on foreign trial judgments[51] which are subsequently repudiated by appellate courts in their own jurisdictions.[52]

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[50] *A.V.G. Management*, *supra* note 17.

[51] Wroth v. Tyler, [1974] Ch. 30, [1973] 1 All E.R. 897; Horsler v. Zorro, [1975] Ch. 302, [1975] 1 All E.R. 584 (1974).

[52] *Johnson*, *supra* note 4.