CONTRACT DAMAGES AND THE PROMISEE'S ROLE IN ITS OWN LOSS

WAYNE COURTNEY*

In a claim for compensation for breach of contract, various principles take account of the injured party's own involvement in its loss. This article considers the interaction of three of them: intervening causation, mitigation as avoidable loss, and reliance upon the contract. Judges and academics alike have suggested that there is a connection between causation and the avoidable loss rule. This article builds on those suggestions to present a model which integrates the avoidable loss rule with other causal norms typically applied to contract. The first part of the article shows that the avoidable loss rule can be implemented in a way that is compatible with a causal framework. The second part reveals a deeper, normative connection between avoidable loss and causation, which concerns reliance upon the contract. The avoidable loss rule, in particular, is underpinned by the idea of a transfer in reliance: from promisor-reliance to promisee (self-)reliance.

CONTENTS

* BComp (Hons) (Tas), BSc, LLB (Hons), PhD (Syd); Associate Professor, Faculty of Law, National University of Singapore; Senior Fellow, University of Melbourne. I thank John Carter for his comments on an earlier draft, Elise Bant, Katy Barnett, Jeannie Paterson and Andrew Robertson for their comments on an oral presentation of the paper, and the two anonymous referees for their comments. The usual disclaimer applies. I acknowledge the support of the NUS Start-Up Grant, Project R-241-000-154-133.

I Introduction

The promisee may play a part in the loss it suffers from the promisor's breach of contract. Contract law regulates the promisee's claim for compensation through principles such as causation, mitigation and contributory negligence. These give effect to various norms and standards. Some assess the quality of the promisee's conduct by reference to culpability, such as whether it is careless or unreasonable; or to freedom of choice; or to its extraordinariness. Others seek to weigh the relative causal impact of different factors. In Australia, and elsewhere in the Commonwealth, there has been growing uncertainty over how these principles, norms and standards interact.

This article examines three concepts: causation, avoidable loss and reliance upon the contract. The narrow focus of this article means that many of the complexities of causation can be put aside. 'Factual' or 'but for' causation is not in issue.[1] It can be assumed that the promisor's breach was a necessary factor in the sequence of events producing the loss. 'Legal' causation is relevant. The promisee's conduct may be so significant in nature or degree that, causally, it is treated in law as superseding the promisor's breach. In the traditional language of the common law it is a novus actus interveniens: an

[1] Cf Michael Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 (July) *Law Quarterly Review* 398, 400–1.

intervening act (or omission). Within the civil liability legislation, where applicable, it is an aspect of 'scope of liability'.[2]

Mitigation in contract is conventionally defined as a composite of three rules.[3] The rule considered here is the first stated by *McGregor on Damages*,[4] also known as the 'avoidable loss' rule. In simple terms, a promisee is not compensated for loss which it could reasonably have avoided. Like intervening causation, the rule is negatively oriented. The reliance concept is the third piece of the puzzle. A promisee is, prima facie, entitled to assume that proper performance will be, and has been, rendered by the promisor. It may also rely upon the state of affairs that would be generated by performance. This concept can, to an extent, shield the promisee from its ignorance of the promisor's breach or its consequences. It has a role to play when evaluating the promisee's conduct as a matter of causation or mitigation.

My argument is that intervening causation, the avoidable loss rule and the reliance concept can be integrated into an overarching causal analysis. There are two strands to the argument. The first strand is about implementation of the avoidable loss rule. The rule can be modelled as one form of intervening causation that operates in addition to, and may overlap with, other norms that determine intervening causes. The other strand of the argument examines the norm which underlies the avoidable loss rule. What justifies the rule and the more discriminating standard of reasonableness, compared with other standards used in intervening causation? Voluntariness is a cogent reason but, ultimately, not a wholly satisfactory basis for the rule. The better view is that the rule reflects a transfer in reliance on the contract, from promisor-reliance to self-reliance. The distinctive feature of the avoidable loss rule is that it

[2] See, eg, *Wrongs Act 1958* (Vic) ss 51(1)(b), 51(4); *Civil Liability Act 2002* (NSW) ss 5D(1)(b), 5D(4). This same expression is used by some commentators to encompass various common law concepts that are normatively oriented to attribute responsibility for loss: see, eg, Jane Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 (July) *Law Quarterly Review* 388. Avoidable loss and intervening causation fall squarely within that description.

[3] Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed, 2014) 250 [9-003]–[9-006]; Dan B Dobbs, *Law of Remedies: Damages — Equity — Restitution* (West Publishing, 2nd ed, 1993) vol 1, 380. Cf Joseph M Perillo, *Corbin on Contracts* (Matthew Bender, rev ed, 2005) vol 11, 294–354 (§§ 57.10–57.16); Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed, 2004) (two rules, relating to unreasonable inaction and unreasonable action: at 122); Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) (one rule about gains and avoided loss (s 20(3)): at 118, 121; and another about avoidable loss (s 21(1)(c)): at 128, 131–2).

[4] McGregor (n 3) 250 [9-004].

evaluates conduct taken (or deemed to have been taken) deliberately in response to breach of contract. That is, it assesses the self-reliant promisee's choices.

The argument is limited in several ways. A complete account of the promisee's involvement in its loss would include contributory negligence. Some reference is made to this below, though it is not considered at length. The focus is upon principles that bar recovery for all, or discrete elements of, loss, rather than with proportionate reduction of an otherwise compensable loss. The argument proceeds on the orthodox basis that causation and the avoidable loss rule are distinct from contributory negligence.[5] Civil liability legislation presents another complication. For claims arising from negligence, including breach of contractual duties of care,[6] the legislation divides the causal inquiry into 'factual causation' and 'scope of liability'.[7] Breaches of strict contractual duties continue to be governed by common law principles. This article assumes that, in the present context at least, common law principles of intervening causation are not relevantly different from corresponding concepts embodied within the statutory 'scope of liability'.[8] The argument is, therefore, unitary and does not distinguish between different types of contractual duty. Lastly, although the argument draws on cases outside of contract (particularly in negligence) as illustrating general principles of causation, it makes no claim that the reliance thesis holds generally for tort or other civil wrongs.[9]

Part II outlines the debate over the connection between causation and the avoidable loss rule. It shows that there is considerable similarity in the operation of the two concepts. Differences remain, and these are addressed in Part III. Part III develops the argument that the avoidable loss rule is based upon a causal norm reflecting a shift in reliance on the contract. Part IV tests the thesis against a selection of cases which represent common factual patterns. Part V contains the conclusion.

[5] See below n 27 and accompanying text.

[6] See, eg, *Wrongs Act 1958* (Vic) s 44; *Civil Liability Act 2002* (NSW) s 5A.

[7] See, eg, *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (NSW) s 5D.

[8] *Chand v Commonwealth Bank of Australia* [2014] NSWSC 708, [258] (Robb J) ('*Chand (Trial)*'). See also *Ruddock v Taylor* (2003) 58 NSWLR 269, 286 [89] (Ipp JA); *Strong v Woolworths Ltd* (2012) 246 CLR 182, 191 [19] (French CJ, Gummow, Crennan and Bell JJ); *Wallace v Kam* (2013) 250 CLR 375, 383 [14], 385–6 [22]–[24] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

[9] Cf *Howmet Ltd v Economy Devices Ltd* [2016] BLR 555.

II The Connection between Causation and Avoidable Loss

A *The Controversy and Why it Matters*

Marshalled on one side of the debate are those who consider causation and mitigation, including the avoidable loss rule, to be independent principles,[10] causation being applied first. In *Burns v MAN Automotive (Aust) Pty Ltd* ('*Burns*'),[11] for example, Brennan J said that the 'reasonableness of the [promisee's] decision is critical to the question of mitigation but it is no novus actus which breaks the chain of causation'.[12] Each provides a basis for denying all or part of the promisee's claim; the promisee may succeed on one and fail on the other.[13] The separatist view is that causation and mitigation provide different reasons for denying compensation.[14] Thus, McGregor argues that framing mitigation in terms of causation risks disguising 'the real ground of a decision'.[15]

In contrast, a growing body of decisions in the United Kingdom describes mitigation in causal terms.[16] Modern developments can be traced to *Koch*

[10] *Castle Constructions Pty Ltd v Fekala Pty Ltd* (2006) 65 NSWLR 648, 653 [21] (Mason P, Beazley JA agreeing at 666 [94]) ('*Castle Constructions*'); *Knott Investments Pty Ltd v Fulcher* [2014] 1 Qd R 21, 41 [44]–[45] (Muir JA, Holmes JA agreeing at 32 [1], Atkinson J agreeing at 43 [55]) ('*Knott Investments*'); *Chand (Trial)* (n 8) [279]; but see at [283] (Robb J); *Chand v Commonwealth Bank of Australia* [2015] NSWCA 181, [184] (Ward JA, Bathurst CJ agreeing at [1], Beazley P agreeing at [2]) ('*Chand (Appeal)*'). See also *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345, 353 (Stephen, Mason, Murphy, Aickin and Wilson JJ) ('*Fazlic*'); *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 19, 22 (McHugh J) ('*Medlin*'). In the United Kingdom, see *Youell v Bland Welch & Co Ltd [No 2]* [1990] 2 Lloyd's Rep 431, 461, 462 (Phillips J) ('*Youell*'); *Uzinterimpex JSC v Standard Bank plc* [2008] 2 Lloyd's Rep 456, 471 [56] (Moore-Bick LJ, Laws LJ agreeing at 474 [71], Clarke MR agreeing at 474 [72]) ('*Uzinterimpex*').

[11] (1986) 161 CLR 653 ('*Burns*').

[12] Ibid 675.

[13] See, eg, *Castle Constructions* (n 10).

[14] Cf Burrows, *Remedies for Torts and Breach of Contract* (n 3): '[T]he duty to mitigate and intervening cause *can* be regarded as denying damages for exactly the same reason': at 75 (emphasis in original); *Chand (Trial)* (n 8) [279]–[283], [389] (Robb J).

[15] McGregor (n 3) 256 [9-018]. See also *Uzinterimpex* (n 10) 471 [56] (Moore-Bick LJ); Robert A Hillman, 'Keeping the Deal Together after Material Breach: Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts' (1976) 47(4) *University of Colorado Law Review* 553, 558 n 23.

[16] *Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellschaft Austrowaren GmbH* [1993] 2 Lloyd's Rep 1, 10 (Bingham LJ) ('*Kaines*'); *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] 1 All ER (Comm) 417, 432 (Toulson J) ('*Standard Chartered Bank (Trial)*'), affd [2001] 1 All ER (Comm) 822, 837 [41] (Potter LJ, Wall J agreeing at 842 [58],

Marine Inc v D'Amica Societa di Navigazione ARL,[17] where Robert Goff J rationalised all three of McGregor's mitigation rules[18] in terms of causation.[19] Similar reasoning can be found in North America.[20] Australian courts have sometimes struggled to explain the substantive difference between the avoidable loss rule and the promisee's conduct as an intervening cause.[21] In an oft-cited passage in *Driver v War Service Homes Commissioner*,[22] Irvine CJ said that the promisee's 'duty' to mitigate

> does not mean that he is under any duty in the ordinary sense, towards the party breaking the contract, but that *he cannot be said to have really incurred any loss which might have been avoided* by his taking such steps as a reasonably prudent man in his position would have taken to avoid further loss to himself …[23]

Academic proponents of the causal analysis include Dyson and Kramer.[24] Their model rests upon the proposition that damages are 'assessed as if the

Henry LJ agreeing at 842 [59]) ('*Standard Chartered Bank (Appeal)*'); *Bunge SA v Nidera BV* [2015] 3 All ER 1082, 1106–7 [81] (Lord Sumption, Lords Neuberger P, Mance and Clarke agreeing) ('*Bunge*'); *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2016] 1 All ER (Comm) 675, 685 [33] (Leggatt J) ('*Thai Airways*'); *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2017] 1 WLR 1373, 1392 [32] (Lord Mance JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lords Sumption and Carnwath JJSC agreeing); *Hughes-Holland v BPE Solicitors* [2017] 2 WLR 1029, 1039 [20] (Lord Sumption JSC, Lord Neuberger PSC, Lords Mane, Clarke and Hodge JJSC agreeing).

17 [1980] 1 Lloyd's Rep 75 ('*The Elena D'Amico*').

18 See above n 3 and accompanying text.

19 *The Elena D'Amico* (n 17) 88.

20 In Canada, see *Hodgkinson v Simms* [1994] 3 SCR 377, 452 (La Forest J for La Forest, L'Heureux-Dubé and Gonthier JJ). In the United States, see *McClelland v Climax Hosiery Mills*, 169 NE 605, 609 (Cardozo CJ) (NY, 1930).

21 *Chand (Trial)* (n 8) [280]–[283], [389]–[391] (Robb J); *Knott Investments* (n 10) 41 [43]–[45] (Muir JA, Holmes JA agreeing at 32 [1], Atkinson J agreeing at 43 [55]). Cf *Medlin* (n 10) 22 (McHugh J); *Tasmania v Shaw* [2001] TASSC 119, [6] (Cox CJ), [20], [27] (Slicer J), [39]–[41] (Blow J) ('*Shaw*') (misrepresentation inducing contract). See also below n 37 (distinction between exacerbating and failing to reduce loss).

22 (1923) 44 ALT 130.

23 Ibid 134 (emphasis added). See also *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130, 162 (Priestley JA) ('*TCN Channel 9*'), explaining ibid 134 in causal terms.

24 Andrew Dyson and Adam Kramer, 'There is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 (April) *Law Quarterly Review* 259.

claimant acted reasonably, if in fact it did not'.[25] Corbin held a similar view.[26] If the causal model is right, it follows that contributory negligence and the avoidable loss rule operate at different levels. The avoidable loss rule is applied first to define the basic loss, which may then be apportioned to account for contributory negligence.[27]

Why does it matter? Some of the more noteworthy implications are as follows. One supposed difference lies in the onus of proof.[28] More substantially, the avoidable loss rule and causation presuppose different degrees of knowledge possessed by the promisee. This in turn affects the time at which the principles take effect.[29] A typical situation is where the promisee perceives some symptoms of a breach of contract but cannot know that breach has actually occurred.[30] The promisee's reaction should be evaluated using causation rather than the avoidable loss rule. This would be practically irrelevant if the standards were the same, and so this points to another difference. Critics of assimilation are right to say that conventional causation and the avoidable loss rule rely upon different reasons, or use different standards, to evaluate the promisee's conduct. The latter is in some respects more stringent; the promisee might succeed under causation but fail if the event were assessed under mitigation.

The contrast carries over to the period during which both sets of principles operate. Take the example of a promisee who turns down an offer of substitute performance from the promisor after breach. A mitigation perspective is to ask whether the rejection is unreasonable. A traditional causal perspective

[25] Ibid 259. See also Adam Kramer, *The Law of Contract Damages* (Hart Publishing, 2nd ed, 2017) 363 [15-41]; *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353, 370 [10] (Lord Bingham) ('*The Golden Victory*').

[26] Perillo (n 3) 301–24 (§ 57.11) (the promisee's 'recovery against the defendant will be exactly the same whether the effort is made and the loss mitigated, or not'; the promisee cannot recover for loss that he 'helped to cause by not avoiding it': at 303 (citations omitted).

[27] *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500, 505 (Jenkins LJ) ('*McAuley*'); *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190, 196 (Lord Cooke), 203–4 (Lord Hobhouse). See generally *Belous v Willetts* [1970] VR 45, 48 (Gillard J); *Ackland v Commonwealth* (2007) Aust Torts Reports ¶81-916, 70308 [142]–[146] (Ipp JA); *Uzinterimpex* (n 10) 471–2 [58] (Moore-Bick LJ); Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (n 1) 403–4; Iain D Field, 'Contributory Negligence and the Rule of Avoidable Losses' (2018) 38(3) *Oxford Journal of Legal Studies* 475. But see Yehuda Adar 'Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion' (2013) 31(4) *Quinnipiac Law Review* 783.

[28] See below Part II(C).

[29] See below Part II(D), n 124.

[30] See below Part IV(B)(3).

might consider whether the rejection was reckless or grossly foolish, or, perhaps, a 'voluntary' choice.

Two other ramifications affect the coherence of the law. Some post-breach decisions (such as termination for breach) are usually analysed under causation, yet others (such as refusal of an offer by the promisor) are assessed under mitigation. The law may not be consistent. An opposite danger lies in duplication. On some occasions, the promisee's conduct has been judged against a standard of reasonableness in the guise of causation and then again in the guise of mitigation.[31] It is difficult to discern any real difference in those standards. Surely, one of them must be redundant.

B *The Causal Contrast and the Counterfactual*

Much of the groundwork on this point has been laid by others,[32] so it is sufficient to sketch the argument. The avoidable loss rule, and intervening causation in the present context, focus upon the position of the promisee. Modelling the rule in causal terms involves a contrast between the promisee's actual position and the position the promisee would have occupied had it acted reasonably.[33] Constructing the counterfactual thus requires the selection of a hypothetical reasonable response.[34] The difference between the two positions represents the degree to which the promisee has caused its own loss by failing to mitigate.[35] There is no distinction in principle between acts and omissions, nor between conduct that fails to prevent loss and conduct that merely fails to ameliorate it. These may, however, be factors that affect what is reasonable in the circumstances.[36] The causal model dovetails

[31] See below n 220 and accompanying text.

[32] See Kramer (n 25) ch 15; Dyson and Kramer (n 24) 260–4.

[33] *Munce v Vinidex Tubemakers Pty Ltd* [1974] 2 NSWLR 235, 239 (Glass JA, Moffitt P agreeing at 236) ('*Munce*'); *Karacominakis v Big Country Developments Pty Ltd* (2000) 10 BPR 18235, 18271 [187] (Giles JA, Handley JA agreeing at 18237 [1], Stein JA agreeing at 18237 [2]) ('*Karacominakis*'); *Arnott v Choy* (2010) 56 MVR 390, 423 [155] (McColl JA, Basten JA agreeing at 431 [210]) ('*Arnott*'). See also *McAuley* (n 27) 505 (Jenkins LJ); *The Golden Victory* (n 25) 370 [10] (Lord Bingham); *Thai Airways* (n 16) 686 [34] (Leggatt J).

[34] For how this is done, see Kramer (n 25) 371 [15-73].

[35] It is not enough to show that the promisee acted unreasonably; its conduct must have worsened its position: *Standard Chartered Bank (Trial)* (n 16) 442 (Toulson J).

[36] See, eg, *Chand (Trial)* (n 8) [389]–[391] (Robb J).

with the use of causation in some contexts to assess damage *increased* by the plaintiff's conduct.[37]

In measuring the difference between the hypothetical and actual positions, McGregor's formulation of the avoidable loss rule[38] is incomplete. It refers to losses that would have been avoided, but not to expenses or other disadvantages that the promisee would have sustained had it acted reasonably. These must also be taken into account to determine the net deficiency attributable to the promisee's unreasonable conduct. This approach is accepted in Anglo-Australian cases,[39] and in the United States.[40] It produces a symmetrical model of mitigation comprising two dyads: one concerned with the hypothetical, being avoidable losses (McGregor's first rule[41]) and associated expenses; the other concerned with real events, being avoided loss and actual expenses (McGregor's third and second rules,[42] respectively).

Several objections can be raised against the model. It has been suggested that the avoidable loss rule merely imposes a cap on the damages recoverable by the promisee.[43] There is an analogy with *Cory v The Thames Ironworks & Shipbuilding Co Ltd* for remoteness of damage.[44] This is plausible but inelegant, because it isolates the avoidable loss rule from other aspects of mitigation. Mitigation goes both ways.[45] McGregor's second rule — that increased loss is recoverable if incurred reasonably[46] — can be regarded as the causal counterpart of the avoidable loss rule. Statements to the effect that the

[37] This overlaps with McGregor's second rule of mitigation: McGregor (n 3) 250 [9-005]. On the distinction in tort, see generally *Munce* (n 33) 237 (Hutley JA), 240 (Glass JA); *Commonwealth v McLean* (1996) 41 NSWLR 389, 399 (Handley and Beazley JJA). Cf Burrows, *Remedies for Torts and Breach of Contract* (n 3) 126.

[38] McGregor (n 3) 250 [9-003]–[9-006].

[39] See, eg, *Falko v James McEwan & Co Pty Ltd* [1977] VR 447, 453 (Anderson J); *Craig v Garfit Mottram* (1977) 17 ACTR 12, 13–14 (Joske J); *CJD Equipment Pty Ltd v A&C Constructions Pty Ltd* [2011] NSWCA 188, [93]–[94] (Handley AJA) ('*CJD Equipment*'). See also *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2011] QB 357, 374 [51]–[52] (Potter P, Dyson LJ agreeing at 375 [57], Kay LJ agreeing at 375 [58]); *Herrmann v Withers LLP* [2012] PNLR 28, 598 [90]–[91] (Newey J) ('*Herrmann*'). See Kramer (n 25) 372–4 [15-76]–[15-79].

[40] Dobbs (n 3) vol 3, 140–1 (§ 12.6(2)).

[41] McGregor (n 3) 250 [9-004].

[42] Ibid 250 [9-005]–[9-006].

[43] *Herrmann* (n 39) 598 [92] (Newey J).

[44] (1868) LR 3 QB 181. See also *Payzu Ltd v Saunders* [1919] 2 KB 581, 586–7 (McCardie J) ('*Payzu*').

[45] See also Andrew Dyson, 'Choice, Benefits and the Basis of the Market Rule' [2016] (2) *Lloyd's Maritime and Commercial Law Quarterly* 202, 206.

[46] McGregor (n 3) 250 [9-005].

avoidable loss rule 'reduces' compensation may suggest a cap, but they are equally apt to describe the effect of the causal model. Another view is that the avoidable loss rule can operate in a proportional manner to share responsibility for loss between the parties.[47] This view is an outlier.

The avoidable loss rule often appears to operate on an all-or-nothing basis, excluding compensation for any loss following the critical non-mitigatory act or omission. But the rule is really one of substitution, not exclusion.[48] Were it otherwise, the rule would operate too harshly, penalising all unreasonable conduct, regardless of degree. If no further loss is recoverable, it must be because reasonable conduct would have avoided it entirely. So, for example, a buyer who accepts the seller's anticipatory repudiation, but then fails to resort to the market in a timely fashion, does not necessarily receive nothing: damages are awarded based upon a notional market transaction at the appropriate time.[49] It is also possible to distinguish between types of loss beyond the critical event, so as to allow some but not others.[50]

C *Onus of Proof and the Fact–Law Distinction*

Australian cases frequently point to an apparent difference in the onus of proof. The promisee as plaintiff must prove that the breach caused loss. In contrast, under the avoidable loss rule, the promisor must establish that the promisee's conduct was unreasonable, and also the extent to which this increased the loss.[51] The civil standard of proof applies.[52] This contrast

[47] *Shine v English Churches Housing Group* [2004] HLR 42, 758 [118]–[119] (Wall LJ); *Lovick & Son Developments Pty Ltd v Doppstadt Australia Pty Ltd* [2012] NSWSC 529, [252] (Slattery J), revd [2014] NSWCA 158 (statutory claim for misleading conduct).

[48] *Plenty v Argus* [1975] WAR 155, 159 (Burt J for the Court); *Copley v Lawn* [2010] 1 All ER (Comm) 890, 898 [26], 900 [30]–[32] (Longmore LJ, Jacob LJ agreeing at 901 [34], Waller LJ agreeing at 901 [35]) ('*Copley*'). Cf *Sayce v TNT (UK) Ltd* [2012] 1 WLR 1261, 1270 [27], 1271 [29] (Moore-Bick LJ, Aikens LJ agreeing at 1272 [35]).

[49] See, eg, *Kaines* (n 16). See also *Copley* (n 48) 898 [26], 900 [30] (Longmore LJ); *CJD Equipment* (n 39) [91] (Handley AJA) (unreasonably rejecting offers).

[50] *Burns* (n 11) 660 (Gibbs CJ).

[51] *Criss v Alexander [No 2]* (1928) 28 SR (NSW) 587, 595–6 (Street CJ, Jacobs and Campbell JJ agreeing) ('*Criss*'); *Bagnall v National Tobacco Corporation of Australia Ltd* (1934) 34 SR (NSW) 421, 430 (Jordan CJ, Stephen J and Markell AJ agreeing); *Watts v Rake* (1960) 108 CLR 158, 159 (Dixon CJ) ('*Watts*'); *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130, 138 (Kitto, Windeyer and Owen JJ); *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507, 514 (Murphy J, Brooking J agreeing at 514, Nicholson J agreeing at 514); *Burns* (n 11) 673 (Brennan J).

[52] *TCN Channel 9* (n 23) 159 (Hope JA), 162 (Priestley JA).

parallels a more general distinction between proof of loss and the application of the avoidable loss rule to reduce a loss already proved on a prima facie basis.

The assessment of damages is simplified in practice by the use of conventional measures of loss. These measures lessen the need to apply separate damages principles directly to the facts. Conventional measures remain a matter of proof of loss, even though some compound measures incorporate mitigatory assumptions.[53] The onus ordinarily should remain upon the plaintiff to establish each element of the measure.[54] However, there can be a slender and sometimes fluid distinction between a compound conventional measure and one that establishes a simpler prima facie measure to which mitigation then applies separately.[55]

The onus for the avoidable loss rule is exceptional;[56] the law starts with a presumption that the promisee acted reasonably.[57] It seems more logical to use the same onus for intervening causation, than it is to flip the onus for avoidable loss to match that used for causation at large. One argument is that the same approach should apply to any matter (including any intervening

[53] See, eg, *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA* [No 2] [1994] 2 Lloyd's Rep 629, 635 (Mance J); *Glory Wealth Shipping Pte Ltd v Korea Line Corp* [2012] 1 All ER (Comm) 402, 408–9 [18] (Blair J) ('deemed mitigation'). These mitigatory assumptions may go beyond ordinary mitigation principles: Michael Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 (July) *Law Quarterly Review* 405, 410 nn 40–1. Cf Dyson and Kramer (n 24) 264–71.

[54] For sale of goods outright, or as part of business, see, eg, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 411, 414 (Dixon and Fullagar JJ); *Aryeh v Lawrence Kostoris & Son Ltd* [1967] 1 Lloyd's Rep 63, 70 (Willmer LJ); *Clark v Macourt* (2013) 253 CLR 1, 12 [30], 14 [36] (Crennan and Bell JJ). For sale of land, see, eg, *Castle Constructions* (n 10) 651 [11], 658 [53] (Mason P). For sale of business, see, eg, *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, 430–1 [32]–[34] (Stuart-Smith LJ).

[55] For employment, see, eg, *Ministry of Defence v Wheeler* [1998] 1 WLR 637, 641, 648–51 (Thomas LJ); *Tasman Capital Pty Ltd v Sinclair* (2008) 75 NSWLR 1, 3–4 [55]–[57], 6 [64], 7–8 [70]–[72] (Giles JA, McColl JA agreeing at 8 [76]). For lessor's damages following repudiation of a lease, see, eg, *Lamson Store Service Co Ltd v Russell Wilkins & Sons Ltd* (1906) 4 CLR 672, 684 (Griffith CJ); *Luxer Holdings Pty Ltd v Glentham Pty Ltd* (2007) 35 WAR 254, 267 [39]–[41] (Buss JA); *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237, 258 [55] (Gleeson CJ, Kirby, Heydon, Crennan and Kiefel JJ). For repair of damaged chattels, see, eg, *Darbishire v Warran* [1963] 1 WLR 1067 ('*Darbishire*'); *Coles v Hetherton* [2015] 1 WLR 160, 172–3 [31]–[32] (Aikens LJ for the Court). See generally McGregor (n 3) 266–8 [9-034]–[9-036].

[56] *Watts* (n 51) 159 (Dixon CJ); *Munce* (n 33) 239 (Glass JA, Moffitt P agreeing at 236).

[57] *Munce* (n 33) 239 (Glass JA, Moffitt P agreeing at 236).

cause) which is, in substance, about avoidable loss.[58] Another explanation is that the promisee must establish a prima facie case of causation; the onus then shifts to the promisor to show that the connection is broken by an intervening act or omission.[59] The promisee should not have to prove a negative. The civil liability legislation must also be considered for breaches of contractual duties of care. The plaintiff bears the onus of proving 'any fact relevant to the issue of causation'.[60] While intervening causation is part of the 'scope of liability' element, it is doubtful whether the same was envisaged for the avoidable loss rule.[61]

A related issue is the fact–law distinction. It arises at common law and also in applying the statutory onus just mentioned. Causation at common law, including intervening causation, is treated as an issue of fact. It nonetheless involves the exercise of judgment and considerations of policy.[62] This evaluative aspect is emphasised under civil liability legislation, which separates historical involvement in fact from scope of liability. It is not clear whether such matters will still be regarded as 'fact[s] relevant to the issue of causation'.[63]

[58] *Standard Chartered Bank (Appeal)* (n 16) 837–8 [41] (Potter LJ, Wall J agreeing at 842 [58], Henry LJ agreeing at 842 [59]); *Medlin* (n 10) 22 (McHugh J).

[59] *The Kelvin Shipping Co v The Canadian Pacific Railway Co* 1928 SC (HL) 21, 26 (Viscount Haldane); *Borealis AB v Geogas Trading SA* [2011] 1 Lloyd's Rep 482, 488 [43] (Gross LJ) ('*Borealis*'). Cf *Medlin* (n 10) 22 (McHugh J). See also Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (n 1) 399.

[60] *Wrongs Act 1958* (Vic) s 52; *Civil Liability Act 2002* (NSW) s 5E.

[61] *Review of the Law of Negligence* (Final Report, September 2002) 114–19 [7.41]–[7.51] refers to intervening causes and remoteness but not mitigation. See generally *Zanner v Zanner* (2010) 79 NSWLR 702, 704–5 [6] (Allsop P), 718 [75] (Tobias JA); *Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd* [2012] NSWCA 94, [69]–[70] (Basten JA).

[62] *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 517–19 (Mason CJ) ('*March*'); *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 413 (Mason CJ, Deane and Toohey JJ), 419 (Gaudron J), 428 (McHugh J) ('*Bennett*'). Cf *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 638 [25], 639 [28]–[29] (Gleeson CJ), 644 [50] (Gummow and Hayne JJ); but see at 646–8 [58]–[62] (Kirby J), 654 [81] (Callinan J) ('*Travel Compensation Fund*') (claim for misleading conduct). See also *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 391–2 (Lord Hobhouse) ('*Reeves*'); *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 1091 [70] (Lord Nicholls); *Six Continents Retail Ltd v Carford Catering Ltd* [2003] EWCA Civ 1790, [19]–[21] (Laws LJ), [28], [32] (Buxton LJ) ('*Six Continents*'); *Corr v IBC Vehicles Ltd* [2008] 1 AC 884, 903–4 [15] (Lord Bingham) ('*Corr*').

[63] *Wrongs Act 1958* (Vic) s 52; *Civil Liability Act 2002* (NSW) s 5E.

Whether there is a duty to mitigate in the circumstances is a question of law.[64] Whether the duty is satisfied is said to be a question of fact,[65] though, again, this does not tell the whole story. What might be subjectively reasonable for the promisee is not necessarily reasonable vis-à-vis the promisor under the avoidable loss rule.[66] Nor is the point simply determined in each case by the fact-finder reaching a personal view about reasonableness. Policy considerations play a part.[67] Default positions have emerged over time for commonplace situations. These include expectations about resort to markets,[68] the pursuit of litigation against others, limits on sentimental considerations or the continuation of difficult personal relationships, and so forth. To this extent, the avoidable loss rule and intervening causation (as it concerns the promisee) are alike. They are regarded as questions of fact which are not wholly factual: there is an evaluative element and the inquiry is guided by precedent.

D *Norms, Standards of Conduct and the Inception of the Duty to Avoid Loss*

There are, prima facie, at least two causes of the promisee's loss: the promisor's breach and the promisee's involvement in events, whether by act or omission. At one time, the law may have required the promisor's breach to be the predominant, or equally significant, causal factor producing the loss.[69] This requirement has been relaxed, so that it is sufficient for breach to be 'a' cause

[64] *Uzinterimpex* (n 10) 469 [49] (Moore-Bick LJ).

[65] *Payzu* (n 44) 588 (Bankes LJ), 589 (Scrutton LJ); *Sotiros Shipping Inc v Sameiet Solholt* [1983] 1 Lloyd's Rep 605, 608, 609 (Donaldson MR for the Court) ('*The Solholt*'); *Karacominakis* (n 33) 18271–2 [188] (Giles JA, Handley JA agreeing at 18237 [1], Stein JA agreeing at 18237 [2]); *Castle Constructions* (n 10) 664 [81] (Mason P, Beazley JA agreeing at 666 [94]), quoting *The Solholt* (n 65) 608 (Donaldson MR for the Court); *Morrison v Town of Victoria Park* [2007] WASCA 164, [38] (Wheeler JA, Pullin JA agreeing at [47], Buss JA agreeing at [48]), quoting *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353, 363 (Blain J), quoting *Payzu* (n 44) 588 (Bankes LJ); *Uzinterimpex* (n 10) 469–70 [49] (Moore-Bick LJ).

[66] *Darbishire* (n 55) 1072 (Harman LJ); *The Elena D'Amico* (n 17) 86, 89 (Goff J); *Dimond v Lovell* [2002] 1 AC 384, 407 (Lord Hobhouse); *Knott Investments* (n 10) 38–9 [31]–[33] (Muir JA, Holmes JA agreeing at 32 [1], Atkinson J agreeing at 43 [55]).

[67] *Copley* (n 48) 898 [23] (Longmore LJ, Jacob LJ agreeing at 901 [34], Waller LJ agreeing at 901 [35]); *Thai Airways* (n 16) 686 [34]–[36] (Leggatt J); *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359, [39] (Briggs LJ, McFarlane LJ at [66], Moore-Bick LJ agreeing at [67]).

[68] Insofar as this is a matter of mitigation and not measure of loss: see above n 53.

[69] See *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1047–8 (Devlin J); *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157, 160 [11] (Thomas JA).

of the loss.[70] Something more is needed to explain why the promisee's conduct supersedes the breach, so that it is no longer regarded as a cause. A distinction can be drawn here between 'norms' and 'standards'. Norms are underlying reasons why the promisor should not be responsible for certain consequences of breach. Norms are manifested in standards, which establish particular tests applicable to a given set of facts.

The norm underpinning the avoidable loss rule is considered later.[71] The rule adopts a standard of 'reasonableness'. The promisee, as the victim of a wrong, is allowed a fair degree of latitude. But the standard can be contravened without fault or error. The avoidable loss rule also seems to be more critical of the promisee's omissions than some other causal standards that evaluate human conduct.[72] Confusingly, 'reasonableness' sometimes appears as a standard separately from the avoidable loss rule.[73] For example, in *Lexmead (Basingstoke) Ltd v Lewis* ('*Lexmead*'), in the Court of Appeal, Stephenson LJ identified the 'real' question as being whether the promisee's 'carelessness was so unreasonable as to be beyond the contemplation of the retailers, or such as to break the chain of causation'.[74] It is tempting to use such references to prove that the avoidable loss rule is a particular instance of a more pervasive causal standard of reasonable conduct. So much may be true for the connection between avoidable loss and other aspects of mitigation.[75] However, usage of 'reasonableness' is probably too variable to draw any broader conclusion.[76]

Other causal norms used in contract to regulate the promisee's conduct include culpability and voluntariness. The standard applied by the culpability

[70] *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322, 346 (Samuels JA, Moffitt P agreeing at 329, Reynolds JA agreeing at 339–40) ('*Simonius Vischer*'); *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 315 (Glass JA), 357–8 (McHugh JA) ('*Alexander*'); *Kim v Cole* (2002) Aust Contract Reports ¶90-149, 92082–3 [3]–[4] (McMurdo P) ('*Kim*'), quoting *Simonius Vischer* (n 70) 346 (Samuels JA); *Kim* (n 70) 92086 [21]–[22] (McPherson JA). See also *County Ltd v Girozentrale Securities* [1996] 3 All ER 834, 846 (Beldam LJ) ('*County*').

[71] See below Part III(C).

[72] See, eg, below Part IV(B).

[73] In tort, see, eg, *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 ('*McKew*'); *Caterson v Commissioner for Railways* (1973) 128 CLR 99, 110–12 (Gibbs J) ('*Caterson*'); *Corr* (n 62) 904–5 [17] (Lord Bingham). See also below n 220 and accompanying text.

[74] [1982] AC 225, 248 ('*Lexmead*').

[75] See above n 37.

[76] See generally *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [11] (Sedley LJ) ('*Spencer*').

norm cannot be defined precisely. Generally speaking, conduct that is merely careless (to use a neutral expression) will not negative a causal connection between breach and loss; it is a concurrent cause.[77] More blameworthy conduct, such as 'gross' carelessness, recklessness or deliberate wrongdoing, will usually negative a causal connection.[78] There seems to be no general rule for conduct by the promisee that constitutes a breach of contract; it depends on the nature and effect of the breach.[79]

Entwined with causal norms is the issue of timing. Whatever rationale underlies the avoidable loss rule, it should be consistent with the inception of the 'duty' to mitigate. This is not a duty in a Hohfeldian sense;[80] it is a convenient label to describe the application of the avoidable loss rule to the promisee's conduct after a certain time. This is no earlier than the time of breach. Causation operates at all times though, by definition, intervening causation is concerned with events between breach and the ultimate loss. It would be wrong to equate the two concepts on this basis alone. Knowledge is one point of difference. The promisee must possess some knowledge of breach before the duty to mitigate begins.[81] In contrast, its conduct may break the

[77] *Derbyshire Building Co Pty Ltd v Becker* (1962) 107 CLR 633, 652–3 (Kitto J) ('*Derbyshire Building*'); *AS James Pty Ltd v Duncan* [1970] VR 705, 723–5 (McInerney J) ('*AS James*'); *Simonius Vischer* (n 70) 347 (Samuels JA); *Daniels v Anderson* (1995) 37 NSWLR 438, 545 (Clarke and Sheller JJA); *Challenge Bank Ltd v VL Cooper & Associates Pty Ltd* [1996] 1 VR 220, 230–1 (Smith J) ('*Challenge Bank*'); *Mouritz v Hegedus* (Supreme Court of Western Australia — Full Court, Kennedy, Ipp and Owen JJ, 19 April 1999) ('*Mouritz*'); *Kim* (n 70) 92086 [21]–[22] (McPherson JA); *Rolfe v Katunga Lucerne Mill Pty Ltd* (2005) ASAL ¶55-146, 60144 [53], 60154 [119] (Santow JA, Hodgson JA agreeing at 60138 [1], McClellan AJA agreeing at 60155 [126]) ('*Rolfe*'). See generally *Astley v Austrust Ltd* (1999) 197 CLR 1, 37 [85]–[86] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Astley*').

[78] *Derbyshire Building* (n 77) 652–3 (Kitto J), 660 (Windeyer J) (Windeyer J ultimately dissented in relation to the final result: at 660–1); *Lexmead* (n 74) 246, 248 (Stephenson LJ) (Court of Appeal); *County* (n 70) 857 (Hobhouse LJ); *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137 ('*Beoco*'); *Borealis* (n 59) 488–9 [44]–[46] (Gross LJ); *Chand (Appeal)* (n 10) [168] (Ward JA). See also *Barnes v Hay* (1988) 12 NSWLR 337, 347 (Mahoney JA) (disgruntled plaintiff's threat to blow up premises); *Mallesons Stephen Jaques v Trenorth Ltd* [1999] 1 VR 727 ('*Mallesons Stephen Jaques*') (for further discussion of this case, see below n 165 and accompanying text). Cf *Spencer* (n 76) [43], [45] (Aikens LJ).

[79] *AS James* (n 77) 724–5, 730–1 (McInerney J); *Wylie v The ANI Corporation Ltd* [2002] 1 Qd R 320, 332–3 [25]–[28] (McMurdo P), 339–40 [50] (Thomas JA), 346 [92] (Ambrose J); *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769, 811 [99], 817 [108] (Andrew Phang Boon Leong JA for the Court). Cf *Government of Ceylon v Chandris* [1965] 3 All ER 48, 56 (Mocatta J).

[80] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16; Perillo (n 3) 305–6 (§ 57.11).

[81] See below nn 124–8 and accompanying text.

causal connection even when it is ignorant of breach. A graduated approach is taken, so that the likelihood of a break increases with the promisee's awareness of the circumstances.[82]

The foregoing analysis shows that many aspects of the avoidable loss rule translate easily to a causal framework. The underlying norm, the standard to be applied, and timing call for further consideration.

III The Avoidable Loss Rule and Other Causal Norms

It is impossible in a single article to address all causal concepts and norms that might affect the promisee's conduct between breach and loss. Hart and Honoré's analysis of intervening causation provides a useful starting point to identify the most relevant.[83] Their 'common sense' approach to causation has been influential in shaping judicial thinking, notwithstanding more recent scepticism about any causation theory's claim to universality.[84] It has not escaped academic criticism.[85] Fortunately, given the narrowness of the present context and relative simplicity of causation in contract compared with tort, many of these criticisms can be put aside. Writing about tort, Hart and Honoré proposed two norms which would justify an event breaking a causal connection to an earlier wrong: abnormality and voluntary human conduct.[86] These are overlapping and alternative grounds.[87] Hart and Honoré did not expressly propound their model as an explanation for mitigation or the avoidable loss rule.[88]

[82] *Borealis* (n 59) 488 [46] (Gross LJ).

[83] HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985).

[84] See, eg, *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 29–31 (Lord Hoffmann), discussed in *Chappel v Hart* (1998) 195 CLR 232, 256 [63] (Gummow J), 276 [96] (Kirby J), 285 [122] (Hayne J) ('*Chappel*'); *Travel Compensation Fund* (n 62) 639 [28]–[29] (Gleeson CJ), 642–3 [45] (Gummow and Hayne JJ), 653 [79] (Callinan J).

[85] See, eg, Richard W Wright, 'Causation in Tort Law' (1985) 73(6) *California Law Review* 1735, 1745–50; Jane Stapleton, 'Causation in the Law' in Helen Beebee, Christopher Hitchcock and Peter Menzies (eds), *The Oxford Handbook of Causation* (Oxford University Press, 2009) 744, 756–60.

[86] Hart and Honoré (n 83) 33, 41, 136, 162, 182.

[87] Ibid 41, 182.

[88] Ibid 153, 230; but see at 156–7, citing *James Finlay & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400 as an example of involuntary conduct to protect reputation.

A *Abnormality*

Abnormal situations are those that represent a deviation from the 'usual' or 'reasonably expected course of events'.[89] This definition may be criticised for being circular,[90] though it is difficult to improve upon as a convenient, shorthand description. Insofar as abnormality encompasses human conduct, the standard applied does not necessarily depend upon fault or culpability. A human actor may be blamelessly involved in a very unlikely conjunction of events. Some human conduct is, however, stigmatised as abnormal *because* it is culpable. Something more than ordinary carelessness is required. Hart and Honoré set the standard for causal disruption at 'gross negligence';[91] Recklessness and deliberately wrongful conduct could also qualify. The reason for translating abnormality as a norm, into significant culpability as a standard, seems to be that '[c]areless conduct may ordinarily be regarded as being within the range of normal human conduct when reckless conduct ordinarily would not'.[92] The fact of culpability itself — absolute or relative to the promisor — must also carry normative weight.

These definitions of abnormality and culpability provide a reasonably good fit for some groups of cases in the modern law of contract.[93] To that extent, the concepts are useful and could be retained. It does not matter, for present purposes, whether culpability is regarded as a distinct norm, or as an aspect of abnormality; the standard of culpability is the same. The cases rationalised on these bases do not, however, present as typical instances of mitigation. Abnormality is generally a poor explanation for the avoidable loss rule because it sets the bar too high. Commonplace conduct by the promisee can still be characterised as unreasonable. Obvious examples include decisions not to resort to the market promptly, or to reject offers of alternative or renewed employment. The standard of significant culpability is unsatisfactory for similar reasons. Much conduct that presently constitutes a failure to mitigate would escape sanction.

[89] Hart and Honoré (n 83) 33–4.

[90] See generally Philippa Foot, 'Hart and Honoré: Causation in the Law' (1963) 72(4) *Philosophical Review* 505, 507.

[91] Hart and Honoré (n 83) 184.

[92] *Reeves* (n 62) 392 (Lord Hobhouse) (Lord Hobhouse ultimately dissented in relation to the final result).

[93] See above nn 77–9.

B *Voluntary Conduct*

The idea that the plaintiff's exercise of free choice relieves the defendant of responsibility for consequent loss often features in explanations of avoidable loss[94] and intervening causation.[95] Voluntariness seems to be a more promising foundation for the avoidable loss rule, but it is unsatisfactory on closer scrutiny. Australian courts do not unreservedly accept that voluntary conduct, in its ordinary sense,[96] defeats causation.[97] In *March v E & MH Stramare Pty Ltd*, Mason CJ remarked that '[t]he fact that the intervening action is deliberate or voluntary does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct'.[98] On numerous occasions, the High Court has found a causal connection between the wrong and the loss despite intervening voluntary human action.[99]

[94] See, eg, *Dampskibsselskabet 'Norden' A/S v Andre & Cie SA* [2003] 1 Lloyd's Rep 287, 292–3 [42] (Toulson J); *Bunge* (n 16) 1106 [80] (Lord Toulson, Lords Neuberger P, Mance and Clarke agreeing); *Thai Airways* (n 16) 686 [35] (Leggatt J). See also Dyson (n 45) 205.

[95] See, eg, *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370, 376–7 (Paull J) (High Court — Queen's Bench Division), 391 (Danckwerts LJ) (Court of Appeal) ('*Quinn*'); *Carpenter v McGrath* (1996) 40 NSWLR 39, 44 (Clarke JA) ('*Carpenter*'); *Mallesons Stephen Jaques* (n 78) 736–7 [24]–[25] (Kenny JA, Callaway JA agreeing at 728 [1], Buchanan JA agreeing at 740 [39]); *Allianz Australia Insurance Ltd v Waterbrook at Yowie Bay Pty Ltd* [2009] NSWCA 224, [106]–[107] (Ipp JA, Hodgson JA agreeing at [30]); *Chand (Appeal)* (n 10) [169]–[171], [185] (Ward JA, Bathurst CJ agreeing at [1], Beazley P agreeing at [2]). See below n 221.

[96] The *Oxford English Dictionary* defines the adjective 'voluntary' in connection with actions as meaning those '[p]erformed or done of one's own free will, impulse, or choice; not constrained, prompted, or suggested by another': *Oxford English Dictionary* (online at 4 August 2018) 'voluntary' (def AI1b(a)). The *Macquarie Dictionary* offers: 'done, … undertaken, etc, of one's own accord or by free choice': *Macquarie Dictionary* (online at 4 August 2018) 'voluntary' (def 1); and 'acting or done without compulsion or obligation': *Macquarie Dictionary* (online at 4 August 2018) 'voluntary' (def 5(a)).

[97] See generally Douglas Hodgson, *The Law of Intervening Causation* (Ashgate, 2008) ch 5. See also *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1027–8 (Lord Reid).

[98] *March* (n 62) 517 (Toohey J agreeing at 524, Gaudron J agreeing at 525). Cf *March* (n 62) 534–6 (McHugh J); *Bennett* (n 62) 429–30 (McHugh J); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 176 (McHugh J).

[99] See, eg, *Caterson* (n 73), 110 (Gibbs J, Barwick CJ agreeing at 101, Menzies J agreeing at 105, Stephen J agreeing at 113) (decision to jump from train); *Medlin* (n 10) (decision to retire after accident); *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 (settling claim against third party); *Chappel* (n 84) (submitting to surgery by a particular surgeon at a particular time). Examples involving third parties include: *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516 (theft); *Pitt Son & Badgery Ltd v Proulefco SA* (1984) 153 CLR 644, 648 (Gibbs CJ, Wilson J agreeing at 649, Brennan J agreeing at 649, Deane J agreeing at 649, Dawson J agreeing at 649) (arson).

Adopting voluntariness, in its ordinary sense, as the sole criterion for mitigation would produce a radical change in the law. Avoidable loss cases could be decided differently, without directly considering the reasonableness of the promisee's conduct. McGregor's second and third rules, which trace the consequences of the promisee's response to breach,[100] would be undermined. More generally, the criterion forces a peculiar usage of its opposite, 'non-voluntary' conduct. A promisee successfully mitigates if it takes any one of a range of reasonable courses of action open to it.[101] By definition, each of these options must be non-voluntary. It also leads to an awkward contrast in describing opposing choices. Consider the position of a wrongfully-dismissed employee against whom the employer asserts a failure to mitigate. If the employee's decision to reject reasonable alternative employment is characterised as voluntary, it seems odd to say that his or her decision to accept the same reasonable alternative employment is non-voluntary,[102] unless acquiring substitute performance is always deemed to be non-voluntary. Courts do not descend into the details to ask whether the employee actually needed the income to sustain himself or herself. A narrower claim might be that the level of substitute income is treated as being practically involuntary, given that most employees are price-takers, with remuneration being set by reference to prevailing market conditions or industrial awards.

To be useful, the norm of voluntary conduct must be reified through a tighter and more precise standard. Whatever standard is chosen, assessing voluntariness will inevitably be a matter of degree. Hart and Honoré defined 'voluntary' human acts or omissions as being free, deliberate and informed, and intended to exploit the situation created by the defendant's wrong.[103] Various objections can be made to this definition as a test for intervening

[100] McGregor (n 3) 250 [9-004]–[9-005].

[101] *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 506 (Lord Macmillan); *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5, 9 (Yeldham J); *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614, 634 (Browne-Wilkinson LJ); *Karacominakis* (n 33) [187] (Giles JA, Handley JA agreeing at [1], Stein JA agreeing at [2]); *Wilding v British Telecommunications plc* [2002] ICR 1079, 1100 [55] (Sedley LJ).

[102] In a different respect, this conclusion may be logically necessary under Hart and Honoré's model. The income the employee earned (or ought to have earned) must be connected back to breach so that it can be accounted for as an offsetting benefit: Hart and Honoré (n 83) 137, 141.

[103] Ibid 41, 136.

causation generally.[104] For mitigation, it still suffers from some of the linguistic awkwardness just mentioned. More importantly, the qualifications to Hart and Honoré's definition carry the burden of rationalising the apparently exceptional cases. Conduct that is deliberate and informed (at least about the breach itself) is generally implicit in mitigation. Exploitation is not necessary: a promisee may fail to avoid loss out of indifference, misjudgment, intransigence or idiosyncrasy.

The most discriminating qualification is, therefore, freedom. Hart and Honoré's model drives them to say that pressure or lack of control, which prevents free choice, thereby renders conduct non-voluntary. On that basis, action to protect rights, privileges or commercial interests, or to meet legal obligations, may be non-voluntary.[105] Hart and Honoré concede that their qualifications may involve considerations of reasonableness.[106] It is not, they say, a question of policy at large, but a matter of weighing the action taken against the interest protected.[107]

The most serious criticism is that these qualifications mask the evaluative aspect of the inquiry.[108] Hart and Honoré's concession sheds no light on how to determine the interests to be protected, or the lengths to which the promisee may go to protect them. Reasonableness in fact and policy is at the forefront of the avoidable loss rule, not subsidiary. In *Fazlic v Milingimbi Community Inc*, discussing the plaintiff's refusal of post-injury treatment, the High Court observed:

> To regard the rule as founded upon causality is likely to distract attention from the true issue, the reasonableness of the refusal viewed in the light of the worker's knowledge … Yet one and the same ultimate physical state of disability can scarcely be said to have been 'caused' by the initial injury if the refusing worker was at the time unaware of certain facts concerning a recommended treatment (and hence was not unreasonable in his refusal) but to lack

[104] For example: (1) it does not openly account for the nature of the duty breached, instead trying to rationalise cases using other exceptions such as 'opportunities to do harm': ibid 197; and (2) requiring exploitation is too demanding: see, eg, *Quinn* (n 95); *McKew* (n 73).

[105] Hart and Honoré (n 83) 144–7.

[106] Ibid 156–7.

[107] Ibid 157.

[108] See Jane Stapleton, 'Law, Causation and Common Sense' (1988) 8(1) *Oxford Journal of Legal Studies* 111, 125, quoted in *March* (n 62) 534–5 (McHugh J).

> the necessary causal relationship when his refusal was made with knowledge which should have led to his acceptance of that treatment.
>
> The doctrine of mitigation of damage appears to us to provide a more rational basis for the rule.[109]

Hart and Honoré would presumably regard such conduct as non-voluntary because it was not sufficiently informed. Some of their qualifications provide good reasons for the law to scrutinise the promisee's conduct in mitigation, but they do not adequately explain the avoidable loss rule itself.

C *Reasonableness and Transfer of Reliance*

A more integrated model of the avoidable loss rule can be achieved through a different perspective, which explains the inception of the duty to mitigate and relates the rule to other causal norms. There are several elements. First, the rule embodies a particular standard — reasonableness — which can be applied in intervening causation. Secondly, an underlying norm justifies the use of this reasonableness standard. Thirdly, the norm is based on the idea of a transfer in reliance upon the contract. Integration occurs because the reliance concept affects other causal norms, notably, abnormality/culpability. Fourthly, the circumstances in which the transfer of reliance occurs also explain why the standard of reasonableness is in some respects more demanding than standards applied for other causal norms. The first element requires no further elaboration. The sections below explain the other three elements.

1 *Reliance upon the Contract*

The concept of reliance is modest and concerns causation only. It does not depend upon adopting a reliance theory of contract. It is not concerned with reliance damages; indeed, avoidable loss cases are typically about consequential losses, or expectation losses as they relate to procuring substitutes for performance. Nor is it concerned with pre-contractual reliance by the promisee upon the promisor as a basis for incorporation or implication of terms.[110]

Upon entering a contract, the promisee is entitled to assume that the executory promises made to it will be performed and that other promises (such as warranties of a state of affairs or negative covenants) will be complied with. That assumption continues through to and beyond the time for

[109] *Fazlic* (n 10) 353 (Stephen, Mason, Murphy, Aickin and Wilson JJ).

[110] See, eg, *Goods Act 1958* (Vic) s 19(a) (implied condition of fitness for purpose).

performance or compliance. Thus the promisee can, subject to certain limitations,[111] assume that the promise has been performed or complied with. This form of reliance is a generalisation of a well-established line of authority going back to the late 19th century.[112] A common pattern of events was as follows. The promisee acquired goods from the promisor under contract and then used them, or resupplied them to another, without first checking that they met contractual specifications. The goods were defective and this led the promisee to incur a liability to a third party. The promisee's liability might be strict, as in a case of resale with warranties as to quality, or it might be based upon negligence (direct or vicarious) towards the third party. Either way, the promisor could, subject to remoteness, be held liable for the full amount of the promisee's liability even though the promisee had contributed to it, in some cases by carelessness.

From these origins, the reliance concept expanded and developed. It is most often seen in connection with sale of goods,[113] but it applies in principle to all contracts.[114] It prevailed despite the introduction of statutory contribution among tortfeasors.[115] And there is no logical distinction between compensation for a third-party liability and a personal loss. The limits of the principle have been disputed in the course of its development.[116] It has been said, for example, that the promisor must have warranted that the promisee

111 See below nn 117, 130 and accompanying text.

112 *Mowbray v Merryweather* [1895] 2 QB 640 ('*Mowbray*'); *Scott v Foley, Aikman & Co* (1899) 16 TLR 55 ('*Scott*'). See also *Becker v Medd* (1897) 13 TLR 313.

113 See, eg, *Pinnock Brothers v Lewis & Peat Ltd* [1923] 1 KB 690, 698 (Roche J); *GC Dobell & Co Ltd v Barber* [1931] 1 KB 219 (statutory warranty); *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd* [1933] 2 KB 141, 198 (Greer LJ) (dissenting in the result); *Sheahan v Stockman* (1922) 22 SR (NSW) 415 ('*Sheahan*'); *St Vincent's Hospital (Melbourne) Inc v University of Adelaide* [2002] VSC 297, [37]–[39] (Warren J) ('*St Vincent's Hospital*'); *Regal Pearl Pty Ltd v Stewart* [2002] NSWCA 291, [81]–[93] (Stein JA, Sheller and Hodgson JJA agreeing); *Shark Fin Burwood Pty Ltd v Ducgo Pty Ltd* [2003] VSCA 20; *Rolfe* (n 77).

114 See, eg, *Mowbray* (n 112); *Hadley v Droitwich Construction Co Ltd* [1968] 1 WLR 37 (supply of goods) ('*Hadley*'); *The Kate* [1935] 1 P 100 (lease); *Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588 ('*Florida Hotels (High Court)*'); *Simonius Vischer* (n 70) 346–7 (Samuels JA); *Marr (Contracting) Pty Ltd v White Constructions (ACT) Pty Ltd* (1991) 32 FCR 425 ('*Marr*'); *Queensland Ice Supplies Pty Ltd v Anco Australasia Pty Ltd* [2000] QSC 72, [22]–[25] (Chesterman J) (services); *Scott* (n 112); *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd* [1955] 2 QB 68 ('*The Stork*') (charterparty).

115 *Sims v Foster Wheeler Ltd* [1966] 1 WLR 769, 777 (Russell LJ, Scarman J agreeing at 778).

116 See, eg, *Hadley* (n 114) 43 (Winn LJ); *Lexmead* (n 74) 247–8 (Stephenson LJ) (Court of Appeal), 277 (Lord Diplock) (House of Lords); *Betts v White Constructions (ACT) Pty Ltd* (1990) 100 FLR 192, 207 (Kelly J); *Marr* (n 114) 441–2 (Burchett J); *Betts v White Constructions (ACT) Pty Ltd [No 2]* (1992) 107 FLR 352, 359–60.

need not take the very precaution that it has failed to take.[117] This view is misleadingly narrow and demands an unrealistic degree of prevision by the promisor. Devlin J stated the principle more broadly, and accurately, in *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd*:

> [G]enerally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not.[118]

The promisee is entitled to rely upon two assumptions. This entitlement may be modified or excluded by contrary terms in the contract.[119] The first assumption concerns performance of the contract itself; that is, that the terms of the contract have been or will be (as the case may be) performed or complied with. This will be called the 'compliance assumption'. The second concerns the existence of a state of affairs that would be generated by performance of, or compliance with, the terms of contract. This will be called the 'results assumption'. These assumptions can be applied divisibly to each term as appropriate. Where the promisor's duty is strict — for example, a warranty that goods are fit for purpose — the promisee is entitled to assume achievement of the promised result. For lesser duties, such as duties of care or duties to exert reasonable endeavours, the results assumption cannot be so strong. The promisee can only assume that reasonable care has been taken or reasonable endeavours exercised.[120] For causal purposes, however, it appears that the promisee is sometimes able to proceed, without verification, on the basis that the promisor's performance was probably successful or accurate.[121]

[117] *Hadley* (n 114) 43 (Winn LJ).

[118] *The Stork* (n 114) 77, cited with approval in *Reardon Smith Line Ltd v Australian Wheat Board* [1956] AC 266, 282 (Lord Somervell for the Court), *Simonius Vischer* (n 70) 347 (Samuels JA) and *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, 229–30 (Beldam LJ).

[119] See below nn 168–71 and accompanying text.

[120] See *Marr* (n 114) 441–2 (Burchett J); *Trebor Bassett Holdings Ltd v ADT Fire & Security plc* [2011] BLR 661, 683–4 [553] (Coulson J) ('*Trebor Bassett Holdings (Trial)*').

[121] *Florida Hotels (High Court)* (n 114) 601 (Windeyer J), referring with approval to the dissenting judgment of Sugerman J in *Mayo v Florida Hotels Pty Ltd* [1964–65] NSWR 1127; see especially at 1134–5 (Sugerman J) ('*Florida Hotels (NSW Supreme Court — Full Court)*'); *Redken Laboratories (Aust) Pty Ltd v Docker* (2000) Aust Contract Reports ¶90-113, 91234 [45] (Sheller JA, Davies AJA agreeing at 91240 [83]), 91238–9 [70]–[73] (Fitzgerald JA). See also *Trebor Bassett Holdings (Trial)* (n 120) 683–4 [551]–[554] (Coulson J), criticised on a different point on appeal: *Trebor Bassett Holdings Ltd v ADT Fire & Security plc* [2012] 1 BLR

Some contracts for professional or specialist services, or contractual duties to guard against particular risks, may be examples.

These assumptions perform several functions. For the causal norm of abnormality/culpability, they may have less work to do nowadays than a century ago, because of the relaxation of causal influence.[122] The promisee's omission operates along with the promisor's breach as a concurrent cause. The continuing significance of the reliance concept is, then, twofold. It shows that the promisee's conduct in relying upon the compliance assumption or results assumption is a 'normal' causal event. Conversely, failing to check compliance with the contract or the results of compliance is not, of itself, causally abnormal or culpable against the applicable standard. For the avoidable loss rule, the compliance assumption is significant because it affects the inception of the duty to mitigate. The results assumption is not directly relevant.

2 *Ending Reliance upon the Contract*

The compliance assumption and the results assumption may each be falsified. This occurs when the promisee gains sufficient knowledge of facts contrary to the assumption, as, for example, when it discovers that the promisor has breached the contract. The material upon which this assessment is made includes information concerning the performance actually rendered, the promisor's capacity to perform, and any warning signs of breach. It also includes statements by the promisor about its own performance.[123] The promisee's entitlement to rely upon an assumption ends when it is falsified.

What constitutes 'sufficient knowledge' is controversial. The issue arises particularly in relation to the compliance assumption, because the duty to mitigate begins when this assumption fails.[124] The degree of knowledge of breach required must be the same. The case law has coalesced around two positions. One is that the promisee must actually know, to a reasonable degree of certainty, that breach has occurred as a matter of fact.[125] Actual knowledge

441, 465 [67]–[69] (Tomlinson LJ) ('*Trebor Bassett Holdings (Appeal)*'). Cf below nn 172–3 (insurance broker cases).

[122] See *Marr (Contracting) Pty Ltd v White Constructions (ACT) Pty Ltd* (n 114) 435 (Beaumont J). See above n 70.

[123] See, eg, *UBC Chartering Ltd v Liepaya Shipping Co Ltd* [1999] 1 Lloyd's Rep 649, 672 (Rix J); *Six Continents* (n 62).

[124] Another view is that the duty to mitigate commences upon breach, but that the promisee can only ever be regarded as acting unreasonably after it possesses sufficient knowledge of breach.

[125] *Youell* (n 10) 461–2 (Phillips J); *St Vincent's Hospital* (n 113) [37] (Warren J); *Schering Agrochemicals Ltd v Resibel NV SA* (England and Wales Court of Appeal — Civil Division,

or comprehension has been treated as relevant in other aspects of mitigation, for example, in connection with decisions to undergo or refuse medical treatment,[126] and to accept or reject offers from the defendant.[127] The other position adopts an objective standard: it is enough that a reasonable person in the promisee's position would realise that there is a breach or, perhaps, would be prompted to take steps that would lead to that discovery.[128]

The reliance thesis accommodates actual knowledge of breach, or knowledge that would indicate breach to a reasonable person. The mere prospect of discovering breach through further investigation goes too far.[129] The objection to requiring actual knowledge is that it rewards ignorance. Causal norms still operate but, according to the standard used for abnormality/culpability, there must be substantially unusual or culpable conduct. This leaves a gap into which falls the unreasonably, but not extraordinarily, ignorant promisee. The gap is not as troublesome as it first appears. It can be filled to some extent by contributory negligence, though the mechanism is limited in Australian jurisdictions[130] to contractual duties of care that are concurrent and co-extensive with tortious duties.[131] There is also a point about consistency between the avoidable loss rule and causal

Purchas, Nolan and Scott LJJ, 26 November 1992) (Scott LJ) ('*Schering Agrochemicals*'); *RW Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1992) 11 BCL 74, 141 (Giles J) ('*RW Miller*'). Remarks in *Burns* (n 11) may also support this view: at 656 (Gibbs CJ), 667–8 (Wilson, Deane and Dawson JJ), 676 (Brennan J). Cf *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 QB 459, 493–4 (Devlin J) (CIF contract, sellers' agents falsifying shipment date on bills of lading); *Arnott* (n 33) 423 [155] (McColl JA, Basten JA agreeing at 431 [210]).

126 *McAuley* (n 27) 505 (Jenkins LJ); *Karabotsos v Plastex Industries Pty Ltd* [1981] VR 675; *Fazlic* (n 10) 350; cf at 352–3 (Stephen, Mason, Murphy, Aickin and Wilson JJ); *Geest plc v Lansiquot* [2002] 1 WLR 3111. But in none of these cases does it appear that the plaintiff was unreasonably ignorant of the relevant information.

127 *Copley* (n 48) 897–8 [20]–[21] (Longmore LJ, Jacob LJ agreeing at 901 [34], Waller LJ agreeing at 901 [35]).

128 *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep 569, 578 (Brandon J); *Schering Agrochemicals* (n 125) (Nolan LJ); *County* (n 70) 858–9 (Hobhouse LJ); *Bak v Glenleigh Homes Pty Ltd* [2006] NSWCA 10, [4]–[8] (Handley JA). See also Edwin Peel, *The Law of Contract* (Sweet & Maxwell, 14th ed, 2015) 1188 [20-115]. Cf *Sherson & Associates Pty Ltd v Bailey* (2001) Aust Torts Reports ¶81-591, 66503 [77] (Heydon JA).

129 See below n 167 and accompanying text.

130 Some Canadian decisions have been more adventurous and apportioned loss at common law, to recognise a form of 'anticipatory mitigation': see *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1982) 139 DLR (3d) 329, 340–1 (Saunders J); *Cosyns v Smith* (1983) 41 OR (2d) 488.

131 See, eg, *Wrongs Act 1958* (Vic) ss 25, 26; *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) ss 8, 9.

abnormality/culpability. The promisee's carelessness is generally insufficient to defeat its claim as a matter of causation. It seems incongruent to allow careless ignorance of breach to enliven the duty to mitigate which then, for the ignorant promisee, may well lead to its claim failing by a different route.

Reliance on the results assumption can end in another way. The assumption holds at the time fixed for performance of, or compliance with, the relevant term. For how long it continues to be reliable afterwards depends on the nature of the term and intervening circumstances. This point lies at the heart of *Lexmead*. A towing hitch attached to a farmer's vehicle failed and the trailer being towed detached, causing a serious accident. The farmer claimed damages against the retailer in respect of his own liability in negligence for the collision. The design of the hitch contained a defect affecting the internal locking mechanism, which kept the towing pin in place. It could not have been detected by an ordinary user. But the farmer had continued to use the towing hitch, with its spindle and handle missing, for three to six months. He must have known that the handle was missing, and that the operation of the locking mechanism also depended upon the handle.[132]

Lord Diplock held that there was a 'continuing' warranty that the towing hitch was fit for purpose for a reasonable time after delivery, so long as it remained in the same apparent state.[133] The accident occurred within that time, but the towing hitch was not in the same apparent state and the farmer knew of this. Therefore, there was no warranty upon which the farmer could rely.[134] Lord Diplock's reasoning is uncharacteristically oblique.[135] There was no ongoing promise of fitness. It was a once-and-for-all term, assessed at the time of delivery.[136] The farmer's case was somewhat unusual in two respects: he was claiming for consequential loss, not difference in value; and he was not merely trying to use the later defective condition of the goods as evidence of

[132] *Lexmead* (n 74) 235–8 (Stephenson LJ) (Court of Appeal).

[133] Ibid 276 (Lord Diplock) (House of Lords). Lord Diplock had expressed a similar view in *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 WLR 862, 866–7 (Diplock J) (goods under a CIF or C & F contract must remain merchantable for a reasonable time, up to arrival) (later reversed on other grounds in *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1962] 1 WLR 16 and distinguished in *Cordova Land Co Ltd v Victor Brothers Inc* [1966] 1 WLR 793, 795–6 (Winn J)).

[134] *Lexmead* (n 74) 276–7 (House of Lords).

[135] For criticism, see Michael G Bridge, 'Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain: Lambert v Lewis' (1982) 6(2) *Canadian Business Law Journal* 184.

[136] See Michael Bridge (ed), *Benjamin's Sale of Goods* (Sweet & Maxwell, 10th ed, 2017) 557–8 [11-035], 564 [11-044], 573 [11-061].

unfitness upon delivery. The farmer was seeking to rely, at a later time, upon a state of affairs produced by assumed compliance with the contract at an earlier time. The only way in which he could do that was to assume that the goods had the warranted quality at that earlier time.

Since the goods were intended to be used over an extended period, on Lord Diplock's view, the warranty of fitness for purpose included an aspect of durability.[137] The promisee was thereby entitled to infer that goods that were fit for purpose at the time of delivery would continue to be fit for a reasonable period thereafter. That inference had to be qualified, because later events might intervene to affect the goods; hence, Lord Diplock's requirement that the goods remain in the same apparent state.[138] The results assumption upon which the farmer sought to rely had ceased to operate because of intervening events.

3 *Consequences of the End of Reliance*

The promisee loses the protection of the results assumption, the compliance assumption or both, as the case may be, from this point onwards. The effect upon the causal norm of abnormality/culpability can be addressed shortly. The promisee cannot invoke the assumption or assumptions to establish that its subsequent conduct was 'normal' and, therefore, that the consequences were caused by breach. This does not mean that the promisee's conduct is necessarily abnormal or culpable; the conduct must still be assessed against the applicable standard. The promisee's knowledge of the circumstances is an important factor in the assessment. The greater its awareness of a deviation from the expected results of performance, or its awareness of breach itself, the narrower the range of 'normal' or 'non-culpable' behaviour in the circumstances.[139]

The avoidable loss rule is enlivened when the promisee's entitlement to rely on the compliance assumption ends. The promisee is expected to act reasonably to minimise the adverse consequences of breach. In this way, the rule effects a transfer in the promisee's reliance upon the contract, from promisor-reliance to self-reliance. Anglo-Australian law has not adopted the exception, found in the United States,[140] which exempts the promisee where

[137] *Lexmead* (n 74) 276 (House of Lords). See also ibid.

[138] *Lexmead* (n 74) 276 (House of Lords).

[139] See above n 82 and accompanying text.

[140] See, eg, *SJ Groves & Sons Co v Warner Co*, 576 F 2d 524 (3rd Cir, 1978); *Toyota Industrial Trucks USA Inc v Citizens National Bank of Evans City*, 611 F 2d 465 (3rd Cir, 1979). See also Michael B Kelly, 'Defendant's Responsibility to Minimize Plaintiff's Loss: A Curious

the promisor has an equal opportunity to mitigate by the same act and it is reasonable that it does so.[141] The reliance thesis is offered as a pragmatic account of the present law. It is a fair question whether the law should operate in this manner, effectively absolving the promisor of further involvement after breach. The answer depends upon a view about the deeper philosophical foundations of mitigation. Different theories can be put forward, including morality or altruism;[142] economic efficiency and avoidance of waste;[143] fairness;[144] good faith co-operation; and remedial minimalism or self-help.[145] It suffices to say that the reliance thesis could be compatible with several of them.

A standard of reasonableness, rather than abnormality or significant culpability, is used because the avoidable loss rule evaluates decisions made by the promisee in response to breach. The promisee's response possesses three qualities. First, the promisee is sufficiently aware of the breach to appreciate the need for a response. This is regulated by the knowledge requirement.[146] Second, the response may be an act or omission. Either way, it is, or is deemed to be, the product of a deliberate choice. The choice will often be consciously made after due consideration. Omissions, even if through tardiness or indifference, can still be regarded as deliberate choices if the promisee had the opportunity to act. Third, the promisee's response is referable to the breach of contract. A decision made by the promisee is not reviewable under the

Exception to the Avoidable Consequences Doctrine' (1996) 47(2) *South Carolina Law Review* 391.

141 Though this may affect what is reasonable to expect from the promisee: *Criss* (n 51) 595 (Street CJ).

142 See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press, 2nd ed, 2015) 131; Charles Fried, 'The Convergence of Contract and Promise' (2007) 120 *Harvard Law Review Forum* 1, 7–8. But see Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120(3) *Harvard Law Review* 708, 724–6.

143 See, eg, Perillo (n 3) 301–2 (§ 57.11) ('least necessary cost' to defendant); Charles J Goetz and Robert E Scott, 'The Mitigation Principle: Toward a General Theory of Contractual Obligation' (1983) 69(6) *Virginia Law Review* 967; Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (n 1) 404–5; SM Waddams, *The Law of Contracts* (Canada Law Book, 6th ed, 2010) 563–4, 571.

144 George Letsas and Prince Saprai, 'Mitigation, Fairness and Contract Law' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 319.

145 Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (n 1) 409–10; Katy Barnett, 'Substitutive Damages and Mitigation in Contract Law' (2016) 28 (Special) *Singapore Academy Law Journal* 795, 800.

146 See above n 124 and accompanying text.

avoidable loss rule merely because it comes after breach in time. It must be reasonably connectable to mitigation of the consequences of breach.[147]

IV Testing the Model

This section tests the model against the case law. It is divided, temporally, into three intervals: the period before breach; the period from breach until the promisee becomes aware of breach, so that the duty to mitigate begins; and the period from that latter point onwards.

A *Before Breach*

Neither intervening causation nor the avoidable loss rule is relevant before breach. The point is seen most clearly in the promisee's freedom not to accept an anticipatory repudiation[148] and in the absence of any general requirement to take precautions against a possible breach.[149] The reliance thesis does, however, raise the question about the inception of the duty to mitigate. The promisee's reliance on the compliance assumption continues until it is falsified by other events. Why should not advance indications of unwillingness or inability to perform, or even a bad 'track record' of prior performance,[150] be sufficient?

As the law presently stands, one line of analysis excludes the promisee's election, to terminate or affirm, from review under the avoidable loss rule.[151] Even if that is right, it does not account for other possible responses. A more general reason is that it would impose too heavy a burden upon the promisee

147 Cf *Esplin v Murray* [1999] NSWSC 338, [63], [67] (Dowd J) ('*Esplin*').

148 *Tredegar Iron & Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 TLR 716; *Shindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038, 1048 (Diplock J). Cf the position in the United States, where an anticipatory repudiation itself permits a claim for damages, subject to mitigation: see American Law Institute, *Restatement (Second) of Contracts* (1981) § 253, § 350 cmt (f); *Uniform Commercial Code* (Westlaw 2018) § 2-610; JW Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2011) 572–4 [11-53]–[11-56].

149 A requirement may arise by the terms of the contract, and a failure to take precautions may still be relevant to contributory negligence for breaches of contractual duties of care. Cf *Hi-Lite Electrical Ltd v Wolseley UK Ltd* [2011] BLR 629, 638 [206]–[207] (Ramsey J) (failure to take precautions between (unknown) breach and damage not breaking causal connection).

150 *Flanagan v Greenbanks Ltd* [2013] EWCA Civ 1702, [53] (Macur LJ) (dissenting); but see at [34] (Rafferty LJ) ('*Flanagan*').

151 See below n 235.

to expect it to anticipate breach and take precautions against it. Nor should the promisee have to second-guess the promisor's original assurance of performance until it is broken. Foreshadowed events may not eventuate. A poor history of performance may be improved. An anticipatory repudiation may be retracted. (This explanation is, admittedly, less convincing when applied to factual inability.) Since non-performance is within the province of the promisor and the promisee is the innocent party, the promisee, not the promisor, should be favoured during the period of uncertainty until breach actually occurs.

These explanations can be accommodated in two ways. They may justify the promisee's continued reliance upon the compliance assumption, which forestalls the avoidable loss rule. Or, if the assumption fails and the avoidable loss rule applies, they may justify as reasonable the promisee's inaction until breach. The latter view has its attractions, but the former view best fits with the present law. Advancing the inception of the duty to mitigate has implications for other aspects of mitigation. There is the thorny question of liability for costs or expenses incurred by the promisee in anticipating a breach which never materialises, or which turns out to be less serious than expected.[152] McGregor's third rule, on accounting for benefits obtained by the promisee through breach,[153] would also need to be reappraised.

B *From Breach until Sufficient Awareness of Breach*

This period covers diverse patterns of events. The focus of the analysis below is upon the promisee's comprehension of, or response to, the circumstances created by breach. This is where the avoidable loss rule and causation are most likely to be conflated. Several other situations falling into this period can be noted briefly. There are cases where the promisee acts normally but the promisor's breach has exposed it to some existential risk which then materialises. The paradigm example is that of a company which, due to its auditors' negligence, continues to trade and, in doing so, incurs losses.[154] The auditors are generally not liable, but this is for reasons other than the

[152] Cf *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510, 603–4 (Pincus J); *Hatfield v TCN Channel Nine Pty Ltd [No 2]* [2011] NSWSC 737, [43]–[61] (Simpson J) (defamation); Donal Nolan, 'Preventive Damages' (2016) 132 (January) *Law Quarterly Review* 68.

[153] McGregor (n 3) 250 [9-006].

[154] See, eg, *Alexander* (n 70); *Galoo Ltd (in liq) v Bright Grahame Murray* [1994] 1 WLR 1360.

company's conduct being treated as a superseding cause.[155] Other possibilities are that the promisee's conduct is abnormal or significantly culpable in a respect unrelated to breach,[156] or that its conduct is not abnormal but its combination with breach and other events is very unusual or coincidental.[157]

According to the reliance thesis, the compliance assumption still holds during this period; the duty to mitigate has not commenced. The promisee should only be disqualified by its conduct on causal grounds, by reference to standards implementing norms such as abnormality or culpability. Given that the results assumption operates as a shield, we might expect culpability to be a critical factor where the results assumption is challenged or fails. Four situations are considered below: (1) where the promisor's duty is to protect the promisee against a particular risk, which materialises; (2) where the promisee fails to check the promisor's compliance with the contract or the results of compliance; (3) where the promisee fails to heed warnings of a danger or of a breach of contract; and (4) related transactions with third parties.

1 *Duties to Guard against Particular Risks that Materialise*

This situation is the most favourable to the promisee because the nature of the duty reinforces the results assumption. The duty would be eroded if the promisee's failure to address the very same risk defeated its claim on causal grounds.[158] *Florida Hotels Pty Ltd v Mayo* ('*Florida Hotels (High Court)*') is the leading Australian case.[159] The employer retained architects to supervise construction work at its hotel. The work was done by employees and tradesmen without any head builder. An employee was injured through a combination of inadequate supervision by the architects and carelessness by

[155] The auditors' breach, as a matter of causation, may not relevantly increase any *particular* risk of loss; alternatively, the auditors' scope of duty is limited.

[156] See *Hardchrome Engineering Pty Ltd v Kambrook Distributing Pty Ltd (in liq)* [2000] VSC 359, [434], [487]–[488] (Gillard J), where the plaintiff was fortunate to succeed on causation. Causation may overlap here with scope of duty: *Snorkel Elevating Work Platforms Pty Ltd v Borren Metal Forming Ltd* (2010) 5 ACTLR 42, 55 [53], 58–9 [73], 60 [82] (Gray P, Refshauge and Cowdroy JJ) (defective component subjected to forces it was not intended to bear).

[157] Cf *Vaile Brothers v Hobson Ltd* (1933) 149 LT 283 (repairer's breach still causing loss despite vehicle owner's separate failure to connect engine switch).

[158] A similar approach is taken for decisions made by directors of the plaintiff company: *British Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] 3 All ER 667; *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64, 146 [344] (Doyle CJ, Duggan and Bleby JJ). The promisee may still be guilty of contributory negligence: *Astley* (n 77) 14 [29]–[30] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Reeves* (n 62).

[159] *Florida Hotels (High Court)* (n 114). See also *Derbyshire Building* (n 77) 653 (Kitto J); *RW Miller* (n 125) 139 (Giles J); *Six Continents* (n 62) [22] (Laws LJ).

other employees, for which the employer was responsible. The High Court held, reversing the majority of the Full Court of the Supreme Court of New South Wales,[160] that the architects had breached the contract by failing to exercise reasonable care and skill in their supervision.[161] The employer was entitled to damages for the whole amount of its liability to the injured employee.[162] Barwick CJ explained that the architects' duty did not need to be specific, such as a duty to protect workers or to protect the employer against liability to employees.[163] The risk fell within the scope of the general duty to supervise the work.

Florida Hotels (High Court) was a straightforward case because the employer was liable for breach of its non-delegable duty to the employee; at worst, the employer may have been personally negligent. This falls below the standard of culpability ordinarily required to break the causal connection. Whether more culpable conduct remains causally connected to breach will depend on the promisor's duty. In principle, a contractual duty could extend to preventing some kinds of reckless or deliberately harmful conduct by the promisee.[164] Causation could then be explained either on the basis that the results assumption extends *pro tanto*, or simply because the duty would otherwise be undermined. The latter is probably more plausible for conscious wrongdoing. In contrast, in *Mallesons Stephen Jaques v Trenorth Ltd* ('*Mallesons Stephen Jaques*'), solicitors were not liable to their client, a vendor of property, when the client used an inaccurate document negligently prepared by them to make fraudulent misrepresentations to the purchaser.[165] The act was beyond the scope of the solicitors' duty. The usual standard of culpability applied. Being a deliberate act of dishonesty, it broke the causal connection.[166]

[160] *Florida Hotels (NSW Supreme Court — Full Court)* (n 121) (Richardson and Macfarlan JJ, Sugerman J dissenting).

[161] *Florida Hotels (High Court)* (n 114) 594 (Barwick CJ, Kitto J agreeing at 599, Taylor J agreeing at 599, Menzies J agreeing at 599), 601 (Windeyer J).

[162] Ibid 599 (Barwick CJ, Kitto J agreeing at 599, Taylor J agreeing at 599, Menzies J agreeing at 599).

[163] Ibid.

[164] Cf *Reeves* (n 62) (tort). See also the cases on contractual duties to guard against wrongful acts by third parties: *Stansbie v Troman* [1948] 2 KB 48; *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd* (1981) 148 CLR 304.

[165] *Mallesons Stephen Jaques* (n 78).

[166] Ibid 728 [1] (Callaway JA), 736–7 [25] (Kenny JA, Buchanan JA agreeing at 745 [16]).

2 *Failure to Check*

This category of cases has been discussed already, in connection with the development of the reliance concept. The compliance and results assumptions operate but, unlike cases in the 'duty to guard' category, the results assumption is not directly reinforced by the contractual duty. Nor is there any reason to deviate from the usual standard of causal abnormality or culpability, as there may be in the 'duty to guard' category.

One point can be made here about the degree of knowledge required to activate the duty to mitigate. It was said earlier that a subjective, or simple objective, standard of knowledge was compatible with the reliance thesis; it went too far generally to require the promisee to be proactive and discover breach.[167] The reason is that such a requirement would conflict with the compliance and results assumptions that protect the promisee. If the law were otherwise, many more cases would be decided on the basis of a failure to mitigate at all or to mitigate sooner.

Flanagan v Greenbanks Ltd is a neat illustration.[168] There was an oral agreement between surveyor and installer to install insulation in customers' premises. The surveyor was to assess the premises for suitability and, if suitable, the installer would proceed with installation. The surveyor breached the contract by wrongly endorsing two homes as suitable; the installer proceeded without further inspection.[169] The English Court of Appeal rightly approached the issue as one of causation. There was nothing to falsify the compliance assumption and so enliven the duty to mitigate. The majority concluded that the surveyor's breach was a cause of the installer's loss, notwithstanding the installer's omission.[170] Although the case was close to the line, the majority's decision was, with respect, right. In proceeding, the installer was relying upon the results assumption. Subject to a possible argument about the assumption expiring because of the delay between survey and installation (some 11 months),[171] it was entitled to do so. Its failure to check was not, therefore, causally abnormal or significantly culpable.

An exception to the general rule may exist between brokers and prospective insureds in the preparation of proposals for insurance. An insured may suffer a loss because its insurer later denies cover for an insured event on

[167] See above n 129.

[168] *Flanagan* (n 150). See also *St Vincent's Hospital* (n 113) [37] (Warren J).

[169] *Flanagan* (n 150) [3], [7]–[15] (Rafferty LJ).

[170] Ibid [41] (Rafferty LJ), [59] (Kay LJ).

[171] Ibid [19] (Rafferty LJ).

the ground of non-disclosure or misrepresentation in the proposal. The insured's failure to check and correct an inaccurate proposal filled in by its broker may be treated as the real cause of its loss, superseding the broker's negligence in preparing the proposal.[172] The rationale for the exception is that the insured is subject to a personal duty of disclosure to the insurer, and its contract with the broker must account for that duty.[173] Of course, the insured cannot recover if it knows of the error or omission and approves the proposal anyway.[174]

3 *Failure to Heed Warning*

In this category, the promisee receives some indication of danger, or of breach, before loss occurs. At one end of the spectrum, the promisor gives the promisee clear advance warning of the danger, which later eventuates due to the promisee's actions. What the promisee does not know, and cannot reasonably be expected to know, is that its exposure to the danger was caused by the promisor's breach of contract. These cases are decided on the basis of causation, assessed against the usual standard of culpability. Mere carelessness by the promisee, which causes the danger to materialise, does not break the causal connection.[175] The results assumption may have relatively little impact because the promisee is aware of the danger. It may, depending upon the promisor's duty, justify the promisee's particular perception of the nature or gravity of the danger in the circumstances.

More difficult are situations where the warning signs, whether from the promisor or elsewhere, are equivocal. The promisee may be alive to some risk but unsure whether this discloses a breach of contract. To have any impact, indications of the risk must be known to the promisee.[176] They must also be

[172] *O'Connor v BDB Kirby & Co* [1972] 1 QB 90; *Dunlop Haywards (DHL) Ltd v Barbon Insurance Group Ltd* [2010] Lloyd's Rep IR 149, 188 [264]–[265] (Hamblen J).

[173] The cases are not uniform; sometimes the insured's oversight is regarded as a concurrent cause: *Dunbar v A & B Painters Ltd* [1985] 2 Lloyd's Rep 616, 620 (Deputy Judge Pratt), affd [1986] 2 Lloyd's Rep 38. Cf *Dickson & Co v Devitt* (1917) 86 LJKB 315; *Youell* (n 10) 460–2 (Phillips J); *JW Bollom & Co Ltd v Byas Mosley & Co Ltd* [2000] Lloyd's Rep IR 136, 153 (Moore-Bick J); *Ravesi v National Australia Bank Ltd* [2014] FCA 99, [80]–[84] (Mansfield J); *ACN 068 691 092 Pty Ltd v Plan 4 Insurance Services Pty Ltd* (2012) 112 SASR 329, 354 [136]–[139] (Kelly J) ('*Plan 4 Insurance Services*').

[174] *Kapur v JW Francis & Co* [2000] Lloyd's Rep IR 361. Cf *Plan 4 Insurance Services* (n 173) 331 [4] (Anderson J), 355 [141] (Kelly J) (aware of inadequate cover).

[175] *Read v Nerey Nominees Pty Ltd* [1979] VR 47, 54–5 (Marks J) (non-functioning safety switch in vehicle); *Kim* (n 70) (manually-controlled gas valve).

[176] *Trebor Bassett Holdings Ltd (Appeal)* (n 121) 463–4 [64], 465 [67] (Tomlinson LJ, Richards LJ agreeing at 467 [78], Morritt C agreeing at 467 [79]).

clear,[177] though they need not point inevitably to breach. Four cases may be taken as examples:[178]

1 *Hunnerup v Goodyear Tyre & Rubber Co (Australia) Ltd* ('*Hunnerup*').[179] The driver of a vehicle noticed it sway from side to side on two occasions. A tyre deflated some distance later on the same journey, causing the vehicle to overturn. The driver had checked the tyres before starting off, but not after the swaying incident. Having been found liable in negligence to his passenger, he sued the retailer for breach of the implied terms of merchantable quality and fitness for purpose.

2 *RW Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* ('*RW Miller*').[180] A large coal-loading machine ran into buffers at the end of its rails while in operation. The owner made a brief inspection but found no evidence of damage. The machine resumed operations; a few days later, a major component collapsed, leading to extensive damage. The structural failure was attributable to various breaches by the contractor in the design and installation of the machine, and to damage sustained (but not detected) in the earlier buffer collision.

3 *Schering Agrochemicals Ltd v Resibel NV SA* ('*Schering Agrochemicals*').[181] Equipment supplied for use in a bottling production line had a defective safety system. The defect was not one which ordinarily would be detected by the purchaser. Forewarning was provided by an incident, after commissioning, in which there was a small explosion accompanied by a flash. The purchaser did not investigate further and production resumed. Several weeks later, a catastrophic fire broke out.

[177] Cases falling below the threshold include: *Sheahan* (n 113) 421–2 (Street CJ) (noticing seeds in chaff); *Rolfe* (n 77) 60152 [105] (Santow JA) (rumours that product was unsafe); *Six Continents* (n 62) (vague note from contractor suggesting something was amiss); *By Design Group Pty Ltd v Blackpool Rock Co Pty Ltd* [2008] WASCA 138, [40]–[46] (Martin CJ, Pullin JA agreeing at [61], Heenan AJA agreeing at [74]) (note recommending supervision of machine while in operation). Cf *Mouritz* (n 77) (placid horse becoming jumpy before run).

[178] See also *Vinmar International Ltd v Theresa Navigation SA* [2001] 2 All ER (Comm) 243, 263–4 [55] (Tomlinson J); *Trebor Bassett Holdings Ltd (Trial)* (n 120), affd *Trebor Bassett Holdings Ltd (Appeal)* (n 121) 465 [67] (Tomlinson LJ); see also at 465 [68]–[69], where Tomlinson LJ did not accept the trial judge's contingent conclusion on whether there was knowledge to break causation. Cf *Burns* (n 11) 667–8 (Wilson, Deane and Dawson JJ).

[179] (1974) 7 SASR 215 ('*Hunnerup*').

[180] *RW Miller* (n 125).

[181] *Schering Agrochemicals* (n 125).

4 *Lexmead*,[182] the facts of which were given earlier.[183]

The promisee succeeded in *RW Miller* but failed in the other three cases to recover compensation for the critical accident.

Failure to mitigate was not considered in *Lexmead*; dismissed as inapplicable in *RW Miller* because the promisee lacked knowledge of breach;[184] upheld in *Hunnerup* as an alternative ground;[185] and upheld by Nolan LJ[186] and, apparently, Purchas LJ in *Schering Agrochemicals*.[187] With the possible exception of *Schering Agrochemicals*, the promisee in each case was not sufficiently aware of the breach, even on an objective standard. The avoidable loss rule was irrelevant. It is not entirely clear what the purchaser in *Schering Agrochemicals* knew or ought to have known. At trial, Hobhouse J said that its employees 'were aware of the facts which constituted a breach of contract'.[188] He must have been applying an objective standard, taking into account that the warranty of fitness was a strict duty. The purchaser and its employees did not actually know of the defects in design, nor of breach as the underlying cause of the fire. Nolan LJ, who preferred the mitigation rationale on appeal, said that Hobhouse J meant no more than that 'they had actual knowledge of the danger to which the defective heat sealer gave rise'.[189] That raises a different point, which goes to causation and the results assumption.

Causation was relevant in all four cases (in *Schering Agrochemicals*, for Purchas LJ and Scott LJ) and decisively against the claim for the accidents in *Schering Agrochemicals*[190] and *Lexmead*.[191] The promisee's reliance on the contract was addressed in *Lexmead* and *Hunnerup*. In *Lexmead*, the results assumption had expired[192] for the reasons already mentioned.[193] In *Hunnerup*,

[182] *Lexmead* (n 74) 268–78 (House of Lords).

[183] See above n 132 and accompanying text.

[184] *RW Miller* (n 125) 140–1 (Giles J).

[185] *Hunnerup* (n 179) 230 (Jacobs J).

[186] *Schering Agrochemicals* (n 125) (Nolan LJ).

[187] Ibid (Purchas LJ).

[188] *Schering Agrochemicals Ltd v Resibel NV SA* (England and Wales High Court — Queen's Bench Division, Hobhouse J, 4 June 1991). See also *County* (n 70) 858–9, where Hobhouse LJ, discussing *Schering Agrochemicals* (n 125), stated that the first incident disclosed that the safety device did not work, in breach of contract.

[189] *Schering Agrochemicals* (n 125) (Nolan LJ).

[190] Ibid (Purchas LJ and Scott LJ). Nolan LJ would have arrived at the same result through causation.

[191] *Lexmead* (n 74) 277 (Lord Diplock) (House of Lords).

[192] Ibid 276 (Lord Diplock) (House of Lords).

Jacobs J was diverted from a thorough causation analysis by his Honour's preference for mitigation.[194] His Honour held that the principle derived from *Mowbray v Merryweather*[195] did not apply when the promisee was sufficiently aware of breach.[196] So much is right, but his Honour's reasoning conflated the compliance and results assumptions. The driver may have known enough to conclude that the tyre was dangerously unstable at the *time of the accident*. The results assumption was falsified. It did not follow that the driver knew or ought to have known of breach itself, so as to displace the compliance assumption. There were other plausible reasons for tyre failure. Indeed, Jacobs J's primary ground of decision was that the tyre failure was in fact caused by impact damage, not any inherent defect.[197]

The promisees in *Hunnerup* and in *Lexmead* were therefore unable to rely upon the results assumption. The same is true for the purchaser in *Schering Agrochemicals*: the spontaneous explosion indicated that the system was not working as intended. This did not conclude the causal analysis. There were still two competing causes of the loss: breach and the promisee's failure to respond to the evident danger. In *Lexmead*, Lord Diplock said that the issue of 'causation' was whether the farmer's negligence 'resulted directly and naturally, in the ordinary course of events, from the dealers' breach of warranty'.[198] That sounds very much like remoteness rather than causation. In any event, it missed the mark. It has never been the law that the buyer's negligence in failing to check the goods must be caused by the seller's breach; it usually occurs because the buyer wrongly assumes proper performance by the seller.[199]

Turning to causal abnormality or culpability, the ultimate question in all three cases was whether the promisee's conduct was sufficiently culpable as to break the causal connection. This is something upon which reasonable minds might differ. Although the trial judge in *Lexmead* acquitted the farmer of being 'reckless of the public safety',[200] it might be said that using the hitch in

193 See above nn 133–4 and accompanying text.

194 Cf *Hunnerup* (n 179) 227 (discussing causation in the claim against the manufacturer).

195 *Mowbray* (n 112).

196 *Hunnerup* (n 179) 229–30.

197 Ibid 228–9.

198 *Lexmead* (n 74) 277 (House of Lords).

199 In *Lexmead* (n 74), the manufacturer's advertising material stated that the hitch was 'foolproof' and 'required no maintenance'. This played no part in the reasoning of the Court of Appeal, as the farmer had never seen it: ibid 248 (Stephenson LJ).

200 *Lambert v Lewis* [1978] 1 Lloyd's Rep 610, 624 (Stocker J).

such an obviously damaged state (whether or not it was originally fit for purpose) was grossly negligent or foolish. It went beyond an ordinary degree of carelessness. The same view might be taken of the purchaser in *Schering Agrochemicals* and, with considerably less conviction, the driver in *Hunnerup*.

4 *Transactions with Third Parties*

These present an added complication. The promisor's breach of contract induces the promisee to enter a transaction with a third party. The promisee sustains loss because the third party refuses or fails to perform, though the promisee only later learns of the promisor's breach. In a typical case, a lender relies upon information negligently provided by a valuer to make a loan which, due to the inaccuracy of the information, is inadequately secured. The borrower defaults. The lender delays in enforcing the security and recovering the amounts owing, inflating the overall loss. It is only when the lender takes these steps that the error is discovered. In a variation on the same theme, an agent's false assertion of authority may mislead the promisee into believing it has a contract with the principal. Unaware of the agent's breach of warranty of authority, the promisee persists with the 'contract' until it becomes plain that the agent lacked authority.[201]

The promisee's claim against the promisor for its loss in the third-party transaction must take into account the promisee's conduct vis-à-vis the third party. It appears that a causal standard of serious culpability is too generous and that a more demanding standard of reasonableness applies.[202] As between the promisor and promisee, however, the promisee cannot have failed in law to mitigate, because it lacks sufficient knowledge of breach.[203] The standard of reasonableness must have a different source. It seems that the standard, which would apply in mitigation as between promisee and third party, is somehow transposed onto the relationship between promisor and promisee. One reason, specific to breach of warranty of authority, is that damages are generally awarded by reference to what the promisee could have recovered

[201] See also McGregor (n 3), 1216–17 [34-014] (expenses incurred in pursuing action against principal).

[202] See, eg, *Challenge Bank Ltd v VL Cooper and Associates Pty Ltd* [1996] 1 VR 220, 231–2 (Smith J); *Bristol & West Building Society v Fancy & Jackson* [1997] 4 All ER 582, 623–4 (Chadwick J); *The Mortgage Corporation v Halifax (SW) Ltd* [1999] Lloyd's Rep PN 159, 183–4 (Judge Laurie) ('*The Mortgage Corporation*') (loans); *Habton Farms v Nimmo* [2004] QB 1, 27 [92]–[95], 28 [99]–[100] (Clarke LJ), 34–5 [126]–[128] (Auld LJ) (breach of warranty of authority).

[203] But see *The Mortgage Corp* (n 202) 183 (Judge Laurie).

against the principal, had it been bound.[204] A more general explanation is that there is an underlying causal norm of equivalence; the promisee is entitled to no more favourable treatment against the promisor than it is against the third party. The promisee's failure to avoid loss in the third-party transaction is treated, causally, as an intervening event in relation to the promisor's breach of its contract with the promisee.

C *After the Promisee is Sufficiently Aware of Breach*

1 *Which Norm and Standard?*

In this period, the avoidable loss rule operates concurrently with other causal norms. Subject to some qualifications discussed below, the promisee's deliberate response to breach is apt to be evaluated using the rule. This is unremarkable for the vast majority of cases. It is surprising, then, that the majority of the High Court took a different approach in *Burns*. The plaintiff acquired a prime mover from the defendant, by way of a hire-purchase arrangement through a third-party finance company. The engine was warranted to be fully reconditioned. It was not, and it caused trouble right from the start, interfering with his interstate haulage business. About a year later, in July 1978, the engine was dismantled and the plaintiff became fully aware of its defective condition. Unable to afford full repairs, he arranged for minor repairs and then used the vehicle for less lucrative, intrastate carriage. This continued until the prime mover was repossessed in 1979. His business had operated at a loss the whole time.[205]

The Full Court of the Supreme Court of Queensland limited damages for the plaintiff's lost profits to the initial period of about a year, up to July 1978.[206] The High Court, by a 4:1 majority, agreed that losses beyond that point were not recoverable.[207] A different division, 3:2, used remoteness instead of mitigation.[208] With respect, the case was ripe to be analysed in terms of mitigation. The real issue was the adequacy of the plaintiff's response to the breach, once he was fully aware of it in July 1978. The standard was one

[204] See McGregor (n 3) 1211–12 [34-003]–[34-005].

[205] *Burns* (n 11) 656 (Gibbs CJ).

[206] *MAN Automotive (Aust) Pty Ltd v Burns* (1986) ASC ¶55-456, 56457 (Connolly J, Macrossan J agreeing at 56459).

[207] The majority comprised Gibbs CJ and Wilson, Deane and Dawson JJ. Brennan J dissented. Gibbs CJ drew a distinction between actual losses and lost expected profits: *Burns* (n 11) 660.

[208] Ibid 668–9 (Wilson, Deane and Dawson JJ); cf at 658 (Gibbs CJ), 675–7 (Brennan J).

of reasonableness. The factors considered by Gibbs CJ to identify a failure to mitigate were similar to those used by Wilson, Deane and Dawson JJ, who relied upon remoteness.[209]

Causal culpability, rather than unreasonableness in mitigation, may be preferred where the promisee executes a chosen course of action carelessly or in bad faith. Carelessness will often fall beyond the boundary of the avoidable loss rule because it cannot be regarded as a deliberate response to breach.[210] So, while a master's decision to comply with an order to a port known to be unsafe is generally assessed as a matter of reasonableness, subsequent negligence in handling the vessel is approached as a matter of culpability in causation.[211] Of course, the difference between careless execution and a deliberate, unreasonable decision can be a matter of perspective. *Quinn v Burch Bros (Builders) Ltd* is a well-known example.[212] The defendant breached the contract by failing to provide the plaintiff subcontractor with a step-ladder. He used an unsecured trestle as a makeshift step-ladder and was injured when it collapsed. On one view, the plaintiff's use of wholly unsuitable equipment was worse than ordinary carelessness; it was grossly careless or reckless.[213] This crossed the threshold of causal culpability, so there was no causation.[214] Alternatively, his deliberate choice to use the trestle could be regarded as an unreasonable response to breach:[215] he had failed to mitigate.[216]

[209] Ibid 660 (Gibbs CJ), 668–9 (Wilson, Deane and Dawson JJ). They differed on the significance of the plaintiff's impecuniosity: at 659 (Gibbs CJ), 668 (Wilson, Deane and Dawson JJ).

[210] See above n 146 and accompanying text.

[211] *Kristiandsands Tankrederi A/S v Standard Tankers (Bahamas) Ltd* [1977] 2 Lloyd's Rep 353, 363 (Parker J); *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2013] 2 All ER (Comm) 1058, 1096–7 [149], 1105–6 [173]–[174] (Teare J) (causation was not considered on further appeals: *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2015] 2 All ER (Comm) 894, 928 [65] (Longmore LJ) (Court of Appeal); *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2017] 1 WLR 1793, 1798 [8] (Lord Clarke) (Supreme Court)). Cf *The Stork* (n 114) 78 (Devlin J).

[212] *Quinn* (n 95). See also *Sayers v Harlow Urban District Council* [1958] 1 WLR 623. Cf *Beoco* (n 78) (reckless decision which could equally have been characterised as deliberate and unreasonable).

[213] See *Quinn* (n 95) 393 (Salmon LJ) (Court of Appeal).

[214] Ibid 391 (Sellers LJ), 391 (Danckwerts LJ), 394–5 (Salmon LJ) (Court of Appeal).

[215] Cf ibid 377 (Paull J) (High Court — Queen's Bench Division), 391 (Danckwerts LJ), 392 (Salmon LJ) (Court of Appeal).

[216] Though the Court of Appeal did not expressly associate their reasoning with mitigation: see ibid 388–9 (Sellers LJ) (duty to minimise loss by acquiring a substitute ladder).

For bad faith conduct, the causal perspective emphasises the promisee's culpability. Recall that in *Mallesons Stephen Jaques*,[217] the solicitors' client used an inaccurate, negligently-prepared document to perpetrate a fraud upon the counterparty. The Victorian Court of Appeal relied upon causation,[218] though the same result could have been reached under the avoidable loss rule. On the basis of the finding of fraud,[219] the client must have known that the solicitors had erred. The client, aware of the solicitors' breach, decided to exploit it and so eventually brought about its own loss. That conduct was patently unreasonable.

Although the avoidable loss rule and other causal norms may overlap in operation, their roles should be kept distinct. It is unnecessary, and confusing, to recognise another causal standard of 'reasonableness' which merely duplicates that applied by the avoidable loss rule.[220] Nor does the promisee's deliberate, voluntary conduct of itself inevitably break the causal connection; something more should be required.[221] In *Chand v Commonwealth Bank of Australia* ('*Chand (Appeal)*'),[222] some of Chand's investments were managed through a trading account with the bank. The bank breached the contract by failing to execute his instructions to redeem them. That failure became apparent to Chand within a few weeks. Had he reissued the instruction to sell at that time or soon after, he could have avoided any loss. Instead, he resolved to remain in the market and await a more opportune time to withdraw his investments. Their value later plummeted.[223] The New South Wales Court of

[217] See above n 165 and accompanying text.

[218] *Mallesons Stephen Jaques* (n 78) 733 [16] (Kenny JA, Callaway JA agreeing at 728 [1], Buchanan JA agreeing at 740 [39]).

[219] Ibid 736–7 [25] (Kenny JA).

[220] Cf *Chand (Trial)* (n 8) [280]–[283], [389]–[391] (Robb J); *Knott Investments* (n 10) 41 [43]–[45] (Muir JA, Holmes JA agreeing at 32 [1], Atkinson J agreeing at 43 [55]); *Shaw* (n 21) [6] (Cox CJ), [39]–[41] (Blow J); cf at [20], [27] (Spicer J) (misrepresentation inducing contract); *Compania Financiera 'Soleada' SA v Hamoor Tanker Corporation Inc* [1981] 1 WLR 274, 285 (Templeman LJ) (causation and McGregor's second rule); see above n 74 and accompanying text.

[221] See *Quinn* (n 95) (as explained above n 212 and accompanying text); *Carpenter* (n 95) 44 (Clarke JA) ('commercial decision' by vendor to retain property); *Fleeton v Fitzgerald* (1998) 9 BPR 16715 (surrender of sub-lease); *Esplin* (n 147) [65], [67] (Dowd J) (decision to retire); *Statewide Developments Pty Ltd v Higgins* (2011) 15 BPR 29195, 29207–8 [69]–[73] (Sackville AJA, Macfarlan JA agreeing at 29195 [1], Handley AJA agreeing at 29195 [2]) (vendor not using 'diligent efforts' to resell property: at 29207 [69]; losses 'the result of the vendor's own decisions or conduct': at 29208 [73]).

[222] *Chand (Appeal)* (n 10). See also *Chand (Trial)* (n 8).

[223] *Chand (Appeal)* (n 10) [10]–[34] (Ward JA).

Appeal, affirming the decision at first instance, held that the bank was not liable because the causal connection was broken by Chand's voluntary and deliberate act;[224] alternatively, because he had failed to mitigate.[225]

The result is not surprising. Chand's position was broadly analogous to that of a seller confronted with a buyer's non-acceptance of marketable securities,[226] though the issues of causation and mitigation arose in a purer form, unclouded by a conventional market measure. The emphasis on Chand's voluntary conduct echoes some justifications for the promisee being expected to resort to an available market. And an informed decision to retain the investments and speculate would even satisfy Hart and Honoré's stringent definition of voluntary conduct.[227] However, as explained above,[228] this is not the best perspective for the law of contract to adopt. The existence of choice is implicit in the avoidable loss rule. So far as the expectation of the promisee's resort to a market operates outside of measures of loss, it should be regarded as a particular instance of the standard of reasonableness in mitigation. It has the benefits of certainty and efficiency, and prevents the promisee speculating at the promisor's expense. The sounder basis for the conclusion in *Chand (Appeal)* was the failure to act reasonably in mitigation, not voluntariness in causation.

2 *Election to Terminate or Affirm the Contract, and Renewed Reliance on the Contract*

The promisee is not, in general, required to act fairly or reasonably in electing between termination and affirmation of the contract.[229] There are, of course, more specific limitations such as estoppel and relief against forfeiture.[230] Other limitations may be incidental to the promisee's remedy. This is one understanding of the 'legitimate interest' qualification from *White & Carter*

[224] Ibid [185] (Ward JA).

[225] Ibid [183] (Ward JA).

[226] See *Jamal v Moolla Dawood, Sons & Co* [1916] 1 AC 175. Cf *Ardlethan Options Ltd v Easdown* (1915) 20 CLR 285, 296–7 (Isaacs J, Powers J agreeing at 298), for the converse position.

[227] Hart and Honoré (n 83) 136. See also above n 103 and accompanying text.

[228] See above Part III(B).

[229] Carter, *Carter's Breach of Contract* (n 148) 492–8 [10-51]–[10-54].

[230] See also *Geys v Société Générale, London Branch* [2013] 1 AC 523, 565 [114] (Lord Sumption JSC) ('*Geys*') (Lord Sumption JSC ultimately dissented in relation to the final result) (right to affirm a contract 'has never been absolute').

(Councils) Ltd v McGregor ('*White & Carter*'),[231] which applies to claims for contract sums earned by the promisee continuing performance in spite of the promisor's breach or repudiation.[232]

In claims for unliquidated damages, it might be thought that the promisee's election — to affirm or to terminate — would be reviewable under the avoidable loss rule. The choice is, after all, one consciously made by or attributed to,[233] the promisee with sufficient knowledge of breach. Clear authority is surprisingly difficult to find.[234] In *Sotiros Shipping Inc v Sameiet Solholt* ('*The Solholt*'), Sir John Donaldson MR expressed the contrary view, holding that the promisee's election was not reviewable but that the avoidable loss rule then applied to subsequent conduct.[235] He gave no reasons. Introducing uncertainty into election is no doubt one consideration; a concern for coherence in the law is another.

Consider first the promisee's election to terminate. In *The Solholt*, the exemption recognised for election was effectively obliterated by the Court's conclusion that the buyer should have taken the initiative and offered to buy the vessel again at the original price in a rising market.[236] That was a remarkable commercial outcome. In assessing damages, the common law has most obviously curtailed termination by another route: causation. This went unmentioned in *The Solholt*.[237] A party who exercises a contractual right to terminate is not automatically entitled to loss of bargain damages.[238] One reason given is that the election to terminate, not the precipitating breach,

[231] [1962] AC 413 ('*White & Carter*').

[232] Ibid 430–1 (Lord Reid); cf at 445 (Lord Hodson). See also *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, 370 (Salmon LJ), 375 (Sachs LJ); *Clea Shipping Corp v Bulk Oil International Ltd* [1984] 1 All ER 129, 134, 137 (Lloyd J) ('*The Alaskan Trader*'); *Geys* (n 230) 556 [86] (Lord Wilson JSC).

[233] *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (Kitto J, Taylor J agreeing at 58, Menzies J agreeing at 60).

[234] Cf *Burns* (n 11) 660 (Gibbs CJ) (termination of a third-party contract). See generally Brian R Opeskin, 'Damages for Breach of Contract Terminated Under Express Terms' (1990) 106 (April) *Law Quarterly Review* 293, 313–15.

[235] *The Solholt* (n 65) 608.

[236] Ibid 609–10 (Donaldson MR), quoting *Sotiros Shipping Inc v Sameiet Solholt* [1981] 2 Lloyd's Rep 574, 580–1 (Staughton J).

[237] *The Solholt* (n 65) 607 (Donaldson MR). The time for delivery of the vessel was probably essential, so the buyer would have had a common law right to terminate.

[238] *Financings Ltd v Baldock* [1963] 2 QB 104 ('*Financings*'); *Shevill v Builders Licensing Board* (1982) 149 CLR 620 ('*Shevill*').

causes the loss.[239] The position is different if the promisee can rely upon a concurrent common law right.

This explanation is puzzling. If the entirety of future performance is inevitably lost by the time of termination, then the election to terminate is not a 'but for' cause. The source of the right to terminate is irrelevant. Of course, in these circumstances, the promisee would ordinarily establish a common law right to terminate, and so obtain loss of bargain damages. The coincidence between causation and common law termination breaks down in less extreme situations, where there is a prospect of some performance in the future. A promisee can terminate at common law for some breaches or repudiations falling far short of a total failure or refusal to perform. To the extent that future performance was likely to be rendered by the promisor, had it not been forestalled by termination of the contract, the promisee's election may be seen as a concurrent cause, or even *the* cause, of that part of the loss of the bargain.

The law clearly rejects the notion of exclusive causation in the exercise of a common law right: the promisee is prima facie entitled to full loss of bargain damages. Assuming, then, that the election to terminate is a concurrent cause of the loss, or is otherwise discounted as a cause, why is this not so for the exercise of a contractual right to terminate? The distinction is particularly difficult to sustain where common law and contractual rights exist concurrently. If the exercise of a contractual right to terminate for non-serious breach alone is accorded causal supremacy, this must be due to a causal norm. Such a decision is hardly unusual, nor is it seriously culpable. The causal analysis is, really, mitigation in disguise. It is underpinned by a concern about inflicting disproportionate consequences upon the promisor for a minor breach. However, any suggestion that the 'reasonableness' of the decision to terminate was relevant was quickly extinguished and replaced by the common law framework for discharge for breach.[240] This was, perhaps, due to concerns about certainty or coherence already noted. In contrast, a breach giving rise to a common law right to terminate is a serious one, according to contract doctrine. An election to terminate for serious breach is always 'reasonable' in a claim for damages.[241]

Even if this is right, a deeper question is whether the law should maintain a distinction between common law and contractual rights. Both the causal and

[239] *Shevill* (n 238) 629 (Gibbs CJ); *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 175 (Gibbs CJ), 186 (Mason and Wilson JJ) ('*AMEV-UDC Finance*').

[240] *Overstone Ltd v Shipway* [1962] 1 WLR 117, 123 (Pearce LJ), 130 (Davies LJ); *Financings* (n 238) 113 (Lord Denning MR), 115–17 (Upjohn LJ), 122–3 (Diplock LJ).

[241] See *Castle Constructions* (n 10) 653–4 [27]–[29] (Mason P, Beazley JA agreeing at 666 [94]).

mitigation analyses assume that loss of the bargain can always be traced back to the precipitating breach. Any attempt at unification is hindered by the *ex post* perspective, which focuses upon the promisee's subsequent election to terminate. It is also curious since, as the law stands, termination is a precondition for loss of bargain damages.[242] Thus, the election that would crystallise the promisee's right to such damages may simultaneously disqualify it. The better view is that the right to loss of bargain damages is circumscribed.[243] It should be limited to events (breach or repudiation) that are sufficiently serious in law to discharge the promisee and entitle it to terminate.[244] Where the promisee exercises an express right to terminate for a less serious breach, its right to loss of bargain damages will depend upon construction of the contract,[245] subject to the rules on penalties. No further constraint upon the connection between termination and loss of bargain damages need be imposed by causation or mitigation.

Turning to the opposite situation, the reliance thesis does not permit the promisee to revive reliance in respect of a past breach. Its decision to continue with the contract, or to negotiate with the promisor for alternative or rectified performance, should be subject to the avoidable loss rule.[246] The objection that the promisee acted unreasonably in affirming the contract is in substance a complaint that the promisee ought to have done something else: for example, ceased its own performance, or sought a substitute for the promisor's performance. Termination of the contract will usually be implicit in pursuing that alternative, either by necessity or prudence.[247] This objection is not limited to affirmation. It extends to a promisee who deliberately keeps its position open after breach and avoids electing immediately to terminate. Affirmation is, then, merely one event in a period commencing from breach,

[242] *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 260–1 (Mason CJ, Deane J agreeing at 265, Dawson J agreeing at 265, Toohey J agreeing at 265), 273 (Gaudron J). But see *Mallick v Parish* (1916) 16 SR (NSW) 305, 309 (Street J), 310 (Sly J); *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, 450 (Barwick CJ).

[243] See *Financings* (n 238) 120–1 (Diplock LJ). Cf *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849–50 (Lord Diplock).

[244] See JW Carter, 'Discharge as the Basis for Termination for Breach of Contract' (2012) 128 (April) *Law Quarterly Review* 283, 295.

[245] Cf *Larratt v Bankers & Traders Insurance Co Ltd* (1941) 41 SR (NSW) 215, 225–6 (Jordan CJ); *AMEV-UDC Finance* (n 239) 194 (Mason and Wilson JJ), 218–19 (Dawson J).

[246] See, eg, *Criss* (n 51) 595–6 (Street CJ); *The Stork* (n 114) 77–8 (Devlin J); *Patel v Hooper & Jackson* [1999] 1 WLR 1792, 1805–6 (Nourse LJ, Ward LJ agreeing at 1806, Mantell LJ agreeing at 1806). See below nn 249–52 for additional cases. See also Peel (n 128) 960 [18-009]; Kramer (n 25) 399–400 [16-25]–[16-26].

[247] See Peel (n 128) 960 [18-009].

during which the promisee persists with the contract instead of taking other measures. It is artificial, as *The Solholt* holds, to isolate the act of affirmation from preceding events (as in the case of a dithering promisee), or those following.[248] Equally, a single election to affirm may rarely be fatal; dogged persistence with the contract and refusal to seek alternatives may be more significant.

This is borne out by the cases. A promisee who tries reasonably to have the contract completed ought to have damages assessed, not at the date of the original breach, but rather 'at the date when (otherwise than by his default) the contract is lost'.[249] This applies where the promisee waits at the promisor's request[250] or presses for performance informally;[251] and also where the promisee pursues specific performance but, without its fault,[252] the remedy is denied or becomes aborted.[253] A promisee who is relegated to a common law claim for damages is subject to mitigation. Its delay while pursuing specific performance must have been reasonable; this allows some margin short of success.[254]

[248] See above n 235 and accompanying text.

[249] *Johnson v Agnew* [1980] AC 367, 401 (Lord Wilberforce, Lord Salmon agreeing at 401, Lord Fraser agreeing at 401, Lord Keith agreeing at 401, Lord Scarman agreeing at 402) ('*Johnson*'), quoted in *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 596 [82] (Gummow, Hayne and Kiefel JJ).

[250] See *Ogle v Earl Vane* (1868) LR 3 QB 272; *Re An Arbitration between Louis Dreyfus & Co and South Australian Milling & Trading Co* [1923] SASR 75, 89–90 (Murray CJ). Cf *Carbopego-Abastecimento De Combustiveis SA v AMCI Export Corporation* [2006] 1 Lloyd's Rep 736, 743–4 [31]–[36] (Aikens J) (time extended without request).

[251] See *Radford v De Froberville* [1977] 1 WLR 1262, 1286–7 (Oliver J); *Turner v Kwikshift Pty Ltd* (1993) 113 FLR 8, 16 (Master Lefevre).

[252] See *Broughton v B & B Group Investments Pty Ltd* [2017] VSCA 227, [179], [184] (Kyrou, Ferguson and McLeish JJA).

[253] See *Bosaid v Andry* [1963] VR 465, 489–90 (Sholl J) ('*Bosaid*'); *Johnson* (n 249) 401 (Lord Wilberforce, Lord Salmon agreeing at 401, Lord Fraser agreeing at 401, Lord Keith agreeing at 401, Lord Scarman agreeing at 402); *The Millstream Pty Ltd v Schultz* [1980] 1 NSWLR 547, 555–6 [22]–[26] (McLelland J); *Ronnoc Finance v Spectrum Network Systems Ltd* (1997) 45 NSWLR 624, 628–9 (Santow J). The position is essentially the same for damages awarded under statute in substitution for specific performance: see *Bosaid* (n 253) 490 (Sholl J) ('time at which the contract goes or is deemed to be gone'); *Madden v Kevereski* [1983] 1 NSWLR 305, 307 (Helsham CJ in Eq); *Mills v Ruthol Pty Ltd* (2004) 61 NSWLR 1, 14 [67] (Palmer J). See also *Johnson* (n 249) 400 (Lord Wilberforce, Lord Salmon agreeing at 401, Lord Fraser agreeing at 401, Lord Keith agreeing at 401, Lord Scarman agreeing at 402); *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400.

[254] See generally *Asamera Oil Corporation Ltd v Sea Oil & General Corporation* [1979] 1 SCR 633, 668 (Estey J for the Court) ('some fair, real, and substantial justification for his claim'); *Southcott Estates Inc v Toronto Catholic District School Board* [2012] 2 SCR 675,

Further support can be drawn from two quarters. The scope of the *White & Carter* 'legitimate interest' qualification remains uncertain.[255] On a broad view, it constrains the promisee's right to elect to continue performance, or to insist upon counter-performance.[256] Logically, it must then also affect the extent of the promisee's damages.[257] The standard expected of the promisee is perceived to be less stringent than for mitigation.[258] However, a fair argument can be made for the qualification to be subsumed within a broader principle of mitigation in some form.[259] This would have far-reaching ramifications. It suffices to say that the argument is most straightforward where, as in the present context, the promisee is content to claim damages for a breach of contract that has actually occurred.[260]

Misrepresentations inducing contracts provide another point of comparison. Upon discovering the falsity of the representation, the party misled may elect to affirm rather than rescind or exercise a right to terminate

690–2 [36]–[40] (Karakatsanis J for LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ), 702 [74] (McLachlin CJ) (McLachlin CJ ultimately dissented on the facts: at 707–8 [92]–[93]).

255 See above nn 231–2 and accompanying text.

256 See, eg, *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, 255 (Lord Denning MR); *Isabella Shipowner SA v Shagang Shipping Co Ltd* [2012] 2 All ER (Comm) 461, 475–6 [43]–[44] (Cooke J) ('*The Aquafaith*'); *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] 2 All ER (Comm) 614, 638–9 [96]–[97] (Leggatt J) ('*MSC Mediterranean Shipping (Trial)*'); *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2017] 1 All ER (Comm) 483, 499 [38], 500 [40] (Moore-Bick LJ) ('*MSC Mediterranean Shipping (Appeal)*') (appeal allowed from *MSC Mediterranean Shipping (Trial)* (n 256) on the facts: *MSC Mediterranean Shipping (Appeal)* (n 256) 500–1 [41]–[43] (Moore-Bick LJ)). See also Carter, *Carter's Breach of Contract* (n 148) 568–72 [11-51]–[11-52]; Qiao Liu, 'The White & Carter Principle: A Restatement' (2011) 74(2) *Modern Law Review* 171, 178–83. The weight of authority supports the narrower view, namely, that the right to elect itself is not affected: see above n 232 and accompanying text.

257 The same result can be reached by taking a broad view about the remedies to which the principle applies: cf above n 232.

258 See, eg, *The Alaskan Trader* (n 232) 137 (Lloyd J); *The Aquafaith* (n 256) 475 [42] (Cooke J) ('extreme case'); *Gator Shipping Corporation v Trans-Asiatic Oil Ltd SA* [1978] 2 Lloyd's Rep 357, 374 (Kerr J); *Reichman v Beveridge* [2007] Bus LR 412, 419 [17], 427 [40] (Lloyd LJ) ('wholly unreasonable'). But see *Stocznia Gdanska SA v Latvian Shipping Co* [1996] 2 Lloyd's Rep 132, 139 (Staughton LJ) ('reasonable grounds for keeping the contract open bearing in mind also the interests of the wrongdoer'). See generally JW Carter, '*White & Carter v McGregor*: How Unreasonable?' (2012) 128 (October) *Law Quarterly Review* 490, 491–2.

259 Jonathan Morgan, 'Smuggling Mitigation into *White & Carter v McGregor*: Time to Come Clean?' [2015] (4) *Lloyd's Maritime and Commercial Law Quarterly* 575. Cf JW Carter, Andrew Phang and Sock-Yong Phang, 'Performance Following Repudiation: Legal and Economic Interests' (1999) 15(2) *Journal of Contract Law* 97, 122–4.

260 Cf above Part IV(A).

the contract. The usual assumption, rarely articulated, is that affirmation only affects the measure of damages; mitigation operates from that point onwards.[261] This is implicit in the prima facie entitlement to damages, on a difference-in-value or net-disadvantage measure, for a party misled into acquiring property or a business.[262] But there is some suggestion that the election to affirm can itself be challenged for unreasonableness in an exceptional case.[263]

V Conclusion

In this article, I have split the issue of implementation — the causal 'mechanics' — of the avoidable loss rule from its rationale. It is possible to accept the first part of the argument and reach a different conclusion about the second (or vice versa). The rule could, for example, be seen merely as a negative rule about compensation which is enlivened immediately upon breach, and which applies a uniform standard of reasonableness to the promisee's conduct thereafter. This view is attractive because it is simple and readily generalisable to other areas of private law. It leads, however, to a self-contained model of the rule that reveals little about its relationship with other substantive aspects of causation.

The integrated approach proposed here attempts to describe that relationship and justify the distinctive features of the avoidable loss rule as compared with other causal norms. The rule is essentially about the reasonableness of the promisee's chosen response to breach, rather than deliberateness, voluntariness or culpability per se. This defining characteristic is underpinned by the concept of a transfer in reliance upon the contract. Of the two assumptions embodied in the reliance concept, the avoidable loss rule

[261] For explicit discussion on this matter, see *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, 192–3 (Jordan CJ); *S Gormley & Co Pty Ltd v Cubit* [1964–5] NSWR 557 ('*S Gormley*'); *TN Lucas Pty Ltd v Centrepoint Freeholds Pty Ltd* (1984) 1 FCR 110, 116–18 (Jenkinson J); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd [No 2]* (1989) 40 FCR 76, 90–1, 93 (Lee J) ('*Henjo Investments*'); *Brothers v Park* (2004) 12 BPR 22501, 22509–10 [50]–[53] (Giles JA, Ipp JA agreeing at 22518 [98], Wood CJ at CL agreeing at 22518 [99]) (reversed on other grounds: *Park v Brothers* (2005) 222 ALR 421).

[262] See generally *Potts v Miller* (1940) 64 CLR 282, 289 (Starke J), 297–8 (Dixon J); *Toteff v Antonas* (1952) 87 CLR 647, 650–1 (Dixon CJ), 652 (McTiernan J), 654 (Williams J); *Alati v Kruger* (1955) 94 CLR 216, 222 (Dixon CJ, Webb, Kitto and Taylor JJ); *Gould v Vaggelas* (1984) 157 CLR 215, 220–2 (Gibbs CJ), 254–5 (Brennan J).

[263] *S Gormley* (n 261) 562 (Asprey J); *Shaw* (n 21) [6] (Cox CJ). Cf *Henjo Investments* (n 261) 93 (Lee J) (compensation for misleading conduct under statute).

relates to compliance with the contract itself; other causal norms are primarily, though not exclusively, directed towards the results of compliance.

The connection between the reliance concept and other damages principles remains to be developed. I finish by mentioning two examples. It may seem inconsistent that the promisee can rely upon the contract for causal purposes, yet such conduct can still amount to contributory negligence. This can, perhaps, be justified by regarding causation as being a more fundamental requirement, whereas contributory negligence is nowadays a matter of degree. Or, it may indirectly support the distinction drawn in contributory negligence legislation between strict duties and duties of care, because the results assumption is not as strong for the latter. The other example is McGregor's second rule of mitigation, concerning recovery of increased losses.[264] Since this rule is positively oriented, it may well be justifiable on more general causal grounds. It is probably also broader than the reliance concept: for example, a promisee who reasonably incurs expenses in investigating and resolving the symptoms of a breach of contract should be compensated for them, despite (reasonably) being unaware at the time that a breach had occurred. At that point, there would be no transfer in reliance upon the contract, nor any objection about unreasonable conduct under the avoidable loss rule.

[264] McGregor (n 3) 250 [9-005].