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An Agreement-Centred Approach to Remoteness and Contract Damages

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INTRODUCTION

THE FORESEEABILITY RULE that restricts contract damages awards, known by common lawyers as the 'rule of remoteness', is applied in both civil and common law jurisdictions.[1] Directly or indirectly, all these jurisdictions have taken the rule from Pothier, the eighteenth century French jurist,[2] who borrowed it from Molinaeus.[3] Both Molinaeus and Pothier employed the foreseeability rule on the grounds that the promisor has 'expressly or impliedly charged himself' with foreseeable losses and is 'presumed to have submitted to these only.'[4] In other words, the rule that only foreseeable losses may be recovered was originally adopted as a crude test of what losses the promisor had assumed responsibility for under the agreement. Thus the

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[1] See, for example: the Appellate Division of the Supreme Court of South Africa's decision in *Victoria Falls & Transvaal Power C Ltd v Langlaagte Mines Ltd* 1915 AD 1, the French Civil Code article 1150, the Israeli Contracts (Remedies for Breach of Contract) Law 1970 section 10, the Louisiana Civil Code articles 1996, the Principles of European Contract Law article 9.503, the Quebec Civil Code article 1613, the Unidroit Principles for International Commercial Contracts article 7.4.4, the U.S. Restatement (Second) of Contracts §351 and Uniform Commercial Code § 2–715, the UN Vienna Convention on the International Sale of Goods article 74, and, in England and Wales, the famous case of *Hadley v Baxendale* (1854) 9 Ex 341. Cf the approach taken in the German Civil Code §252.

[2] RJ Pothier, *Traité des Obligations* (1761), part 1, chapter 2, article 3, para 160ff. For an English translation see RJ Pothier, *A Treatise on Obligations*, trans F Martin (Union, New Jersey, The LawBook Exchange Ltd, 1999).

[3] Carolus Molinaeus, also known as Charles Dumoulin, *Tractutus De Eo Quod Interest* (Venetiis, 1574), paras 51, 60–4. Pothier, *ibid*, cites Molinaeus at several points. See further GA Mulligan, 'Special Damages in South African Law' (1956) 73 *South African Law Journal* 27, 30–4, and R Zimmermann, *The Law of Obligations* (Oxford, OUP, 1996), 829.

[4] Pothier, n 2 above, at paras 162 and 160 respectively. See also Mulligan, *ibid*.

point of departure for this chapter: is the test as to recoverable losses based on the intentions of the parties? And if a promisor is presumed to have submitted to foreseeable losses, might not that presumption sometimes be capable of rebuttal?

In this chapter it will be argued that the allocation of responsibility for the consequences of breach is one of the matters that is determined by contractual agreement, even when it is not covered by the express terms of the agreement. According to this view, the central rule restricting awards of damages, the foreseeability requirement, is not a strict rule originating outside the contract for reasons of efficiency, fairness or proportionality, but is a rule of thumb that is justified when and to the extent that it indicates what the parties wanted. The foreseeability rule, and many of the other rules governing damages, should thus be understood as a framework for discovering what was agreed, not a default rule to operate when nothing was agreed.[5]

The common law reader may have already recognised that this argument is in essence the long-discredited tacit agreement/implied promise theory of remoteness, last supported in the latter half of the nineteenth century and having as its high-point the decision in *British Columbia and Vancouver's Island Spar, Lumber, and Saw-Mill Co v Nettleship*.[6] The discrediting that the theory suffered was, it is submitted, partial, clumsy and largely unconvincing. In addition, times have changed and we now have a much more sophisticated understanding of the interpretation of contracts. Under the modern approach, the English standard-bearer of which is the leading case of *Investors Compensation Scheme v West Bromwich Building Society*,[7] we are not afraid to find parts of the agreement outside the express words by looking to the factual matrix, the surrounding norms and the reasonable expectations. Indeed we are required to do so ubiquitously when we interpret express words and imply terms. Where once we balked at intention-based approaches to contract doctrines because of the objective principle of interpretation, we now realise that all communication is subject to such a principle, and necessarily so, and that for the parties to reach a single agreement between themselves the principle is necessary.[8]

[5] For default rule theories, see CJ Goetz and RE Scott, 'The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms' (1985) 73 *California Law Review* 261 and I Ayres and R Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87, and the (largely American) literature spawned by these articles, usefully summarised and discussed in CA Riley, 'Designing Default Rules in Contract Law: Consent, Conventionalism and Efficiency' (2000) 20 *Oxford Journal of Legal Studies* 367.

[6] (1868) LR 3 CP 499.

[7] [1998] 1 WLR 896 (HL).

[8] By the objective principle, even the meaning of an unambiguous express word is not part of the contract because it was intended but rather is part of the contract because it reasonably appeared to be intended. It seems that much of the criticism of agreement-centred approach comes from those who harbour a view of contractual intention that is inconsistent with the objective test, a test these same critics do not seek to replace.

The argument proposed will stand or fall on whether it convinces the reader that the agreement, objectively interpreted and rooted in implied norms as it is, can extend to the implicit allocation of risk and responsibility. The new orthodoxy is that parts of the agreement are tacit but are no less genuinely intended for that. It is submitted, perhaps impertinently, that it is for those who accept the new orthodoxy, but do not accept an agreement-centred approach to remoteness, to show that the implicit agreement covers details of primary terms (discovered in interpretation) and new primary terms (discovered through the implication of new terms) but does not cover the allocation of responsibility of the parties. If the agreement of the parties does stretch to the allocation of responsibility for consequences of breach, it would be hard to justify not giving effect to this allocation without seriously undermining the justifiability and coherence of the basic contractual aim of giving effect to what was agreed, since we would then be giving effect to some things that had been agreed but not others.[9] It should be noted that it is not being argued that the agreement includes an implied promise to pay damages, or that it necessarily even extends all the way to the consequences of breach, but rather that the allocation of risk and responsibility is implied and an imposed obligation to compensate gives effect to that allocation.[10]

Of course, it is difficult or impossible to prove this pudding except in the eating. The bulk of the argument contained herein is that the default rule theory is inadequate as an explanation of the law, and the implicit agreement theory is much to be preferred. Full of variables as it is, the foreseeability rule is simply too indeterminate usefully to serve as a default rule. As Fuller and Perdue observed, 'the test of foreseeability is less a definite test itself than a cover for a developing set of tests'.[11] The indeterminacy is not such a problem, however, when the rule is understood as a rough and ready rule of thumb for applying the parties' agreement, rather than a principle in its own right. Furthermore, the agreement-centred theory should have the first chance of explanation, since the default rule theory can only be convincing if the agreement-centred theory has failed. Default rules are externally imposed and should only be resorted to in default, ie when the agreement has

[9] Such selective application of the agreement would render the basic rule normatively arbitrary: E Weinrib, *The Idea of Private Law* (Cambridge, Mass, Harvard University Press, 1995), 39.

[10] One might conceptualise the approach proposed as closely analogous to the implication in fact of exclusion clauses.

[11] 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52, 85. M Tilbury, 'Remedies and the Classification of Obligations' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (London, UCL Press, 2004) at 20, describes the test as 'weasel words'. Swinton even praises the remoteness test's role as a fig-leaf to keep the exercise of discretion on the basis of policy factors decent, K Swinton, 'Foreseeability: Where Should the Award of Contract Damages Cease?' in B Reiter & J Swan (eds), *Studies in Contract Law* (Toronto, Butterworths, 1980).

nothing to say on the matter in question.[12] It is argued herein that actually agreements have a lot to say about the allocation of responsibility, and that we shouldn't be fooled into thinking otherwise by what the agreement has to say not being explicit. Liquidated damages clauses and exclusion clauses are the explicit tip of the iceberg of the agreement.[13]

The implicit agreement theory, however, enables us to reconcile under one slightly improved doctrine of remoteness various doctrines that look to the allocation of responsibility. In England and Wales that would include the current rules of remoteness, the rules of mental distress damages and of loss of amenity, and the recently-emerged scope of duty test from *South Australia Asset Management Corp v York Montague*.[14] Such a change would be less a revolution than a recharacterisation. The proposed test will lead to largely the same results, still concentrating upon foreseeability, but will do so with more coherence and justification.

Such discussion is for later, however. First it is necessary to explore a little the relationship between contractual right and remedy, and what it might mean for the implicit agreement of the parties to stretch to the assumption of responsibility. Some examples of norms that may govern this area and give rise to reasonable expectations will be posited, and it

[12] A Morris, 'Practical Reasoning and Contract as Promise: Extending Contract-Based Criteria to Decide Excuse Cases' (1997) 56 *Cambrige Law Journal* 147, 162 and SJ Burton, 'Default Principles, Legitimacy and the Authority of Contract' (1994) 3 *South California Interdisciplinary Law Journal* 115, 116ff. Where default rules are based upon economic efficiency alone, the contrast with the theory proposed herein is obvious. The distinction between this theory and that by which default rules are based on conventionalism and the tacit expectations of the parties, see eg R Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 *Virginia Law Review* 821 and '… And Contractual Consent' (1994) 3 *South California Interdisciplinary Law Journal* 421, is less clear-cut. This is so because the process that operates in all interpretation is a type of 'default rule' process. Essentially, unless the parties say otherwise, the norms of society that one would reasonably expect to govern do govern. These norms apply in default, as in every communication, because it would be too costly to express everything in a contract. So there is a 'default rule' process, but the relevant norms are numerous and very specific and operate in the world of community practice (when I go into a coffee shop and ask for 'a cup' I am offering to pay for a cup of coffee, hot and not poisonous, and then to return the cup, unless I say otherwise). This process, unlike the process by which legal default rules govern, takes account of the specific variables of individuals by selecting between specific norms rather than applying a blunt blanket rule. Thus it is argued herein that rather than trying to make default rules that conform to the tacit understanding of the parties, we should first try to find out in individual cases what the tacit understanding of the parties were. Barnett says the same, and I don't know whether he would agree that the foreseeability rule of contract damages is a cover for an inquiry into the tacit understandings of the parties (as is argued herein), or whether he would be of the view that the tacit understandings have already run out (which is disputed herein).

[13] It is conceded that, at least in theory, there may be a limit to the community norms that are incorporated by means of tacit understandings and that eventually we may need to go outside the contract, but I agree with Randy Barnett that it is more a case of 'islands of imposed-by-law terms in a sea of consent-based obligation' than 'islands of consented-to terms amid a sea of state-imposed policy-driven obligations', '… And Contractual Consent' (1994) 3 *South California Interdisciplinary Law Journal* 421, 431.

[14] [1997] AC 191 [hereinafter *SAAMCO*], discussed below at 280.

will be demonstrated that our existing rules are best understood as an attempt to discover the implicit allocation of risk/responsibility. The community norms described herein are not supported by direct empirical evidence, rather they are inferred from the indirect evidence of current rules, the body of judicial decisions, and my own everyday dealings and communications with others. The detail of the norms is probably wrong; they are proposed only to demonstrate how one might go about discovering the implicit agreement of the parties.

The central thesis of this chapter is one that is relevant to all the jurisdictions that use the foreseeability test and some that don't. However, primarily by reason of the author's ignorance, the examples of detailed rules and their judicial application are drawn principally from English law.

OBLIGATION-CENTRED ACCOUNTS OF REMEDIES

The relationship between rights and remedies in the law of obligations is not easy to define.[15] Even if it is the case, and I do not concede that it is, that '[p]romise-keeping does not entail any preference of one remedy over another'[16] and breach of contract is a 'wrong' and so in principle gives a 'wide-open remedial potential' and a 'licence to mistreat the wrongdoer',[17] it is clear that our society and legal system has an established preference for compensation by way of damages awards as the primary remedy for torts and breach of contract. The question thus arises how this compensation is to be worked out in a particular case of commission of a tort or breach of a contract. Whilst of course it is correct that there are extrinsic policies and practical factors that affect the particular remedy awarded in a particular case, and these policies and factors should be identified, arguments that attempt to play down the importance of the right in determining the remedy[18] do no service to our understanding of the law, or at least the law of contract damages. More direct attempts to get to grips with the question at hand are made by Daniel Friedmann and Stephen Smith.[19] Friedmann argues that

[15] Discussion shall be confined to the law of torts and the law of contract.
[16] H Dagan, 'Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory' (2000) 1 *Theoretical Inquiries in Law* 115, 121.
[17] P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 12.
[18] See discussion in D Wright, 'Wrong and Remedy: A Sticky Relationship' [2001] *Singapore Journal of Legal Studies* 300 and Tilbury, n 11 above.
[19] D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628 and 'Rights and Remedies' (1997) 113 *Law Quarterly Review* 424; SA Smith, 'Rights, Remedies, and Normal Expectancies in Tort and Contract' (1997) 113 *Law Quarterly Review* 426. See also S Smith, 'The Reliance Interest in Contract Damages and the Morality of Contract Law' (2001) *Issues in Legal Scholarship* (bepress.com), 36.

> the very recognition of a legal right entails some consequences regarding the remedy, one of which relates to the initial point of inquiry. This initial point relates to the value of legal right, at least where such value can be ascertained. The right of recovery may be qualified or subject to exceptions. The initial point is, however, clear.[20]

Friedmann goes on to argue that

> *the basic principle as to damages is identical in contract and in tort* … This principle provides in essence that the purpose of damages is to put the plaintiff, in economic terms, in the position in which he would have been had the wrong (either a tort or breach of contract) not been committed. *The different results reached in tort and contract derive from the fact that they are usually called on to protect different rights*' [emphasis in original].[21]

Smith has added that 'The reason that different sums may be awarded depending on whether a cause of action is in tort or in contract is not because the measure of compensatory damages awarded is different, but because the nature of the breach of duty which the damages are meant to undo is different' and so apparent differences in the measure of damages awarded usually reflect differences in the 'underlying obligation'.[22]

However I would like to go a little further and investigate aspects of the relationship between rights and remedies that are hidden by the words Friedmann and Smith use. If damages awards in both contract and tort cases are determined by what Friedmann calls the value of the underlying right and Smith calls the nature of the underlying obligation, and it is respectfully submitted that they are, then the question arises as to what dimensions underlying obligations can and do take. The more detailed the underlying obligation (for example, if it governs the type of harm it is protecting from and the directness with which that harm must be caused to be wrongful) the more work the right does in determining the remedy and the less work there is left for external policies and rules.

Elsewhere I have investigated this question in the context of torts, particularly the tort of negligence.[23] I argued that, when tortious rules are interpreted against the background of societal norms of behaviour and responsibility from which they originate, one can derive the type of harm against which protection is provided and the proximity that the harm must have to the offending cause to give rise to recovery. In other words, rules of causation and proximity and the type of harm for which compensation

[20] Friedmann, 'The Performance Interest in Contract Damages', *ibid* 637.
[21] *Ibid* 639.
[22] S Smith, 'Rights, Remedies, and Normal Expectancies in Tort and Contract', n 19 above, 430–1.
[23] 'Proximity as Principles: Directness, community norms and the tort of negligence' (2003) 11 *Tort Law Review* 70.

is provided are to a great extent dictated by the underlying tortious obligation, as obligation-centred principles, rather than by independent policies originating outside the obligation. In this chapter I would like to investigate how this approach and these conclusions can be applied to contract law.

In one way, this project is easier to apply to contractual obligations. Tortious obligations derive from community standards and, as such, are the same for everyone and change little over time, thus their scope rarely needs to be addressed as the scope of most torts has been laid down after investigative interpretation over previous decades or longer.[24] Contractual obligations, however, stem from individual agreements made in individual contexts, and so just about every contract case requires the interpretive process to be engaged in anew. For this reason we are more familiar, and so comfortable, with the interpretive process in contractual cases. On the other hand, however, whereas it makes good sense to think of tortious obligations as being oriented towards particular types of harm caused in a particular way, at first sight it makes less sense to see contractual obligations as being similarly oriented. This is because tortious obligations are obligations not to cause harm, whereas contractual obligations are obligations to do or abstain.

Still, it does not require one to take Holmes' Bad Man's point of view, and to fully endorse the theory of efficient breach,[25] to see that contractual obligations might be oriented towards losses resulting from their non-performance. It is true that promises are treated by the parties as more than just obligations to pay damages (for example, promises are also significant in terms of morality, trust and cooperation),[26] but the legally-binding (and so coercive) nature of contracts at least partly undermines the moral and social force (the 'bond-creating function') of the promises those contracts contain.[27] In commercial cases in particular, the contract is often made with at least one eye on the remedies that would become available in the case of breach.[28] The common occurrence

[24] The proximity requirement in the tort of negligence, and the questions arising in *Hunter v Canary Wharf* [1997] AC 655, are important exceptions showing that there is still some interpretive work to be done.

[25] OW Holmes Jnr, *The Common Law* (1881), 301ff and OW Holmes Jnr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457. See further the correspondence between Holmes and Sir Frederick Pollock, in which the latter is very critical of Holmes' theory, M DeWolfe Howe, ed., *The Holmes-Pollock Letters* (Cambridge, Mass, Harvard University Press, 1941), volume 1, 79–80, 177 and volume II, 200–1, 233–5.

[26] J Finnis, *Natural Law and Natural Rights* (1980) 320 ff. See also S Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 *Modern Law Review* 360.

[27] D Kimel, 'Neutrality, Autonomy, and Freedom of Contract' (2001) 21 *Oxford Journal of Legal Studies* 473; D Kimel, 'Remedial Rights and Substantive Rights in Contract Law' (2002) 8 *Legal Theory* 313; D Kimel, *From Contract to Promise: Towards a Liberal Theory of Contract* (Oxford, Hart Publishing, 2002).

[28] D Campbell, 'Chapter 1: Introduction' in D Harris, D Campbell and R Halson, *Remedies in Contract and Tort*, 2nd edn (London, Butterworths, 2002), 17–18; D Campbell and D Harris, 'In defence of breach' (2002) *Legal Studies* 208. See the statement of the arbitrators in *The Sine*

of exclusion and limitation clauses and liquidated damages clauses is merely the clearest manifestation of this fact. Even taking the internal, or good man's, point of view, and treating contracts as morally binding promissory commitments, one can see that promises entail an assumption of responsibility for the consequences of breach.[29] The existence of enforcement remedies such as specific performance and injunctions does not prevent the scope of responsibility for a breach being an important issue, both for the party that is deciding whether to perform and for the court that is deciding whether to compel performance.

AN OBLIGATION-CENTRED ACCOUNT OF CONTRACT LAW DAMAGES

As John Wightman has observed (commenting on the *SAAMCO* decision, to which we will later return):

> The tradition of seeing contract damages rules as imposed by law (subject to contrary express agreement) may have meant that the assessment of damages has not been sufficiently sensitive to the parties' reasonable expectations where these are not made express. The law on implied terms demonstrates the importance of primary obligations which have not been agreed by the parties. It would be surprising if there were not a similar need for secondary obligations to be shaped by factors which are not express but depend upon the expectations of the parties in their particular contracting community.[30]

To see the correctness of Wightman's comments does not require one to take the view that the obligation to pay damages is itself intended by the parties[31] (a view that not even Holmes held[32]), and besides, the question

Nomine that '[I]nternational commerce on a large scale is red in tooth and claw' and '[I]t is in the nature of things unlikely that the wrongdoer will make a greater profit than [the difference between the contract and market price]. And if he does, it is an adventitious benefit which he can keep', *AB Corp v CD Co: The Sine Nomine* [2002] 1 Lloyd's Rep 805, 806.

[29] See Diplock LJ in *The Heron II* [1966] 2 QB 695 (CA), 730.
[30] 'Negligent Valuations and a Drop in the Property Market: the Limits of the Expectation Loss Principle' (1998) 61 *Modern Law Review* 68, 76.
[31] See Diplock LJ in *The Heron II* [1966] 2 QB 695 (CA), 730–1, who says that entering the contract implies an undertaking of 'a secondary obligation to make monetary reparation for any loss sustained by the other party of a kind which the non-performer has reasonable grounds for assuming that he, the other party, knows is liable to result from the breach.' Later Lord Diplock seems to have preferred the more orthodox view that the obligation to pay damages is implied in law but may be varied by agreement (see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848–9). See also E Peden, *Good Faith in the Performance of Contracts* (Chatswood, NSW, Butterworths, 2003), 16, and the discussion in D Harris, D Campbell and R Halson, n 28 above, 90.
[32] See *The Common Law*, n 25 above, 302 and M DeWolfe Howe, n 25 above, volume II, 233–5.

is complicated by the wide-spread knowledge among contractors that the law will impose legal liability for breach. Rather than argue for an intended obligation to compensate, it is argued herein merely that obligations are *oriented* to particular consequences and that the risks of such consequences are allocated within the contract. As Cartwright observes,

> In contract the defendant consents to be bound to an agreement which contains within it a particular balance of risks and rewards: in consequence, the limit to the losses for which he is responsible is set by reference to what he can be taken to have accepted at the time of concluding the agreement.[33]

The final step to an award of damages is taken by the law itself in the well-known rule that 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'.[34] The crucial thing to recognise here is that the contract itself determines which of the infinite characteristics of the situation in which the non-breaching party was expecting to be, require compensation.[35] Wightman, above, put this in terms of 'shaping' the obligation to pay damages 'by factors which are not express but depend upon the expectations of the parties in their particular contracting community'. The emphasis on expectations, discussed below in terms of social norms, is valuable, but Leon Green puts it more precisely, in terms that German lawyers will recognise:[36]

> Parties, in making contracts, rarely contemplate *the losses* which would result from its breach. But they do count the advantages they will gain from its performance. *What interests does the contract promote or serve?* These are actually considered in the most part, and those which are shown to have been considered or reasonably falling within the terms in view of the language used and background of the transaction, mark its boundaries—the limits of protection under it. Did the parties intend (using intention in the sense indicated above) that the injured interest was to be protected? Did this

[33] J Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' (1996) 53 *Cambridge Law Journal* 488, 505.
[34] Parke B in *Robinson v Harman* (1848) 1 Exch 850, 855.
[35] Lord Hoffmann makes the same point in a slightly different way. In arguing that the scope of responsibility is determined by the scope of the obligation, he says of *Robinson v Harman* 'I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a claimant is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation… For this purpose it is better to begin at the beginning and consider the lender's cause of action.' *SAAMCO* [1997] AC 191, 211.
[36] German law limits recovery by reference to the protective purposes of the contract that was breached, the 'Schutzzweck der Norm'. See H Beale, A Hartkamp, H Kötz and D Tallon, *Cases, Materials and Text on Contract Law* (Oxford, Hart Publishing, 2002), 824–7 and D Coester-Waltjen, chapter 4 in this volume.

> agreement fairly comprehend the advantage now claimed to have been lost? [emphasis in original][37]

It would be absurd to argue that a vendor, who has agreed to deliver on a particular date, is unaware of or uninterested in the importance of the delivery to the promisee. Such an uninterested vendor would be ambivalent between the following: the delivery may be important because the promisee wants the vendor to get out of the house more, it may be important because the promisee thinks the date specified is astrologically auspicious, it may be important because the promisee needs the goods on the specified date for use, or it may be important because the promisee estimates that the market will be up on that date so the goods will fetch a good resale price. If promises are to provide reasons for action, that does not mean that all promises must, in practice, provide equally good reasons for action. The significance of the consequences of breach varies with the circumstances of the contract and the parties to it.

If we recognise that the obligations are oriented towards consequences, purposes and interests, then we can see that the measure of damages, and maybe the answers to other remedial questions, are determined by the contractual agreement itself. For this reason, I think that when Friedmann concedes that the rules of remoteness are not self-evident even once the contractual or tortious right has been identified,[38] he concedes too much. It is argued herein that the scope of responsibility for breach of contract is implicitly determined by the contract itself. The orientation is a descriptive feature of each obligation that goes without saying and can be implied (in fact) through the ordinary process of interpretation, looking at the factual matrix and the apparent purposes through the lens of the objective test and the usual common sense principles.[39]

FLESHING OUT THE ACCOUNT: A LIST OF NORMS

A little will be said about how such an orientation should be identified, in other words how it is accessed through the pragmatic process of

[37] *Rationale of Proximate Cause* (Kansas City, Mo, Vernon Law Book Co, 1927), 51.
[38] D Friedmann, 'The Performance Interest in Contract Damages', n 19 above, 636–7. He also concedes that the difference between contract and tort rules of remoteness is probably historically grounded, at footnote 57. See also Daniel Friedmann's essay in chapter 1 of this volume.
[39] *Investors Compensation Scheme v West Bromwich Buildings Society* [1998] 1 WLR 896. To use the terminology of my earlier article on the implication of terms (A Kramer, 'The Implication of Contract Terms as an Instance of Interpretation' (204) 63 *Cambridge Law Journal*, 384), the orientation of an obligation is more secondary (descriptive of obligations) than primary (creating a new and independent obligation), and so the interpreter needn't be too sceptical as to the orientation of the obligation going without saying. There is a licence to infer the orientation because the parties clearly intended the obligations to have some significance but also clearly intended responsibility for the consequences of breach not to be of unlimited scope.

interpretation. As discussed elsewhere, in the absence of express disavowal, a promisor appears to intend, and so is by the objective test deemed to have intended, the principles and standards that it would be normal to intend in the circumstances.[40] The norms are important only when and to the extent that they reasonably appear by both parties to have been intended; they are what the parties would have reasonably expected to apply: this is why the reasonable expectations are part of the binding agreement. Thus in arms-length commercial transactions the norms will be inclined more towards the assumption that the parties are out to serve and protect themselves, whereas in less commercial arrangements such as employment the norms will factor in more of an assumption of cooperation. All depends upon the contracting culture.[41] The following, then, are some possible norms that one might expect to apply in the absence of disavowal, although it must be stressed again that these will only be expected to apply if and when it is normal for them to apply, and indeed on their face they could not all apply as some would sometimes conflict:

1 Every Obligation Has Some Orientation

It is elementary that if a contractual promise has been made it must have some orientation — some interests it seeks to further or protect or some consequences that were in mind — else why was it made/required? In other words, it is very unlikely that parties will have intended a contractual promise to be without orientation and so responsibility for consequences, as that would mean the promise would be 'illusory'[42] and could be breached with impunity. As Pollock has said, in the context of a discussion of the doctrine of consideration, whatever 'a man chooses to bargain for must be conclusively taken to be of some value to him'.[43] Thus whereas a promisor may well be able to argue that in a particular case a promisee did not suffer any relevant (contractually contemplated) loss in a particular case of a breach, it rarely makes any sense to argue, with regard to a particular term, that the promisee could never suffer any relevant loss as a result of breach.[44] If this does appear to obtain, then 'relevant loss'

[40] See A Kramer, 'Common sense principles of contract interpretation (and how we've been using them all along)', (2003) 23 *Oxford Journal of Legal Studies* 173.
[41] R Brownsword, 'After *Investors*: Interpretation, Expectation and the Implicit Dimension of the "New Contextualism"' in D Campbell, H Collins and J Wightman, *Implicit Dimensions of Contract* (Oxford, Hart Publishing, 2003), 123ff.
[42] Lord Mustill uses this word to make essentially the same point in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 360.
[43] *Principles of Contract*, 10th edn (London, Stevens, 1936), 172.
[44] Although occasionally terms may be guidelines with little or no intended risk attached. See H Beale and T Dugdale, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 *British Journal of Law & Society* 45.

is almost certainly not being defined the way the parties appear to intend it to be defined. This is the problem with cases such as *Surrey CC and Mole DC v Bredero Homes Ltd*[45], and cases in which a promise is made for the benefit of a third party.[46] To say that specific relief may be available in such cases is no answer: the damages remedy, the primary remedy in our law of contract, should be made adequate by giving effect to the responsibility assumed in all cases in which this is possible.[47] Just because it is difficult to assess loss in cases where the obligation is oriented towards a non-financial interest does not mean that the court should not make an assessment anyway, as it does in personal injury cases all the time.[48] Where a promisor made a gain from the breach, that may even provide an evidentially presumed measure of promisee loss, but the focus should still be on compensating for the losses within the contract's orientation, not on restoring gain.[49]

2 It May be that the Promisor can *Prima Facie* be Assumed to be Taking Responsibility for all Consequences with Regard to which the Promisee Considered the Promise Significant

This reminds us only that a promisor knows what he is letting himself in for and *prima facie* assumes responsibility that extends as far as the losses for which he is a *sine qua non* cause, since cause in our society is often sufficient for blame. However many of the following norms greatly limit the scope of the apparently intended responsibility beyond this one.

3 The Promisor Enters the Contract Voluntarily

In this respect the promisor's situation is very different to that of a tortfeasor. The incurring of the obligation out of choice indicates that the

[45] [1993] 1 WLR 1361.
[46] Such as *Beswick v Beswick* [1968] AC 58.
[47] In those few cases where the very remedy of compensation is incapable of giving full effect to the responsibility assumed, as opposed to the inadequacy being merely of the current rules governing that remedy, specific relief will still be required. See the discussion below at text to note 160.
[48] As Lord Mustill observes in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 361.
[49] See the interesting discussion in A Phang and P Lee, 'Restitutionary and Exemplary Damages Revisited' (2003) 19 *Journal of Contract Law* 1, 7ff. If such a rule were adopted the burden of proof would fall on the promisor to show that the promisee's loss was less than the promisor's gain. Even where the burden were not discharged, the damages would still not be awarded for disgorgement of gain/restitution of profit. As an aside, it is not unusual for an evidential shift in the burden of proof to cause confusion as to the substantive basis of damages measurements: arguably the whole idea of the reliance interest is merely a mis-

incurring of the obligation is in the nature of a gift or sale (depending upon whether it is in a deed or a contract with consideration) rather than in the nature of a compulsory transfer of rights forced by society and its rules. Because of this, the promisor is not obliged to assume any more responsibility than she wishes to, and, of course, it is apparent that a promisor (being at least partly self-interested) will want to assume as little responsibility as is necessary for her purposes or is required by the promisee who is buying the promise. In other words, the scope of responsibility will almost always be heavily circumscribed.

4 The Promisee Enters the Contract Voluntarily

The promisee is not like the potential victim of a tort because the promisee has not had the transaction and relationship imposed upon him but rather has entered into it voluntarily. Consequently, the allocation of responsibility is made by the parties in full knowledge of the possibility of breach, and with full opportunities for disclosure and negotiation, whereas in the case of most torts the allocation is made by society with no awareness, input or control on the (eventual) victim's part. As the rules are not those of society but those of the parties, and as the transaction has not been entered into involuntarily, there is no reason to be harsh to the promisor or to err on the side of the promisee.[50] In standard form and consumer cases this norm may well not apply.

5 As the Promisor is Rational, the Promise and Assumption of Responsibility will be Part of a Plan

The promisor will only usually accept responsibility for consequences for which he is able to plan, and in any case is unlikely voluntarily to

reading of an evidential presumption that the promisee would have at least broken even (recovered costs) if the contract had been performed, an evidential presumption which serves in cases in which it is hard to prove the profit but is rebutted when it can be shown that a loss would have been made.

[50] Note that these features of contracts also apply to the tortious responsibility arising under negligence and resulting from an 'assumption of responsibility' for the consequences of a statement not being (carefully checked to be) true or a service not being (carefully) performed. Such cases similarly involve a transaction voluntarily entered into by the victim in advance of any tort, by way of the victim's voluntarily relying upon the tortfeasor. There are good arguments for saying that the scope of responsibility in such cases should follow the contract model (the scope of responsibility assumed) rather than the tort model, particularly, but not only, when there is concurrent liability under a contract. See further A Burrows, 'Solving the Problem of Concurrent Liability' in *Understanding the Law of Obligations* (Oxford, Hart Publishing, 1998), A Burrows, 'Limitations on Compensation' in A Burrows and E Peel, *Commercial Remedies: Current Issues and Problems* (Oxford, OUP, 2003), 35–6; and J Cartwright, n 33 above, especially at 500ff.

take responsibility for all the consequences of breach: to do so would be to guarantee performance in all respects. Thus, firstly and most simply, the promisor will not usually assume responsibility for unforeseeable losses since he cannot take them into account in deciding whether to perform or in guarding against liability for non-performance.[51] Secondly and more importantly, it will be understood from the context of the promising that the promise is made (the performance is desired) for a particular reason or reasons: the promisee's reasons for wanting the promise, the promisor's reasons for wanting to give the promise.[52] It will be these desired results that the promisor can reasonably be expected to be guaranteeing, and usually no more (given the promisor's interest in assuming no less responsibility than that required to serve the purposes of making the promise).

6 Furthermore: The Promisor is Usually Looking to Make a Profit

At least in commercial cases, not only will the promisor not intend to assume unforeseeable losses (as discussed in the previous norm), but the promisor intends to make a profit and to run a business and to look out for herself. Thus the circumstances of the deal, particularly the magnitude of the price[53] and what insurance could have been available at what cost, are relevant in determining what responsibility the promisor reasonably appears to have intended to assume.[54]

[51] Where a promisee communicates knowledge to the promisor it is more reasonable to understand the promisor as having assumed responsibility for the losses disclosed by that knowledge because such knowledge is a precondition to the promisor planning and acting rationally. The opportunity to plan and the unlikelihood that one would assume responsibility for unforeseeable losses are why we require communication of special knowledge before liability is imposed, not because we want to increase economic efficiency by encouraging information disclosure (as economists have argued). Efficiency may be desirable, but except insofar as such norms inform the objective reasonable understanding of the assumption by the promisor (see norm 11 below) they have no place in our current discussion. For discussion of the mitigation rule, see below. For a recent questioning of the economic analysis see EA Posner, 'Economic Analysis of Contract Law After Three Decades: Success or Failure?' (2003) 112 *Yale Law Journal* 829, especially 837 and 853–4.

[52] Of course, the promisor's reasons may be direct (putting the promisee at ease about a certain thing) and indirect (earning a particular price paid by the promisee for the promise). In the latter case, the promisee's reasons are the same as promisor's reasons, because the promisor knows that the promisee is only paying on the condition that the promisor secures the promisee's desired results.

[53] See further footnote 91 and surrounding text.

[54] Cf the dependence on the price paid of the reasonableness of exclusion and limitation clauses under the Unfair Contract Terms Act 1977 and the fairness of clauses under the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999, No 2083). See for example the discussion in *George Mitchell(Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, 817 and (CA) [1983] QB 284, 302.

7 Insurance and Prices are Often (in Business) Fixed Generally Rather than on a Contract-By-Contract Basis

When a price is fixed generally, rather than for a specific bespoke transaction, the price will be fixed on the basis of the average magnitude of losses not a specific loss caused in a specific way, and so the scope of the consequences ('type' of loss) for which risk has been assumed by the promisor will be wide and unspecific. However in cases in which it is reasonable to expect the promisor to insure his risk, it may only be reasonable to expect the type of loss for which risk has been assumed to be as wide as the insurance likely to be available. Thus where a specific loss that occurs is caused in a way that would take it outside the insurance that could be expected to have been taken out (and upon the basis of which the transaction was entered), responsibility for that loss will often not have been assumed.

8 It May be that a Promisee is Less Likely to Accept the Risk of Suffering Physical Harm than to Accept the Risk of Suffering Economic Loss[55]

If this is the normal attitude of promisees, then, in the absence of express words or conflicting norms, it would be more reasonable to interpret a promisor as accepting responsibility for physical harms than for economic harms. Consequently, in physical cases the type of loss for which liability was assumed can be drawn more widely and the likelihood for such loss to give rise to responsibility need be lower.[56]

9 A Promisee Usually Accepts the Risk of Suffering Idiosyncratic Non-economic Losses Due to Disappointment or Lack of Pleasure

These are things often taken to be subject to the vicissitudes of life and luck. Generally the risk of loss of enjoyment or amenity will not be assumed by the promisor, although where the promisee's purpose in entering the contract was clearly of this nature (as in some consumer cases) then this norm is displaced, particularly in cases where there is no other obvious orientation to an obligation (see norm (1) above). Norms such as these depend upon such apparently messy factors as how stoical a culture

[55] Perhaps because, in the case of physical harm, the promisee is less likely to be as neutral when faced with the choice between being harmed and compensated on the one hand, and not being harmed or compensated on the other.
[56] This might explain Lord Denning's approach in *Parsons v Uttley Ingham & Co Ltd* [1978] QB 791, CA.

expects its members to be, and can thus change (albeit slowly) as a culture becomes more or less blaming and litigious. This makes sense, since the culture is part of the background against which the parties are contracting.

10 It May be that a Promisor will not Normally Accept the Risk of Losses that are Exacerbated by the Promisee's Impecuniosity

At least in commercial cases.[57]

11 Often the Party that can most Easily or Cheaply Avert the Consequences can be Assumed to have taken Responsibility for them[58]

This is Posner's view of the remoteness rule,[59] although he would base it directly on efficiency, rather than taking the approach here by which it is assumed that sometimes the parties will intend the most efficient allocation of risk.[60] A norm of joint-cost minimisation may also explain the rule preventing recovery of avoidable losses, again on grounds of implicit understanding (ie intention) rather than external manipulation of the contract and remedies in the name of efficiency.[61]

12 A Party is Unlikely to take Responsibility for Losses Caused by the Fault of the other Party

First, then, the promisor is unlikely to assume responsibility for losses caused by the promisee's own fault. If the mitigation rule is to have an

[57] This norm may allow for a middle way between the old English rule banning all recovery attributable to impecuniosity (stemming from *Liesbosch Dredger (Owners of) v Owners of SS Edison ('The Liesbosch')* [1933] AC 449 and overruled recently in *Lagden v O'Connor* [2003] UKHL 64, [2003] 3 WLR 1571), and a stark approach allowing recovery whenever impecuniosity is reasonably foreseeable as not unlikely (which it will be in most cases).

[58] Waddams observes that it is generally more efficient for a property owner or other business claimant to insure against the risk of loss, which he can accurately estimate, than for the service-provider to take out liability insurance. See SM Waddams, *The Law of Contracts*, 4th edn (Toronto, Canada Law Book Inc, 1999), para 740, and *The Law of Damages*, 3rd edn (Toronto, Canada Law Book Inc, 1997), para 14.330. See also H Collins, *The Law of* Contract, 4th edn (London, Butterworths, 2003), 413. ASM Waddams observes, *The Law of Damages* at para 14.350, this norm is not applicable to personal injuries.

[59] Posner J, *Evra Corp v Swiss Bank Corp* 673 F.2d 951 (7th Cir 1982), 957, purporting to follow *Siegel v Western Union Telephone Co* 37 N.E.2d 868 (Ill. App 1941). See also R Posner, *Economic Analysis of the Law*, 5th edn (New York, Aspen, 1998), 140–1.

[60] This may be why in contracts of sale it is generally understood that the buyer is responsible for consequential losses she suffers resulting from late delivery by the seller. See Beale and Dugdale, n 44 above, 54.

[61] D Campbell and H Collins, 'Discovering the Implicit Dimensions of Contract' in D Campbell, H Collins and J Wightman, *Implicit Dimensions of Contract* (Oxford, Hart Publishing, 2003) 43.

agreement-centred foundation, the most likely foundation is this norm (supplemented by a more positive cooperative obligation to attempt to minimise losses for which the other party will ultimately be liable) and the preceding one (number 11). Second, when looking at the promisee's assumption of risk, this norm may have implications in cases of promisor fraud. It is an established norm of interpretation that it is presumed that a promisee would not agree to exclusions of liability for fraudulent or negligent actions of the promisor or promisor's agent (such a presumption rebuttable in most cases by a clearly worded exclusion clause).[62] Similarly, it may be that a promisee cannot be reasonably understood to agree that the usual implicit exclusion of promisor liability for unforeseeable losses extend to cases of fraudulent breach by the promisor. This is discussed further below.[63]

13 The Use of a Fixed Price will Often Imply the Corresponding Allocation of Risk of Market Changes[64]

14 There Will be Many More Norms that Result from Specific Business Practices that cannot Easily be Generalised, Especially where there is a Contracting Community in which Customs can Develop[65]

USING THIS ACCOUNT TO EXPLAIN THE LAW

At first sight, the account proposed herein is ill-fitted as a description of the present law. The current rule of remoteness is that loss is considered not to be too remote if it is of a type or kind[66] that, at the time of contracting,[67]

[62] See the discussion in *Canada Steamship Lines Ltd. v The King* [1952] AC 192, *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 and *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61. As the *HIH Casualty & General Insurance* case confirms, there is also a rule of public policy alongside the norm, which rule prevents the exclusion of liability for one's own fraud even in the face of a clearly worded exclusion (Lord Bingham [68], Lord Hoffmann [78] and Lord Scott [85]). In such a case the norm is not rebuttable and the intentions of the parties are overruled.

[63] See 'Fraudulent Breaches of Contract'.

[64] SM Waddams, *The Law of Contracts*, n 58 above, para 740.

[65] See further J Wightman, 'Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings' in D Campbell, H Collins and J Wightman, *Implicit Dimensions of Contract* (Oxford, Hart Publishing, 2003). I agree with Roy Kreitner, see chapter 2 in this volume, that the type of contract (carriage, merger, insurance etc.) is important for the measure of damages, but I say it is important because the type of contract indicates the norms that the parties tacitly intended to apply, whereas he argues that the type of contract indicates the measure of damages that is suited to a particular situation for external reasons (such as fairness, social utility and administrative concerns).

[66] *Parsons v Uttley Ingham & Co Ltd* [1978] QB 791, *Brown v KMR Services Ltd* [1995] 4 All ER 598.

[67] *Hadley v Baxendale* (1854) 9 Ex 341.

was reasonably foreseeable as not unlikely[68] to result, in the light of the knowledge that can be reasonably imputed to the promisor and the knowledge that the promisor in fact had.[69] Losses that fall within this definition are said to be in the 'reasonable contemplation of the parties'. The orthodox view of the law seems to provide little room for doubting that that mere knowledge of the promisor, without some further assumption of responsibility, is sufficient to give rise to liability, and indeed this 'further assumption of responsibility' approach has been rejected by the House of Lords.[70] Judges do not discuss pricing, insurance and the other matters referred to in the norms mentioned above, and indeed mental distress and loss of enjoyment are usually understood as being based upon a separate test of recoverability to the ordinary remoteness test. First appearances can be deceptive, however, and it will be shown that something like the account proposed herein is the best explanation of the law not only for prescribing changes but also for the purposes of describing and justifying the law as it stands at present.

Are Damages Essentially about Foreseeability or the Scope of an Assumption of Responsibility?

In *Hadley v Baxendale,* Baron Alderson did not need to consider whether mere foreseeability of a loss was sufficient for promisor responsibility, as the loss in that case was held not to be foreseeable. Soon after the decision, however, John Mayne raised just this issue:

> But it may be asked with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be held answerable for them, and consented to undertake such a liability?[71]

Mayne's view is on the same lines as the view put forward here, namely that contractual obligations are oriented towards various purposes and consequences of breach on the basis of apparently intended assumption of risk. The rival view is that remoteness is merely a test of knowledge-informed foreseeability, and that liability does not depend upon express or even implied assent to the foreseen risk. The assumption of risk view was at its height in the late nineteenth and early twentieth centuries,

[68] *The Heron II* [1969] 1 AC 350.
[69] *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528 reinterpreting *Hadley v Baxendale* (1854) 9 Ex 341.
[70] *The Heron II* [1969] 1 AC 350, 422.
[71] JD Mayne, *A Treatise on the Law of Damages* (London, Sweet, 1856), 8. This was the first edition of the book that in its twelfth edition became *McGregor on Damages*.

championed by Sir James Shaw Willes in England[72] and Oliver Wendell Holmes Jr in the US. Willes J put the view in the following terms:

> the mere fact of knowledge cannot increase the liability. The knowledge must be *brought home* to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it [emphasis added].[73]

Holmes observed in the seminal Federal US case on contract remoteness that: 'the extent of liability… should be worked out on terms which it fairly may be presumed [the defendant] would have assented to if they had been presented to his mind.'[74] Extra-judicially he has written that

> What consequences of the breach are assumed is more remotely, in like manner, a matter of construction, having regard to the circumstances under which the contract is made. Knowledge of what is dependant upon performance is one of these circumstances. It is not necessarily conclusive, but it may have the effect of enlarging the risk assumed … The price paid in mercantile contracts generally excludes the construction that exceptional risks were intended to be assumed.[75]

By the mid-twentieth century the pendulum had swung away from the assumption of risk theory. Although Asquith LJ appeared to support the *Nettleship* view in the *Victoria Laundry* case,[76] a dictum of Lord Upjohn in *The Heron II* expressly stated that mere knowledge and foresight is enough, rejecting the view that liability must be made a term of the contract.[77] Although it was the stricter form of the assumption of risk theory (requiring that the assumption of responsibility be an actual term of the contract) that had been rejected, this dictum has been taken as laying to rest the *Nettleship* approach.[78] With the exception of South Africa, where the

[72] *British Columbia and Vancouver's Island Spar, Lumber, and Saw-Mill Co v Nettleship* (1868), LR 3 CP 499 *Horne v Midland Railway* (1872) LR 7 CP 583 (Court of Common Pleas). Willes was counsel for Mr Baxendale in *Hadley*: Danzig, 'Hadley *v* Baxendale' (1975) 4 *Journal of Legal Studies* 249, 257ff. For other English support see *Portman v Middleton* (1858) 4 CB (NS) 322; *Horne v Midland Railway* (1873) LR 8 CP 131 (Exchequer Court); *Elbinger Aktiengesellschaft v Armstrong* (1874) LR 9 QB 473, 478; *Patrick v Russo-British Grain Export Co*, [1927] 2 KB 535, 540, but see FE Smith, 'The Rule in Hadley *v* Baxendale' (1900) 16 *Law Quarterly Review* 275, 284ff. and Pollock in M DeWolfe Howe, n 25 above, volume 1, 120.
[73] *Nettleship*, *ibid* 509. See also Justice Willes' comments at 505.
[74] *Globe Refining Co v Landa Cotton Oil Co* (1903) 190 US 540, 543.
[75] *The Common Law*, n 25 above, 302–3. See also M DeWolfe Howe, n 25 above, volume 1, 119 and volume 2, 55.
[76] *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528, 538–9.
[77] [1969] 1 AC 350, 422. Note that Lord Reid expressly reserved judgment on this point, at 387A, and Lord Hodson quoted a relevant passage from *Nettleship* without comment, at 398.
[78] In *GKN Centrax Gears Ltd v Matbro Ltd*, [1976] 2 Lloyd's Rep 555 (CA), Lord Denning MR expressly states that Lord Upjohn's comments have this effect at 574. See also Stephenson LJ

tacit agreement approach is good law even now,[79] modern judges and textbooks give little attention to the assumption of risk view, and base remoteness squarely on foreseeability and knowledge.[80]

However despite this, it is submitted that the implied assumption of risk approach is still good law and the basis for the current remoteness test. The paucity of explicit recognition that the test is based upon the implied assumption of risk is due to the rarity with which the tests lead to a different result, because foresight and reasonable knowledge will almost always be enough to give rise to an apparent assumption of risk. It will almost always be correct that '[o]nce the defendant has been given notice of unusual potential losses, he can act accordingly, whether by refusing to contract, or by raising the price, or by reducing the probability of breach, or by excluding liability'[81] and so by entering the contract the defendant, without more, impliedly assumes responsibility for foreseeable losses.[82] This is so providing the unusual potential losses are part of the mutual context in which the contract is made and in which it stands to be interpreted.[83] However foresight will not always be enough to infer an assumption of responsibility.[84]

at 577 and Bridge LJ at 580. See also Goff J's statement in *The Pegase: Satef-Huttenes Alberns SpA* v *Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175, 182 that '[t]he decided cases appear to support the opinion so expressed by Lord Upjohn.'

[79] This approach was championed by Sir Wessel JA in the 1930's, see especially *Lavery & Co Ltd v Jungheinrich* 1931 AD 156, 176 and JW Wessel, *Wessel's Law of Contract in South Africa* (Johannesburg, Hortors Ltd, 1937), paras 3256 and 3266. The South African Supreme Court of Appeal has several times conducted interesting discussions of the issue, and although the discussions are critical of *Lavery*, the Court has so far passed up the opportunity to conclusively rule against the tacit agreement approach and has confirmed it subsists. See *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) AD 545, 551 and *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* (2001) (4) SA 551 (SCA), 582 and 597.

[80] The Restatement (Second) of Contracts and the UCC expressly reject the 'tacit agreement' test for the recovery of consequential damages: Restatement (Second) Contracts, §351 cmt a (1980); UCC § 2-715 cmt 2 (1995). It seems that there is some American support for the test at the federal level, however, eg *Wells Fargo Bank v United States*, 33 Fed Cl 233, 242–4 n 8 (1995). The Scottish Law Commission considered proposing legislation to restate the rule of remoteness solely in terms of foreseeability (Scottish Law Commission Discussion Paper No 109, *Remedies for Breach of Contract* (1999), para 8.22 and proposition 24), although decided against it (Scottish Law Commission No 174, *Report on Remedies for Breach of Contract* (1999), para 7.31).

[81] AS Burrows, *Remedies for Torts and Breach of Contract*, 2nd edn (London, Butterworths, 1994) 56.

[82] Initially, Mayne thought that it undesirable to make such an inference as it would put the onus upon the promisor to refuse to contract or to renegotiate: JD Mayne, *A Treatise on the Law of Damages*, 1st edn (London, Sweet, 1856) 8. By the third edition, his views had changed: see below at n 84.

[83] As Diplock LJ observes, *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1448, special knowledge must be acquired from the promisee 'or at least … he should know that the [promisee] knew that he was possessed of it.' For further discussion of the mutuality point see Kramer, above n 40, 178–9.

[84] Mayne and Smith put it as follows: 'Where a person who has knowledge or notice of such special circumstances might refuse to enter into the contract at all, or might demand a higher remuneration for entering into it, the fact that he accepts the contract without requiring any higher rate will be evidence, though not conclusive evidence, from which it may be inferred that he has accepted the additional risk in case of breach.' JD Mayne and L Smith, *Mayne's Treatise on Damages*, 3rd edn (London, Stevens and Hayes, 1877) 33.

In short, the inference of assumption of responsibility from mere foreseeability is not justified in the following (overlapping) situations:[85]

i) Where the promisor has no choice but to enter the contract, entering the contract does not indicate a voluntary assumption of the risk of foreseeable losses as it was not voluntary. This may explain some of the common carrier cases.[86]
ii) Where the consequences of breach are severe, as compared to the benefits received by the promisor under the contract (the price), it will sometimes not be reasonable to infer that the promisor undertook the risk of such consequences merely from the promisor's apparent foresight of such consequences.[87] This point is made by Robert Goff J in *The Pegase*, who explains that where breach is not unlikely to result in 'particularly high profits … or… particularly catastrophic results' such as the stoppage of a whole factory for want of machinery or raw materials (as occurred in both *Hadley v Baxendale* and *Nettleship*), more than mere foresight may be required to infer an assumption of risk.[88] As Halson explains, '[i]ndications of the implicit assumption of responsibility would come from D's adjustment of the proposed price, or from his adding some provision to the contract to deal with the risk, such as a clause restricting C's remedy or one which in specified circumstances excused D's non-performance'.[89] As the paradigmatic example shows, 'if I tell my taxi driver that I will miss the opportunity of making a profit of £1 million if I fail to reach an appointment on time, his acceptance of me as a passenger should not lead to the inference that he accepts the risk',[90] although things would be

[85] For example, even *Hadley v Baxendale* itself is probably not explicable on the basis of a foreseeability rule alone and is explicable on one or more of the bases that follow in the text. See further R Cooke, 'Remoteness of Damages and Judicial Discretion' (1978) 37 *Cambridge Law Journal* 288, 290.
[86] Haultain CJS makes this point well in *Rivers v George White and Sons Co Ltd* (1919) 46 DLR 145 (Sask CA), 147. Mayne introduces this point into the third edition of his text: Mayne and Smith, above n 84, 25, 28 and his second and third 'rules', 33. See also Diplock LJ at 728 in the CA in *The Heron II*. However in cases of extraordinary risk the common carrier may be able to refuse to contract or to demand extraordinary remuneration: Lush J in *Horne v Midland Railway Co* (1873) LR 8 CP 131,145.
[87] See JW Carter and DJ Harland, *Contract Law in Australia*, 3rd edn (Sydney, Butterworths, 1996), 783.
[88] N 79 above, 184. It is noteworthy that the American Restatement (Second) of Contracts takes the approach proposed in the text: under §351(3), courts are given a discretion to reduce damages for foreseeable loss if the loss is disproportionate to the price paid because in such circumstances the promisor may not be intended to bear the risk (see comment f and illustrations 17–19 to that section).
[89] D Harris, D Campbell and R Halson, n 28 above, 97.
[90] *Ibid.* In such a case the price charged does not reasonably appear to take account of the risk that would fall upon the driver if he were to be liable for the loss of the large profit, and so the driver does not reasonably appear to have taken the risk of the loss. For a brief discussion of

different if he upped the fare to £100,000.[91] In the absence of such indications of an assumption of responsibility, it is at least necessary that the loss was 'signalised' to the promisor as part of the 'purpose and intent' of the promisee in entering the contract such that 'he may fairly be held, in entering his contract, to have accepted the risk'.[92]

iii) Where the promisor has been communicated knowledge that renders losses foreseeable, it may not be reasonable to understand that promisor as implicitly accepting responsibility for the losses where the communication of the information was, albeit before the contract was entered into, too late to assist the promisor. If the promisor has already performed his promise to the relevant extent (for example where the goods have already been manufactured and boxed) and has already fixed the price (for example where, as is usual, the price is fixed generally) and has already taken out whatever insurance is to be taken out (for example where insurance is taken out generally) then the promisor cannot realistically make greater endeavours not to breach or secure an increased return or secure against the risk. In such circumstances it may well be too late reasonably to understand the promisor to have taken the risk, given that the usual justification for foreseeability giving rise to responsibility is that 'the parties might have specially provided for the breach of contract by special terms as to the damages in that case'.[93] Although the parties may still provide special terms, they are, as we all know, in practice unlikely to do so, and so the opportunity is more theoretical than real.

Since many transactions, particularly consumer ones, are standardised rather than negotiated individually, the situation discussed in the previous paragraph may be very common. As Atiyah observes of contracts of carriage, 'terms are likely to be fixed by the carrier on the basis of some general rate applicable to the weight or volume or quantity of the goods to be carried. It is normally impracticable to fix a separate rate for every contract.'[94] Because the price and the terms are fixed in advance,

this issue see PS Atiyah, *An Introduction to the Law of Contract,* 5th edn (Oxford, Clarendon Press, 1995), 467.

[91] See D Harris, D Campbell and R Halson, *ibid*, 92; see also SM Waddams, *The Law of Contracts*, para 740 and *The Law of Damages*, paras. 14.190–14.200, both n 58 above. As the taxi example shows, Burrows goes too far when he says that the 'fact that the claimant's losses are out of all proportion to what the defendant was to receive under the contract is irrelevant', A Burrows, 'Chapter 18: Judicial Remedies' in P Birks, ed., *English Private Law* (Oxford, OUP, 2000), 830.
[92] Per Lightman QC, *Seven Seas Properties Ltd v Al-Essa (No 2)* [1993] 1 WLR 1083, 1088 (Ch D).
[93] Alderson B in *Hadley v Baxendale* (1854) 9 Ex 341. See also, GH Treitel in *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988) 156.
[94] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, OUP, 1979) 433.

as the consumer well knows, it will often not be reasonable to think that the promisor has accepted responsibility merely because the promisee has communicated a special circumstance to her. If a buyer mentions to a high street electronics salesman, before finalising the purchase of a television, that the television will be placed in a highly flammable room, then it is not reasonable to understand the salesman to be accepting the risk of the television malfunctioning, giving off sparks, and setting the house on fire. It is important to note that in this and many such cases, the risk in question may well be one that the vendor has already accepted, since it is reasonable in such cases to understand the promisor as fixing his risk broadly and in very general terms given that the pricing and insurance are done on that basis.[95] However the point being made here is that the particular communication of the special information makes no difference to the apparent scope of the assumed risk unless the promisor in some way 'signalises' an acceptance of the risk.[96]

iv) Where the promisor has been communicated knowledge that renders losses foreseeable, it may not be reasonable to understand that promisor as implicitly accepting responsibility for the losses where the communication of the information was casual;[97] fortuitous,[98] or from someone other than the claimant;[99] or to an employee who, albeit with authority to undertake responsibility, is unlikely to do so lightly and so impliedly and in commercial reality plays no part in negotiating the terms.[100] As with the case in the previous paragraph, the loss may still fall within the scope of the responsibility assumed, not because it is reasonable to think that responsibility was assumed in response to the communication of special knowledge, but rather because it is reasonable to think that the risk was fixed broadly with a general assessment of the possible losses.[101]

[95] Indeed, as Beale observes, 'the party in breach may have made the deliberate decision not to implement office procedures to deal with unusual risks because the costs would outweigh the benefits.' H Beale, *Remedies for Breach of Contract* (London, Sweet & Maxwell, 1980).

[96] N 92 above.

[97] Cf *Kemp v Intasun Holidays Ltd* [1987] 2 FTLR 234. See J Smith, *The Law of Contract*, 4th edn (London, Sweet & Maxwell, 2002), 222, J Beatson, *Anson's Law of Contract*, 28th edn (Oxford, OUP, 2002), 609.

[98] E McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford, OUP, 2003), 1061.

[99] D Harris, 'Chapter 26: Damages' in HG Beale, ed., *Chitty on Contracts*, 29th edn (London, Sweet & Maxwell, 2004), H McGregor, *McGregor on Damages,* 17th edn (London, Sweet & Maxwell, 2003), para 6-176. But see H McGregor, *Contract Code drawn up on behalf of the English Law Commission* (Milan, Giuffre, 1993) at 120.

[100] Atiyah, n 94 above, 432–33. See also authorities cited above at note 91.

[101] See norm 7 above.

Despite this, in many, or perhaps the majority, of situations, foreseeability of the loss will be sufficient for the promisee to infer that the risk of loss was assumed by the promisor. This should not blind us, however, to the underlying principle according to which remoteness is dependant upon assumption of risk, with foresight important only insofar as it (along with the fact of subsequent entry into the contract) indicates an apparent assumption of risk.[102] As Halson puts it:

> This should be put in terms of the intention of the parties rather than in terms of reasonable contemplation or foreseeability. Although the categories of loss which are reasonably anticipated will often be those for which the parties intend D to be liable, their intention (express or implicit) should be the paramount test: it may sometimes be inferred from the express terms that there was an intention that D should not be liable for a particular loss even though it could have been reasonably anticipated.[103]

As McGregor observes, '[n]ot only must the parties contemplate that the damage resulting from the special circumstances may occur, but they must further contemplate that the defendant is taking the risk of being liable for such consequences should they occur.'[104] Recently, Waller LJ, *obiter*, approved McGregor's observation,[105] explicitly stating that 'simply drawing the attention of the [promisor] to special circumstances, does not necessarily impose a liability on the payer to be responsible for damages flowing from the special circumstances to which attention has been drawn' and stating that for the promisee to succeed at trial he would have to demonstrate that the promisee had 'accepted the risk' of the particular loss for which the claim was brought.[106] The formidable chorus of modern academic voices to this effect should be harkened,[107] and the test

[102] Bridge LJ is explicit about this *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555, CA 580. See also Diplock LJ in *The Heron* II, CA, 731 and 728; Salmon LJ in the *The Heron II* [1966] 2 QB 695, CA, 739; and the minority in *British Columbia and Vancouver's Island Spar, Lumber, and Saw-Mill Co v Nettleship* (1868) LR 3 CP 499.

[103] D Harris, D Campbell and R Halson, n 28 above, 90–1.

[104] *McGregor on Damages*, above n 99, para 6-177. This view is reflected in McGregor's *Contract Code*, above n 99, at article 437 and the accompanying discussion at page 121: in art 437, the requirement of foreseeability is supplemented by a requirement that, in addition, 'the party against whom the claim is made … could reasonably be regarded as having contracted to be liable.'

[105] Referring to exactly this statement, although in the earlier 16th edition of *McGregor on Damages*. Waller LJ also approves Robert Goff J's statement in the *Pegase*, quoted later in this paragraph.

[106] *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112 at paras [24]–[26].

[107] As well as those already quoted, see particularly D Campbell and H Collins, n 61 above, 45; H Collins, *The Law of* Contract, 4th edn (London, Butterworths, 2003), 413; F Dawson, 'Reflections on Certain Aspects of the Law of Damages for Breach of Contract' (1995) 9 *Journal Contract Law* 20; D Harris in *Chitty on Contracts*, n 100 above, paras 26-055, 26-056; D Harris, D Campbell and R Halson, n 28 above, 90–1; *McGregor on Damages*, above n 99, para 6–177; GH Treitel, *The Law of Contract*, 11th edn (London, Sweet & Maxwell, 2003), 970;

should be reformulated. We could do worse than adopt the formulation of Robert Goff J (as he then was):

> have the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event of a breach by him, *such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach*. The answer to that question may vary from case to case, taking in to consideration such matters as, for example, the nature of the facts in question and how far they are unusual, and the extent to which such facts are likely to make fulfilment of the contract by the due date more critical, or to render the plaintiff's loss heavier in the event of non-fulfilment [emphasis added].[108]

How Likely Must Occurrence of the Loss Be?

If, as is argued, foreseeability is important because of what it indicates about assumption of risk, then the level of likelihood of occurrence of the loss that must be foreseen is certain: a loss must be foreseeable as sufficiently likely that it can be inferred that the promisor assumed responsibility for it. This, in turn, is a question of fact requiring the application of a purposive test and norms of behaviour. If this is right, then ballpark figures/rules of thumb such as 'not unlikely' and 'serious danger', as put forward in the House of Lords in *The Heron II*, are helpful. As Dawson argues:

> The question in every case is the extent of the secondary obligation undertaken by the defaulting promisor at the time that he enters into the contract. The question is did the promisor implicitly or explicitly undertake responsibility for the loss which has occurred. Clearly if the particular damage that has occurred can be expected to arise in the usual course of things, a court is likely to find that the defendant assumed responsibility for that loss. Similarly, if a particular loss is highly unlikely to occur, it will be difficult (although not impossible) to say that the defendant has undertaken responsibility for that loss.[109]

If the proposed thesis is incorrect, however, then foreseeability is either an end in itself, or serves to indicate some other principle other than assumption of risk. If the former, then the test, made up of fuzzy words ('serious danger', 'not unlikely' etc), is inherently uncertain and so unhelpful

SM Waddams, *The Law of Contracts*, paras 740ff, and *The Law of Damages*, paras 14.200ff, both n 58 above. But see eg A Burrows, n 91 above, 830.

[108] *The Pegase,* n 78 above, 184.
[109] F Dawson, n 107 above, 33–4.

without a purposive principle behind it. If the latter, and there is some other principle behind the test, then what is that principle? For their Lordships in *The Heron II* to expend significant effort on pin-pointing a precise level of likelihood with which a loss must be foreseen, without explaining on what basis they were determining the level (except that it was stricter than tort), is to reduce proceedings to farce. As Cartwright observes, '[t]he question, 'how foreseeable?' cannot be separated from the question of why we use a test based on foreseeability: the content of a rule must fulfil the policy of the rule.'[110] Without a reasoned justification for the rule, we are left with 'abstract speculation on the literal meanings of words' which produces 'a pointless logomachy in the leading cases.'[111] However when we take an agreement-centred view, we can ask whether the risk was one the promisor 'when he was settling the balance of the bargain … could *realistically* have had in mind as the consequences of his failure to fulfil his obligations.'[112] This is a difficult test, but at least it has content.

Only the 'Type' or 'Kind' of Loss, and Not the Precise Loss, Must be Foreseeable as Not Unlikely

Probably the best explanation for why the courts haven't needed to accept that remoteness is about an assumption of risk, and haven't explicitly addressed the norms discussed above that decide whether or not there has been an assumption to be assessed, is that these norms are usually applied, where necessary, under the veil of the 'type or kind' test. It is common ground that it is not the precise loss that must be foreseen (as not unlikely), rather it is only the type or kind of loss, of which the actual loss is one manifestation.[113] To fix the level of probability by which a loss must be foreseeable (with hair-splitting precision in *The Heron II*) comes to nought if there is no precise way of fixing the level of generality with which a loss must be foreseeable. A general loss of profits may be foreseeable as 99 per cent likely to result from breach, but a particular loss of profits caused in a particular way through loss of a particular deal may be unforeseeable or foreseeable as 1 per cent likely.[114] Thus, as Harris

[110] N 33 above, 493. See also SM Waddams, *The Law of Contracts*, n 58 above, para 736.
[111] D Campbell and H Collins, n 61 above, 45.
[112] *Ibid*, 49.
[113] *Parsons v Uttley Ingham & Co Ltd* [1978] QB 791, *Brown v KMR Services Ltd* [1995] 4 All ER 598. In French law the extent of loss, and not only the type of loss, must be foreseeable: B Nicholas, *The French Law of Contract*, 2nd edn (Oxford, Clarendon Press, 1992). As the following discussion shows, common law manipulation of the concept of type means that similar results are reached in the common law and French systems.
[114] See *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528 and *Brown v KMR Services Ltd* [1995] 4 All ER 598, which both fit this sort of pattern but were decided differently.

observes, '[t]he application of the test for remoteness to a particular set of facts therefore depends largely on the judicial discretion to categorise losses into broad categories.'[115]

The consequences of breach are the data that must be categorised into types on the basis of set criteria. Without agreed criteria, it is impossible to distinguish between type or extent, and the consequences of breach can be categorised into types in an infinite number of ways, none of them salient. Which features of losses render them different types and which features merely render them different extents of loss of the same type? With what level of specificity must a loss be foreseeable? This problem is often raised,[116] but no answers are ever provided because there is no accepted principle upon which such answers could be based.

It is submitted that the best way of making sense of the 'type/extent' distinction is to see it as part of the application of the basic test of assumption of risk. The degree of likelihood by which something must be foreseen and the characteristics by which the 'something' that must be foreseen is defined, the type, are both servants to the basic test of whether, and to what extent, it reasonably appears that risk was assumed for the consequences of a breach. The type/extent question is really an inquiry into whether the loss differs in significant ways from the sorts of losses envisaged at the time of making the contract. The key question, of course, is what count as 'significant ways'. The answer must be: 'whatever reasonably appears to have been significant to the promisor who was assuming the risk', the promisor who was setting the price, taking out insurance, and deciding how much effort to expend in seeking to perform.

When this is accepted, and norms of the sort suggested above[117] are brought into consideration, much of the mystery disappears. Sometimes, as Cartwright observes, 'unexpectedly high economic losses are indicative of a *different order of risk* undertaken by the defendant under the contract [emphasis added]',[118] but this will only be so where the magnitude of the economic loss indicates that it differs in a way that is significant, such that the promisor could not reasonably have been expected to have taken that loss into account when setting the price and taking out insurance. Where that is the case, the loss will sometimes still be similar in enough significant ways that the contemplated element of the loss (that

[115] N 99 above, para 26–050. See also SM Waddams, *The Law of Contracts*, para 737, and *The Law of Damages*, paras. 14.260–14.270, both n 58 above.
[116] A Burrows, n 91 above, §18.40 and n 81 above, 50; M Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 14th edn (2001), 665 n 1; E McKendrick, n 98 above, 1071ff.
[117] See p 259 above.
[118] N 33 above, 506 footnote 65. See also *Brown v KMR Services Ltd* [1995] 4 All ER 598 (CA), per Stuart-Smith LJ at 620: 'But I do not see any difficulty in holding that loss of ordinary business profits is different in kind from that flowing from a particular contract which gives rise to very high profits, the existence of which is unknown to the other contracting party who *therefore does not accept the risk* of such loss occurring' [emphasis added].

which could have been taken account of when setting the price and taking out insurance) may still be recoverable.[119] In such cases, although the species of loss is not contemplated, providing the genus of the loss *is*, recovery may be made up to the value of an ordinary loss under the species that was contemplated but didn't in fact occur.[120]

Other 'type' issues can be explained once the agreement-centred, and so normatively focused, account of remoteness is adopted. For example, in *Parsons v Uttley Ingham & Co Ltd*,[121] a supplier of a defective food hopper was held liable for pig fatalities resulting in a then unforeseeable way from the pigs' consumption of mouldy nuts. It seems that the Court of Appeal in the *Parsons* case felt that risk reasonably appeared to have been assumed by the promisor for just about any physical damage to the pigs, that the promisor should have known that the hopper was intended to further the pigs' physical well-being, and that generally physical harm is likely to be less palatable to promisees than other harm and so the risk of it is less likely to be assumed by them.[122] In such cases neither the precise manner in which that damage is caused, nor the likelihood that it will be caused, make a significant difference to the promisor, and so they make no significant difference to the scope of risk that the promisor appears to have intended to assume. Indeed, the likelihood that a consequence will result is often barely relevant where its occurrence depends upon factors outside the control of the parties. Lord Pearce gives the following example in *The Heron II*:

> Suppose a contractor was employed to repair the ceiling of one of the Law Courts and did it so negligently that it collapsed on the heads of those in court. I should be inclined to think that any tribunal … would have found as a fact that the damage arose 'naturally, ie according to the usual course of things.' Yet if one takes into account the nights, weekends, and vacations, when the ceiling might have collapsed, the odds against it collapsing on top of anybody's head are nearly ten to one.[123]

As this demonstrates, if a consequence (such as the collapse of the ceiling) is the sort of consequence that is one of the things against which a contract is guarding, the relative improbability of its occurring will rarely

[119] As in *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528.
[120] Pothier, above n 2, para 173, *Cory v Thames Ironworks Co* (1868) LR 3 QB 181. This will be fair where it reasonably appears to the promisee that price, but not insurance (which may not extend to the sub-species of loss actually suffered), is significant in determining the promisor's loss. In other words, it all depends whether or not the sub-species differ in a sufficiently significant way. This is a difficult aspect of the test, and deserves closer examination, but can only be an improvement over the present situation in which none of these issues are discussed.
[121] [1978] QB 791, CA.
[122] Norm 8 above.
[123] [1969] 1 AC 350, 417. See further F Dawson, n 107 above, 38.

render the losses resulting too remote because the improbability is, in such cases, not relevant to the promisor's apparent assumption of risk. In such cases the directness or indirectness of the loss may reasonably appear to be more significant to the assumption of risk (and sometimes the taking out of insurance against liability) than the likelihood of the loss.[124]

Indeed, the account proposed would bring within the sphere of remoteness and under one coherent principle several other doctrines of the law of responsibility for breach of contract that are not currently thought of as determined by the rules of remoteness, as follows.

Mental Distress, Loss of Amenity and Idiosyncratic Losses[125]

It is accepted that in awarding damages, courts seek to put the claimant in the position in which he would have been had the contract been performed. In recent decades the law's approach to the 'position in which he would have been' has become more sophisticated, recognising that it is not only financial goals (in terms of assets and profits) that motivate people to enter contracts, and that where the contract is understood to be one that is oriented towards other goals, the promisor will often reasonably appear to have assumed responsibility for the failure to achieve those goals. So far the courts have not allowed such losses to be recovered under the basic remoteness test, but rather have imposed a special rule, although the specialness of the rule is disappearing. It used to be thought that damages for mental distress were only available where 'the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation',[126] but this has been broadened significantly in two House of Lords decisions. In *Ruxley Electronics and Construction Ltd v Forsyth*,[127] loss of amenity damages were awarded against a construction company when a swimming pool failed to provide the enjoyment that could reasonably be expected. This is a far cry from holiday[128] and wedding photograph[129] cases and in principle could extend to most consumer contracts.[130] More recently, in *Farley v Skinner*[131] the House of Lords tempered the special rule by holding that it is not necessary for peace of mind to be 'the very object' of the contract, and that 'it is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind.'[132]

[124] F Dawson, *ibid* 47.
[125] See further E McKendrick and K Worthington, chapter 13 in this volume.
[126] Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445.
[127] [1996] AC 344.
[128] *Jarvis v Swan's Tours* [1973] QB 233, *Jackson v Horizon Holidays* [1975] 1 WLR 1468.
[129] *Diesen v Samson* 1971 SLT (Sh Ct) 49.
[130] See especially the speech of Lord Mustill.
[131] [2001] UKHL 49, [2002] 2 AC 732.
[132] At [24].

It is argued that the reason for the current existence of a special rule is not any special feature of amenity or distress loss, but rather that the current doctrine of remoteness, with its over-concentration on foreseeability at the expense of the general principle of assumption of risk, is inadequate to account for these cases.

Bingham LJ has stated:

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.[133]

It is respectfully submitted that his Lordship is correct that mental distress and amenity cases cannot be explained on the grounds of foreseeability, as such losses may well be foreseeable in many more cases than recovery is, and should be, allowed.[134] However it is also respectfully submitted that the limitation on such recovery is not based on considerations of policy as his Lordship stated, but rather is based on the rarity with which responsibility for such losses will be assumed by the promisor. If the approach proposed herein is accepted then there would be no special rule for mental distress and loss of amenity damages, but rather such losses would be available whenever it reasonably appears that responsibility for them has been assumed. This determination would depend upon whether the contract is oriented towards pleasure or other non-financial consumer goals, given that all contractual obligations must be intended to have some contractually significant goals (see norm 1 above) but that generally (since such losses are hard to quantify, often ephemeral, and to be expected as vicissitudes of modern life[135]) such losses will not be within the scope of responsibility of the contract (see norm 9 above). As Green observed, the question to ask is: 'What interests does the contract promote or serve?'[136] The test as to whether pleasure was 'an important object' of the contract is merely to emphasise that for recovery such pleasure must be not merely foreseeable but also an understood orientation of the contract within the responsibility of the

[133] *Watts v Morrow* [1991] 1 WLR 1421, 1445.

[134] D Yates, 'Damages for Non-Pecuniary Loss' (1973) 36 *Modern Law Review* 535, 538; AS Burrows, 'Mental distress damages in contract — a decade of change' [1984] *Lloyds Maitime Commercial Law Quarterly* 119, 121. Contrast the approach of the Scottish Law Commission Report 174, *Report on Remedies for Breach of Contract* (1999), which recommended that non-patrimonial losses should be recoverable subject only to the ordinary remoteness rule (§3.8) and yet understood the ordinary remoteness rule solely in terms of foreseeability (§7.31).

[135] For example, contract-breaking itself is an 'incident of commercial life which players in the game are expected to meet with mental fortitude', per Lord Cooke in *Johnson v Gore Wood & Co (No 1)* [2002] 2 AC 1, 49.

[136] N 37, 51.

promisor, and that usually this will not be the case. Under this test, it seems that in the usual surveyor case there is no apparent assumption of responsibility for peace of mind as such contracts are contemplated as being solely financial in orientation, but that this can be displaced where there is a specific undertaking to investigate a matter that is important for the buyer's peace of mind.[137] With this understood, there is no need for a special rule to supplement the basic contemplation test (as reformulated herein).[138]

Cases of skimped performance, in which the promisor, in providing a service, has provided less than was required under the contract specifications,[139] and cases of promises for the benefit of a third party, can be brought within the same umbrella.[140] All are questions of whether the promise was oriented towards some valued purpose of the promisee, whether or not it had financial value. This is the same idea as the 'consumer surplus' idea that was raised in both *Ruxley* and *Farley*.[141]

SAAMCO

The most important recent decision on the scope of assumed responsibility for the consequences of breach is that of the House of Lords in *South*

[137] This is one explanation for the different results in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 and *Watts v Morrow* [1991] 1 WLR 1421. However things are not so simple. If the special agreement to investigate noise levels is an extra obligation undertaken by the surveyor, then it introduces new liability and new losses. However if the surveyor is already obliged to investigate noise levels then the 'special agreement' amounts merely to a special communication as to losses resulting from breach, in other words an intimation by the promisee that if the promisor breaches the promisee will lose enjoyment. In this case much would depend upon whether the intimation was too late (discussed above at 270) or too casual (discussed above at 271). And is it not implicit that a house-buyer is seeking peace of mind and that an obligation to investigate noise levels is not only about financial value but also about enjoyment? For this latter point see E McKendrick and M Graham, 'The Sky's the Limit: Contractual Damages for Non-Pecuniary Loss' [2002] *Lloyds Maritime & Commercial Law Quarterly* 161, 163.

[138] See *McGregor on Damages*, above n 99, paras 3-021 and 3-030, and Lord Scott in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 at [75].

[139] *City of New Orleans v Firemen's Charitable Association* 9 So 486 (1891), *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361, *White Arrow Express Ltd v Lamey's Distribution Ltd.* (1996) 15 Trading LR 69, (1995) *The Times*, 21 July.

[140] See the discussion of Lord Griffiths in *Linden Gardens Ltd. v Lenesta Sludge Disposals Ltd.* [1994] 1 AC 85 and Lords Goff and Millett in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518.

[141] The idea is most clearly formulated in D Harris, A Ogus and J Philips, 'Contract Remedies and the Consumer Surplus' (1979) 95 *Law Quarterly Review* 581, cited in *Ruxley* by Lord Mustill at 360, and in *Farley* by Lord Steyn at [21] and Lord Hutton at [48]. Lord Scott's judgment in *Farley* is particularly important for its grounding of the remedy in that case within a broad intangible interests theory. See further B Coote, 'Contract damages, *Ruxley*, and the performance interest' [1997] *Cambridge Law Journal* 537, E McKendrick, 'Breach of contract and the meaning of loss' [1999] *Current Legal Problem* 37, J Cartwright, 'Compensatory Damages: Some Central Issues of Assessment' in A Burrows and E Peel, *Commercial Remedies: Current Issues and Problems* (Oxford, OUP, 2003).

Australia Asset Management Corp v York Montague,[142] although none of their Lordships used the word 'remote' or 'remoteness' anywhere in their judgments.[143] There is no space to investigate the complicated facts of the case, which are ably discussed elsewhere;[144] essentially, some property valuers negligently overvalued property and so the banks that had engaged the valuers lent money against the security of the property. The valuers were not held liable for all the banks' losses even though the banks would not have advanced the money had the valuations been careful (and so accurate), since the part of the loss that was due to the property market falling was held to be part of the banks' responsibility. This was so because the valuers had not undertaken to advise on whether and how much to lend against the properties, only to provide valuation information. Part of the responsibility, and so the risk, for acting upon that information must lie with the banks.

Lord Hoffmann, giving the only reasoned speech, explained that, as in tort, it is necessary before quantifying losses to determine the extent of liability under the obligation assumed, meaning 'the kind of loss in respect of which the duty was owed' which 'is defined by the term which the law implies' which requires 'construction of the agreement as a whole in its commercial setting' and in the light of its purpose.[145] This is exactly what is being proposed in this account: the orientation of the obligation was towards the provision of accurate information rather than advice, and so losses caused by the market drop are attributable to the acts of the banks in deciding to lend the money, and not to the breach by the promisor (even though but for the careless valuation the losses would not have occurred). The market losses are of a different type or kind with regard to this contractual obligation because of the nature of the service that was being provided.[146] Lord Hoffmann explicitly decides the assumption of responsibility issue on the basis of implied intention:

> The scope of the implied duty in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them

[142] [1997] AC 191.
[143] In reference to a judge's discussion of a *SAAMCO* scope of duty point, Waller LJ observes in *Mulvenna v Royal Bank of Scotland plc* (2003), n 106 above at [24] 'I prefer to approach *what is in reality the same point* by reference to the cases on remoteness' [emphasis added].
[144] E Peel, '*SAAMCO* Revisited' in A Burrows and E Peel, *Commercial Remedies: Current Issues and Problems* (Oxford, OUP, 2003); T Dugdale, 'The impact of *SAAMCO*' (2000) 16 *Professional Negligence* 203.
[145] [1997] AC 191, 211.
[146] Similarly, an ordinary mountaineer's accident, although it would not have been suffered but for a doctor's breach (as the expedition wouldn't have gone ahead), is of a different type or kind of loss to injury resulting from failure of the mountaineer's knee (on the mountain or elsewhere), because of the nature of the service that is being provided. It must be noted that the words 'type or kind' are used as labels marking the conclusion as to what features of loss are significant to the scope of responsibility assumed, they are not fixed tests of themselves.

> down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking.[147]

That this decision does not mention remoteness merely indicates that the current remoteness test is not yet sufficiently sophisticated to operate as one coherent principle encompassing all of the law of assumption of responsibility for consequences.[148]

Fraudulent Breaches of Contract

The agreement-centred account of contract damages put forward herein has been principally applied to explaining how one can have a theory of contract damages which gives a central place to foreseeability of loss, but still explains the many situations in which foreseeable losses are not (and should not be) recoverable. However there is one important situation in which this assumption of responsibility account might lead to recoverability even when loss is not foreseeable, in other words, a situation in which the account enlarges responsibility beyond the foreseeability test rather than reducing it.

The situation I have in mind is that of the fraudulent breach of contract. It was suggested in norm 12 in the list of norms above that a party is unlikely to take responsibility for losses caused by the fault of the other party. If, and when, this norm is strong enough, the clear unspoken refusal to accept losses deliberately or fraudulently caused by the promisor may outweigh other unspoken norms, such as 5, 6 and 7 above, by which it is usually concluded that a promisor will only accept responsibility for foreseeable losses. If this is the case, then it would be reasonable to infer that the parties had agreed that the promisor would be liable for all, or perhaps all direct, losses resulting from a deliberate or fraudulent breach. This result is found in French and related legal systems, as well as in the Principles of European Contract Law,[149] but not in Common

[147] [1997] AC 191, 212.

[148] See J Wightman, n 31 above, 75–6: 'The classical remoteness test is not therefore well suited to reflect the subtleties of how the risks of an occasioned harm should be distributed'; T Dugdale, n 144 above, 223–4; *McGregor on Damages*, above n 99, para 6–45. In addition, I have argued elsewhere that most questions of legal causation in the tort of negligence (as opposed to questions of factual quantification) can be better resolved by investigating the scope of the tortious duty in the light of social norms (see A Kramer, n 23 above). It may be that, as well as contractual remoteness issues, contractual questions of causation should be similarly governed by the scope of the contractual duty, in other words its orientation, and the *SAAMCO* decision and discussion certainly seem to indicate this. There is not space to elaborate this further here, but it is the author's view that legal questions of causation are essentially indistinguishable from the remoteness issues discussed herein. See further L Green, n 37 above, 54ff.

[149] French Civil Code articles 1150–1, Louisiana Civil Code articles 1996–97, Principles of European Contract Law article 9.503, Quebec Civil Code article 1613.

Law or Scottish or German legal systems.[150] It should be noted, however, that I would seek to explain such a result not on the basis of punishment or evidential burdens or delict, but rather on the basis that the parties impliedly agree to such a result.[151]

It should also be emphasised that this result, like most of those proposed in this chapter, depends for its applicability on the extent to which a particular norm is accepted as prevalent in the national or other community in which the parties contract. It may be that the common law world, in which the irrelevancy of fault to contract damages and the theory of efficient breach have long attracted discussion and some support, has evolved a culture in which the norm is not part of the reasonable expectations of the contractors, whereas other legal systems such as the French legal system do not have such a culture. It should also be noted that what amounts to 'fraud', and what limitation, if any, should take the place of the foreseeability test in fraud cases, have deliberately not been elaborated upon: they are matters, and very difficult matters, for elsewhere, and ultimately for the particular community norm.[152]

CONCLUSION

This chapter has sought to justify the account proposed herein by its consistency with our general approach to contractual obligations, which is to find their content in the apparent intention of the parties. However, the proposed account is to be preferred not only because it fits with the general agreement-centred approach to contractual obligations. It also provides a more coherent and sense-making description of the existing law. The apparently clear rule of 'foreseeability of the type of loss as not unlikely' has been shown to be unacceptably unclear by providing no guidance as to how to apply the vague concepts of 'type of loss' and 'not unlikely'. Moreover, even dishonest manipulation of this test cannot satisfactorily resolve cases such as the taxi-driver who is paid an ordinary

[150] For a summary, see the notes accompanying article 9.503 of the Principles of European Contract Law.

[151] Treitel briefly discusses the various explanations in 'Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)' in A von Mehren, chief ed., *International Encyclopedia of Comparative Law: Volume VII: Contracts In General* (Tübingen, Mohr Siebeck, 1976) at a para. 16–81.

[152] In the French and Quebec Civil Codes, fraud includes intention and gross negligence and in such cases all 'immediate and direct losses' are recoverable (French Civil Code articles 1150–1, Quebec Civil Code article 1613, and notes accompanying article 9.503 of the Principles of European Contract Law). In the Louisiana Civil Code, 'bad faith' breaches give rise to liability for all losses that are a 'direct consequence' of the breach (article 1997). The Principles of European Contract Law disapply the foreseeability requirement to cases of 'intentional and grossly negligent' breach, but make no mention of the test to apply in its stead, or to directness in general (article 9.503).

fare in the knowledge that tardiness will result in his passenger losing a huge financial gain. Furthermore, in situations in which the foreseeability test cannot cope even when applied in a contorted manner, the law has responded to this, as it must, by creating separate rules for mental distress, amenity and *SAAMCO*-type cases, essentially supplementing the inadequate foreseeability test with further tests that look at the implicit assumption of responsibility.

It is time that we take stock of the situation and treat the *SAAMCO* and mental distress tests as warnings as to the inadequacy of the foreseeability test, interim solutions to the problem, and indications of the way forward. The foreseeability test should be reconceived, along with the mental distress and *SAAMCO* tests, as being applications of one basic principle that looks to the scope of the implied assumption of responsibility (and the orientation of the obligation, if that metaphor is thought to be helpful). Foreseeability should be seen as a good but inconclusive indication of an assumption of responsibility, and the label remoteness may be applied to this new approach or discarded, according to taste. Problems of determining *how likely* a forseeable loss must be, and *how precisely* it must be foreseeable, will then fall away as mere indications of what responsibility reasonably appears to have been assumed. Waddams has observed that:

> The rule in *Hadley v Baxendale*, like all legal rules in a developing common law system, is an interim rule. It seemed sufficient in 1856. The fact that it has stood so long suggests that it answers a need with considerable success. But the subsequent decisions suggest that the rule is incomplete; it is now encrusted with exceptions and presumptions and will eventually yield to a revision.[153]

Now is the time for such a revision.

POSTSCRIPT: OTHER PARTS OF THE LAW OF CONTRACT THAT MAY BE EXPLICABLE ON THE SAME BASIS

There may be other aspects of the law of damages that can be explained, or at least partially explained, by the agreement-centred approach applied herein. One of these is the principle of avoidable harms, also known as the mitigation principle. Whereas that principle may be understandable on the basis of external, policy-based, principles of fairness or the avoidance of waste,[154] it may also be explicable on the basis

[153] SM Waddams, *The Law of Contracts*, above n 58, para 742.
[154] See the discussion by M Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 *Law Quarterly Review* 398.

of an implied community norm that parties will take reasonable steps to minimise their own loss.[155] This may seem remote from the assumed attitude of parties in individualistic transactions that are low on cooperation and high on adversarialism, but then in those cases the standard of reasonableness may be less onerous than in more cooperative cases. If we are to be accurate, we must recognise that the principle of avoidable harms, by its reference to 'reasonable' steps to mitigate, is in truth not one norm but a complicated set of norms that determines what is to be expected in a variety of situations. Furthermore, what counts as reasonable depends upon what the mitigating party is willing to accept in substitute for the performance promised to them (most obviously when the mitigation is through purchase of a replacement), and in such cases it should be the shared orientation of the contract that governs what features of the promised position the mitigating party is permitted to hold out for and which features they must sacrifice in the name of avoidance of loss.

Related to this last point, another aspect of damages that may be better understood by the proposed approach is that of the adequacy of damages, which is central to the exercise of a common law court's discretionary decision to award specific performance. One element in the assessment of whether a damages award is adequate compensation should be the disparity between the purposes and values that are protected in the award of damages and the purposes and values that fall under the orientation of the contract. When the court, in a case of contract for the sale of a unique good, awards specific performance, it should be when and because the uniqueness of the property was part of the orientation of the contractual obligation.[156] Even if the promisee values the property's uniqueness and the promisor is aware of this, unless the uniqueness is part of the orientation of the contract — the agreed stakes — then specific performance should not be awarded because damages in such a case are adequate. They are adequate because they fully compensate for all the values and purposes towards which the contract was oriented, which is all that the promisee is entitled to. To award specific performance in such a case is, in some ways, to order the promisor to make a gift, since it forces the promisor to compensate for the non-fulfilment of a goal for which the promisor had not assumed responsibility.[157]

[155] See norms 11 and 12 above.
[156] All property is unique, but the unique identity is not usually important to the purchaser.
[157] Kimel argues that, following the harm principle, specific performance is only justifiable when an award of damages (the less harmful remedy) is not as effective at redressing the harm: D Kimel, *From Promise to Contract*, n 27 above, 104. SA Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 *Modern Law Review* 360, argues that specific performance should be available only when necessary, since whenever specific performance is potentially available it is possible that the performance of a promise was motivated by the threat of compulsion.

As the modern trend in awards of damages is towards recognition of purposes and values of a non-financial nature,[158] specific performance will less often be justified on the basis of a contractual value not being covered by the compensation award. One situation in which specific performance might still be needed is when it is difficult to estimate the amount of compensation for non-financial loss, and so there is a high risk of over-estimating and so punishing the promisor.[159] Specific performance might also be needed when no amount of money is equivalent to the contractually contemplated loss that has been suffered. When specific performance is impossible or undesirable in such cases, an award of punitive damages may be justifiable, since otherwise the promisor is able to avoid fulfilling the responsibility assumed under the contract (because paying compensatory damages are inadequate). In such cases the law may be justified in viewing the promisor as a tortfeasor, since the promisor is in effect reducing the promisee's patrimony without her consent. Note that this is not a simple case of efficient breach, in which the promisor can make a profit even after fully compensating the promisee for those things for which he was responsible under the contract. Our case is one in which it is impossible to compensate the promisee for those things for which the promisor assumed responsibility under the contract. If such cases do exist, which depends upon the view taken as to what money can compensate for, they will be rare: the old example of breach of a promise to marry springs to mind.[160]

Finally, there is the question of what goes to the root of the contract so as to bring about frustration or a repudiatory breach of an intermediate term. This is a similar question of allocation of risk to that discussed in this chapter, and is determined by reference to the information contemplated by the contract. For example in *Blackburn Bobbin Company Ltd v TW Allen & Sons Ltd*,[161] a contract for the sale of Finland birch timber was held not to be frustrated on the outbreak of war because the risk of the Finnish timber being unobtainable fell upon the promisor vendor, the promisee not having the necessary knowledge of the promisor's routes and not having assumed (shared) risk for a particular route. In the words of Pickford LJ, the continuance of the usual mode of shipping was not 'contemplated'[162] by both parties as necessary for the fulfilment of the contract. The magic remoteness word 'contemplated' is used twice,[163]

[158] Discussed above at 'Mental Distress, Loss of Amenity and Idiosyncratic Losses'.
[159] Smith, n 157 above, 374.
[160] More common is the situation in which the cost of cure is awarded because the simple valuation ('difference in value') of compensation is deemed to be inadequate when put against the values and purposes contemplated by the contract.
[161] [1918] 2 KB 467.
[162] At 469, 470.
[163] *Ibid*.

and it is submitted that this is no coincidence as the same issue arises here as in remoteness cases: the issue of assumption of risk, for which foreseeability is necessary but not sufficient. Of course, 'contemplation', like reasonable expectations, is used often in interpretation cases too, for example by all their Lordships who gave reasoned opinions as to the interpretation of a release in *BCCI v Ali*.[164] The word 'contemplation' signifies a family of inquiries into what the parties reasonably appear to have intended, and remoteness is an important member of this family.

[164] [2001] UKHL 8, [2002] 1 AC 251.