Compensation for Losses Flowing from an Injured Party’s Impecuniosity

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## COMPENSATION FOR LOSSES FLOWING FROM AN INJURED PARTY’S IMPECUNIOSITY

By Gordon Phillips*

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### VI. SUMMARY
I. INTRODUCTION

A court determining the quantum of recovery in an action for damages is influenced by considerations of policy to the same extent as a court determining the existence of liability. Such considerations are presented in their starkest form when a plaintiff seeks to recover damages traceable in part to his own impecuniosity.

The extent of a plaintiff's financial resources\(^1\) may affect the quantum of both his pecuniary\(^2\) and his nonpecuniary\(^3\) losses. This article, however, will be concerned with only one question: what is the court to do when a plaintiff, suing in tort or in contract, and admittedly entitled to some damages, seeks to recover damages in respect of losses that a person of greater means would have suffered to a lesser extent, if at all?

The undivided voice of the House of Lords purported to answer this question in 1933. Yet so ambiguous was the answer that it gave, so unworkable the distinctions that it drew, that today the jurisprudence on this point is in a state of hopeless confusion. As a result of high inflation rates, the question is coming before the courts with increasing frequency, and agreement on some basic issues is needed to bring some measure of certainty to the area.

This article will examine the decisions of the Commonwealth courts and mention American decisions for comparative purposes. Various options open to the courts will be set out and analysed. The cases will be examined

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\(^2\) One instance of this is found in the principle that an injured party can recover the full extent of his lost wages, even though he may have been engaged in an extraordinarily lucrative occupation: The Arpad, [1934] All E.R. 326, 152 L.T. 521, 50 T.L.R. 505; Smith v. London & S.W. Ry. Co. (1870), L.R. 6 C.P. 14, [1861-73] All E.R. 167, 23 L.T. 678, aff'g (1870) 5 C.P. 98.

against a common background: Lord Wright's decision in the classic case of *The Liesbosch.*

II. THE CASES BEFORE 1933

Before 1933 the problem of the impecunious plaintiff had arisen in various contexts. In each context, rules had been developed to determine the extent of his recovery. But the common thread of his impecuniosity had not been perceived, and no attempt had been made to develop general principles on which the decisions could rest.

Some of the early cases involving questions of impecuniosity will be considered under a few general headings in the following sections. Although they have seldom been considered, these early cases may prove useful in interpreting *The Liesbosch,* a case whose interpretation is long overdue.

A. Impecunious Plaintiffs Recover: Cases Involving the Sale of Goods or the Loan of Stock

In suits for a borrower's failure to return stock, and in suits for a vendor's failure to deliver goods paid for in advance, the courts had established not only that the plaintiff's impecuniosity would be presumed, but that it would excuse his failure to purchase substitute goods. This meant that he could recover damages assessed as of the trial date rather than the date of breach.

In actions for the non-return of stock, the plaintiff recovered the value of the stock as of the date of the trial. It was argued that he should have mitigated his damages by purchasing other stock on the day on which his own stock should have been returned to him, and that the defendant should not be held responsible for the amount by which the stock's value rose between that date and the trial date. To this the courts replied that a plaintiff would not be penalized for his failure to purchase substitute stock be-

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The selection of judgment date rather than breach-date as the appropriate date as of which to assess damages could in those days have been justified without reference to the plaintiff's presumed impecuniosity if the actions had been brought in detinue or in conversion: McGregor on Damages (14th ed. London: Sweet & Maxwell, 1980) para. 1051 [hereinafter McGregor]. But the actions were in fact all brought in contract.

The principle upon which those cases were based was doubted by Sidney Smith J.A. in Dawson v. Helicopter Exploration Co. (No. 3) (1957), 22 W.W.R. 207 at 213-14, 8 D.L.R. (2d) 97 at 103-104, and was finally rejected by the Supreme Court of Canada in Asamera Oil v. Sea Oil and Gen. Corp., [1979] 1 S.C.R. 633 at 651, 89 D.L.R. (3d) 1 at 13, [1978] 6 W.W.R. 301 at 315, where Estey J. described them as raising "no responsibility in the plaintiff to mitigate his loss." As will be seen, the cases ostensibly raised that responsibility, but permitted the plaintiff to evade it.
cause "the borrower holds in his hands the money of the lender, and thereby prevents him from using it."\textsuperscript{6}

In short, the plaintiff could not have purchased substitute stock because he did not have access to the stock in the hands of the defendant. The premise compels the conclusion if, and only if, the plaintiff had no source of funds\textsuperscript{7} other than the stock held by the defendant. These cases could thus be cited as authority for two propositions: first, impecuniosity would be assumed,\textsuperscript{8} and second, impecuniosity would excuse a failure to purchase goods in substitution for those wrongfully withheld by another.\textsuperscript{9}

The first of these propositions did not escape comment. In\textit{ Robertson v. Dumaresq}\textsuperscript{10} Lord Chelmsford recognized the unrealistic nature of an assumption of impecuniosity. In allowing the respondent the value as of trial date, rather than the value as of breach-date, of land which the appellant had wrongfully failed to grant him, he stated:

\begin{quote}

[T]he right of the respondent to the highest value of the lands which he has not received in performance of the promise made to him seems to be even stronger than that of the lender of stock upon the borrower's omission to replace it. The owner of the stock might have the means of purchasing other stock at the day...\textsuperscript{11}
\end{quote}

But whatever doubt this cast upon the first of the two propositions, Lord Chelmsford did not suggest that the trial-date rule was inappropriate in the case of a plaintiff who was indeed too impecunious to replace the stock. The "stock loan" cases could thus have been cited in support of the following proposition: an impecunious plaintiff will not be penalized for his failure to replace a chattel to which he was entitled and of which he was deprived, if his impecuniosity made it impossible for him to do so.

The same principle could have been supported by cases concerning the non-delivery of goods whose purchase price was paid in advance. These

\textsuperscript{6} \textit{Gainsford v. Carroll} (1824), 2 B. & C. 624 at 625, 107 E.R. 516 at 516, 2 L.J.K.B. (O.S.) 112 at 113. In \textit{Dunn v. Callahan} (1908), 1 Alta. L.R. 179 at 184, 8 W.W.R. 169 at 173, Beck J. indicated that the assessment of damages as of the trial date in actions for not replacing stock was due to the fluctuating or speculative character of stock. While the rule could have been based on such grounds it seems in fact to have been based on considerations involving the plaintiff's assumed impecuniosity.

\textsuperscript{7} In this article the word "funds" will, unless the contrary is stated, refer to the combination of funds in hand and funds available, including credit. Both Commonwealth and American courts usually treat a plaintiff with credit as if he had the cash itself: see, \textit{e.g.}, \textit{Carriage Bags, Ltd. v. Aerolinas Argentinas}, 521 F. Supp. 1363 at 1367 (1981).

\textsuperscript{8} In fact the \textit{ratio} of those cases is only that non-impecuniosity will not be presumed; but their tenor is that impecuniosity will be presumed.

\textsuperscript{9} The effect of this combination would be that the plaintiff would never have to mitigate his damages by purchasing substitute stock. It would seem that impecuniosity was irrebutably presumed.

\textsuperscript{10} (1864), 10 L.T. 110, 15 E.R. 827 (P.C., N.S.W.).

cases can best be understood if the rationale of the rule establishing the 
prima facie measure of damages for non-delivery is kept in mind. The rule 
is that the measure of damage will prima facie be the difference between the 
contract price and the market value of the goods where the latter is evalu-
at ed as of the date on which the goods should have been delivered. Delivery date is the appropriate date because "the plaintiff had his money in 
his own possession, and might have gone into the market, and bought other 
[goods] as soon as the contract was broken." In other words, from the 
merely fact that a plaintiff had obligated himself to have one sum, the con-
tract price, on hand on a certain day, the court inferred that he must have 
had a greater sum, the market price, on hand on that day. This prima facie 
rule conceals a presumption of unlimited assets.

In fact, there are several possibilities:

(1) The plaintiff may indeed have had sufficient disposable funds to 
purchase substitute goods in the market on the delivery day. In that case 
the prima facie measure is the correct one.

(2) The plaintiff may have had more than the contract price, but less 
than the market price, in disposable funds on the delivery day. In that case 
he could be described as having been "too impecunious to mitigate." The 
problem has never arisen, and it is unclear what effect the courts would give 
to such impecuniosity.

(3) The plaintiff may have had less than the contract price in dispos-
able funds on the delivery day. In that case, ordinarily, he suffered no dam-
ages; for even if the defendant had tendered the goods on the appointed 
day, the plaintiff would have been unable to pay for them, and the defendant 
would have been justified in refusing to deliver; in this case the defendant's 
non-delivery would not attract damages. This also holds true wherever the 
defendant has committed an (accepted) anticipatory breach if it can be 
shown that the plaintiff's inability to pay the price on delivery was already 
inevitable.

This will not always be true, however, for sometimes a vendor will not

12 Sale of Goods Act, R.S.B.C. 1979, c. 370, s. 54(3).
13 Shaw v. Holland (1846), 15 M. & W. 136 at 146, 153 E.R. 794 at 798 per Parke B. See also Barrow v. Arnaud (1846), 8 Q.B. 605, 115 E.R. 1004, 10 Jur. 319, 
14 In 1938 Lord Wright, citing no cases, said that "if a seller defaults in delivering 
the goods sold, the buyer, if there is a market, can recover only the difference between 
the contract and the market price if the market has risen, and only nominal damages if 
the market has fallen, even though he can show that want of money or credit would 
have prevented him from availing himself of the market and covering the default." 
Wright, Legal Essays and Addresses (London: Cambridge Univ. Press, 1939) at 114 
[hereinafter Wright].
164. The requirement of inevitability may require reappraisal: see Jobling v. Associated 
be able to excuse his failure to deliver by showing that the purchaser would not have been able to pay the purchase price on delivery. This will be the case if the vendor's obligation to deliver is not predicated upon the plaintiff's payment upon receipt. This can only mean one of two things.

First, the vendor might have agreed to accept payment later, that is, to extend credit to the plaintiff. It would be possible in such a case for a plaintiff to have had insufficient funds to buy replacement goods on the delivery date, and yet to have suffered damages. Should his lack of funds excuse his failure to purchase replacement goods, and enable him to recover the difference between the contract price and the market price as of trial date, which may be higher than the difference as of delivery date? This question was finally answered affirmatively in 1952, when the Court of Appeal decided Trans Trust S.P.R.L. v. Danubian Trading Co.17

Second, the vendor might already have been paid. It is here that a second line of cases involving impecunious purchasers of goods appeared. In Elliott v. Hughes,18 a purchaser who had paid in advance recovered the difference between the contract price and the market price as of the date of trial plus the monies he had already paid. Although the report does not indicate the judge's reasoning, the decision must have been based on the same grounds as the cases concerning the non-return of stock, which were cited in argument in Elliott. It was on precisely those grounds, that impecuniosity will be assumed and will excuse a failure to purchase substitute goods at the time of the breach, that the Illinois Supreme Court decided Illinois Central Railway Co. v. Cobb, Christy & Co.19 In that case the plaintiff had sold corn to the army, and had commissioned the defendant to ship the corn to Cairo, Illinois, where the army was to take delivery. The defendant delayed the shipment, in breach of its contract with the plaintiff, and as a consequence the plaintiff lost the profits that it might have made under its contract with the army. The Court noted that the lost profits could be recovered under the rule in Hadley v. Baxendale20 because the defendant was aware of the existence of the sale to the army. The Court then disposed of the argument that "the plaintiffs should have gone into the market at Cairo and have [sic] bought corn to fill their contract, and that, not having done so, they can only recover the market price,"21 by stating:

17 [1952] 2 Q.B. 297, [1952] 1 All E.R. 970, [1952] 1 T.L.R. 1066 (C.A.). There were, however, American decisions bearing on this point. In actions for non-delivery by a purchaser to whom the vendor was to extend credit, it had in some states been held that the purchaser had to mitigate his damages by buying the goods for cash if the defaulting vendor offered to sell them providing he was paid on the spot [cf. Payzu Ltd. v. Saunders, [1919] 2 K.B. 581, aff'd 89 LJ.K.B. 17, [1918-19] All E.R. 219 (C.A.)], but that he would not be penalized for his failure to do so if he did not have the funds: Plesofsky v. Kaufman & Flonacker, 140 Tenn. 208, 204 S.W. 204, 1 A.L.R. 433 (1919); Weber Implement Co. v. Acme Harvesting Machine Co., 268 Mo. 363, 187 S.W. 874 (1916).
19 64 Ill. Rep. 128 (1872). Although the case did not involve breach of a contract of sale, the same principle should apply.
21 Supra note 19, at 142.
However this might be, if they had not already invested their money in the corn in controversy, we can not so hold in the present case. It would be very unreasonable to require one, who has bought and paid for an article, to have the money in his pocket with which to buy a second, in case of non-delivery of the first.\(^2\)

These cases, then, support the same two propositions as the cases concerning the failure to return stock. But just as those cases were doubted in *Dumaresq*, so these cases were rejected (this time in *ratio*) in *Startup v. Cortazzi*\(^2\).\(^3\)

In *Startup*, the plaintiffs had paid one-half of the purchase price in advance. The old cases concerning loans of stock were cited to the Court. But the Court found that special damages (by which the rise in the market price from delivery date to trial date was meant) could not be awarded, as they had not been established. Lord Abinger C.B. said in reference to the purchase monies that had been paid in advance: “(i)t was not proved that the plaintiffs could have made more than 5 per cent on that money, or that they had not credit at their bankers to that extent, and thereby had sustained any peculiar inconvenience.”\(^2\)\(^4\) It would seem that special damages could have been recovered if the plaintiffs had been able to show that they had insufficient credit to purchase replacement goods.\(^2\)\(^5\) As the burden was cast upon the plaintiffs to show that they could not have mitigated their damages in this way, a *prima facie* case must have been made out that they could have done so.\(^2\)\(^6\) This could only have been done with the aid of a presumption of non-impecuniosity.

*Startup* can be taken to stand for the proposition that a party will be assumed to be in funds. It reinforces, however, the principle deduced from the above-mentioned cases concerning non-delivery of goods paid for in advance, that impecuniosity (if it can be established) will excuse the plaintiff’s failure to replace a chattel to which he was entitled but which was not delivered to him, if his impecuniosity made such replacement impossible.

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\(^{22}\) Id.

\(^{23}\) (1835), 2 Cr. M. & R. 165, 150 E.R. 71, 4 L.J. Ex. 218. The question of the measure of damages if the purchase price was paid in advance and the market was falling at the date of the breach was treated as open by Atkin L.J. in *Aronson v. Mologa Holzindustrie A/G Leningrad* (1927), 32 Com. Cas. 176 at 289-290, 138 L.T. 470 at 475 (C.A.). This is taken as leaving open the question of whether *Startup* or *Elliott* is to dominate where the two decisions conflict: Benjamin, *Benjamin's Sale of Goods* (London: Sweet & Maxwell, 1974) at para. 1267; McGregor, *supra* note 5, at paras. 225, 591; *Asamera Oil, supra* note 5, at 657-58 (S.C.R.), 18 (D.L.R.), 320 (W.W.R.) per Estey J. For a modern case analogous to *Startup*, see *Cain v. Bird Chevrolet-Oldsmobile* (1977), 12 O.R. (2d) 532, 69 D.L.R. (3d) 484 (H.C.).

\(^{24}\) Id. at 168 (Cr. M. & R.), 72 (E.R.), 219 (L.J. Ex.).

\(^{25}\) Lord Abinger assumed that such damages could not have been suffered if the plaintiff had a line of credit sufficient to enable him to bring his monies up to the contract price of the goods. He did not contemplate the case of a plaintiff with a line of credit sufficient to enable him to bring his monies up to that level, but insufficient to enable him to bring his monies up to the market price on the delivery day.

In 1933, then, there was some support for the principle that the impecuniosity of a plaintiff would, in some circumstances, affect the quantum of damages which he could recover.

B. Impecunious Plaintiffs Recover: Cases Involving the Duty to Mitigate

The cases discussed in the preceding section may be seen as exemplifying the general principle that a party may recover damages which, but for his impecuniosity, it would have been reasonable for him to have taken steps to avoid. Apparently the only pre-1933 Commonwealth decision in which this point was explicitly made was *Clippens Oil Co. v. Edinburgh & District Water Trustees.*

The defendants in that case obtained an interim injunction preventing the plaintiff from working various mineral seams near the defendant's water pipes. The injunction was too broad, and should only have prohibited the plaintiff from depriving one of those pipes of vertical support; the plaintiff, effectively prohibited by the broad injunction from carrying on its business, was ruined.

The measure of damages alone concerned the House of Lords. Matters were complicated by the fact that the lower courts had assessed damages without indicating the manner in which the assessment was made. Lord Collins interpreted a passage in the judgment of the Court of Sessions as meaning only that lost profits could not all be recovered by a plaintiff whose financial position had been so precarious as to make it doubtful that it would have made those profits even had all gone well. He then added:

It was contended that this passage implied that the defendants were entitled to measure the damage on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defendants ought not to suffer for it.... In my opinion, the wrong-doer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrong-doer, who has got to be answerable for the consequences flowing from his tortious acts.

This principle was evidently taken for granted in numerous cases decided over the next three decades. Thus, in *Payzu Ltd. v. Saunders,* McC-
Cardie J. noted in passing that whether or not the plaintiff should have taken certain steps to mitigate her damages was to be determined by considering, *inter alia*, her financial position; the point was evidently too clear to require comment.

It seemed equally clear to McPhillips J.A. of the British Columbia Court of Appeal. In *Cain v. Schultz*, it was argued that the plaintiff should have mitigated its losses by paying a particular licence fee. This was rejected by the learned judge who noted that "it might be a very inconvenient rule of law, and might work great injustice if it were the rule of law, because there might be the inability to advance the licence fee." He then indicated that the likelihood of a plaintiff being too impecunious to mitigate his losses justified the rule that a plaintiff need not expend money in an effort to mitigate his losses.

Many American cases could also, in 1933, have been cited to illustrate this point. Numerous courts had held that the plaintiff in a personal-injury suit could excuse his failure to seek the medical assistance that a reasonable man would ordinarily have sought by showing that he had insufficient funds to procure such assistance. Since a plaintiff in an action for wrongful attachment of his automobile could have posted security and had the vehicle released, his damages were ordinarily limited to the cost of posting such security plus damages for the temporary deprivation of his vehicle but this limitation would not apply if he had been too impecunious to furnish security.

One court, in an action for wrongfully ejecting a train passenger who

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33 Id. at 335 (B.C.L.R.), 602-603 (W.W.R.).

34 Id. The case usually cited to support the "rule" is Jewelowksi v. Propp, [1944] 1 K.B. 510, [1944] 1 All E.R. 483, 171 L.T. 234. The rule has long been discredited; e.g., Asameri *Oil*, supra note 5.

35 In addition to the cases described in the text, see *Pratt Consol. Coal Co. v. Vintson*, 85 So. 502, 204 Ala. 185 (1920); *American Smelting & Refining Co. v. Riverside Dairy & Stock Farm*, 236 F. 510 (1916). Lord Collins' words are echoed in *American Law Institute, 4 Restatement of the Law, Second: Torts* (Washington: A.L.I. Pub., 1977), § 918, para. e.


had paid his full fare, had held that, "the rule requiring the passenger to pay a second time, if he has the money, in compliance with his duty to minimize defendant's loss" did not apply to a plaintiff with insufficient funds to meet the conductor's demand for an additional fifty-one cents, nor did it require him to attempt to borrow that sum from his friends or acquaintances on the train. In another such action, the plaintiff was refused a transfer to a connecting streetcar, and had to walk six blocks to her destination, suffering a serious relapse as a result. It was argued that she should have purchased a ticket on the streetcar to which she needed to transfer. The court held that her lack of funds for this purpose excused her failure to do so:

But plaintiff owed defendant no duty to be prepared for an emergency forced upon her by defendant's wrong, nor can defendant be relieved of responsibility for the full measure of her suffering by reason of the fact that her unpreparedness for a wrong she need not have anticipated. Her lack of money was thus an important factor in the production of the injury suffered, and for it, as for all the proximate results of the wrong done, defendant was responsible.

In an action for breach of an agreement to sharecrop, which the court treated as "of the nature of a contract for personal services," it was held that the plaintiff was under a duty to mitigate his damages by accepting employment of the same general nature, but that:

If the crop season at the time of the breach of the contract had not advanced too far to permit the plaintiff, in the exercise of reasonable effort, and at a reasonable expense, to rent similar lands at the same place and to replace the stock and tools that the defendants agreed to furnish, evidence of the financial condition of the plaintiff at the time the contract was breached would be relevant on the question as to whether or not the plaintiff, by reasonable efforts, could have minimized the damages.

Each of these decisions applied a principle without making any attempt to show that it followed logically from other well-accepted principles. This

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39 Light, id. at 436 (Mich.), 1126 (N.W.). This rule is not part of Canadian law: Toronto Ry. Co. v. Grinsted (1895), 24 S.C.R. 570.
41 Hatton, id. at 577 (Ala.), 936 (So.).
42 T.L. Farrow Mercantile Co. v. Riggins, 14 Al. A. 529, 71 So. 963 (1916).
43 Id. at 535 (Al. A.), 965 (So.).
44 Id. at 536 (Al. A.), 966 (So.).
was inevitable, for the principle that a plaintiff is not to be penalized for his failure to expend monies which he did not possess is truly a first principle, to be rejected or accepted on policy grounds alone. The principle expounded by Lord Collins in *Clippens Oil* had, however, been accepted wherever it had been considered: impecuniosity will excuse a failure to mitigate.

Closely connected to this issue is the issue of whether impecuniosity will excuse a failure to crystallize one's losses. Once it was accepted that a person whose chattel had been tortiously injured could recover damages in respect of being deprived of its use, the question arose, could he recover such damages even if he had not rented a replacement and thus crystallized his losses? Clearly, the damages would be difficult to assess unless a replacement had been rented, in which case the damages would simply be the rental charges, but American courts had held that they could be recovered even if no replacement had been rented. To hold otherwise would be to place a condition of financial ability to rent another chattel upon the plaintiff's right to recover, and "the law cannot condone such a condition." C. *Impecunious Plaintiffs Do Not Recover: Cases Involving Forced Bankruptcy*

Two nineteenth-century English cases established that a plaintiff could not recover damages for having been driven into bankruptcy after the defendant deprived him of his money or assets. That rule may have been an application of a general rule that a plaintiff may not recover damages which he would not have suffered if he had had unlimited funds.

In *Hodgson v. Sidney* the plaintiff claimed to have been induced by a false representation to pay £2,000 to the defendant, as a result of which he had lost the £2,000 and had ultimately become bankrupt. He sought to recover the £2,000, as well as damages flowing from his having been adjudicated bankrupt. It was held that the plaintiff had no standing to bring the action because the damages claimed were, with the exception of those flowing from the plaintiff's having been declared bankrupt, recoverable only by the assignee in bankruptcy.

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45 *Cf. Wright, supra* note 14, at 113: "It is not possible to give any logical reason why the law disregards this . . . financial incapacity."

46 Much of the confusion in this area stems from the unthinking use of the term "mitigate" (see text accompanying notes 328-31, *infra*. In what follows, the rule that impecuniosity excuses a failure to mitigate will at times be called "the rule in *Clippens Oil*."


49 (1866), L.R. 1 Exch. 313, 14 L.T. 624.
The exception was “of no effect” because, as Bramwell B. commented in argument, the damages from the adjudication were “clearly too remote.” Hodgson could thus have been cited for the proposition that losses flowing from the plaintiff’s bankruptcy were too remote to be recovered, where the bankruptcy was attributable to the defendants’ tortiously depriving him of his assets.

Hodgson was not, however, seen in Morgan v. Steble as involving any question of remoteness. The defendants, attorneys acting for the plaintiff, were alleged to have breached their duty to obtain the highest possible price for his property. As a result, the plaintiff did not have the funds to stave off bankruptcy. It was alleged that the defendants knew that the plaintiff’s bankruptcy would be the inevitable consequence of their breach of duty, and the plaintiff argued that this special knowledge on the defendants’ part took the case out of the ambit of Hodgson.

The Court did not decide that the damages claimed were too remote. Hannen J. explicitly stated that they were not. The Court interpreted Hodgson as saying only that such damages could not be recovered by a bankrupt, since that would result in an undesirable splitting of one cause of action, with the assignee bringing an action for some of the damages and the bankrupt bringing an action for the remainder.

Following Morgan, it could have been argued that losses flowing from an adjudication of bankruptcy were recoverable where the adjudication results from the defendant wrongfully depriving the plaintiff of his assets; but that bankruptcy might in some circumstances deprive the bankrupt of standing to recover them. The rule might be seen as involving standing

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50 Id. at 315 (L.R.) per Martin B. The L.T. report uses the phrase “null and void.”

51 In M’Gregor v. Campbell (1909), 11 W.L.R. 153 at 159, 19 Man. R. 38 at 49 (C.A.), Richards J.A. stated that the L.R. version was misleading, because it did not reveal that the judges disregarded the exception.

52 Id. at 314 (L.R.). The L.T. report quotes him as saying “it is questionable to my mind whether you could recover anything on this declaration but the pecuniary damage” (at 625), rather than the words quoted in the text.

53 (1872), L.R. 7 Q.B. 611.

54 Id. at 614-15. The judgment is difficult to understand, and might be interpreted as saying that Hodgson determined the issue, not because it determined that a cause of action could not be split between a bankrupt and his assignee in bankruptcy, but because it determined that damages flowing from an adjudication of bankruptcy are always too remote in an action of this type. In that case Morgan could be seen as determining that such damages are too remote even if the defendant knew that they would result from his actions. But that interpretation seems untenable in light of two observations: (a) Hannen J. who held that the damages were not too remote, evidently felt that his reluctantly-rendered judgment was not inconsistent with that of the majority; and (b) the majority was willing to proceed under the assumption that “this special damage... would not pass to the assignee” (at 614). Of course “damage” cannot pass: only a chose in action can pass. So the majority was referring to a right of action, which they would not have done had they not at least kept an open mind as to its existence, i.e., as to the recoverability of damages.

55 Not only was the point obiter, the judgment of the Court (Pollock C.B., Martin, Bramwell, Channell BB.) made no mention of it. Only the assignee had standing to recover the £2,000.
rather than remoteness, and as being in no way based upon the fact that the plaintiff's bankruptcy and resulting damages were attributable in part to his own impecuniosity.

That was the argument made in Clark v. Hassamal Moolchand & Co.\footnote{55} The plaintiff claimed to have been forced into bankruptcy as a result of the defendant's breach of his contractual obligation to pay a debt of £4,000 owed by the plaintiff to a third party. He sought damages flowing from having been adjudicated bankrupt, arguing that his bankruptcy had not deprived him of standing to bring the suit,\footnote{56} and that Hodgson and Morgan did not decide that the damages he sought were too remote. But the Court held that those two cases did indeed decide that such damages were too remote.\footnote{57}

Hodgson and Morgan, as understood by the Court in Hassamal Moolchand, could be seen as standing for the following narrow proposition: if one person tortiously or in breach of contract deprives another of his assets, and as a consequence the victim is adjudicated bankrupt, then the bankruptcy is too remote to sound in damages at least if the wrongdoer did not know that it was likely to follow from his acts. Since the bankruptcy can be seen as following from the combination of the defendant's breach on the one hand, and the plaintiff's impecuniosity on the other hand, this could be seen as merely a narrow formulation of a broader principle: damages flowing from the combination of the defendant's wrongful act and the plaintiff's impecuniosity will be too remote, at least if the defendant was unaware of that impecuniosity.\footnote{58}

In no other reported case does it appear that the defendant's wrongful act combined with the plaintiff's impecuniosity to bring about the latter's bankruptcy.\footnote{59} It is, as a result, impossible to say what knowledge on the defendant's part might suffice to make damages flowing from the bankruptcy recoverable. But the cases do support a proposition complementary to that supported by the cases concerning the sale of goods or the loan of stock:

\footnote{55} (1900), 2 W.A.R. 30.

\footnote{56} On the ground that no pecuniary damages, for which only the assignee in bankruptcy could sue, were claimed, and so there was no possibility of the cause of action being split. The argument seems rather tenuous.

\footnote{57} This interpretation was adopted by the reporter, but it must be admitted that the case is ambiguous. At 34, the Chief Justice stated that Hodgson and Morgan "decide conclusively that bankruptcy proceedings are not the necessary consequence of the alleged breach," whereas at 35, Stone J. quoted Bramwell B. as saying in Hodgson that "the bankruptcy... naturally resulted from the fraudulent representation." The quotation attributed to Bramwell B. is not found in either of the reports.

\footnote{58} Impecuniosity represents a combination of three or four factors, all of which must be known before the plaintiff's impecuniosity will be revealed. If all of them require explicit knowledge, and none of them can be presumed, then a man's impecuniosity will generally only be known to, or foreseeable by, his intimates or those having significant financial dealings with him.

\footnote{59} In Wilson v. United Counties Bank, [1920] A.C. 102, [1918-19] All E.R. 1035, 122 L.T. 76, the plaintiff recovered damages in respect of his having been forced into bankruptcy, but the decision is distinguishable because the defendant had contracted to protect him against that very event.
impecuniosity may excuse a failure to mitigate but it cannot, in the absence of special knowledge on the defendant's part, generate a new head of damages.60

D. Impecunious Plaintiffs Might Recover: Cases Involving Lost Profits

In a few cases decided before 1933, the plaintiff failed to recover damages for profits lost as a consequence of the combination of his own impecuniosity and the defendant's wrongful act. The refusal to award damages in such cases is equivocal. It might reflect an unwillingness to award damages for losses consequent upon the plaintiff's own impecuniosity. On the other hand, it might simply reflect the principles concerning damages for lost profits, for example, the principle that damages are recoverable in respect of lost profits only if those profits were reasonably likely to have been earned if the wrong had not been committed.61

In *Greenbirt v. Smeee*,62 the defendant wrongfully seized the plaintiff's mail cart and the two horses required to work it. The plaintiff brought an action in trespass. He had hired other horses, not having the funds to purchase replacements, and had as a consequence lost his contract with the post office. He was allowed only the value of the property taken. Bramwell B. stated:

This is a tort, and a man who commits a tort commits it at his peril. But in the present case the damages do not follow solely from the tort committed, but from the tort committed and from the plaintiff not having money enough in his pocket to buy a fresh horse.63

Although the decision could, perhaps, be explained on the ground that the requisite special knowledge was not possessed by the defendant,64 it seems that Bramwell B. was reiterating the view that he had ten years earlier expressed in *Hodgson*: impecunious plaintiffs cannot recover damages attributable to their impecuniosity. But this time he phrased his reasoning in terms of causation, rather than remoteness, suggesting that even knowledge of the

60 The cases considered later in this article will demonstrate the difficulties in applying this seemingly simple proposition.

61 *Carsten v. N. Pac. Ry. Co.*, 44 Minn. 545, 47 N.W. 49 (1890); *O'Neill v. Johnson*, 55 Minn. 443, 55 N.W. 601 (1893); *Hail v. Dahlgren*, 157 Minn. 100, 195 N.W. 765 (1922), are cases in which an injured party was denied compensation for losses flowing from his impecuniosity, but which were decided on the ground of uncertainty.

62 (1876), 35 L.T. 168 (Exch.). This has been described as the first case to acknowledge the proposition that damage caused by impecuniosity is too remote: Lawson, *The Status of 'The Edison'* (1974), 124 New. L.J. 240. Cf. *Duckworth v. Ewart* (1863), 2 H. & C. 129, 159 E.R. 54, 9 L.T. 297 (Exch.).

63 *Greenbirt*, id. at 170. Amphlett B. concurred. The judgment is somewhat weakened in that the third member of the Court, Huddleston B. felt that the case was in all relevant respects indistinguishable from *Hughes v. Quentin* (1838), 8 C. & P. 703, 173 E.R. 681 (Exch.), a case which did not involve impecuniosity.

64 The principle was that the plaintiff could only recover special damages if he could show that the defendant knew that he would suffer inconvenience beyond the mere loss of his property: *Bodley v. Reynolds* (1846), 8 Q.B. 779, 115 E.R. 1066, 15 L.J.Q.B. 219; *France v. Guadet* (1871), L.R. 6 Q.B. 199, 40 L.J.Q.B. 121. Both cases were cited by counsel in *Greenbirt*. 
plaintiff's impecuniosity would not suffice to render the defendant liable for damages flowing from it.

A rather different approach had, however, been suggested three years earlier by the decision of the Judicial Committee in Larios v. Bonany y Gurety, a decision not cited in Greenbirt. In that case the defendant, a banker, lent money to the plaintiff, an exporter, not by transferring cash to him, but rather by crediting the amount of the loan to his account. While that account still contained several thousand dollars, the defendant refused to honour a bill for $1,000 drawn on it. The plaintiff sought damages of $1,340 in respect of a "[l]oss at the rate of $2 per quintal on the sale of 670 quintals of cork ... which cork Plaintiff was forced to sell at a reduced price to raise money in consequence of the Defendant's breach of contract." The case was not treated as one in which the defendant had breached a contract to loan money, but rather as one in which the defendant had breached a special contract, and in which damages might be assessed in the usual way, following the principles of Hadley v. Baxendale. The Judicial Committee refused to allow the damages in question, but Sir James Colville said:

[We] entirely concur with the learned Chief Justice, who in his charge to the assessors ruled that the full market value of the cork... on the day of the sale must on the evidence be taken to have been realised, and that any extra price which the plaintiff might possibly have obtained for it in a foreign market, had he had the funds to export it, was uncertain, speculative, and remote. In fact, he failed to prove on this item that he had actually sustained a loss, so that the question whether the Defendants could be reasonably taken to have contemplated such damages when they made the contract never arose.

It seems clear from this passage that the damages claimed by the plaintiff could have been recovered if it had been established that he actually suffered them and that the defendant was aware at the time of contracting that they might result from a breach on its part; that is, the damages would have to meet the requirements of one of the two branches of Hadley v. Baxendale's remoteness test.

But the damages in question flowed from the plaintiff's impecuniosity, for a plaintiff with sufficient disposable cash would not have been forced to

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65 (1873), L.R. 5 P.C. 346 (Gibraltar). Sedgwick on Damages, (11th ed., 1920) para. 126c describes the case thus: "In an action for failure to accept drafts, a loss on pork [sic] which the plaintiff was obliged to sell in order to raise money was held too remote for compensation." Sed quaere.

66 Id. at 347.

67 Numerous cases had been characterized as involving "special" contracts, but had not indicated what made the contracts special. The better view is probably that they were special only in that the borrower's losses met the requirements of the second branch of the rule in Hadley v. Baxendale (McGregor, supra note 5, para. 848), but it was arguable that they involved, not breach of an obligation to loan money, but rather breach of an obligation to disburse money already lent [Mennie v. Leitch (1885), 8 O.R. 397 at 404 (Q.B.)]. Note that most of the cases were concerned with losses flowing from the wrongful dishonour of a cheque, losses unrelated to any impecuniosity on the plaintiff's part (supra note 38).

68 Id. at 358.
sell the cork. A plaintiff with sufficient credit would simply have borrowed
the necessary sum from some other source.\textsuperscript{69} It is possible to view the issue
as one of a plaintiff endeavouring to recover the cost of an attempt to miti-
gate his damages which involved steps which a non-impecunious plaintiff
would not have been compelled to take.\textsuperscript{70} In that case \textit{Larios} can be seen as
illustrating the principle expressed in \textit{Clippens Oil}.\textsuperscript{71} The Judicial Committee,
however, clearly treated the issue as one of heads of damage, not as one of
mitigation; it would have allowed the plaintiff to recover his loss, notwithstanding
that it flowed from his impecuniosity, if only he had been able to
establish that he had suffered it.

The same attitude had been displayed two decades earlier in \textit{Hyde v.
Gooderham},\textsuperscript{72} a decision from Upper Canada. The plaintiff alleged that, as
a result of the defendants' failure to advance him £20,000, he was "unable
to do so extensive a business as he might have done, and has lost the profits
he might have made thereby."\textsuperscript{73} Draper C.J. held that such losses might be
recoverable:

If having required and failed in obtaining from defendants any specific advance,
the plaintiff was able to shew that he was unable to complete any particular
purchase of wheat, and so lost it and consequent profits, I think such ground of
damage might have been proper, and that it may not be going too far to say he
might recover the profits of that particular transaction, though this may not be
clear.\textsuperscript{74}

The validity of this approach seems to have been taken for granted else-
where in Canada. In \textit{Walton v. Ferguson},\textsuperscript{75} an action in contract for failure
to furnish a tractor, the plaintiff sought to recover losses suffered when her

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\textsuperscript{69} Although the figures are not displayed explicitly in the report, it seems that at
the time of the breach the defendant still held $3,500 or less in the plaintiff's account,
that the plaintiff was under no obligation to repay the loan until a further 4 years 11
months had passed, and that monies were available at 6\% per annum. On this basis
the plaintiff could have obtained the requisite funds by taking out a loan with a different
firm, borrowing $3,500 at 6\% per annum for 4 years 11 months. This would have cost
$1,161 in interest, $179 less than the amount actually claimed. It is possible that the
plaintiff's inability to arrange such financing was due to some cause other than his own
impecuniosity.

\textsuperscript{70} The cases discussed \textit{infra} will illustrate the difficulties involved in categorizing
an issue as one of mitigation or as one of heads of damage. See especially \textit{Compania
(H.L.).

\textsuperscript{71} There is a difference between the question answered in \textit{Clippens Oil} and the
question posed here. \textit{Clippens Oil} stated that a plaintiff's impecuniosity will excuse his
failure to take steps to mitigate his losses: he may remain supine and still recover
consequent damages. But the question here is whether that impecuniosity will excuse
inefficient attempts to mitigate. If the plaintiff chooses to take the limited steps that are
within his power rather than to remain supine, can he recover the cost of so doing?
See text accompanying notes 337-38, \textit{infra}.

\textsuperscript{72} (1856), 6 U.C.C.P. 21, subsequent proceedings at 539.
\textsuperscript{73} Id. at 22.
\textsuperscript{74} Id. at 36.
\textsuperscript{75} (1914), 19 D.L.R. 816, 7 W.W.R. 611 (Alta. S.C.).
land remained unplowed after her efforts to purchase horses to replace the tractor failed “as she had no money with which to pay for them and no one seemed willing to sell on credit.” The Alberta Supreme Court denied her claim because the defendant was unaware of her impecuniosity, but noted that it was obvious that her losses would have been recoverable under the second branch of the rule in *Hadley v. Baxendale* if the defendant had known of the special circumstances. Before 1933, *Greenbirt* supported the proposition that damages flowing from the combination of the plaintiff’s impecuniosity and the defendant’s tortious act were not recoverable as a matter of law. *Larios, Gooderham* and *Ferguson* supported the proposition that damages flowing from the combination of the plaintiff’s impecuniosity and the defendant’s breach of contract were recoverable if they met the remoteness test applicable to other heads of damage, and if no rule of law applicable only to impecuniosity prevented their recovery. It is difficult to see why there should have been such a difference between tort and contract if the first proposition was based on concepts of causation or policy; it must have been based on the rules of remoteness in tort, just as the second proposition was based on the rules of remoteness in contract.

E. **Impecunious Plaintiffs Might Recover: Cases Involving Contracts to Loan Money**

When a lender breaches a contract to loan money, the damages suffered by the borrower will usually depend in part on his financial status and the extent of his assets. Decisions in which the borrower had recovered such damages could, therefore, have been cited in 1933 to make some points concerning impecuniosity.

In order to understand these decisions, and the relationship between the borrower’s impecuniosity and the measure of his damages, it is necessary to remember the nature of a loan of money. Although not a sale of goods within the meaning of the *Sale of Goods Act*, a loan of money is economically indistinguishable from such a sale. One party, in need of an item, proceeds into the marketplace to obtain it. Another party, possessing such an item, transfers the property in it to him. The first party, in return, generally gives some security, and either promises to pay the second party a lump sum on some future date or, more commonly, promises to pay certain sums at various stipulated future dates. If the item sought were a load of bricks, the transaction would be characterized as a sale of bricks on credit; if the item sought is instead a sum of money, the transaction can accurately be characterized as a sale of money on credit.

Cases in which a borrower sues a lender for breach of a contract to loan money can thus be assimilated to cases in which a purchaser sues a

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76 *Id.* at 817 (D.L.R.), 611 (W.W.R.).
77 *Id.* at 818 (D.L.R.), 612 (W.W.R.).
78 R.S.B.C. 1979, c. 370, s. 1.
79 A loan of money is really a sale, for it differs in many ways from a loan in the sense of a bailment of a chattel. Not only does the borrower obtain the property in the money lent to him, but the money he must return need not be the same as the money lent to him.
vendor for breach of a contract to deliver goods. In the former, as in the latter, the plaintiff's impecuniosity may make it impossible for him to utilize alternate sources of supply; other potential lenders might consider his limited assets insufficient to constitute adequate security. More commonly, however, alternate financing is available at a price which depends in part on the borrower's credit-worthiness.

If the interest rate of the repudiated loan was equal to the market rate at the time the contract was made, the borrower might find alternate financing either unobtainable or more costly. The market may have changed, making money generally more difficult to obtain, or his financial situation may have changed making him less credit-worthy. It was held in *Bahamas (Inagua) Sisal Plantation (Ltd.) v. Griffin* that damages attributable to the second of these two factors are not recoverable. In that case the defendant refused, in breach of contract, to subscribe for debentures in the plaintiff company. At the time of contracting the company was able to find subscribers for its debentures, but by the time of the defendant's breach it had fallen out of favour with investors and was unable to find alternate subscribers. Bigham J. refused to award damages. He is paraphrased as saying:

But, in measuring the damages, it must be assumed that when the company applied elsewhere for an advance it still remained a company with ordinary credit. If, by reason of circumstances, the company had fallen into disrepute and bad financial odour, the defendant was not responsible for that.... (T)he company's difficulty in getting the money at the rate which the defendant had undertaken to pay [sic-accept] was not due to the defendant but was the fault of the company for falling into that position.  

Suppose, then, that the borrower is able to obtain alternate financing, but that the cost of money has increased since he first negotiated the loan which has now been repudiated by the lender. In such a case it has been held that he may recover the excess of the cost of the alternate loan over the cost of the loan that the defendant lender should have granted him. This principle, which seems at first glance to accord with common sense, could have been seen as permitting the recovery of compensation for losses which only an impecunious person would have suffered. The point had not been taken in 1933, and seems to have been taken only once since then, in *Jacobson Ford-Mercury Sales Ltd. v. Sivertz*. The defendant had drafted an unenforceable option to borrow money at 7% to buy land. The plaintiff was forced to borrow at 12%, and brought suit in negligence. The defendant argued that those losses flowed from "the plaintiff's alleged impecuniosity in not being able to pay cash for the property," and that they were, accordingly, not recoverable.

The argument, although rejected by the judge in a terse and somewhat

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80 (1897), 14 T.L.R. 139 (Q.B.).
81 Id. at 140.
84 Id. at 147 (W.W.R.), 485 (D.L.R.), 280 (C.C.L.T.).
ambiguous passage is worthy of analysis, for it can be met in either of two ways, each of which involves the application of principles to which reference will frequently be made in the remainder of this paper.

The first argument is both the simplest and the most controversial. "Impecuniosity" is the combination of a lack of assets, and a lack of credit, and the plaintiff, though he lacked assets, certainly did not lack credit. None of his losses can, therefore, be attributed to his non-existent impecuniosity.

The second argument is more subtle. The plaintiff's lack of assets, even if it constituted impecuniosity, was not the cause of his losses, for he would have suffered the same losses even if his assets were unlimited. In order to see this, consider a simple example: a lender promises to pay $1000 to a borrower on January 1, and the borrower in return promises to repay it in one year at 17% interest, that is, to pay $1170 exactly one year later. Suppose that the lender resiles, and that interest rates have risen to 20% by January 1. What are the borrower's pecuniary losses?

The losses are determined by comparing the borrower's financial position on that day with the position in which he would have found himself if the lender had not resiled. His gross losses are easily quantified: he has $1000 less than he would have had if the lender had not resiled. But he has gained something from the breach, the value of which must be set off against his gross losses: he has gained a release from the obligation to pay $1170 one year later. The value of such a release—or, equivalently, the value of the obligation to pay $1170 one year later—is found by applying the simple interest formula: a loan of $P$ at a rate of $i\%$ for a term of one year is a contract whereby the lender pays $P$ for the borrower's promise to pay $P(1+i/100)$ one year later. Thus the market value of a promise to pay $A$ one year later is $P$, where $A = P(1+i/100)$. On the day in question, $i = 20$ and $A = 1170$, so $P = 975$; the market value of the obligation to pay $1170$ one year later was thus $975$ on January 1, and so $975$ is the value of the release which the borrower gained. After his gross losses are offset by that amount his net recoverable losses are $25.86$.

The important thing about this analysis is that it has nothing to do with the extent of the borrower's assets. He is simply saying, "You promised to sell me some money, you breached your promise, so I am entitled to the difference between the market price of that money as of the breach-date and the contract price." He need not reveal that he needed the loan to finance some project for which his assets were otherwise inadequate, since damages such as this do not depend on the use to which the buyer planned to put his purchase.

There are thus two reasons why a borrower can, on the lender's default, recover the excess cost of a substitute loan: decisions to the contrary

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86 Id.
88 Other damages, not considered here, may also be recoverable: McGregor, supra note 5, at para. 862.
notwithstanding, impecuniosity is found only in the lack of both assets and credit, and, at any rate, even a person with unlimited assets would have suffered the same losses.

But neither of these reasons applies if the borrower's credit rating is so bad that he cannot obtain alternate financing. In that case he will lose his chance to make profits from opportunities which his embarrassed circumstances do not allow him to seize. He might be unable to meet his obligations and thus be forced into bankruptcy. He might be unable to complete a contract with some third party, and consequently be forced to pay a sum to placate that person. Can he recover such damages?

Prior to 1933 there was no satisfactory Commonwealth authority on this point, but there were numerous American cases. Most American jurisdictions had held that the principles of Hadley v. Baxendale applied to such cases. The plaintiff could recover damages provided they were of a type within the contemplation of the parties at the time of contracting. For example, a borrower deprived of his ability to enter into an advantageous purchase by the lender's breach could recover lost profits, provided they were sufficiently certain, if he could show that the lender had known that the monies were to be used for that purchase and that the plaintiff had no other source of funds.

Some jurisdictions, however, had held that to allow the plaintiff to recover such damages would be to allow an impecunious person to recover damages flowing from his own impecuniosity, and that this should not be allowed. In Lowe v. Turpie this attitude was made explicit:

[If the owner of real estate who has a contract with another to loan him money to pay liens of incumbrances on his land, who refuses to do so, has knowledge

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87 *Infra* notes 307-309.

88 *Supra* note 7, *infra* note 310.

89 The cases of *Walls Chlorine Syndicate v. American Alkali Co.* (1901), 17 T.L.R. 656, 45 Sol. J. 654 (K.B.) and *Manchester and Oldham Bank, Ltd. v. W.A. Cook and Co.* (1883), 49 L.T. 674 (Q.B.), are sometimes cited as bearing on this point. The former, however, was treated as an action for breach of duty to disburse monies that had already been lent to the plaintiff, rather than as an action for breach of the contract to lend them; the judge felt constrained to follow cases involving the first type of action, and may have felt that there was a difference between the principles applicable to the two types of actions. As for the latter, it is reported in too summary a fashion to be useful. It would seem that the plaintiff's poor credit rating, if indeed he had such, was not behind the failure of the project for which he needed the loan. The defendant bank had been leading him on with assurances that the loan would soon be disbursed, and the plaintiff discovered that the bank would not honour the contract when it may have been too late for him to finance the project even if he had the funds in his pocket. This was the view of the case adopted in *Lowe v. Turpie*, 147 Ind. 652 at 673, 44 N.E. 25 at 31 (1896), *afld* 147 Ind. 690, 47 N.E. 150.


91 *Id.*

92 *Supra* note 89.
of such refusal in time to give him an opportunity to seek for it elsewhere, the fact that he cannot procure the money on account of being in embarrassed circumstances will not entitle him to recover more than nominal damages; for the reason that no party's condition in respect to the measure of damages is any worse for having failed in his engagement to a person whose affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances.

The weight of American authority, however, supported the view that the plaintiff's impecuniosity was only another factor which had to be within the contemplation of the parties at the time of contracting. It it were, then damages were not to be denied simply because they flowed from that impecuniosity. In order for damages flowing from the plaintiff's impecuniosity to be recoverable that impecuniosity had to be explicitly brought home to the other party; it was not the sort of common circumstance that fell within the first branch of the rule in *Hadley v. Baxendale* and which was deemed to have been within the contemplation of all contracting parties.

F. Summary

In general, two propositions emerge from the cases decided before 1933 in which an impecunious plaintiff sought damages in some sense attributable to his own impecuniosity. First, impecuniosity would excuse a failure to mitigate one's damages. More generally, damages of a type which a non-impecunious plaintiff would have suffered could be recovered even if their *quantum* was increased as a result of the plaintiff's impecuniosity. Second, damages of a type which only an impecunious person would suffer would not be recoverable unless the defendant knew, at the relevant time, of the plaintiff's impecuniosity and perhaps, at least according to Bramwell B., not even then. If the anomalous rules in cases involving the failure to return stock or to deliver goods paid for in advance are set aside, the cases also established that impecuniosity is not, in the absence of special knowledge, within the contemplation of contracting parties. It is in the light of these principles that the decision in the case of *The Liesbosch* must be considered.

III. THE DECISION IN THE LIESBOSCH

The “Liesbosch” was a dredger engaged in work on the harbour of Patras, Greece. Her moorings were fouled by the steamship “Edison,” and she was towed into the open sea where she sank. The owners of the Edison admitted liability in negligence, and only the *quantum* of damages was in issue.

The Liesbosch sank on November 26, 1928. Substitute dredgers were available in Holland at that time, but the owners of the Liesbosch had invested all their funds in its purchase. So they remained inactive, unable to purchase a replacement. In January, 1929, the harbour authorities threatened to cancel the contract under which the Liesbosch had been working, and to forfeit a deposit put up by its owners, unless a substitute were found within a certain time. The owners, still without the funds to purchase a

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93 *Id.* at 677-78 (Ind.), 33 (N.E.).
94 *Supra* note 4.
replacement, resolved to rent one. On May 11, 1929, they rented the "Adria" from Italy. The rental payments were very high, and the Adria was more costly to operate than the Liesbosch had been.

On June 17, 1929, the Adria arrived at Patras and commenced operations. But even though the owners of the Liesbosch were once again earning money, the Adria's high rental payments presented problems. As a result, the harbour board purchased the Adria, and re-sold it on June 30, 1930, to the owners of the Liesbosch, who paid for it in forty-eight instalments.

The plaintiffs sought damages for:

1. the price of the Adria;
2. overhead wasted and other money needlessly expended during the period from November 26, 1928, to June 17, 1929, during which period the plaintiffs were unable to work on the harbour;
3. profits lost during the same period;
4. the extra cost of operating the Adria over the cost of operating the Liesbosch; and
5. the cost of renting the Adria from May 11, 1929, to June 30, 1930.

The House of Lords allowed, in place of the damages claimed under the third and fourth heads, profits lost and monies wasted from November 26, 1928, until the time when the plaintiffs could have put a replacement dredger into operation, had they had the money to buy that replacement immediately upon the loss of the Liesbosch. In place of the damages claimed under the other three heads, the House of Lords allowed the cost of a replacement dredger (including such items as its transportation to Patras, and its conversion to meet the plaintiffs' exact needs) such as could have been purchased in the market by a person with sufficient funds.

The decision of Lord Wright, with whom the other members of the House concurred, contains many useful points concerning the measure of damages for destruction of profit-earning chattels. This paper, however, will be concerned exclusively with his comments concerning the effect of the plaintiffs' impecuniosity on the measure of their damages:

But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort: the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes' or consequences of consequences. Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents'

96 Lord Warrington of Clyffe, Lord Buckmaster, Lord Tomlin, and Lord Russell of Killowen.
tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger.90

Then, after quoting the passage from Lord Collins’ speech in Clippens Oil which dealt with impecuniosity,97 Lord Wright distinguished it as irrelevant: “[b]ut, as I think it is clear that Lord Collins is here dealing not with measure of damage, but with the victim's duty to minimize damage, which is quite a different matter, the dictum is not in point.”98

Several comments should be made before the cases that have considered The Liesbosch can be properly understood.

First, Lord Wright did not define “impecuniosity.” In The Liesbosch, the plaintiffs seem to have been almost penniless. But subsequent cases have shown that a plaintiff will be described as impecunious whenever he is compelled, in justifying his actions or explaining how it happened that he suffered certain damage, to point out that his funds were limited.99 Impecuniosity will be found in insufficient funds, not merely in utter poverty, so a person may be impecunious for some purposes but not for others. Furthermore, a plaintiff will be regarded as impecunious whenever he is forced to point out that business or other considerations made it inadvisable for him to follow some course of action; this is not only because limited disposable funds imply limited funds in general, but also because a person who finds expenditures inexpedient cannot expect better treatment than one who finds them impossible.100 There would seem to be little or no important difference between one who was “impecunious” (meaning poverty-stricken or unable to raise the necessary money),101 and one for whom “the provision of... money... would have involved... a measure of 'financial stringency'.102

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86 Supra note 4, at 460 (A.C.), 292 (T.L.R.), 76 (L.J. P. & A.). The decision is entirely one of policy, and the reference to causation is misleading, for by no theory of causation could it be said that the plaintiff's loss was not caused by the defendants act: Hart and Honoré, Causation in the Law (Oxford: Clarendon Press, 1959) at 163.

97 Supra note 29 and accompanying text.

98 Supra note 4, at 461 (A.C.), 292 (T.L.R.), 76 (L.J. P. & A.).


100 If the issue is labelled as one of “mitigation,” then poverty-stricken persons can justify their failure to mitigate on the basis of their poverty: Clippens Oil, supra note 30. And so too can those for whom mitigation would merely produce a financial strain; this follows from the principle that a party need not take steps in mitigation of damages if those steps might adversely affect his commercial interests: Finlay v. Kwick Hoo Tong, [1929] 1 K.B. 400, 98 L.J.K.B. 251, 140 L.T. 389.


102 Id.
Second, Lord Wright did not cast any doubt upon the soundness of Lord Collins' dictum in Clippens Oil.103 nor did he approve it.104 It remained for later courts to accept or reject it.

Third, Lord Wright did not reveal what he meant by "the victim's duty to minimize damage,"105 which he contrasted with the "measure of damage."106 If the characterization of an issue as one of mitigation or as one of measure of damage will determine the effect to be given to a plaintiff's impecuniosity, some guidelines must be established to separate the two concepts. Yet an attempt to formulate such guidelines, encounters several obstacles.

One obstacle lies in the fact, noted by Scrutton L.J. in Payzu Ltd. v. Saunders,107 that problems of mitigation can in all cases be phrased as problems of a different sort. For example, instead of saying that a plaintiff is denied damages because he should have acted to mitigate them, a court could say that he is denied damages because they flow from his own unreasonable refusal to take steps to protect himself, and not from the wrongdoer's acts; the issue is thus presented as one of causation, not mitigation. Yet if Lord Wright's distinction is to be meaningful, there must be some problems which are to be characterized as problems of mitigation. It is suggested that only one solution is logically defensible: every problem which can be characterized as one of mitigation must be so characterized, even though it might also be possible to characterize it in another way.

In this way the difficulties inherent in separating the concepts of mitigation and causation can be overcome. But the general inseparability of these basic concepts of the law continues to cause problems, and raises this further obstacle to a logical analysis of Lord Wright's speech: every question of mitigation is necessarily a question of the measure of damages.

This stems from the inclusion of the concept of mitigation in the general rule determining the measure of damages recoverable by a plaintiff. The rule is that a plaintiff may, in respect of each type of damage that is not too remote, recover a portion of the damage that he actually suffered: that por-

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103 The headnote to the A.C. report is wrong in this regard. See also Reiter and Sharpe, Wroth v. Tyler: Must Equity Remedy Contract Damages? (1978-79), 3 Can. Bus. L.J. 146 at 152: "there is authority to the effect that impecuniosity is not an excuse for failure to mitigate," citing inter alia The Liesbosch. Whatever authority there may be for such a proposition is not to be found in The Liesbosch.

104 Despite observations to the contrary in Dodd Properties, supra note 101, at 935 (All E.R.), 453 (W.L.R.) per Megaw L.J.: "Lord Wright... accepted Lord Collins's [sic] dictum." Indeed, in an address delivered five years later, Lord Wright, after referring to "certain not very clear observations of Lord Collins in Clippens Oil," would say no more than that "it may be that Lord Collins' view may be justified on some such ground," referring to the principle that a plaintiff need only do what is reasonable in trying to mitigate his losses. Wright, supra note 14, at 115-16.

105 Supra note 98.

106 Id.

107 Supra note 17, at 589. See also the observations of the Earl of Halsbury L.C. in The Mediana, [1900] A.C. 113 at 117 (H.L.).
tion being the amount that he would have suffered if he had acted as a reasonable person in trying to mitigate his damages. As Laskin, C.J.C. said in *Red Deer College v. Michaels and Finn*:

The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in had there been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the *quantum* of damages payable to the plaintiff. . . .

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered, but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.

If Lord Wright's speech is to be understood, a way must be found to characterize some questions as questions of mitigation, and others as questions of measure of damages. It might be possible to subdivide narrowly the questions involved in measuring damages, and to categorize some as falling under the rubric of mitigation, with the remainder falling under the rubric of "pure" measure of damages. But the problem cannot be solved in this manner, for the distinction drawn between mitigation and measure of damages by Lord Wright cannot survive this final observation: any definition of mitigation that conforms to accepted academic and judicial usage must include two particular questions as questions of mitigation, the first of which is the question Lord Wright was answering in *The Liesbosch* when he purported to distinguish *Clippens Oil* as dealing only with questions of mitigation.

These two questions are usually formulated as one question, as in the leading case of *British Westinghouse Electric Co. v. Underground Electric Rys.*, where Viscount Haldane, L.C. said:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

But to say that it is a question only of determining which steps are reasonable is to combine two questions into one. The first question to ask is which of his idiosyncrasies will the plaintiff be allowed to retain, and which must be deleted and replaced by other, more "reasonable," characteristics? Having created a hypothetical plaintiff with only some characteristics in common with the actual plaintiff, the second question to ask is what steps would it be reasonable for such a person to take? These are the steps that the actual plaintiff will be penalized for failing to take.

In answering the first question, the court could alter none of the actual plaintiff's idiosyncrasies, thus creating the "subjective reasonable person;"

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108 *Supra* note 26.
109 *Id.* at 330-31 (S.C.R.), 390 (D.L.R.), 579 (W.W.R.). Though directed to contract, the passage is equally applicable to tort.
111 *Id.* at 689 (A.C.), 69 (All E.R.), 329 (L.T.).
or it could alter all of them, thus creating the "objective reasonable person." The courts, however, generally adopt a middle course.\textsuperscript{112} Thus the characteristic of being psychologically unable to undergo an operation is one that a reasonable person may not be allowed to possess.\textsuperscript{113} On the other hand, the more impersonal characteristic of lacking good business connections in India is one that a reasonable person will be allowed to possess.\textsuperscript{114}

In \textit{The Liesbosch}, Lord Wright awarded the plaintiffs the profits they missed from the date of the loss of their dredger until the date when a person with sufficient funds would have got a replacement operational. In short, he awarded the plaintiffs the damages that a different reasonable person in their position would have suffered, where that person differed from them in only one attribute: he had sufficient funds to purchase a dredger.

In deciding that impecuniosity was an attribute of the plaintiffs that would be altered in creating the reasonable person, Lord Wright was answering a question of mitigation or, as he put it, "dealing with the victim's duty to minimize damage."\textsuperscript{115} The distinction which he drew between the problem facing him and the problem considered by Lord Collins in \textit{Clippens Oil} is illusory; Lord Wright’s decision is incompatible with Lord Collins’ \textit{dictum}. As consideration of subsequent cases will show, this enables a court to award damages in situations where Lord Wright clearly would not have done so, by following \textit{Clippens Oil} and distinguishing \textit{The Liesbosch}.

\textit{Fourth}, Lord Wright excepted impecuniosity “traceable to the respondents’ acts”\textsuperscript{116} from the ambit of his principle. He did not elaborate on this exception. In a very real sense, however, a plaintiff’s impecuniosity is frequently traceable to the defendant’s wrongful act. In most actions, whether in tort or contract, the defendant’s wrongful act deprives the plaintiff of the profits that he might have otherwise obtained. In personal injury actions, the plaintiff is often deprived of earnings from the date of the tort; in actions for non-delivery of goods purchased, the plaintiff is often deprived of profits from a sub-sale. Suppose that at some later date the plaintiff’s house is sold at a forced sale, and accordingly for a very low price, because he had been

\textsuperscript{112} In \textit{Glavonic v. Foster}, [1979] V.R. 536 at 537 (S.C.), Gobbo J. asked: “is the reasonableness to be judged upon an objective basis or is it to be judged subjectively?” and adopted “an intervening position wherein one is to ask what would a reasonable man have done, assuming he had been in the circumstances facing the plaintiff.”


\textsuperscript{114} \textit{Lesters Leather and Skin Co. v. Home and Overseas Brokers Ltd.}, [1948] W.N. 437, 64 T.L.R. 569, 92 Sol. J. 646 (C.A.). It seems to be generally accepted that a plaintiff will not be penalized for his failure to take steps in mitigation of damage if his circumstances, commercial \textit{id.} or physical \textit{id.} \textit{Savage v. T. Wallis Ltd.}, [1966] 1 Lloyd’s Rep. 357; \textit{Murphy v. MacAdam} (1965), 51 M.P.R. 267 at 283, 5 N.S.R. 575 at 596-97 (S.C.), were such that the steps in question either could not have been carried out, or would probably not have been effective to diminish his loss. The principle in \textit{The Liesbosch} may form an anomalous exception to this rule.

\textsuperscript{115} \textit{Supra} note 98.

\textsuperscript{116} \textit{Supra} note 96.
relying on his profits or earnings to enable him to keep up his monthly payments. Can the plaintiff recover damages flowing from the forced sale resulting from his own impecuniosity, which in turn would not have existed but for the defendant's wrongful act?

The illustrations of non-recoverable loss given by Lord Wright in his judgment in *The Liesbosch* show that he would not have allowed such recovery. Probably what his Lordship had in mind was wrongful appropriation of the plaintiff's funds, depriving him of present monies, as opposed to wrongful acts merely depriving him of his ability to obtain funds in the future. The line between the two is not, however, always easy to draw, for an expectation of future gains is a present asset, which may in some circumstances be turned into money as readily as a cheque or a bag of foreign currency.

Seldom has any court considered this exception to the principle that losses stemming in part from the plaintiff's impecuniosity are not recoverable. Its extent and significance remain uncertain. Indeed, as the cases to be discussed will demonstrate, courts wishing to distinguish *The Liesbosch* can easily find other grounds upon which to do so, and it seems unlikely that this exception will ever be of much practical significance.

Fifth, Lord Wright's judgment came twelve years after the decision in *Re Polemis*. The relationship between his principle that losses stemming from impecuniosity are not recoverable, and the principle of that decision, that losses are recoverable only if they are the direct consequences of the defendant's negligent acts, has seldom been considered. There are at least two possibilities, however, one of which renders the principle of *The Liesbosch* irrelevant in the 1980's.

The first possibility is that Lord Wright's judgment was based on considerations of policy; as a matter of basic policy, losses flowing from the plaintiff's impecuniosity are not recoverable. So when Lord Wright said, "[i]n the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons," he was laying down a rule that damages flowing from impecuniosity are not to be regarded as relevant. The rule in *Re Polemis* had nothing to do with this.

But there is another possibility: Lord Wright's judgment was based on

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117 Especially the illustration of the shipowner forced into bankruptcy upon the destruction of his sole means of livelihood. See note 96, *supra* and accompanying text.


119 [1921] 3 K.B. 560, 90 L.J.K.B. 1353, 125 L.T. 154. Lord Wright, as counsel for the unsuccessful defendants, argued that damages in the tort of negligence are the same as those in breach of contract, in that losses are recoverable if, and only if, they were such as could reasonably have been anticipated as resulting from the negligent acts; but his Lordship later declared the decision to be correct as a matter of principle as well as precedent: Wright, *Re Polemis* (1951), 14 Mod. L. Rev. 393.

120 *Supra* note 96.
Considerations of causation (which, admittedly, are always connected with considerations of policy).\(^\text{121}\) So when he referred to the abstraction of some consequences as relevant for practical reasons, he was not laying down any new rule. He was merely referring to the pre-existing rule that only the direct consequences of the defendant’s negligent acts could sound in damages. In short, he was referring to the rule in *Re Polemis.*

If this is so then it must be admitted that Lord Wright’s decision was not a necessary consequence of that rule. Some further link in the chain of reasoning must be found. That link must be found in the assumption that damages flowing from the plaintiff’s impecuniosity are not direct consequences of the defendant’s acts.

According to this analysis, Lord Wright said two things:

1. damages that are not direct consequences of the defendant’s negligent acts are not recoverable; and
2. damages flowing from the plaintiff’s impecuniosity are not direct consequences of the defendant’s negligent acts.

From these propositions, his conclusion followed inexorably.

If this is correct, then Lord Wright’s principle is no longer relevant. The first portion of his *ratio,* embodying the rule in *Re Polemis,* is no longer good law.\(^\text{122}\) The second part might be good law, but is no longer relevant: the categorization of consequences as “direct” or “indirect” remains as valid as ever, but since the demise of the rule in *Re Polemis* it has no legal significance. The rejection of *Re Polemis* constituted a rejection of *The Liesbosch* also.

This interpretation of Lord Wright’s speech is supported by the exception discussed earlier. Why should Lord Wright’s principle not extend to losses flowing from impecuniosity “traceable to the respondents’ acts?” Surely it should only because such damages will be direct consequences of the defendant’s acts. If the exception to the principle is based on the distinction between direct and indirect consequences, then the principle itself must be based on the same distinction.

Further supporting the thesis that Lord Wright was only establishing one rule—namely, that damages flowing from impecuniosity are indirect damages—and then combining that rule with an accepted principle, is his speech in *Hay (or Bourhill) v. Young,*\(^\text{123}\) where he cited *The Liesbosch* as demonstrating the principle that the direct consequences rule “must be under-

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\(^\text{121}\) At the very least the question of what concept of causation will be applied in a particular case is entirely a question of policy.

\(^\text{122}\) Ever since *The Wagon Mound (Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.),* [1961] A.C. 388, [1961] 2 W.L.R. 126, [1961] 1 All E.R. 404 (P.C., N.S.W.). The provincial courts of appeal in Canada have accepted the principle that damage caused by a negligent act is recoverable if, and only if, it is of a type that was reasonably foreseeable at the time of the negligent act.

stood to be limited...to ‘direct’ consequences to the particular interest of the plaintiff which is affected.”

Re Polemis was mentioned in Lord Wright’s speech in The Liesbosch, where it was dismissed as immaterial. But it had only been cited by counsel to support the argument that damages flowing from the plaintiff’s impecuniosity should be categorized as “direct” consequences of the defendants’ act, so its dismissal represents only a decision that it was immaterial to the second part of Lord Wright’s ratio, that is, to the categorization of such losses as indirect. Its dismissal does not establish the immateriality, to Lord Wright’s judgment, of the “direct consequences” rule which is traditionally named after Re Polemis.

In summary a court that does not wish to follow The Liesbosch may adopt one of several approaches. First, it may decide that the plaintiff’s impecuniosity was in fact irrelevant, because the same losses would have been suffered by a non-impecunious person. Second, it may characterize the problem as one of mitigation, and follow Clippens Oil. Third, a court may find that the plaintiff’s impecuniosity was traceable to the defendant’s wrongful acts. Fourth, it may apply the foreseeability test, and hold that the rule in The Liesbosch only applies to actions in tort decided before 1960. Finally, a court may eschew all these approaches and search out a path hitherto un trodden: there are, for example, recent indications that a plaintiff will not be stopped from pointing to his impecuniosity to justify his behavior or to explain his losses if the defendant has already gained some benefit by reason of that impecuniosity.

An analysis of the cases decided since 1933 will show the reception which The Liesbosch has received in the Commonwealth, the situations in which it has been declared irrelevant and the situations in which it has, though seldom with any explanation, been declared determinative of the issues. In particular, this analysis will show the ease with which The Liesbosch may be evaded if the appropriate decisions are invoked.

IV. THE CASES SINCE 1933
A. Cases Allowing Recovery for Losses Attributable to the Plaintiff’s Impecuniosity
1. Cases Distinguishing The Liesbosch: Impecuniosity may be Irrelevant

In several reported cases, the defendant claimed that the plaintiff was attempting to recover damages which flowed from his own impecuniosity, and that such attempts should not meet with success, but the court held that even a non-impecunious person in the plaintiff’s position might well have suffered the same losses. In each case the plaintiff’s impecuniosity had rendered him unable to take certain steps which would have restricted his losses, but the court refused to reduce his damages, holding that in the circumstances even a person able to take those steps might reasonably have failed to do so. The same results could have been reached by categorizing

124 Id. at 110 (A.C.), 405 (All E.R.), 267 (L.T.).
the issues as issues of mitigation, and then applying the principle of *Clippens Oil*. The status of that principle is, however, unclear, at least in Canada.\textsuperscript{125}

In *General Securities Ltd. v. Don Ingram Ltd.*,\textsuperscript{126} the defendant had agreed to finance the plaintiff's purchase of Studebaker automobiles, but refused to supply the funds that the plaintiff needed to pay for a shipment of automobiles. The plaintiff tried to arrange alternate financing, but to no avail. One finance company was willing to advance the necessary funds if a further $5,000 capital was put into the plaintiff's business, but that sum could not be raised in a manner satisfactory to the finance company. Finally the Studebaker company cancelled the plaintiff's franchise as a result of its failure to pay for the shipment.

The trial judge, making no reference to the significance of the plaintiff's impecuniosity, held that the defendant's knowledge of the likely consequences of its refusal to loan the money sufficed to render it liable for the damages suffered by the plaintiff.\textsuperscript{127} These included damages in respect of the destruction of the plaintiff's business and the resulting sale of its assets at bargain-basement prices as well as damages in respect of the loss of the profits anticipated upon the sale of the cars.

Before the Supreme Court of Canada, the defendant argued that "a deficiency in the amount of capital employed in respondent's business was the cause of the respondent being unable to secure the necessary funds elsewhere and that the damages flowed from that lack."\textsuperscript{128} Of the five members of the court, only Kerwin J., with whom Taschereau J. concurred, made reference to this argument. His Lordship stated:

Assuming it to be proved that in a business sense the respondent required further capital in its undertaking, one of the main objects of the bargain between the parties was the supplying of that capital and, in any event, the short time at the disposal of the respondent to make other arrangements shows that that circumstance was the compelling factor in respondent's inability to secure funds from other sources.\textsuperscript{129} [Emphasis added.]

Davis J. had already noted that funds could have been obtained from the finance company if the plaintiff had been able to increase its capital by $5,000.\textsuperscript{130} Thus Kerwin J. can only have meant that a reasonable person with sufficient funds might still have refused the finance company's offer, and sought financing elsewhere, but that his search would have been too brief to be fruitful. The plaintiff's impecuniosity, although at first sight critical, was actually irrelevant.

The same stance was adopted by Somervell L.J. in *Trans Trust S.P.R.L. v. Danubian Trading Co.*\textsuperscript{131} The S.A. company had sold steel to Trans Trust,
which in turn sold it to Danubian, which in turn sold it to the L company. There were only three problems. The S.A. company did not have the funds to purchase any steel from the wholesaler. Trans Trust did not have the funds to purchase any steel from the S.A. company. And Danubian did not have the funds to purchase any steel from Trans Trust. Only the L company had funds.

So Danubian agreed, as part of its contract with Trans Trust, to cause the L company to open a confirmed credit in favor of the S.A. company. This would have eliminated all problems caused by the three firms' impecuniosity, but Danubian repudiated its agreement.

Trans Trust sued for the profits that it failed to earn and for a declaration that it was entitled to be indemnified against any damages that might be recoverable against it by the S.A. company. It was successful at trial.132

On appeal it was argued for the defendant that, since the market was rising, a non-impecunious plaintiff would have used its own funds to purchase steel from the S.A. company, resold it in the market and thus gained even more profits than it would have gained if Danubian had honoured its obligations. All three members of the Court of Appeal decided the question as a problem of foreseeability.133 But Somervell L.J. went on to reject the defendant's argument on alternate grounds:

Even if the plaintiffs had been very rich, it might still have been "contemplated" that if the defendants did not procure the obtaining of the credit the plaintiffs could not and would not themselves have used their resources for the opening of a credit for this steel.134

However difficult this might be to reconcile with the usual requirement to mitigate one's losses, it exemplifies the principle that a plaintiff unable to take certain steps to minimize his losses will not be penalized if a plaintiff with more funds might well have been equally unwilling to take those steps.

Later cases illustrate this point.135 In Martindale v. Duncan,136 the defendant negligently damaged the plaintiff's taxi. It could have been repaired within four weeks of the accident, but the plaintiff did not get it back into operation for ten weeks. He gave two reasons for this. First, he did not have the funds to pay for the repairs. Second, he was reluctant to commence repairs without the authorization of either his own or the defendant's insurers, and he did not receive such authorization until eight weeks after the accident. Defence counsel referred to The Liesbosch which, said Davies L.J., was "authority for the proposition that impecuniosity is no excuse for not mitigating damage."137 But the learned judge indicated that the plaintiff's failure to expedite the repairs was not unreasonable in light of the insurers'

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133 See text accompanying notes 214-26, infra.
134 Supra note 17, at 302 (Q.B.), 975 (All E.R.), 1071 (T.L.R.).
135 See also Dodd Properties, supra note 101.
137 Id. at 577 (W.L.R.), 358 (All E.R.), 560 (Lloyd’s). A baffling assertion.
silence.\textsuperscript{138} His impecuniosity may have made him unable to repair the taxi, but he might reasonably have been unwilling to repair it, even if he had the necessary funds.

In \textit{Bunclark v. Hertfordshire County Council},\textsuperscript{139} roots from the defendant's trees caused cracking of the walls of the plaintiffs' houses. Proceedings were begun in 1969, when the structures could have been repaired at a cost of £7,300. But repairs were not carried out, because most of the plaintiffs had insufficient funds. By the date of the trial, seven years later, the cost of repairs had risen to £58,625. The defendant cited \textit{The Liesbosch}, and argued that damages should be assessed at £7,300, but the judge assessed damages at £58,625. One of the grounds on which he rejected the defendant's argument\textsuperscript{140} was that even non-impecunious plaintiffs would have been justified in refusing to undertake the repairs.

The county council... by obdurate silence, refused to remove the trees, and both Mr. Cooper and the plaintiffs' other advisors thought that to do the work before the defendant's trees were felled would be a waste of money. Mr. Cooper admitted that even underpinning to a depth of 9 feet would not safeguard absolutely against root action. In my judgment, therefore, that would also be a good reason for the plaintiffs' failure to mitigate their damages.\textsuperscript{141}

These cases establish the general proposition that an impecunious plaintiff will not be denied damages if he would have suffered the same losses even if he had not been impecunious. That proposition might seem trivial. But it deserves notice for two reasons. The first is that this is an area in which logic does not always carry the day, and in which case law support should be sought for even the most elementary propositions. The second is that this proposition lies at the heart of the principle established in \textit{Wroth v. Tyler},\textsuperscript{142} discussed in the following section.

2. Cases Ignoring \textit{The Liesbosch}: Bringing Suit for Specific Performance Makes Impecuniosity Irrelevant

Two propositions which find their origin in the case of \textit{Wroth v. Tyler} could be cited by an impecunious plaintiff seeking damages attributable in part to his own impecuniosity, and searching for ways to evade the principle of \textit{The Liesbosch}. The first proposition, relatively narrow but extremely useful, will be developed at some length in view of the frequency with which it has been invoked of late.

\textsuperscript{138} Id. Note that these very grounds were held not to excuse a failure to mitigate in \textit{Smith v. McConnell Bros. and Elkin} (1954), 11 W.W.R. 600 at 607, 62 Man. R. 72 at 80 (Q.B.). In \textit{Rivere v. Bellefonte Ins. Co.}, 388 So. 2d 75 (La. C.A. 1980), recovery for extended downtime was denied where the plaintiff's car could have been repaired quite quickly but he lacked the funds to pay for repairs. The decision is not only outside the mainstream of American decisions (\textit{infra} note 194), but also in sharp contrast to Louisiana's benign attitude to impecunious wrongdoers: numerous cases since \textit{Daly v. Kiel}, 106 La. 170, 30 So. 254 (1901), have held that even compensatory damages can be reduced if the defendant is impoverished.

\textsuperscript{139} Id. Note that these very grounds were held not to excuse a failure to mitigate in \textit{Smith v. McConnell Bros. and Elkin} (1954), 11 W.W.R. 600 at 607, 62 Man. R. 72 at 80 (Q.B.). In \textit{Rivere v. Bellefonte Ins. Co.}, 388 So. 2d 75 (La. C.A. 1980), recovery for extended downtime was denied where the plaintiff's car could have been repaired quite quickly but he lacked the funds to pay for repairs. The decision is not only outside the mainstream of American decisions (\textit{infra} note 194), but also in sharp contrast to Louisiana's benign attitude to impecunious wrongdoers: numerous cases since \textit{Daly v. Kiel}, 106 La. 170, 30 So. 254 (1901), have held that even compensatory damages can be reduced if the defendant is impoverished.

\textsuperscript{140} The other ground is mentioned in the text accompanying notes 179-87, \textit{infra}.

\textsuperscript{141} Supra note 99, at 687.

The first of these propositions, which has already attracted much attention,\textsuperscript{143} can be phrased quite narrowly: a plaintiff who unsuccessfully seeks specific performance of a contract for the sale of land is entitled to damages assessed as of the date on which he should have realized that specific performance would not be ordered. Phrased so narrowly, the proposition might seem to be founded on the words of Lord Cairns' Act\textsuperscript{144} which details the circumstances under which a court of equity may award damages. Thus in \textit{Wroth v. Tyler} itself the plaintiff sought specific performance of a contract to sell land, but Megarry J. would not order it;\textsuperscript{145} instead he awarded damages under Lord Cairns' Act and assessed them as of the date of the trial.\textsuperscript{146} This approach has met with approval in Canada.\textsuperscript{147} \textit{Wroth v. Tyler} has even been distinguished on the ground that it dealt only with damages in equity, and could have no relevance to the measure of damages at law.\textsuperscript{148} But the rule that damages need not be assessed as of the breach-date is not restricted to damages in equity; a conceptual basis for the rule, independent of Lord Cairns' Act, can be found which applies equally to equity and to law.\textsuperscript{149} In order to understand the rule, and to understand both its exact extent and the manner in which it may on occasion be invoked by an impecunious plaintiff, a


\textsuperscript{144}The Chancery Amendment Act, 1858, 21 & 22 Vict., c. 27.

\textsuperscript{145}Among other factors, any order would have had the effect of splitting up the vendor's family.

\textsuperscript{146}At 58 (Ch.), 428 (W.L.R.), 920 (All E.R.), Megarry J. said:

\textit{On the wording of the section, the power "to award damages to the party injured, ...in substitution for such... specific performance," at least envisages that the damages awarded will in fact constitute a true substitute for specific performance. Furthermore, the section is speaking of the time when the court is making its decision to award damages in substitution for specific performance, so that it is at that moment that the damages must be a substitute.}

\textsuperscript{147}\textit{E.G.H. Holdings Ltd. v. Bougie} (1977), 7 A.R. 213, 3 Alta. L.R. (2d) 244 (Dist. Ct.).

\textsuperscript{148}\textit{Woodford Estates Ltd. v. Pollack} (1979), 93 D.L.R. (3d) 350, 22 O.R. (2d) 340 (H.C.). It would seem that \textit{Wroth} had no application to the facts of this case. The purchaser of land was in breach, and in a falling market the vendor retained the land. He alleged that he had been unable to find any buyers for his property, which he had contracted to sell to the defendant for $426,000, and that its value had now dropped to $178,000. The Court, however, found that the property could have brought $355,000 if exposed for sale on the open market at the time of the defendant's breach. The plaintiff had never sought specific performance, and so could not excuse his failure to seek purchasers on the open market, as could the plaintiffs in \textit{Wroth}.

\textsuperscript{149}\textit{Johnson v. Agnew}, [1979] 2 W.L.R. 487, [1979] 1 All E.R. 883 (H.L.); \textit{306793 Ontario Ltd. in Trust v. Rimes} (1980), 25 O.R. (2d) 79, 100 D.L.R. (3d) 350, 10 R.P.R. 25 (C.A.). In several cases the damages were assessed as of the trial date without any indication of whether they were being assessed in equity or at law. See, \textit{e.g.}, \textit{Dynamic Transport Ltd. v. O.K. Detailing Ltd.}, [1978] 2 S.C.R. 1072, 85 D.L.R. (3d) 19, 4 R.P.R. 208.
framework will be developed within which both the classic breach-date rule and the new rule derived from *Wroth v. Tyler* can be supported.

In actions for breach of contract, one party has failed to carry out his agreed tasks. The plaintiff, as a result, suffers losses; in most instances in which the choice of the date as of which to assess damages is important, those losses will continue to increase until someone is found to carry out the defaulting party's tasks. If an employer breaches a contract of employment, the employee's losses in the form of lost wages will increase indefinitely until someone else employs him. Similarly, if a vendor breaches a contract to deliver a profit-earning chattel, the purchaser's losses in the form of lost profits will increase indefinitely until someone else supplies a substitute. Since an injured party must take all reasonable steps to minimize his losses, he must ensure that the defaulter's tasks are carried out as soon as possible.

The most common way of ensuring this is to engage a third party. So in an action for a vendor's failure to deliver, the purchaser's damages, inasmuch as they represent the excess of the market price of substitute goods over the contract price, will be assessed as of the earliest date on which substitute goods should reasonably be obtained. They will usually, though not always,\(^\text{150}\) be found by comparing the contract price to the market price as of the breach-date. This, of course, is the basis of the breach-date rule.

The injured party might, however, decide not to engage a third party to carry out the defaulter's tasks. Even if he decides not to carry out those tasks himself, he has a further alternative: he may seek an order for specific performance, and try to compel the defaulter to perform his duties under the contract.\(^\text{151}\)

Like any injured party seeking to minimize his losses, one who seeks specific performance must act reasonably. In particular, as soon as he learns of circumstances which make it unreasonable for him to expect to obtain an order for specific performance, he must seek out a third party to perform the defaulter's tasks. He need not do so earlier, for a plaintiff seeking an order for specific performance need not engage another to carry out the very tasks that he reasonably anticipates compelling the defaulter himself to carry out.

This reasoning leads to three sub-rules, each a particular application of the more general rule that an injured party must act reasonably to minimize his losses. First, if an injured party does not seek specific performance,\(^\text{152}\) or seeks specific performance in circumstances where he should

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\(^{150}\) The plaintiff is given a reasonable time after the breach to take steps to minimize his losses: *Asamera Oil*, supra note 5, at 666 (S.C.R.), 24-25 (D.L.R.), 327 (W.W.R.).

\(^{151}\) In appropriate circumstances it may be reasonable for the injured party to spend some time trying to persuade the defaulter to repent: *Costello v. Cormier Ent. Ltd.* (1980), 108 D.L.R. (3d) 472 at 479, 63 A.P.R. 398 at 407, 28 N.B.R. (2d) 398 at 407 (C.A.). This may afford a theoretical basis for the rule that a refusal to accept an anticipatory breach does not constitute an unreasonable failure to mitigate.

\(^{152}\) In *100 Main St. Ltd. v. W.B. Sullivan Const. Ltd.* (1978), 20 O.R. (2d) 401 at 419, Morden J.A. distinguished *Wroth* on the ground that "from the statement of claim stage forward there has been no claim for specific performance."
know from the start that it will not be ordered, then the breach-date rule applies. Second, if an injured party reasonably seeks specific performance, but learns before the trial of circumstances making it clear that specific performance will not be ordered, then his damages will be assessed as of the date on which he learns of those circumstances. Finally, if an injured party reasonably seeks specific performance, and learns only when judgment comes down that it will not be ordered, then his damages will be assessed as of the date when he should have learned that specific performance would not be ordered. This will be the date on which judgment should have come down, that is, the date on which it would have come down had he prosecuted the action expeditiously. As a matter of convenience, and because such dates cannot in any event be calculated with precision, it is customary to speak of the trial date rather than the date on which judgment should have come down.

These three rules have developed slowly, and decisions not entirely consistent with them have come down in recent years. The House of Lords in Johnson v. Agnew has, however, now made it clear that damages are

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153 Two decisions of the Supreme Court of Canada exemplify this. In A.V.G. Management Sciences Ltd. v. Barwell Developments Ltd., [1976] 6 W.W.R. 289, 69 D.L.R. (3d) 741 (B.C.S.C.), the vendor of an apartment building sold it to both A.V.G. and Jordan Development Corp. Jordan obtained an order for specific performance [Jordan Development Corp. v. Barwell Developments Ltd., unreported, Aug. 18, 1975 (B.C.S.C.)] and A.V.G. sued for damages. McKenzie J. found its damages to be $35,000, if evaluated as of the breach-date, and $100,000, if evaluated as of the date on which Jordan obtained its order. The plaintiff sought the higher figure, arguing that Wroth v. Tyler applied, but McKenzie J., with whom both the B.C.C.A. ([1978] 1 W.W.R. 730, 83 D.L.R. (3d) 702, 3 R.P.R. 90) and the S.C.C. ([1979] 2 S.C.R. 43, [1979] 1 W.W.R. 330, 92 D.L.R. (3d) 289) ultimately agreed, distinguished that case: here the property in question was an apartment building with no special characteristics, and it was unreasonable for A.V.G. to have sought specific performance at all, even while the property was still in the vendor's hands. (The same point would have defeated Jordan's action for specific performance, but was not raised in that action).

In Asamera Oil, supra note 5, at 668 (S.C.R.), 26 (D.L.R.), 328 (W.W.R.), Estey J. said for the Court:

Before a plaintiff can rely on a claim to specific performance to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found.


157 The same rules should apply not only when a purchaser is seeking specific performance of an executory sale, but also when the vendor is seeking rescission of an executed sale: Lynch v. Vickers Energy Corp., 429 A. 2d 497 (Del. S.C. 1981).


159 Supra note 149.
indeed to be assessed as of the date on which the plaintiff should have mitigated his losses. The only significance of an action for specific performance is that it postpones, if reasonably brought, the date on which third-party performance of the defaulter's tasks should have been sought.

The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, . . . . But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would appear to me more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost . . . .

In the present case if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors' fault) should logically be fixed as the date on which damages should be assessed. Choice of this date would be in accordance . . . with common law principle . . . .

In an action for breach of contract, a plaintiff may recover only those losses which he could not have avoided by appropriate counter-measures. If the doctrine of Clippens Oil is not good law in Canada, then the plaintiff's impecuniosity will not excuse his failure to take such counter-measures. In particular, his impecuniosity will not excuse his failure to engage a third party to fulfil the defaulter's tasks if his losses are increasing while those tasks remain unfulfilled.

On the other hand, bringing an action for specific performance, if reasonable, will excuse such a failure. The plaintiff's damages will be assessed as of the date on which it becomes unreasonable for him to continue such an action. This postponement of the assessment date will result in an increased award in many circumstances. In an action for failure to deliver goods or to convey land, it enables a plaintiff to recover higher damages in a rising market; in an action for lost profits, it enables him to recover all the profits lost between breach-date and assessment date.

So it is to an impecunious party's advantage to bring an action for specific performance. If the action succeeds, he might also recover the losses he sustained between breach-date and trial date; if the action fails, he

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100 Id. at 499 (W.L.R.), 896 (All E.R.) per Lord Wilberforce.
101 In assessing such damages, it is important to distinguish between two equitable jurisdictions.

1. Since 1858 equity has had jurisdiction to award damages in addition to, or in lieu of, specific performance. The damages will be what the purchaser lost as a result of his being refused possession and title, offset by what he gained as a result of his retaining possession of the purchase money. If damages are awarded in lieu of, rather than in addition to, specific performance, the purchaser will also have lost the increase in the property's value from completion date to the date on which he should have purchased substitute property (if the second of these three exceeds the first, then the damages recoverable by the pur-
has postponed the date of assessment, and will thus recover more moneys than otherwise. The fact that his impecuniosity made it impossible for him

chaser should be the third figure, diminished by the excess of the second over the first; but see 306793 Ont. Ltd. in Trust, supra note 149).

If specific performance is ordered, then the purchaser’s damages can often be written as “P’s profits - P’s interest.” The first term, “P’s profits,” is the profit which the purchaser would have made if he had obtained possession, not the profits which the vendor actually made while retaining possession [see, e.g., Hartwell v. Glavin, unreported, July 6, 1977 (B.C.S.C.)]. Similarly, the second term, “P’s interest,” is the interest which the purchaser made on the retained purchase money. This may be the interest that he avoided paying on a mortgage which he no longer had to give; it is not the interest that the vendor could have made if he had obtained the purchase money (see, e.g., Schielkhardt, supra note 154, at 262: the relevant rate is that at which the purchaser would have borrowed the purchase money).

2. Equity has always had jurisdiction to require a purchaser who obtained possession of the property before payment of the purchase money to pay interest on that money to the vendor: Int. Ry. Co. v. Niagara Parks Comm., [1941] A.C. 328 at 344-45, [1941] 2 All E.R. 456 at 462-63, 57 T.L.R. 462 at 466-67 (P.C., Ont.). This is distinct from its jurisdiction to award damages (Hayes v. Elmsley (1893), 23 S.C.R. 623 at 627); but because the two jurisdictions have a great deal in common, they are easily confused.

The jurisdiction extends to allow equity to “settle accounts” even if the purchaser was denied possession subsequent to the completion date: Moscovitch’s Estate v. South End Dev. Co. (1968), 4 N.S.R. 182 (S.C., App. Div.); Fry, Specific Performance of Contracts (6th ed. Toronto: Carswell, 1921) at 640 et seq. [hereinafter Fry]. Since the vendor has been wrongfully in possession, the purchaser may receive (i.e., reduce the purchase price by) the excess of the rents and profits of the property over the interest on the purchase money. (If this is negative, i.e., the interest exceeds the fruits of the land, then the defaulting vendor might himself seek an accounting to recover the excess, but equity will deny its assistance lest the wrongdoer benefit from his evil acts: Esdaile v. Stephenson (1822), 1 Sim. & St. 122, 57 E.R. 49; Cowpe v. Bakewell (1851), 13 Beav. 421, 51 E.R. 162.)

a) The “interest on the purchase money” is not the interest that the purchaser made on the money that he retained, and can be either more [City of Toronto v. Toronto Ry. Co., [1926] 1 D.L.R. 1029, 58 O.L.R. 283 (S.C.), aff’d [1926] 3 D.L.R. 629, 59 O.L.R. 73 (C.A.)] or less [Roberts v. Massey (1807), 13 Ves. Jun. 561, 33 E.R. 404 (Ch.)] than the purchaser made. It seems customary to adopt an “official rate” independent of the particular facts of the case (Fry, §1424), but the view that the appropriate rate should be that at which the vendor could have invested the money, if he had been given it, has much to recommend it [Burnell v. Brown (1820), 1 Jac. & W. 168 at 175, 37 E.R. 339 at 342 (Ch.)], and has been followed in recent years [First Gastown Land Corp. v. Wicklow Hotel Ltd., [1976] W.W.R. 172 (B.C.S.C.)].

b) The “rents and profits of the property” include occupation rent if the vendor used the property as his residence (Fry, §1440), and seem to be the rents which the vendor actually received (Fry, §1427) and not the rents that he or the purchaser could have received [e.g., Roy v. Roy, unreported, Jan. 30, 1978 (Sask. Q.B.)]. There are problems in reconciling this with the approach taken in First Gastown, supra, however.

Probably the purchaser can seek either damages or an accounting, since he has such a choice if breach of trust, rather than breach of contract, is at issue: Waters, Law of Trusts in Canada (Toronto: Carswell, 1974) at 849-53. Although the principles applicable to an accounting do not appear to be definitively settled, it may often be preferable to damages, especially if the purchaser was going to borrow the purchase money at a high rate of interest.
to engage a third party is irrelevant, for his reasonably bringing an action for specific performance made it unnecessary for him to do so.

Everything hinges on the answer to this question: when is it reasonable to bring an action for specific performance? It would serve no useful purpose here to examine the numerous and well-known factors which determine the availability of specific performance. One example will serve as an illustration. Contracts for the sale of a dwelling house are almost routinely ordered to be specifically performed. Thus the purchaser of a house, too impecunious to purchase an alternate house upon the vendor's default, may reasonably commence an action for specific performance. By so doing he renders his impecuniosity, and the doctrine in The Liesbosch, largely irrelevant.

The doctrine in Wroth v. Tyler may be even more important than would appear at first glance, for it may be reasonable for an impecunious plaintiff to hope for specific performance in circumstances in which it would be unreasonable for a non-impecunious plaintiff to do so. Consider, for example, a contract for the sale of a commonplace item. If the vendor refuses to deliver, equity will not order specific performance, and it would be unreasonable for the purchaser to seek it, because damages at law are regarded as adequate:

So a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.  

This reasoning fails if the breach-date rule is applied to an impecunious plaintiff, for the law's refusal to consider his impecuniosity means that his damages at law will be inadequate. Should not equity's general rule be inapplicable in such circumstances? Equity has denied specific performance where the defendant's impecuniosity would cause him to experience great hardship were it ordered; it should order specific performance where the defendant's impecuniosity would cause him to experience great hardship were it ordered; it should order specific performance where the

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163 Adderley v. Dixon (1824), 1 Sim. & St. 607 at 610, 57 E.R. 239 at 240 per Sir John Leach.

164 Dowsett v. Reid (1912), 15 C.L.R. 695 (High Ct. of Aust.) where the defendant was the vendor; Major v. Sheppard (1909), 10 W.L.R. 293, 18 Man. R. 504 (K.B.) and Campion v. Jacobson, [1919] N.Z.L.R. 209 (S.C.), where the defendant was the purchaser. In McIntosh v. Dalwood (No. 3) (1930), 30 N.S.W. 332 at 335, (No. 4) 415 at 418 (C.A.), specific performance of a contract to indemnity was given on the ground that the plaintiff might be ruined if he were forced to pay the debt first and then to seek damages. In Bennison Lane Ent. v. W. Krause Logging Ltd., [1977]
plaintiff's impecuniosity would cause him to experience great hardship were it denied.

This argument seems never to have been raised in the Commonwealth. No cases run counter to it. *The Liesbosch* may have established that a plaintiff's impecuniosity cannot affect the measure of his legal remedy of damages, but it did not decide whether or not his impecuniosity can affect the existence of his equitable remedy of specific performance.

Some support for this argument can be found in a decision of the California District Court of Appeal, *Gerwin v. Southeastern California Association of Seventh-Day Adventists*. Specific performance of a contract to sell bar equipment was ordered in that case because the purchaser lacked the funds to purchase similar equipment in the market, the contract being for a price far below market price.

Whether or not this decision would be followed in Canada remains questionable. At this stage it is possible to state only one thing with assurance: in some circumstances, whose limits have not yet been marked out, an impecunious party to a broken contract might circumvent *The Liesbosch* by bringing an action for specific performance.

This is not the only proposition for which *Wroth v. Tyler* might be cited. The plaintiffs in that case were too impecunious to purchase alternate property. Megarry J. mentioned the point without seeming to base his decision on it, but it could be argued that his choice of the trial date as the date as of which damages were to be assessed was due to the plaintiffs' inability to mitigate their losses at any earlier date. This was the interpretation given to *Wroth v. Tyler* in *Tominski v. Headway Builders (Sault) Ltd.*, in which the plaintiffs sought damages for breach of a builder's warranty. Gould D.C.J. held that the damages were the difference between the market value of the house and the value which it would have had if it had answered the warranty. The plaintiffs claimed that this difference should be assessed as of the trial date, and cited *Wroth v. Tyler*. Mr. Justice Gould distinguished that case on two grounds. First, the Tominskis, unlike the Wroths, had never requested specific performance.

Secondly, the judgment in *Wroth v. Tyler* was expressly based on a finding that (1) the plaintiff was financially unable to raise additional money; and (2) the defendant was at all times aware of that fact. In the present case [the plaintiff] gave evidence that he did not have enough money to make such a purchase but

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6 W.W.R. 92 (B.C.S.C.), the fact that the defendant's breach would cause the plaintiff to suffer losses which *The Liesbosch* would prevent him from recovering was held to justify the granting of an injunction. For equity's tender treatment of impecunious parties, see *Roberts v. Tunstall* (1845), 4 Hare 247, 67 E.R. 645, 14 L.J. Ch. 184.

Although equity will not require a person to do that which he lacks the funds to do, the law has adopted a more severe approach: see *McLeod v. The Board of School Trustees of School District No. 20*, [1952] 2 D.L.R. 562 (B.C.C.A.) citing the authorities on the availability of *mandamus* to compel the performance of a financially impossible task.


166 Supra note 142, at 56-57 (Ch.), 426-27 (W.L.R.), 918-19 (All E.R.).

167 (1979), 12 R.P.R. 290 (Ont. Dist. Ct.).
there is no evidence that the defendant knew this. Accordingly I am not prepared to assess the damages as at the date of trial or judgment.\textsuperscript{168}

\textit{Wroth v. Tyler} as interpreted by Mr. Justice Gould, could thus be cited for the following proposition: a plaintiff's impecuniosity will excuse his failure to take steps in mitigation of damages if, and only if, the defendant knew of that impecuniosity at the relevant time.

This proposition is much narrower than that stated by Lord Collins in \textit{Clippens Oil}. Many plaintiffs will find that they can circumvent \textit{The Liesbosch} only if they can successfully invoke Lord Collins' doctrine that impecuniosity excuses a failure to mitigate. This doctrine will be considered in the following section.

3. Cases Following \textit{Clippens Oil}: Impecuniosity Excuses a Failure to Mitigate

McGregor's eighth rule concerning mitigation is that "a plaintiff will not be prejudiced by his financial inability to take steps in mitigation."\textsuperscript{169} This has been approved by various courts which have not elaborated on its meaning.\textsuperscript{170} Merely stating the rule is insufficient, however, for it leaves unanswered the question whose answer will determine the significance of the rule: when is a fact pattern said to involve a question of mitigation?

In \textit{General Securities Ltd. v. Don Ingram Ltd.},\textsuperscript{171} the British Columbia Court of Appeal responded to the argument that a borrower whose lender breached the contract to loan money could, if he had sufficient capital or credit, have procured the money elsewhere. Macdonald J.A. stated that "[t]he right to recover damages... in such a case as this does not depend upon the financial standing of the injured party. Respondent was obliged to mitigate the damages by securing funds elsewhere, if possible; its manager made reasonable efforts to do so and failed."\textsuperscript{172} The Court allowed damages flowing from the plaintiff's lack of funds.

In \textit{Robbins of Putney Ltd. v. Meek},\textsuperscript{173} the plaintiff had purchased a
Bentley for resale to the defendant. The plaintiff had cash-flow problems, and the purchase of the car had tied up a significant portion of its resources. Upon the defendant's refusal to take delivery, the plaintiff sold the car hurriedly. It was argued that a better price could have been obtained if the plaintiff had not been in such a hurry, and that the defendant should only be responsible for the difference between the contract price and that better price. Stephenson J., as he then was, characterized this as a question of mitigation, and held that the only question was whether the plaintiff had acted reasonably in light of its financial position. He held that it had done so, and allowed it to recover the difference between the contract price and the price actually obtained for the car.

In Bede Distributors Ltd. v. Newcastle-upon-Tyne Corp., a decision of the Land Tribunal, compensation was assessed in respect of the corporation's expropriation of land upon which Bede carried on its business. When the land was expropriated, Bede went into liquidation. This resulted in a loss of about £40,000, which Bede sought from the corporation. The corporation established that Bede would only have lost about £23,000 if it had moved to another location and continued its operations, and argued that only £23,000 should be awarded. But Bede's cash-flow did not permit it to move to the other location, which would have involved an immediate expenditure of some £27,000. The arbitrator awarded it £40,000, stating that "[t]he present case seems to me analogous with Liesbosch Dredger v. Edison in which it was held that where the financial state of the victim prevents him from doing something to mitigate the damage, the defendant must suffer accordingly."

In Smith v. Richardson, waste oil from the defendant's service station polluted the plaintiff's well, and the defendant was found liable in negligence, nuisance, and the tort in Rylands v. Fletcher. The plaintiff recovered $2,800 in respect of the cost of drilling a new well. She also sought general damages in respect of inconvenience and hardship. The extent of that inconvenience and hardship was directly proportional to the length of time between the pollution of the old well and the drilling of the new one, and so the plaintiff could have minimized her losses by having a new well drilled as early as possible. But the judge refused to penalize her, noting that "[s]he was not in a position financially to provide new facilities," and that "a plaintiff will not be prejudiced by her financial inability to mitigate."

In Bunclark v. Hertfordshire County Council, the plaintiffs' impe-
cuniosity excused their failure to repair their houses, for this was “a matter of mitigation of damages.”

In Dodd Properties (Kent) Ltd. v. Canterbury City Council, the defendants negligently damaged the plaintiff’s building. Repairs could have been carried out in 1970 at a cost of £11,000. But for various reasons, of which its impecuniosity was not the least important, the plaintiff did not commence repairs. By the time of the trial eight years later the cost of the repairs had risen to £30,000. At trial damages were assessed at £11,000, following The Liesbosch; the Court of Appeal, however, did not display fondness towards that decision. Megaw, L.J. held that even a plaintiff with sufficient funds would have refrained from repairing the building until the defendants admitted liability and it became clear that whatever funds were expended would ultimately be recovered. Donaldson L.J. distinguished The Liesbosch on the ground that the plaintiff’s impecuniosity did not prevent it from repairing the building, but only prevented it from repairing the building without experiencing cash-flow problems. His Lordship held that fear of cash-flow problems would have caused even a reasonable person to refrain from repairing the building. It is difficult to see why impecuniosity rendering repairs impossible cannot be considered by the Court, while impecuniosity rendering repairs inconvenient but not impossible can be considered. But all three members of the Court agreed that this was a question of mitigation, and that the plaintiff’s impecuniosity excused its failure to institute repairs at an earlier date. The plaintiff was awarded the cost of repairs as of the trial date, but was denied interest.

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182 Id. at 686 per Gibbens Q.C., citing Clippens Oil and Robbins of Putney Ltd.
185 Donaldson L.J. indicated that “it is not at once apparent why a tortfeasor must take his victim as he finds him in terms of exceptionally high or low profit-earning capacity, but not in terms of pecuniosity [sic] or impecuniosity which may be their manifestations;” supra note 101, at 940 (All E.R.), 458 (W.L.R.).
187 Dodd Properties, id. at 941 (All E.R.), 459 (W.L.R.).
188 Supra note 100.
189 Supra note 101, at 935, 938, 941 (All E.R.), 453, 456, 459 (W.L.R.). Browne L.J. was the third member.
190 The parties agreed that interest was inappropriate in the circumstances. When repair or replacement costs are assessed as of trial date, the plaintiff would be over-
The most recent case applying *Clippens Oil* is *Popular Homes Ltd. v. Circuit Developments Ltd.* The defendant breached its contractual obligation to lend money to the plaintiff builder. The plaintiff, unable to obtain alternate financing, could not complete several homes which were in the middle of construction. The uncompleted homes were protected from the elements to a minor extent, but vandals and bad weather caused damage of $8,613. It was argued that the plaintiff should have taken more elaborate steps to protect the structures, but Barker J. held that its financial inability excused its failure to do so.

These cases support the *dictum* of Lord Collins in *Clippens Oil*. Several points should, however, be noted here. First, the *dictum* finds most of its support in decisions of New Zealand and English courts; it finds little support in Canada. Second, as discussed below there are many cases which apply *The Liesbosch* to circumstances that smack of mitigation; this stems from the fact that *The Liesbosch* was itself a case involving an impecunious person's inability to mitigate his losses. Third, these cases only give examples. They do not suggest any tests to distinguish questions of mitigation from questions of remoteness: American decisions tend to categorize most questions as questions of mitigation rather than remoteness, but these cases are never cited in Commonwealth decisions. Fourth, even if *Clippens Oil* is accepted as good law, there will be many cases, such as "foreclosure cases," that cannot be categorized as mitigation cases. Impecunious plaintiffs involved in such cases must rely on the next line of cases.

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The plaintiff has no choice: he cannot opt for damages assessed as of breach-date, plus interest, rather than damages assessed as of trial date: *Reynolds v. Phoenix Ass'n Co.*, (1978) 2 Lloyd's Rep. 440.  

192 *Id.* at 654.  
193 See text accompanying notes 106 et seq., supra.  
Cases Explaining The Liesbosch: It's All a Question of Reasonable Foresight

It might seem that the principle laid down in The Liesbosch could have no application in actions for breach of contract, where for over a century the rule has been that damages are recoverable if, and only if, they are of a type that was (or should have been) within the contemplation of the parties at the time of contracting. This is the rule in Hadley v. Baxendale. Since the rise of the “reasonable foresight” test to determine the recoverability of damages in tort, the rule in The Liesbosch is, arguably, inapplicable even to actions in tort. This argument gains support from recent suggestions that the rules regarding remoteness are the same in tort as in contract, save that in contract the foreseeability of damage is to be assessed as of the time of contracting, whereas in tort it is to be assessed as of the time of committing the tort. The argument that the rule in The Liesbosch has been superseded by the reasonable foresight test has received nods of approval from high authority. But it has seldom been accepted in tort. The reasonable foresight test has generally been applied to evade The Liesbosch only in actions for breach of contract.

The earliest case which has been viewed as applying the reasonable foresight test was General Securities Ltd. v. Don Ingram Ltd. In the Supreme Court of Canada, Duff C.J.C. clearly espoused that test, but the views of the other members of the Court were not set forth with clarity. The decision does not unequivocally support the thesis that damages flowing from the combination of the plaintiff's impecuniosity and the defendant's
breach of contract may be recovered if they were reasonably foreseeable at the relevant time.\textsuperscript{203} The great respect always accorded the views of Chief Justice Duff, however, makes the decision strong persuasive authority at the very least.

The first decision to adopt the reasonable foresight test in what was clearly an impecuniosity case was a decision of the Privy Council on appeal from Palestine, \textit{Muhammad Issa el Sheikh Ahmad v. Ali}.\textsuperscript{204} The plaintiffs sold land to one Haski, and then sold the same land to the defendants. Anticipating trouble, they obtained from the defendants a promise to indemnify them against any judgment recovered against them by Haski. Haski obtained a judgment in the amount of £1,830 against the plaintiffs. The plaintiffs lacked the funds to satisfy the judgment, and the defendants refused to furnish them with the necessary monies. So Haski caused some of the plaintiffs' other land to be sold at a court sale. It realized £2,883 less than its true value.

The plaintiffs sought to recover the £2,883 and the Privy Council held that the loss resulting from the execution sale was not too remote:

The vendor's impecuniosity was not a separate and concurrent cause of the land being sold in execution, and the trial judge held, as has been stated, that is [sic] was common knowledge that on a forced sale full value was seldom realized. Whether the contract be read as a contract to indemnify the vendors at all stages or as a contract to indemnify the vendors against the amounts due to Haski with a right in the vendors to fight Haski to such extent as they chose, the result is, in their Lordships' opinion, the same.... On the first basis the damages claimed fall within the terms of the contract on its true construction, and on the second they are damages which, on the facts found by the trial judge, might reasonably be expected to be in the contemplation of the parties.\textsuperscript{205}

Although this could have been viewed as impecuniosity excusing a failure to mitigate,\textsuperscript{206} the Privy Council was clearly treating it as impecuniosity giving rise to a new head of damages and applying the test in \textit{Hadley v. Baxendale}.

Within two years Lord Wright himself took note of the decision in \textit{Muhammad Issa}. In \textit{Monarch Steamship Co. v. Karlshamns Oljefabriker (A/B)}\textsuperscript{207} the rules of remoteness in contract were in issue. Lord Wright first noted that \textit{The Liesbosch} had held that losses due to a party's impecuniosity were too remote.\textsuperscript{208} He did not elaborate on this. Then his Lordship noted

\textsuperscript{203} The decision of Duff C.J.C. was mentioned in a note in (1948), 64 L.Q. Rev. 2 at 3. The case was cited by Munro J. in \textit{Pelletier v. Pe Ben Ind. Co.}, [1976] 6 W.W.R. 640 (B.C.S.C.) as supporting the reasonable foreseeability test.


\textsuperscript{205} \textit{Id.} at 427 (A.C.), 461-62 (L.J.K.B.) \textit{per} Lord Uthwatt. \textit{The Liesbosch} was not mentioned in the speech, and is not shown as mentioned in argument.

\textsuperscript{206} Of course, if the plaintiffs had been able to satisfy the judgment, the loss should not have arisen.


\textsuperscript{208} \textit{Id.} at 224 (A.C.), 14 (All E.R.), 785-86 (L.J. Ch.).
that such losses had been held not to be too remote in Muhammad Issa because they met the “reasonable contemplation” test.209 He concluded his remarks by observing that “[t]he difference in result did not depend on the differences (if any) between contract and tort in this connexion.”210

Two corollaries follow from this statement. First, damages flowing from the combination of the plaintiff's impecuniosity and the defendant's breach of contract will be recoverable if, and only if, they meet the reasonable foresight test. Second, the same is true of damages flowing from the combination of the plaintiff's impecuniosity and the defendant's tort. These conclusions are rather surprising, following as they do an earlier speech of Lord Wright, who had stated in 1938 that such damages would be too remote even if the defendant knew full well that they would be the inevitable consequences of his breach.211 In any event they would be useful to a plaintiff seeking to recover damages flowing from his own impecuniosity, even though they can only be supported by a comment which was not necessary to the decision and which is found in the speech of a Law Lord speaking only for himself212 on an appeal from Scotland. It therefore seems strange that, although the first corollary has been applied numerous times, the second corollary appears to have passed generally unnoticed, and has been applied only once.213

In Charles v. Malherbe, Bosch & Co. (Pty.) Ltd.,214 the South Africa Supreme Court was prepared to adopt the second corollary, and cited Monarch Steamship Co. for the proposition that damages in both tort and contract are based on “the doctrine of 'reasonable contemplation.'”215 On the strength of the defendants' representation that they had purchasers ready and willing to buy eighty percent of a certain farm, the plaintiff bought the farm, paying £500 down and depending on the receipts of the resales to pay off the balance. When the purchasers did not materialize, he was compelled to rescind the bargain and to forfeit half his deposit. His attempt to recover the forfeited sum was defeated because “there is nothing to suggest that defendant knew what the financial position of the plaintiff was or that he was relying on his ability to sell 4/5ths of the property... in order

209 Id.


211 Wright, supra note 14, at 113-14 where Lord Wright stated “where payment of a debt is withheld, the creditor may be in such a difficult financial situation that he may be driven into bankruptcy, but all he can recover as damages is interest on the amount during the period of delay. I have never heard it suggested that the position is any different even if when the debt was contracted the debtor was informed of the creditor's position.”

212 Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Morton of Henryton also gave reasons. Only Lord Uthwatt made any mention of the speech of Lord Wright: he agreed only with the conclusion.


215 Id. at 389, quoting from a note in (1949), 65 L.Q. Rev. 137.
to finance the transaction.\textsuperscript{216} The case is especially interesting because the Court indicated that \textit{The Liesbosch} would have been determinative of the issue only if \textit{Monarch Steamship Co.} were wrong and the test in \textit{Re Polemis}, not the test of reasonable foresight, applied to remoteness in tort;\textsuperscript{217} the authority of \textit{The Liesbosch} was seen as resting squarely on that of \textit{Re Polemis}.

The first corollary was affirmed by the English Court of Appeal in \textit{Trans Trust S.P.R.L. v. Danubian Trading Co.}\textsuperscript{218} All three members of a strong court adopted the view that remoteness in contract falls to be determined according to the test in \textit{Hadley v. Baxendale}, and that there are no special rules applicable to special types of contracts. Both Denning L.J.\textsuperscript{219} and Romer L.J.\textsuperscript{220} went out of their way to state in \textit{dicta} that damages which met the test in \textit{Hadley v. Baxendale} could be recovered for breach of an obligation to pay money.\textsuperscript{221} All three Lords Justice\textsuperscript{222} adopted the principle that damages flowing from the combination of the plaintiff's impecuniosity and the defendant's breach of contract are recoverable if they meet the test in \textit{Hadley v. Baxendale}.\textsuperscript{223}

The \textit{Trans Trust} case has been approved in Canada, New Zealand and Australia.\textsuperscript{224} In Canada it was first considered in \textit{Freedhoff v. Pomalift Ind.}

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{Id.}


\textsuperscript{219} \textit{Trans Trust, id.} at 306 (Q.B.), 977-78 (All E.R.), 1074 (T.L.R.).

\textsuperscript{220} \textit{Id.} at 307 (Q.B.), 978-79 (All E.R.), 1075 (T.L.R.).

\textsuperscript{221} The imagined rule that only interest was recoverable for breach of an obligation to pay money was probably due to a presumption of non-impecuniosity; such a presumption, if irrebuttable, is equivalent to a rule that damages flowing from an injured party's impecuniosity are not recoverable. Strangely enough, in America, where the foresight test generally determines the recoverability of damages flowing from an injured party's impecuniosity, the rule survives that breach of a contract to pay a debt does not sound in consequential damages: \textit{New Orleans Ins. Ass'n v. Piaggio}, 83 U.S. 378, 21 L. Ed. 358 (1872).

\textsuperscript{222} \textit{Supra} note 17, at 306 (Q.B.), 977-78 (All E.R.), 1074 (T.L.R.) \textit{per} Denning L.J.; at 307 (Q.B.), 978 (All E.R.), 1075 (T.L.R.) \textit{per} Romer L.J.; and at 302 (Q.B.), 975 (All E.R.), 1071 (T.L.R.) where Somervell L.J. said: "We were referred to \textit{The Liesbosch} and \textit{Muhammad Issa el Sheikh Ahmad v. Ali}. The result is stated by Lord Wright in the former case, namely, that damages due to impecuniosity may not be too remote if the loss might reasonably be expected to be in the contemplation of the parties." \textit{Quaere}, if Lord Wright said this.

\textsuperscript{223} Although this principle is now well-accepted in England (\textit{The "Elena D'Amico"}, [1980] 1 Lloyd's Rep. 75 at 87), it has only recently been applied to allow the recovery of interest on funds improperly withheld: compare \textit{Techno-Impex v. Gebr. van Weele ScheepvaartKantoor B.V.}, [1980] 1 Lloyd's Rep. 484 (Q.B.), rev'd [1981] 2 W.L.R. 821 (C.A.) \textit{with} \textit{The Borag, supra note 70}. See also \textit{Wadsworth v. Lydall}, [1981] 1 W.L.R. 598 (C.A.) which held that lost interest is recoverable whenever it meets the normal criteria for the recoverability of special damages.

The plaintiff had purchased a defective ski lift. As a result, he was unable to attract patrons to his heavily-mortgaged ski facility. So he could not earn the profits upon which his ability to make mortgage payments depended. Ultimately the mortgagee caused the ski facility to be sold. It realized only a fraction of its true value, and Stewart J. allowed the plaintiff to recover the shortfall. He distinguished *The Liesbosch* on the ground of foreseeability.

There must be a distinction made between impecuniosity extraneous of the ... breach of contract when damages caused by it must be regarded as being too remote, and between impecuniosity traceable to the wrongful acts of the defendant, foreseeable and a likely consequence of the defendant's default. 226

It seems strange to require that the impecuniosity, and not the damages flowing from it, be foreseeable and traceable to the breach of contract. 227 Fortunately the Ontario Court of Appeal made it clear that the tests of foreseeability and causation are applicable only to the damages, and not to the plaintiff's impecuniosity. 228 Although he found that the alleged damages had not been adequately proven, and should not have been awarded, Kelly J.A. went on to say:

In the instant case, even if the plaintiff be entitled to be compensated for damages in the amount of loss of revenue, the loss of property through the sale by the Industrial Development Bank because of the plaintiff's failure to keep the mortgage in good standing, does not entitle him to damages measured by the loss he alleges that he suffered in the sale of the property. It does not meet the test of foreseeability. 229

Since Stewart J. made no finding of special knowledge on the defendants' part, the damages were unforeseeable; damages flowing in part from the plaintiff's impecuniosity do not, it seems, meet the first branch of the test in *Hadley v. Baxendale*.

In this context it is interesting that an American court had, fifty years earlier, 230 labelled damages in a personal injury action as "too remote" when the plaintiff alleged that she had lost her equity in a lot that she had been

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226 Id. at 581 (O.R.), 532 (D.L.R.), Stewart J. referred to *Trans Trust*, supra note 17, and then continued: "In *Muhammad Issa el Sheikh Ahmad v. Ali* [supra note 204] and in *Monarch S.S. Co. v. Karlshamns Oljefabriker (A/B)* [supra note 207], loss due to a party's impecuniosity was considered as not being too remote and was therefore allowed" [id. at 580 (O.R.), 532 (D.L.R.)].

227 This was not a slip, for Stewart J. re-emphasised the point when he said that "their act created that very impecuniosity" [id. at 581 (O.R.), 533 (D.L.R.)].

228 [1971] 2 O.R. 773, 19 D.L.R. (3d) 153 (C.A.). Of course the damages can not be foreseeable unless the impecuniosity is foreseeable, but the damages can be caused by the wrongdoer's acts without the impecuniosity being so caused.

229 Id. at 778 (O.R.), 158 (D.L.R.), speaking for the Court and citing no cases.

buying when "in consequence of her injuries she had been unable to keep up her payments." And in a case decided five years before Freedhoff, where a plaintiff injured in a motor vehicle accident claimed similar damages, the Virginia Supreme Court of Appeals held "that plaintiff's alleged losses by reason of the repossession of the tractor and two trailers, which were either not damaged or not involved in the collision, were speculative, remote, and not the natural and proximate result of any wrongful act on the part of defendant." The opposite result has, however, been reached when the defendant had special knowledge of the plaintiff's circumstances.

The trial decision in Freedhoff, rather than the decision of the Court of Appeal, has been followed in British Columbia. It was approved in dictum in Bango v. Holt, and followed in Groves-Raffin Const. Ltd. v. Bank of Nova Scotia. In the latter case, the defendant's breach of contract had enabled one of the plaintiff's directors to defraud the plaintiff of $176,000. As a consequence, the plaintiff lacked the funds to discharge its obligations under various contracts with third parties. It was forced to default, and suffered damages as a result. Andrews J. applied a hybrid of the test set out by Stewart J. in Freedhoff and the test in Hadley v. Baxendale; he allowed recovery on the basis that both the plaintiff's impecuniosity and the resulting damages were foreseeable as well as traceable to the defendant's breach of contract.

The Court of Appeal refused to allow the damages. Not only were they not quantified with sufficient precision, but the relationship between the defendant's breach and the plaintiff's default on the third-party contracts did not even meet the minimal "but for" test of causation: "Groves-Raffin's impecuniosity was not attributable to the payment out of the $176,000 because it could not, on any reasonable degree of probability, have survived for long in any event..." This passage seems to support the thesis that the plaintiff's impecuniosity, and not merely his damages, must meet the causation test. It is not, however, clear if the Court of Appeal was directing

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231 Id. at 615 (Cal. App.), 198 (P.).
233 In Horton v. Medicine Rock Land Co., 275 Or. 59, 549 P. 2d. 1122 (1976), the defendant breached its obligation to log the plaintiff's timber and deliver it to a purchaser. As a result, the plaintiff received no money from the purchaser and could only satisfy its creditors by selling certain land in a hurry and for less than market value. It recovered the deficiency because the defendant knew that it required the receipts from the timber sale to pay its outstanding notes. See also Markowitz & Co. v. Toledo Metropolitan Housing, 608 F. 2d 699 at 707 (6th Cir. 1979), where the Court explicitly adopted the foresight test.
236 Id. at 132-33 (W.W.R.), 414 (D.L.R.).
238 Id. at 729 (W.W.R.), 130 (D.L.R.) per Robertson J.A. with whom the other members of the Court agreed on this point.
its mind to this distinction, for Groves-Raffin's damages, as well as its impecuniosity, were not attributable to the defendant's breach.

In the most recent reported British Columbia case to consider this matter, Pelletier v. Pe Ben Ind. Co., Munroe J. applied the tests of foresight and causation to the plaintiff's damages, and not to the impecuniosity from which, in part, they flowed.

There is thus authority in British Columbia for the proposition that damages flowing from the combination of the plaintiff's impecuniosity and the defendants' breach of contract are recoverable if, and only if, both the impecuniosity and the damages meet the tests of causation and foresight. There is also authority for the proposition that only the damages need meet these two tests. Whether there is any difference between the two propositions will depend largely on the courts' willingness to describe impecuniosity as traceable to the defendant's acts. The trial decisions in Groves-Raffin and Pelletier suggest that the courts will be quite willing to do so.

The second proposition, that only the damages must meet the tests of causation and foresight, is well accepted in New Zealand. One case from that country, Inder Lynch Devoy & Co. v. Subritzky, illustrates the difficulties in applying the proposition during periods of economic change. The defendant was the plaintiff's solicitor, and was acting for her in the sale of her house. He knew that she planned to use the proceeds to have a new house built. The consequence of the defendant's negligence was that the purchase monies were not available on the completion date. As a result the plaintiff was unable to hire a builder. After a few months she did obtain the greater part of the purchase monies, and could then afford to begin construction. But the cost of construction had risen several thousand dollars in the interim, and she sought to recover that sum from the defendant.

The New Zealand Court of Appeal held that the defendant's knowledge of the plaintiff's impecuniosity enabled the plaintiff to recover, not only the usual damages that would have been suffered even by a non-impecunious plaintiff, but also the cost of accommodation during the period of delay. But no other damages flowing from the delay in having the new

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239 Supra note 203. The plaintiff, owner-operator of a truck that was being purchased under a conditional sales contract, was counting on his earnings under a contract with the defendant to enable him to meet the payments. When the defendant repudiated the contract, the plaintiff lost his truck. The resulting damages were held to have been foreseeable. Freedhoff and General Securities were cited in the judgment.

240 Id. at 641.

241 In Dodd Properties, supra note 101, at 935 (All E.R.), 453 (W.L.R.), Megaw L.J. referred to cases "where, as here, the plaintiff's 'financial stringency' so far as it was relevant at all, arose, as a matter of common sense, if not as a matter of law, solely as a consequence of the defendant's wrongdoing."

242 Popular Homes, supra note 191; Bevan Inv., supra note 186.


244 Id. at 94-95.
house built were held to be foreseeable. For although "it may be taken to have been within contemplation that during delay in payment to the respondent the cost of building a house might vary," still "[s]uch variations... were those within the confines of what, on the evidence, must be assumed to be settled economic conditions," and "[a]gainst the assumed market no such loss as was asserted by the respondent can be said to follow ordinarily from the breach." 245

This reluctance to recognize the foreseeability of inflation must be compared with the more robust attitude demonstrated in the astonishing case of Taupo Borough Council v. Birnie. 246 There the defendant council had negligently caused flooding which damaged the plaintiff's hotel and grounds. The hotel's reputation suffered, and it attracted fewer patrons. When it could not make its mortgage payments, the mortgagee had it sold. At this forced sale the hotel realized only a fraction of its true value. Its owner sued to recover the deficiency.

The New Zealand Court of Appeal held that foreseeability was the touchstone of recovery. 247 Since it is always foreseeable that property sold at a forced sale will not realize its full value, 248 the question was whether the forced sale could have been foreseen. For this it was necessary, though hardly sufficient, that the presence of debts secured by the property be foreseeable at the date of breach.

In considering this matter, the Court laid down a potentially far-reaching rule. "As a matter of common sense," said Cooke J. for the Court, "the existence of mortgage or debenture liability was probable." 249 Whether this will be extended to residential buildings is questionable, but it shows that the existence of debts secured by property will sometimes meet the first branch of the rule in Hadley v. Baxendale.

That did not end the matter. Encumbered property can only be lost if the owner defaults on his payments and the charge-holder seeks to realize on his security. The charge-holder's actions are never mentioned, and are doubtless always foreseeable. A forced default normally would be foreseeable only if the plaintiff's lack of funds is foreseeable.

In considering this point, the Court laid down another unexpected rule: impecuniosity meets the first branch of the rule in Hadley v. Baxendale. It

245 Id. at 95. So the plaintiff recovered no damages at all in respect of the rise in the cost of construction. In light of the finding that some increase was foreseeable, it would seem that some portion of the loss should have been recoverable: Cory v. Thames Ironworks Co. (1866), L.R. 3 Q.B. 181, [1861-73] All E.R. 597, 37 L.J.Q.B. 68.

246 Supra note 213.

247 Id. at 410 per Cooke J., for the Court, citing Monarch Steamship and Muhammad Issa el Sheikh.

248 Supra note 205 and accompanying text.

249 Supra note 213, at 411.
is not up to the plaintiff in establishing foreseeability to show that the defendant had special knowledge which should have told him that the plaintiff was impecunious. On the contrary, it is up to the defendant in establishing unforeseeability to show that he had special knowledge that should have suggested to him that the plaintiff was not impecunious. This is the thrust of the following passage from the judgment of Cook J.:

As already indicated...it was no less foreseeable that serious flooding, especially successive floods, would have a damaging effect on the hotel's reputation as an attractive place in which to stay....In these circumstances default to a secured creditor, and ultimately a forced sale, were the very kind of things which were likely to happen. There is nothing in the evidence to suggest that the defendant Borough had any reason to suppose that independently of the hotel income the plaintiffs commanded financial resources of a magnitude which would have enabled them to keep the hotel in operation despite two floods.  

No court has yet commented on these two points. Certainly if both impecuniosity and the existence of debts secured by one's property are automatically foreseeable, then damages in respect of forced sales become routinely recoverable. It is unlikely, however, that a Canadian court will ever go so far. Two decisions illustrate the prevailing view in Canada.

In Jones v. Fabbi, the defendants induced a breach of a contract between the plaintiff and certain milk producers under which the plaintiff was to haul milk. The plaintiff had bought a truck to haul the milk, but because of the producers’ breach he was unable to keep up the payments on it; it was repossessed, and he lost his equity in it. Hinkson J. (as he then was) denied recovery of such a loss both in contract and in tort because the defendants were ignorant of, and could not have foreseen, both the fact that the plaintiff's purchase had been financed and the fact that breach of the contract might prevent him from making the payments. Neither of these was considered automatically foreseeable.

In Len Pugh Real Estate Ltd. v. Ronvic Const. Ltd. the defendant's breach deprived the plaintiff of $98,000 for four years. The trial judge awarded the plaintiff a sum representing the profits which it would have earned over those four years if it had received the $98,000 and invested it in its business. The Court of Appeal disallowed that portion of the award. Brooke J.A.—who evidently adopted the view that foreseeability determined the issue—held that the defendant was not made aware of the plaintiff's

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250 Id. at 411-12. In Bevan Inv., supra note 186, at 117, Richmond P. held that the possibility of a plaintiff being unable to mitigate his losses because he was in a position of difficulty “from a commercial and common sense point of view,” met the requirements of the first rule in Hadley v. Baxendale. (The President seems to have assumed that only foreseeable impecuniosity would excuse a failure to mitigate.)

251 (1973), 37 D.L.R. (3d) 27 (B.C.S.C.). The Liesbosch was not cited.

252 Id. at 33, applying Hadley v. Baxendale.

253 Id. at 36-37, applying The Wagon Mound (No. 1), supra note 122.

financial position, or of the likelihood of such losses resulting from its breach, and awarded only four years' lost interest on the $98,000.\textsuperscript{255}

5. Cases Distinguishing *The Liesbosch*: He Who Takes a Benefit Must Take the Burden Too

It sometimes happens that the plaintiff's impecuniosity causes his damages under one head to be increased, and his damages under another head to be decreased by an even greater amount. In this case the defendant, glad to have his damages under the second head restricted to the decreased figure, must by an elementary rule of equity be liable for the increased damages under the first head.

*Multi-Malls Inc. v. Tex-Mall Properties Ltd.*\textsuperscript{256} comes closest to illustrating this. M gave $180,000 to T who used the money to buy land. Both parties were to use their best efforts to have the land rezoned. If they were successful, M would give T a further $320,000, and T would convey the land to M. If they were unsuccessful, T had an option: it could repay the $180,000 to M and keep the land, or it could convey the land to M.

M, in breach of contract, acted so as to make rezoning almost impossible. Craig J. found that there was a 20% chance of rezoning if M had honoured its obligations, and awarded $64,000 to T. He also ordered T, unable to raise the $180,000 necessary to repay M and retain the land, to convey the land to M.

M argued that T should have exercised its option to pay $180,000 and retain the land and that the land was worth far more than $180,000. The exercise of its option would accordingly have given T a benefit that would have more than offset its loss of $64,000. M argued that T could not excuse its failure to exercise the option by its lack of funds, since *The Liesbosch* established "that impecuniosity not caused by the wrongdoer does not excuse a claimant from taking steps to mitigate."\textsuperscript{257} But as T's impecuniosity had enabled M to obtain the order for specific performance of the agreement to convey the land, so it enabled T to resist M's argument that it should have mitigated; M's argument would result in a windfall profit and was therefore rejected. A statement to the same effect is found in *Clearlite Holdings Ltd. v. Auckland City Corp.*\textsuperscript{258} but the plaintiff's impecuniosity was actually irrelevant\textsuperscript{259} so the statement loses much of its force.

\textsuperscript{255} *Id.* at 456 (O.R.), 73 (D.L.R.).

\textsuperscript{256} (1980), 28 O.R. (2d) 6, 108 D.L.R. (3d) 399, 9 B.L.R. 240 (H.C.) .

\textsuperscript{257} *Id.* at 17-18 (O.R.), 410 (D.L.R.), 255 (B.L.R.). It is not clear if Craig J. accepted this contention.

\textsuperscript{258} *Supra* note 170, at 743-44.

\textsuperscript{259} The plaintiff had sold the building in which it carried on its business. The defendant damaged the building, and the plaintiff had to repair it before handing it over to the purchaser. The repairs took slightly over three months, and the plaintiff had to pay the purchaser in respect of the three months delay in giving possession. It seems difficult to argue that the losses represented by that payment were attributable to the plaintiff's impecuniosity.
6. Cases Distinguishing *The Liesbosch*: Impecuniosity Caused by the Defendant's Act Generates Recoverable Damages

In at least three cases—Freedhoff, Groves-Raffin, and *Dodd Properties (Kent)* Ltd.—the court has described the plaintiff's impecuniosity as caused by the defendant's wrongful acts. But in none of those cases was the nature or significance of such a causal connection discussed, for the first two were decided on the ground that foreseeability determines the recoverability of losses flowing in part from the injured party's impecuniosity, and the third was decided on the ground that impecuniosity excuses a failure to mitigate. The principle suggested in *The Liesbosch*, that damages flowing in part from the plaintiff's impecuniosity might be recoverable if that impecuniosity is in turn attributable to the defendant's wrongful acts, has remained dormant. It may be, however, that the recent decision in *K.R.M. Const. Ltd. v. B.C.R.* will breathe new life into it.

In that case the defendant was held liable in deceit, having fraudulently induced the plaintiff to enter into two disadvantageous contracts. Damages were assessed as the difference between the plaintiff's financial position and the position in which it would have found itself if the fraud had not been perpetrated. This depended on how the plaintiff would have acted if it had known the truth. The question was one of causation, remoteness having no place in the assessment of damages for deceit.

Counsel agreed that the plaintiff could recover the losses that it had suffered by performing under the contract, but joined issue over the recoverability of damages in respect of lost opportunities, that is, compensation for profits which the plaintiff would have earned under other contracts if it had been able to enter into them. The judge found that the plaintiff was unable to enter into other contracts because its contracts with the defendant were tying up too much of its capital and too many of its experienced people. With reference to the first factor, the defendant cited *The Liesbosch* and argued that "the loss of potential profits on other contracts is too remote if it is due to the plaintiff's financial inability to bid on other contracts."
The proposition did not call for comment, since a shortage of manpower would have prevented the plaintiff from entering into other contracts even if it had not been experiencing a shortage of funds also, but Fawcus J. explicitly rejected it:

...I think, with respect, that if the plaintiff's inability to bid on other contracts was, for example, due to not being able to raise another bid deposit or to secure adequate financing or bonding because of their involvement in the subject contracts, then that could hardly be said to be '...not traceable to the [defendant's] acts....'269

The ramifications of this remain unclear. The plaintiff's financial inability to enter into other contracts was attributable to two factors: first, the contracts with the defendant were tying up much of its capital and second, the plaintiff's resources, even if it had not entered into those contracts, would have been finite. The first factor would not have prevented it from entering into other contracts if the second had not also been present. The second factor can be paraphrased as "the limited nature of the injured party's funds even if it had not been wronged," which is what is generally meant by "impecuniosity not traceable to the wrongdoer's acts." Indeed, by a similar analysis an injured party's impecuniosity could always be attributed to its "impecuniosity not traceable to the wrongdoer's acts." This would sterilize the qualification "not traceable to the wrongdoer's acts." The judgment of Mr. Justice Fawcus indicates, however, that the qualification may yet bear fruit.

Its potency will depend on the test used to characterize impecuniosity as "traceable to the defendant's acts." The "but for" test of causation seems at first glance to be the appropriate test: impecuniosity is "traceable to the defendant's acts" whenever it would not have existed if the defendant had not wronged the plaintiff. But this test is phrased in terms that might be misleading. The cases show that "impecuniosity," when used in connection with the rule in The Liesbosch, does not have its ordinary meaning: it refers, not to poverty, but simply to an inability to make some particular expenditure. Thus the nature of the expenditure in question determines whether a person is to be labelled "impecunious," and the word "impecuniosity" is meaningless unless that expenditure is specified. The test should therefore be rephrased: an inability to make a particular expenditure is "traceable to the defendant's acts" and The Liesbosch is distinguishable, whenever that inability would not have existed if the defendant had not wronged the plaintiff.

Unfortunately this test is irreconcilable with the foreclosure cases applying The Liesbosch. Nor is it a satisfactory test if the expenditure in question was only made necessary by the defendant's acts: the question "would a driver whose taxi was not damaged have earned enough fares to have the damage to his taxi repaired" seems, if not meaningless, at least too artificial for anything of importance to hinge upon its answer. Yet if the "but for"

269 Id. Notice, however, that in Esso Petroleum Co. v. Mardon, [1976] Q.B. 801 at 828-29, [1976] 2 All E.R. 5 at 22-23 (C.A.), the plaintiff sought damages in respect of lost income, which "continued after the closure of the business because [he] no longer had the capital to reinvest in another business," but all he recovered was interest on the money which he had negligently been induced to disburse.
test is rejected, what can take its place? This must be settled before this sixth exception to *The Liesbosch* can be freely invoked.

7. Conclusion

The Courts of Appeal of England and New Zealand have decided both that impecuniosity excuses a failure to mitigate and that damages of a type which only an impecunious person would have suffered are recoverable if they meet the remoteness tests applicable to heads of damage generally. New Zealand has adopted the second proposition both in tort and in contract; England has yet to adopt it in tort, but that adoption seems inevitable. As a result, in those two countries *The Liesbosch* has been rendered irrelevant. There is no longer anything special about damages attributable in whole or in part to the plaintiff's impecuniosity.\(^\text{270}\)

But such is not the case in Canada. Significant appellate support is lacking for both propositions. It is true that sometimes the courts award damages in respect of losses attributable to the plaintiff's impecuniosity without comment. For example, the Nova Scotia Court of Appeal has decided that an impecunious plaintiff who was forced to borrow the money to repair the effects of the defendant's wrongdoing can recover interest paid on the loan.\(^\text{271}\) A non-impecunious person in the same position would, however, have to pay for the repairs from his own pocket and would not be able to recover damages in respect of lost interest on the money which was no longer his to invest.\(^\text{272}\) No one has yet remarked upon the interaction between this principle and whatever principle *The Liesbosch* established, although *The Liesbosch* has elsewhere been taken to prohibit the recovery of interest in such circumstances.\(^\text{273}\) But such cases are anomalous. No appellate decision detracts significantly from *The Liesbosch*, or states that it is to be read in the light of *Clippens Oil*, *The Wagon Mound* or even *Hadley v. Baxendale*. On the contrary, there are many Canadian cases denying re-

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\(^{272}\) Municipal Spraying, id. at 248-49 (N.S.R.), 248-49 (A.P.R.), noting that such damages could not be recovered; *D. Latimer Engineering Ltd. v. Cassidy* (1980), 39 N.S.R. (2d) 663 at 674, 71 A.P.R. 663 at 674 (S.C., Tr. Div.), denying such damages because the plaintiff could not show that it had been forced to borrow the money. There is no justification for such diversity of treatment, for there is no valid distinction between interest charged on an increased overdraft and interest lost on money withdrawn from a deposit account. The situation has now been rectified by the introduction of section 38(9) to the *Judicature Act*, S.N.S. 1972, c. 2 (see C.S.N.S. 1979, c. J-3), but a plaintiff forced to borrow money can still choose between pre-judgment interest and the interest which he was forced to pay: *Young v. Burgoyne* (1981), 122 D.L.R. (3d) 330 at 339-40 (N.S.S.C., Tr. Div.).

\(^{273}\) See text accompanying notes 306-10, infra.
covery even in circumstances where recovery would be almost automatic in New Zealand or England. It remains to discuss these cases in the next section.

B. Cases Denying Recovery for Losses Attributable to the Plaintiff’s Impecuniosity

1. Cases Rejecting Clippens Oil: Impecuniosity Does Not Excuse a Failure to Mitigate

Most of the cases applying the doctrine of The Liesbosch have involved a plaintiff pointing to his impecuniosity to explain his failure to take steps which would have reduced, though not eliminated, the quantum of his losses under a particular head. This might be seen as impecuniosity explaining, though not excusing, a failure to mitigate; such cases might be seen as implicitly denying the validity of Lord Collins’ dictum in Clippens Oil.

But that denial is implicit only if the court characterized the issue before it as one of mitigation. Consider Coffey v. Dickson. The plaintiff purchased a defective juke box. It could have been repaired in a few months, but the plaintiff’s inability to pay for the repairs extended the period during which the juke box was inoperative. At trial the magistrate allowed recovery of profits lost during the entire period, but on appeal the New Zealand Supreme Court allowed only the profits lost during the time necessary to repair the juke box. This would seem to represent a rejection of Clippens Oil. But the judge stated clearly that the case was not one involving “the duty of a plaintiff to mitigate loss,” and implied that Clippens Oil was good law.

For this reason, the only cases that can be said to represent a rejection of Clippens Oil are those in which the court explicitly described the issue as one of mitigation. There are three such cases, all from Canada.

The first is the decision of the Supreme Court of Canada in Dawson v. Helicopter Exploration Co. The plaintiff had been engaged to carry out certain work for which he was to receive 75,000 shares in a new company. The defendant breached the contract by hiring another, and it was found that the plaintiff was entitled to the entire 75,000 shares. The question was whether that value should be determined as of the breach-date, as of the judgment date, or at the highest intermediate value. In opting for the breach-date, Rand J. said for the Court:

Dawson could have purchased the number of shares promised and had he done so his damages would have been made certain. From the point of view of a purchaser, that is really in the nature of mitigation, and it would be no answer that at the time he was not financially able to buy: “Liesbosch Dredger” v. S.S. “Edison”...

Whether or not this rule will stand is now questionable in light of the

274 Supra note 170. The decision has never been the subject of adverse comment, although it seems out of line with recent decisions from New Zealand.

275 Id. at 1146.

276 See also the ambiguous case of Abbeyview Ent. Ltd. v. Dist. of Matsqui (1980), 22 B.C.L.R. 113 (S.C.).


278 Id. at 11. The Liesbosch was the only case cited.
decision of the Supreme Court of Canada in the *Asamera Oil* case. The case involved the breach of a contract to return shares. The breach-date rule was applied, but Estey J. indicated for the Court that the result might be otherwise if the plaintiff were financially unable to purchase replacement shares at that time. In this context, it is useful to compare *Theis v. duPont, Glore, Forgan Inc.*, in which the Supreme Court of Kansas held that impecuniosity excuses a failure to purchase shares in order to mitigate one's losses. But until *Dawson* is overruled, the doctrines in *Clippens Oil* must be regarded as rejected in Canada.

That doctrine was next rejected by the Manitoba Court of Queen's Bench in *Western Processing & Cold Storage Ltd. v. Hamilton Const. Co.* The defendant used unsuitable material in constructing a cold storage plant for the plaintiff. The plant deteriorated progressively. The plaintiff sought damages in respect of the deterioration up to the time of trial. The deterioration could have been stopped had certain remedial work been undertaken in 1961, but the plaintiff could not afford the repairs. The judge allowed damages in respect of the deterioration up to 1961 and no further: "the duty of a person who has suffered damage to minimize his loss is not affected by his impecuniosity."

Most recently, the Ontario Court of Appeal explicitly rejected *Clippens Oil* in *R.G. McLean Ltd. v. Canadian Vickers Ltd.* The defendant had supplied a defective printing press to the plaintiff. The defendant offered to refund the purchase monies paid but the plaintiff had already sustained such losses that even the return of its money would not have enabled it to purchase a replacement press. The Court allowed recovery only of the losses suffered until another press could have been bought by a non-impecunious plaintiff. Arnup J.A. said:

> If the plaintiff had a good cause of action for damages by March, 1966 (and I have already found that it had), any delay in actually collecting such damages would not in law be the fault of the defendant nor a valid excuse for the plaintiff's failure to mitigate its damages by accepting the offer.

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270 Supra note 5.
282 Id. at 171.
284 Id. at 215-16 (O.R.), 23-24 (D.L.R.). The money spent must have been money wasted in fruitless attempts to get the press working. The losses sustained were losses on printing contracts that had gone unfilled.
285 This was not because the price of the machines had risen, but because the machines were being bought under a conditional sales agreement, and it was unlikely that the plaintiff, whose financial position had deteriorated, would have been able to arrange financing of a replacement machine.
286 Supra note 284, at 216 (O.R.), 24 (D.L.R.), citing no cases. The "delay" was not a delay in instituting proceedings, and by "any delay in actually collecting such damages," Arnup J.A. seems to have meant only "any impecuniosity of the plaintiff."
It is disheartening to realize that the rejection of *Clippens Oil* has been based on the mistaken view that it was rejected by Lord Wright in *The Liesbosch*, and not on any firmer ground. Surely at the Supreme Court level, at least, an authority that is merely persuasive should only be followed after a rather more detailed analysis than is suggested by *Dawson*. But the rejection of *Clippens Oil* is, until the Supreme Court speaks again, the law of Canada; indeed, its rejection may be implicit in many of the cases considered in the next section that have purported to follow *The Liesbosch* without indicating what that case was thought to have decided.

2. Cases Applying *The Liesbosch* Without Analysis

There are many such cases, but they represent only a few typical fact patterns.

(a) *Delayed Repairs:* It often happens that the plaintiff's lack of funds prevents him from repairing damages for which the defendant is liable. In such a case he may not recover losses attributable to the continuation of the state of disrepair beyond the date by which a non-impecunious person would have had the repairs completed. In *Clements v. Bawns Shipping Co.*, for example, an action in fraud, lost profits were awarded only in respect of the time necessary to repair a decrepit fishing vessel sold to the plaintiff by the defendant, even though the plaintiff's impecuniosity had, for over two years, prevented him from repairing the vessel. In *Newman v. Cook*, an action in contract, damages were refused in respect of the plaintiff's purchase of equipment for an unusable fishing vessel sold to it by the defendant when the equipment remained idle because the plaintiff lacked the funds to repair the vessel. In *Smith v. McConnell Bros. and Elkin*, an action in negligence, the plaintiff was only allowed the cost of renting a replacement for his damaged car until repairs could have been made, even though he may not have had the funds to commission them. In *Alberta Caterers Ltd. v.*

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288 (1948), 81 Lloyd's Rep. 232 at 235 (K.B.), citing only *The Liesbosch*.
290 *Id.* at 666. It is not clear what damages the plaintiff was seeking: only the interest on the purchase price of the idle equipment seems recoverable.
291 *Supra* note 138, citing only *The Liesbosch*. In *Hollett and Hollett v. Coca-Cola Ltd. and Fougere* (1980), 7 N.S.R. (2d) 695 at 710, 11 C.C.L.T. 281 at 298, 67 A.P.R. 695 at 710, Cowan C.J.T.D. stated that the plaintiff "is entitled to the actual expense to which he has been put by the loss of the use of his vehicle, but only for such reasonable period as might be expected to elapse before he had an opportunity to replace it, and, for this purpose, it is assumed that he can finance the purchase of a new vehicle." He cited no cases. *Quaere,* if the learned judge was referring to a rebuttable or an irrebuttable assumption.
292 The plaintiff was also held not entitled to delay repairs by reason of a "dispute between the insurance companies or their adjusters" [*id.* at 607 (W.W.R.), 80 (Man. R.)]. In the similar case of *Green v. White* (1975), 10 N.B.R. (2d) 299 (S.C.), damages were not allowed for the increase in the cost of repairs to the plaintiff's vehicle during the time he refrained from commissioning them "being short of money and having no promise of settlement" (at 300). The decision cites only *The Liesbosch* and *Nason v. Aubin* (1959), 41 M.P.R. 314, 16 D.L.R. (2d) 309 (N.B.C.A.), in which such damages were disallowed on the authority of *The Liesbosch*, the delay being attributable entirely to the plaintiff's impecuniosity. *Cf. Martindale v. Duncan,* *supra* note 136 and accompanying text.
Losses Flowing from Impecuniosity

R. Vollan (Alta.) Ltd., an action in negligence, the plaintiff, whose building was damaged and who had not been able to raise the funds to commission the repair work in the three and one-half years leading up to the trial, sought the profits lost during the entire period as well as the cost as of trial date of repairing the building. Cavanagh J. denied his claim and gave the only analysis of the problem of impecuniosity found in the reports of the last five decades:

The plaintiff says that inability to repair because of the plaintiff's impecuniosity is a sufficient reason. On the other hand a deliberate choice not to repair because the plaintiff did not wish to disturb its investments and preferred to await the outcome of the litigation before undertaking repairs would not be a sufficient reason.

That impecuniosity was not created by the defendants. That condition was created by the plaintiff itself. It risked its all on this venture. It did not have a reserve fund for contingencies. It gambled that nothing would happen before it could earn some money to meet contingencies. It lost that gamble.

The plaintiff acknowledges that it had a duty to mitigate its loss. It offers as excuse that it could not due to its own impecuniosity, but I think before one gets to the question of mitigation one must go back to the question of causation. Did the defendants cause the additional loss suffered by the plaintiff? It is not a physical loss that flowed naturally from the tort of the defendants. In popular language it flowed from the impecuniosity of the plaintiff so that in that respect one might say that it was not caused by the defendants at all. In the "Liesbosch" case, however, it is clear that the House of Lords held that the results of impecuniosity were too remote to attach to the defendants in law. I consider that case to be binding on me and the facts do not show the plaintiff's impecuniosity to be traceable to the defendants' acts. I therefore reject the plaintiff's claim...

There is a suggestion here that the plaintiff is being punished for its failure to retain sufficient reserves to meet contingencies. If this is truly at the root of the principle in The Liesbosch, intriguing ways of evading that principle suggest themselves.

(b) Delayed Replacement: What holds true for repairs delayed by reason of the plaintiff's impecuniosity should hold equally true for delayed replacement. The Liesbosch itself was such a case. Impecuniosity has thus been held not to excuse a delay in replacing a useless truck sold by the defen-

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293 (1978), 81 D.L.R. (3d) 672 (Alta. S.C., Tr. Div.). The judge found that the defendant was ignorant of the plaintiff's impecuniosity.

294 Cf. Burton v. Pacific Aircraft Salvage Inc. and Beulieu, unreported, Sept. 12, 1980 (B.C.S.C.). The defendants in that case had improperly repaired the plaintiff's airplane, which he then kept in storage for almost three years until he obtained funds to have it repaired properly. Wallace J. stated, "the inflated cost of repairs due to the plaintiff keeping the plane in storage for 2½ years was not a foreseeable consequence of the defendants' breach of the contract to repair, but rather was the result of the independent decision of the plaintiff who, because of the nature of the repairs he insisted on being carried out, and of his financial status, decided to forego having the repairs effected until late 1978..." and refused to allow recovery. See, similarly, Wozny v. Pankhurst, unreported, Oct. 6, 1981 (Ont. Co. Ct.).

295 Supra note 293, at 682-84. The view that a plaintiff with available funds cannot sit back and await the outcome at trial seems now to be rejected in some jurisdictions: supra note 186.
a yarder converted by the defendant, an oven sold by the defendant, a well polluted by the defendant, cattle poisoned by the defendant, and a building destroyed by the defendant.

(c) Foreclosure: Several of the cases already discussed have involved a plaintiff whose earning capacity was destroyed by the defendant’s acts and whose property was seized when he found himself unable to discharge a debt which it secured, or to continue the payments under which he was buying it. In such cases he has seldom been allowed to recover his lost equity from the wrongdoer. Thus in Burton v. Dominion Steel & Coal Corp. a plaintiff whose injuries prevented him from working found his schooner seized for debt, and in Clements v. Wyatt property belonging to a developer was foreclosed when the houses in whose construction the developer had invested all his disposable funds turned out to be unsaleable as a result of a defect in title which the defendant solicitors should have discovered. Neither plaintiff recovered damages in respect of the losses occasioned by the foreclosure. And just as damages stemming from foreclosure are not recoverable, neither are the costs of employing a solicitor to negotiate with the mortgagee in an effort to prevent foreclosure.

The most recent foreclosure case seems to be Muller N.D. v. Government of the Republic of South Africa. Synman purchased property subject to a mortgage which was not revealed on the title deed. When the mortgagee revealed himself and sought to enforce the mortgage, Snyman, who did not have the funds to discharge the debt, was forced into insolvency. His trustee sued the Deeds Registry for negligence in not recording the mortgage on the title deed, but his attempt to recover the administration costs was dismissed. The Court cited The Liesbosch and stated that “it is true that Snyman’s financial embarrassment was a consequence of the negligence, but

\begin{footnotes}
296 Bird Chevrolet, supra note 23.
299 Chiasson, supra note 177.
301 Bischoff v. Sams (1965), 51 W.W.R. 49 (Alta. S.C.). The dispute concerned only the loss of use of a suite in the destroyed building, which had been replaced by a smaller building similar to it but lacking a suite. The report does not reveal the reason for holding the defendant liable for anything at all, and presents problems of interpretation.
302 [1940] 1 D.L.R. 476 at 481 (N.S.S.C.), citing no cases.
303 9 R.P.R. 1 at 34 (Ont. H.C.). Rutherford J. noted that the losses in question were unforeseeable. He cited no cases.
304 Isaak v. Brisbane City Council, [1971] Q.W.N. 101 (S.C.), citing only The Liesbosch. This reflects the rule that expenses incurred in forestalling a loss are not recoverable if the loss itself would have been too remote if it had occurred: Foster v. Public Trustee, [1975] 1 N.Z.L.R. 26 at 29.
305 [1980] 3 S.A.L.R. 970 (T.P.D.). For another recent example see Mardon, supra note 269 per Lord Denning M.R.
\end{footnotes}
I do not think that the negligence can be regarded as a cause of the expenses claimed.\textsuperscript{306}

(d) **Interest:** An impecunious plaintiff forced to borrow money to counter the effects of the defendant's wrongful acts cannot recover the interest that he paid on it; at least not if a non-impecunious plaintiff in similar circumstances would be denied pre-judgment interest. Although this principle could be attributed to the common law's horror of usury, it has been attributed to *The Liesbosch* in cases where a plaintiff has been denied interest on money he borrowed to go abroad in order to seek treatment for the injuries the defendant had caused him,\textsuperscript{307} to furnish an apartment so that he could live near the hospital in which his wife was being treated for injuries the defendant had caused her,\textsuperscript{308} and to purchase a car to replace one demolished by the defendant.\textsuperscript{309} Recent cases, however, suggest that it may be due for reappraisal.\textsuperscript{310}

\textsuperscript{306} *Id.* at 975. The decision is totally at odds with *The Liesbosch*: see note 116, *supra* and accompanying text.

\textsuperscript{307} *Johnson v. Browne* (1975-76), 19 W.I.R. 382 at 390 (Barbados H.C.).


\textsuperscript{310} In *Burton, supra* note 294, Wallace J. remarked *obiter* that he agreed with the proposition "that an innocent plaintiff is required to borrow funds, if necessary, in order to mitigate his loss if, in all the circumstances, to do so is a reasonable business decision," and that if "such an obligation is imposed upon the plaintiff he is entitled to recover any interest paid to obtain such funds." See also *S & N Timber Ltd. v. Greenwood Forest Products (1969)* Ltd., unreported, Dec. 21, 1977 (B.C.C.A.). Damages for delay in payment, calculated as interest, were awarded in *E & B Mortgages Ltd. v. Skrivanos* (1980), 118 D.L.R. (3d) 139 (B.C.S.C.), *Lozcal Holdings Ltd. v. Brasso Dev. Ltd.* (1980), 111 D.L.R. (3d) 598 at 609, 22 A.R. 131 at 147-48 (C.A.), and *Len Pugh, supra* note 254.


(e) Conversion: Only one Canadian case remains to be considered. In Stilling v. Clarke Simpkins Ltd., the plaintiff gave his old truck plus a $1,025 cheque to the defendants in return for a new truck. The deal was cancelled and the trucks re-exchanged, but the defendants cashed his cheque anyway. He had insufficient remaining money to buy a truck from another firm, and was unable to undertake various jobs that required one. His claim for lost profits was rejected on the ground that “the plaintiff cannot recover damages—real though they may be—which arose out of his own impecuniosity.”

The decision could perhaps be supported on the grounds of remoteness, but The Liesbosch was inapplicable: if ever there was a plaintiff whose impecuniosity could be traced to the defendant’s wrongful acts, Stilling was that plaintiff. Unfortunately the judge did not consider this point: he cited The Liesbosch but did not comment upon it.

3. Conclusion

Although The Liesbosch has been cited many times to explain a court’s refusal to allow the recovery of losses which a non-impecunious person would not have suffered, it has seldom been analysed. As a result, the decisions have not established any general principles to guide the courts in future cases.

At the appellate level the status of The Liesbosch remains unclear. At the House of Lords, The Liesbosch stands alone; the issue it raised has not been considered since 1933. In England and in New Zealand the decision has been relegated to the limbo of legal history by the courts of appeal, which have held that the test of reasonable foresight applies to damages flowing in part from the plaintiff’s impecuniosity. Outside Canada, The Liesbosch has been followed in recent years only in a series of Australian trial decisions devoid alike of reasoning and of authority and in a few isolated decisions from South Africa and Barbados.

This leaves appellate decisions in Canada and The Liesbosch itself. But the latter affords no guidance. The basis of the rule laid down by Lord Wright, which alone can determine if the rule survives The Wagon Mound, remains unclear. In addition, a fundamental problem lies in the widespread

The Liesbosch should not be applied in such circumstances, for the plaintiff is not impecunious in the usual sense, i.e., lacking both cash and credit. The question here is not the amount of money to which the injured party has access, but the manner in which he must gain access to it: the questions, though easily confused, are distinct.


312 The defendants offered to return the $1,025, and it would seem that the plaintiff’s inability to purchase another truck would be attributable to his refusal to accept this offer. But truck prices had risen in the interim, and the offer came too late.

313 Supra note 311, at 303, citing only The Liesbosch.


315 In addition to the cases cited elsewhere, see Antonatos v. Dunlop Ins. Co., [1968] Qd. R. 114 (S.C.).
disagreement over what the rule says. Some courts have taken it to say that impecuniosity excuses a failure to mitigate. Other courts have taken it to say the opposite. It has even been taken to say that a party may not recover lost profits when his impecuniosity would have prevented his earning those profits in any event.\textsuperscript{316} A rule which need not look to \textit{The Liesbosch} for support.\textsuperscript{317} All this confusion has rendered \textit{The Liesbosch} irrelevant; a decision that may be interpreted in any of several conflicting ways, each of which finds case support, can aptly be described as devoid of authority.

Decisions of the Supreme Court of Canada afford little guidance. The Court may or may not have approved the foresight test in \textit{General Securities Ltd. v. Don Ingram Ltd.}\textsuperscript{318} The case is ambiguous. Kerwin J. referred to \textit{The Liesbosch} in his judgment in \textit{R. v. C.P.R.},\textsuperscript{319} but again in ambiguous terms.\textsuperscript{320} Rand J. clearly assumed in \textit{Dawson}\textsuperscript{321} that unforeseeable impecuniosity does not excuse a failure to mitigate; this is the only principle which finds explicit Supreme Court approval. Some guidance can be found in decisions of provincial courts of appeal but these decisions are restricted to three or four provinces.

In light of this relative silence, Canadian trial courts, and all Canadian appellate courts, are free to answer at least the first of the following questions as they choose:

(1) Should losses flowing wholly or in part from the plaintiff's impecuniosity be recoverable, and if so, under what circumstances?

(2) Is it meaningful to draw a distinction between the concepts of mitigation and of heads of damages, and if so, should impecuniosity excuse a failure to mitigate even though the circumstances outlined in response to the first question are absent?

The discussion of these questions will occupy the remainder of this paper.

V. THE PLAINTIFF'S IMPECUNIOSITY: HOW IT SHOULD BE TREATED

A. Impecuniosity in Relation to Heads of Damage

Reserving for the next section the difficult task of trying to separate problems of mitigation from problems of heads of damage, it is possible at
this stage to consider those problems which seem clearly to have nothing to do with mitigation. Such a problem would arise, for example, in a foreclosure case. If A injures B so that B is deprived of his earning power and consequently finds himself unable to meet the mortgage payments due on his house, which is ultimately sold at a forced sale for a price substantially below its true value, can B recover the deficiency from A?

To this there are only two defensible answers. One is that such a loss, attributable as it is not only to A’s wrong but also B’s impecuniosity, can never be recovered. The other is that this loss, being of a unique type, is recoverable if it meets the usual criteria for recoverability: causation alone in some intentional torts, or both causation and foreseeability in contract and in the unintentional torts. Either of these answers could be given without logical inconsistencies entering the law, and it is only possible to set out their competing merits, leaving the reader to choose between them.

Adoption of the second answer, that foreseeability and causation should together determine recoverability, has the disadvantage of complexity: it would require the courts to answer questions which they have never yet had to answer, and which may indeed be unanswerable. An example will suffice to demonstrate this. Suppose, to make the argument as strong as possible, that X is totally conversant with even the most intimate details of Y’s life: he knows that Y has $900 in the bank and no other assets, that Y requires $600 per month to live, that Y’s only source of income is his job, which pays $950 each month, and that Y is buying a car under a conditional sales agreement which requires him to pay $250 per month. Suppose that X, who is Y’s employer, wrongfully dismisses Y without the requisite two months notice. Could X have foreseen that Y’s car might be repossessed?

At the very least, X could only foresee repossession if he could foresee default. So could he have foreseen that Y might be forced to default on his car payments? X knows that Y can weather one month’s unemployment, but that before two months have passed he must somehow obtain another $800 in addition to his savings, or he will be forced to default. Since Y would have earned $1,900 if he had been given appropriate notice, this is equivalent to saying that his wage loss flowing from the wrongful dismissal will be no more than $1,100. X’s ability to foresee a default thus depends in part on his ability to foresee the pecuniary loss which his wrong will cause Y to suffer, and even better foresight would be demanded of one not so conversant with his opponent’s affairs.

It seems likely that the courts will treat the “type” in question as “damages attributable to impecuniosity.”

This illustrates a general rule. In deciding if it was foreseeable that a plaintiff would have suffered losses which only an impecunious person would have suffered, a court must first decide if it was foreseeable that he would be impecunious—that is, required to make an expenditure beyond his means—aftter being injured; this requires some estimate of the quantum of pecuniary loss which it was foreseeable the injury would cause him.

The question of the foreseeability of quantum presents, however, various difficult conceptual problems. Indeed, the rule making the recoverability of losses of a particular type independent of the foreseeability of their quantum was probably adopted largely in order to circumvent them. But if the recovery of losses attributable to an injured party's impecuniosity is to depend on the foreseeability of such losses, these problems will eventually have to be confronted.

A test, the adoption of which would ultimately force the courts to answer a question that they have resolutely avoided in the past, may be criticized on the ground that it is unworkable. Only experience will show if such criticism is well-founded.

Leaving practical problems behind, the problems of principle which adoption of the foresight test might present should be considered. The concept of "remoteness" is a device to restrict both the number of claimants and the quantum of their awards, and the foresight test must prove that it will extend neither beyond acceptable bounds.

One fear is easily allayed. Adoption of the foresight test would not result in the proliferation of claims, for claims in negligence and in contract are limited by the twin concepts of duty and privity respectively. The foresight test would affect neither of these; its adoption would affect only the measure of damages recoverable by one to whom the defendant had already been found to have owed a duty of care, or with whom the defendant had already been found to have contracted.

The foresight test will, however, certainly increase the size of some awards, and so the question is whether it will increase them unduly. It has the potential to do so, because of the nature of economic "leverage." A precarious financial empire might be tipped into insolvency for want of a relatively small sum, and it might seem harsh to hold a wrongdoer responsible for all the resulting losses. It is unlikely that such losses will often meet the foresight test, but what if certain minor losses flowing from the combination of injured company's cash-flow problems and the wrongdoer's acts could have been foreseen? Must the wrongdoer pay for the immense losses that actually resulted?

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324 In Wroth v. Tyler, supra note 142, at 61 (Ch.), 450 (W.L.R.), 922-23 (All E.R.), Megarry J. accepted this as the rationale of the rule.

325 In J.R.S. Holdings Ltd. v. Dist. of Maple Ridge (1981), 122 D.L.R. (3d) 398, 27 B.C.L.R. 36 (B.C.S.C.), the plaintiff sought to recover levies he had allegedly paid under "practical compulsion" when his impecuniosity prevented him from resisting the defendant's unlawful demands. Berger J. rejected his claim: "Impecuniosity ought not to be considered a factor in recovery. To hold otherwise would be to put a premium on poor business judgment." [at 407 (D.L.R.), 46 (B.C.L.R.)].
Although at first glance it might seem that he must, this need not be so. If the wrongdoer's acts caused the injured company only minor losses (other than those attributable to its impecuniosity), then the recoverable damages may be reduced on causal grounds. A company so close to the brink of insolvency might well have stumbled over unaided, and the losses it suffers when pushed over that brink must be discounted to reflect that probability. On the other hand, if the wrongdoer's acts caused the injured company enormous losses (other than those attributable to its impecuniosity), then it does not seem overly harsh to hold him responsible for the additional losses flowing from the combination of his acts and the injured company's impecuniosity. In either case, the wrongdoer need not be held liable for an unwarranted sum. The foresight test would not increase quantum unduly.

There is another problem of principle that the foresight test might present. Following the suggestion in *Alberta Caterers*, it might be argued that an impecunious plaintiff is unworthy of relief; like a cyclist who insists on riding without a helmet, one who goes through life without financial reserves sufficient to cushion him from the impact of another's negligence should be able to recover only the losses which he would have suffered if he had taken precautions to protect himself.

There is no merit to this argument. For many persons the lack of financial reserves is a matter of necessity, not choice, and it seems hard to fault a man for not retaining money that he never had. Even in the commercial context, where the decision to establish a business usually represents a choice made freely and with knowledge of the reserves that the embryonic business will possess upon birth, the argument is fallacious. Not only is it impossible to maintain "sufficient" reserves—for there is no reserve that might not be exhausted if a wrongdoer's acts were to place a sufficient strain on it—but the argument runs counter to basic economic principles. The vitality of our economy depends to a great extent on the small businessman who is willing to take a risk. By penalizing those persons who establish a

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The discounted award is equal to the product of the lost profits and the probability of their having been earned if the plaintiff had not been wronged [*Multi-Malls*, supra note 256; *Talbot v. Gen. T.V. Corp. Pty.*, [1980] V.R. 224 at 253 (S.C.)]. The propriety of this arithmetic approach was treated as open to question in *M.J.B. Ent. Ltd. v. People's Food Mkt. Ltd.* (1979), 11 B.C.L.R. 130 at 141 (C.A.). The probability must be established by the defendant: *Kohler v. Thorold Natural Gas Co.* (1916), 52 S.C.R. 514, 27 D.L.R. 319.


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* Supra note 293 and accompanying text.

business when they are not in a position to protect themselves against the risk of another's negligence or breach of contract, the courts would in effect be declaring that such small businessmen have no place in society. This would be wrong both philosophically and economically.

In summary, the only disadvantage of the foresight test lies in its potential to confront the court with problems of extreme complexity. The only disadvantage of the "no recovery" rule lies in its denial of recovery to those who might be seen as deserving of compensation. The choice between the two is ultimately a policy choice which the courts must make.

B. Impecuniosity in Relation to Mitigation

However one answers the first question, it remains to consider the significance of an injured party's financial inability to mitigate his losses. Before the issues can be formulated in a meaningful manner, the term "mitigation" must be defined. Properly understood, it refers to the principle that an injured party cannot recover losses which he could have avoided by "reasonably" acting, or ceasing to act, in a certain way. In other words, an injured party whose losses will continue to increase as long as a certain state of affairs exists must take all reasonable steps to terminate that state of affairs. If he fails to take adequate steps, then he will not be able to recover the increased losses, even if they meet the tests of causation and foreseeability, unless his inactivity was reasonable. The courts have often found inactivity to have been reasonable when no reasonable steps would have terminated the state of affairs under which the injured party's losses were increasing. In principle, inactivity should also be reasonable whenever the injured party has no reason to believe that his losses will continue to increase. If the vendor fails to deliver an item destined solely for the purchaser's personal use, and not intended to be used in any profit-earning capacity, only the difference between the market price of a substitute and the contract price is generally recoverable. The purchaser, normally unable to predict market fluctuations, will have no reason to believe that the market will rise and his losses increase; he should therefore be able to excuse his failure to purchase a replacement. The law has, however, developed a "breach-date" rule to the effect that damages will be assessed as of the date of breach. The rule against the recovery of avoidable loss can be phrased as follows: an injured party cannot recover losses which increased during the continuance of a certain


331 Supra note 277.
state of affairs, providing he could reasonably have predicted such an increase and taken steps to terminate the state of affairs that brought it about.

The question dealt with in this section is this: in applying the rule against the recovery of avoidable losses, when should the injured party's impecuniosity be taken into account in characterizing steps as reasonable or unreasonable? It is not necessarily possible to consider this question independently of the question posed in the preceding section. Suppose, for example, that a plaintiff's profit-earning chattel could have been repaired in thirty days, but that owing to his impecuniosity it remains unrepaired at the date of trial. The profits lost after the initial thirty-day period can be viewed as damages of a special type, flowing as they do from the injured party's impecuniosity. The test of their recoverability then depends on the answer given to the question posed in the preceding section. Conversely, the entirety of the lost profits can be viewed as damages of one type, where the profits lost after the initial thirty-day period would usually be avoided, so that the test of their recoverability depends on the answer to the question posed in this section. They could have phrased the question as one of heads of damage with equal validity. The losses that a psychologically-normal plaintiff would reasonably have mitigated could be described as damages of a special type. The court could then ask whether damages of that type met the test of remoteness. The question of whether a plaintiff's psychological inabilities excuse his failure to mitigate his losses, and the question of whether a plaintiff's financial inabilities excuse his failure to mitigate his losses, may have different answers, but they should have the same characterization. The latter, like the former, should be seen as a question of mitigation and not of heads of damage.

Whether or not a plaintiff's impecuniosity should excuse his failure to mitigate his losses must depend on the reasons underlying the rule against the recovery of avoidable losses. The plaintiff would not have suffered the losses if the wrongdoer had not acted as he did. They are losses of foreseeable type. The wrongdoer may not have anticipated, or even have been able to foresee, that the extent of those losses would increase while the injured party sat idly by, but the unforeseeability of quantum has never been held to justify the denial of recovery. Prima facie, then, avoidable losses should be recoverable.

It is insufficient to state in opposition to this that the injured party owes the wrongdoer a duty to mitigate his losses, for this leaves unanswered the logically anterior question: why do the courts impose such a duty on him? Nor is it enough to describe the issue as one of causation. For example,

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332 The choice of one of these two seems to underlie almost every Canadian decision mentioned in this paper, but no decision has yet mentioned the existence of two alternatives.  
333 Supra note 113 et seq.
postulate an employer who wrongfully dismisses an employee who could obtain alternate employment after sixty days, but who decides to remain idle for one hundred and twenty days. The first sixty days’ lost wages are attributable to the refusal of potential employers to enter into a contract of employment with the ex-employee. In the same way, the second sixty days’ lost wages are attributable to the refusal of the ex-employee to enter into a contract of employment with potential employers. As a matter of causation, there is no difference between the two. To state that losses caused by one innocent party’s refusal to act are recoverable whereas those caused by another innocent party’s refusal to act are not, and to describe the difference between the two as a difference in causation, is to conceal under the guise of causation the fundamental value judgment that the victim, and only the victim, must act to minimize the losses flowing from a wrongdoer’s acts. That judgment must still be supported.

The rule against the recovery of avoidable losses can be explained on economic and moral grounds. The economic argument is based on “the desirability of avoiding economic waste.” Avoidable losses represent economic waste, and so the injured party who incurs them is penalized as an example to those who might be tempted to follow his lead. Seen in this way, the rule against the recovery of avoidable losses is designed to deter economically undesirable behaviour.

The moral argument is based on an intuitive feeling that, for reasons that cannot be logically explained, an injured party who fails to mitigate his losses is at fault, and should be punished accordingly. On this basis ignorance of one’s ability to mitigate should excuse a failure to do so, as should a psychological inability to mitigate, because neither of them reflects any fault on the injured party’s part. Seen in this way, the rule against the recovery of avoidable losses is designed to punish morally undesirable behaviour.

Under either view, an injured party’s financial inability to mitigate his losses should excuse his failure to mitigate. His punishment could not deter others, for those others still have no alternative but to remain idle while their losses increase. Nor can he be faulted for his failure to do the impossible. The purpose of the rule, be it to deter the wasteful or to punish the blameworthy, would not be furthered by penalizing an impecunious plaintiff for his failure to mitigate. Yet if the rule against the recovery of avoidable loss is inapplicable, there is no reason to deny him recovery. Impecuniosity should excuse a failure to mitigate.

Certainly this leaves many questions unanswered. Many cases have held that losses suffered in counterproductive attempts to mitigate one’s fore-

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336 Elloway, supra note 113.
seeable losses are recoverable providing those attempts were reasonable.\textsuperscript{337} The resulting damages need not have been foreseeable.\textsuperscript{338} Does this mean that losses flowing from counter-productive attempts to mitigate foreseeable losses should be recoverable by an unforeseeably impecunious plaintiff, if the attempts are only reasonable insight of his poverty? The question of whether a plaintiff's impecuniosity excuses his failure to avoid losses that even a non-impecunious plaintiff would have suffered, albeit to a lesser extent should be characterized as a question of mitigation. Even unforeseeable impecuniosity should excuse such a failure. How should the law characterize the question of whether an unforeseeably impecunious plaintiff can recover foreseeable damages that should have been avoided in their entirety by any non-impecunious person in his position?\textsuperscript{339} Is this a question of mitigation or of heads of damage? The answers to these and many other questions must await further development in the law concerning mitigation generally.

VI. SUMMARY

An injured party's impecuniosity can affect the measure of his losses in many ways. Two of those ways in particular have come under examination in recent years: his impecuniosity might cause him to suffer losses of a kind that only an impecunious person would have suffered, or it might render him powerless to mitigate certain of his losses that even a non-impecunious person would have suffered, though for a shorter time and accordingly to a lesser extent. In each case the question whether the resulting losses can be recovered at law arises. The two questions thus generated are traditionally expressed in terms of heads of damage and of mitigation: can impecuniosity give rise to new heads of damage, and can it excuse a failure to mitigate? The two questions overlap to some extent, but can be separated if the concept of mitigation is closely analysed; most of the inconsistencies in the reported cases stem from a failure to do so.

The first question had not been explicitly addressed in 1933. Various cases involving a failure to deliver goods, to replace stock, or to loan money, suggested that impecuniosity could in some circumstances give rise to new


\textsuperscript{339} \textit{Walton}, supra note 75, involved such a question.
heads of damage. A handful of cases involving lost profits suggested that this applied to contract but not to tort, and still other cases involving involuntary bankruptcy suggested that impecuniosity could never give rise to new heads of damage. The cases generally supported only one principle, that impecuniosity could in some circumstances give rise to new heads of damage in contract. The second question, though it had arisen less often, had been addressed more explicitly and with less ambiguity, and the cases indicated that impecuniosity would indeed excuse a failure to mitigate.

In *The Liesbosch*, Lord Wright denied the recovery of losses attributable to the injured party's impecuniosity. His decision can be, and has been, interpreted to support numerous theories, but is best understood as saying only that losses resulting from an injured party's impecuniosity are not "direct" consequences of the wrongdoer's acts. On this basis, his speech lost all relevance with the demise of the rule in *Re Polenis*.

The current view in both New Zealand and the United Kingdom is that impecuniosity does excuse a failure to mitigate. The courts of both nations agree also that impecuniosity can give rise to new heads of damage, provided those damages meet the usual remoteness tests. The two countries differ as to whether such damages can fall under the first branch of the rule in *Hadley v. Baxendale*, and can be foreseen in the absence of special knowledge.

Neither question has received much consideration outside those two countries and Canada. In Canada, however, the questions have arisen in numerous cases. The decisions seldom contain any analysis of the issues involved, seldom recognize the existence of earlier cases dealing with the same points, and are often irreconcilable. It is therefore possible for almost any court to give any answer to either question.

As a matter of principle, it seems that the second question should be answered 'in the affirmative; impecuniosity, even unforeseeable impecuniosity, should excuse a failure to mitigate. The first question cannot be resolved on logical grounds, however, and its answer must represent a fundamental value choice by the courts. Whatever the choice that will ultimately be made, a strong decision squarely facing up to some of the problems presented by these two questions must eventually come down, for in the present state of the law it is impossible to predict how any court will resolve any issue that involves an impecunious plaintiff seeking to recover damages in respect of losses that a person of greater means would have suffered to a lesser extent if at all.