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DAMAGES AS COMPENSATION FOR LOSS

ROBERT J. NORDSTROM*

Courts have adopted many "rules" to aid in measuring the size of money recoveries. Some rules deal exclusively with contracts, others with torts. Often, the classification is narrower with specific rules for breaches of employment contracts, land contracts, sales contracts, construction contracts, and so on. However, each of these rules attempts to reflect basic principles which American courts believe will best promote "fairness" and "justice."

The principle from which damage awards begin is that the damages should be computed so that the dollars awarded will be an adequate *compensation* for the *loss* which was suffered by the injured party.¹ The objective of compensating for losses has been expressed so often by courts and by legislatures² that it has become natural for lawyers to think about damages in these terms. Once it has been determined that the defendant has breached some duty owing to the plaintiff (that is, once the question of liability has been decided), the next—and almost automatic—question becomes: what was the loss suffered by the plaintiff? The lawyer has a practical justification for thinking in this sequence. Most of the rules about damages rest upon the principle of compensating for losses and the lawyer's job very often is that of advocating the application of those rules to the facts of the case. There is no such easy justification, however, for the lawyer or judge who is seeking to promote a specific rule of damages. Is there any rational basis for promoting a principle which stresses compensation of the injured party for his losses?

THE THEORETICAL BASIS OF THE COMPENSATION PRINCIPLE

There is nothing inherent in a legal system which requires promotion of the compensation principle. Early systems used money recoveries to

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¹ *Avery v. Fredericksen & Westbrook*, 67 Cal. App. 2d 334, 154 P.2d 41 (1944); *Brewster v. Van Liew*, 119 Ill. 554, 8 N.E. 842 (1886); *Hughett v. Caldwell County*, 313 Ky. 85, 230 S.W.2d 92 (1950); *Neuman v. Corn Exchange Nat'l. Bank & Trust Co.*, 356 Pa. 442, 51 A.2d 759 (1947); *Reed v. Consolidated Feldspar Corp.*, 71 S.D. 189, 23 N.W.2d 154 (1946).

² *E.g.*, *Coughlin v. Blair*, 41 Cal. 2d 587, 262 P.2d 305 (1953); *White & Hamilton Lumber Co. v. Lynch*, 159 Ga. 283, 125 S.E. 472 (1924); *Shebestor, Inc. v. Ford*, 361 P.2d 200 (Okla. 1961).

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assuage the injured party so that he would not resort to private war.³ As such, the goal of these systems was to preserve public order; whether the recoveries also compensated for losses was incidental to their main purposes. Other recoveries were shaped to punish the wrongdoer, undoubtedly with the notion that such punishment would deter other members of society from engaging in activity which society believed contrary to the best interests of its members. Most legal systems have also experimented with fixed recoveries for specific wrongs.⁴ These fixed recoveries did not attempt to compensate for individual losses; at best, they may have been viewed as compensatory for the aggregate of injuries occurring within the society in which they were applied. Generally, the application of these schedules to specific cases made the administration of the legal order less time-consuming and probably less costly. There are, therefore, other principles (*e.g.*, preserving public order, deterring unlawful conduct, and ease of judicial administration) which could have been accepted as the "cardinal" purpose of money recoveries.⁵ Why have American rules about money recoveries stressed compensation for losses?

A partial answer to this question is that, as a matter of court holdings, no one single principle has been accepted to the exclusion of all others. For some wrongs, deterrence is still a key factor;⁶ for others, a fixed recovery is preferred.⁷ This, however, is only a partial answer because the great bulk of litigated cases still expresses rules of damages centering on the goal of compensating the plaintiff for his losses.⁸

³ Nordstrom, *Toward a Law of Damages*, 18 WEST. RES. L. REV. 86 (1966).

⁴ See R. POUND & T. PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 46 (3d ed. 1927).

⁵ The idea that an injured party should be compensated for his losses is referred to as the "fundamental and cardinal" principle of damages in *Western Union Tel. Co. v. Green*, 153 Tenn. 59, 82, 281 S.W. 778, 785 (1926), and as the "cardinal" principle in *James, Damages in Accident Cases*, 41 CORNELL L.Q. 582 (1956). Compensation is referred to as the "bottom principle of the law of damages" in *Hughett v. Caldwell County*, 313 Ky. 85, 91, 230 S.W.2d 92, 96 (1950), and as a "fundamental principle of damages" in *J. B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 144, 184 N.E. 737, 739, *aff'd* 290 U.S. 163 (1933).

⁶ In addition to those cases in which punitive or exemplary damages are awarded, cases like *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S.W. 574 (1888) appear to be in point. There, the petition against the telegraph company alleged damages in the form of mental anguish. A demurrer was overruled, the court stating that a holding of no liability for injury to feelings "would justify the conclusion that the defendant might, with impunity, have refused to receive and transmit such messages at all; and that it has the right in the future to do so as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so." *Id.* at 706, 8 S.W. 577.

⁷ Workmen's compensation does not compensate for injuries, *Castro v. Bass*, 74 N.M. 254, 258, 392 P.2d 668, 671 (1964).

⁸ *Lawrence v. Porter*, 63 F. 62 (6th Cir. 1894): *Acme Mills & Elevator Co. v.*

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The compensation principle is—like many other general principles of a legal system—based upon certain assumptions, the validity of which has not been adequately tested by external data. The most probable assumption underlying damage recoveries is that compensation for losses is the fairest for both parties involved in a dispute.⁹ The injured party is given what he lost—either by reason of a tort or a breach of contract promise. With torts, the court seeks to place the injured party in the same financial position which he occupied prior to the tort—that is, in dollars and cents, to put him back where he was before the injury.¹⁰ With contracts, the attempt is to place the nondefaulting party in the same financial position which he would have occupied had the contract promise been performed—that is, in dollars and cents, to put him ahead to where he would have been in the event of full contractual performance.¹¹ In both cases, the injured party is made whole, at least as far as money can be used as a substitute for the injuries. Courts and legislatures have assumed that such a result is “fair” to the plaintiff.

It is more difficult to state the assumption involved when the same problem is considered from the standpoint of the defendant. Perhaps the assumption is that compensatory damages will deter the defendant (and other members of society) from engaging in tortious conduct or in breach of contract promises.¹² It can be argued that the rules of compensatory damages remove any reason for engaging in unlawful conduct because the defendant will be called upon to make good the losses which

Johnson, 141 Ky. 718, 133 S.W. 784 (1911). When the legal rules for measuring damages run counter to the “paramount rule” of compensation, the legal rules yield to the “principle underlying all such rules.” *Rutherford v. James*, 33 N.M. 440, 443, 270 P. 794, 796 (1928).

⁹ “The principle of compensation is a natural enough corollary of the fault principle. If the defendant is a wrongdoer and he is to pay damages to an innocent plaintiff, it seems eminently fair that these damages should (at least) put the plaintiff, as nearly as may be, in the same position he would have been in if defendant’s wrong had not injured him. So deeply does this correspond to our natural feelings that the basic principle has been taken pretty much for granted.” *James, Damages in Accident Cases*, 41 CORNELL L.Q. 582, 583 (1956).

¹⁰ *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958), cert. denied, 358 U.S. 899 (1958); *Mahoning Valley Ry. v. De Pascale*, 70 Ohio St. 179, 71 N.E. 633 (1904). But see *Conard, The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964).

¹¹ *Woodburn Bros. v. Erickson*, 230 F.2d 240 (10th Cir. 1956); *United Protective Workers of Am. v. Ford Motor Co.*, 223 F.2d 49 (7th Cir. 1955); *Coughlin v. Blair*, 41 Cal. 2d 587, 262 P.2d 305 (1953); *Groves v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235 (1939); *Spitz v. Lesser*, 302 N.Y. 490, 99 N.E.2d 540 (1951); *Maxwell v. Schaefer*, 381 Pa. 13, 112 A.2d 69 (1955); *Orebaugh v. Antonious*, 190 Va. 829, 58 S.E.2d 873 (1950).

¹² See *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S.W. 574 (1888).

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that conduct has caused. The difficulty here is that the principle of deterring future unlawful conduct would be better effectuated if recoveries were multiples of (as, for example, ten or twenty times) the amount of plaintiff's loss. Indeed, limiting recovery to the plaintiff's loss could in some cases, place a premium on breach. For example, a builder who is faced with a losing contract might be financially well advised to default and to use his labor force to perform a profitable contract. There is a chance that the builder will not be sued for breach; there is a further chance that, if sued, the case can be settled short of the entire loss; but if these chances fail to materialize, the only penalty incurred will be that the builder must pay the plaintiff's *loss*—which could well have been made up by the profitable contract. Therefore, the compensation principle has only limited value in compelling performance of contracts; this task is performed by other forces in the business community—forces such as economics, good will, and pride (“I gave my word; thus, I will do the job”).

Perhaps the assumption is that awarding compensatory damages “in-jures” the defendant to the same extent that the defendant wrongfully injured the plaintiff. The extent of the plaintiff's injury is his loss; thus, the defendant's injury *ought* to be measured by that loss. The most exact method of injuring the defendant would, in many instances, be to have the court do to the defendant what the defendant did to the plaintiff—that is, retribution in kind. If the defendant had tortiously injured the plaintiff, the defendant should be injured in the same way; if the defendant had defaulted in a contract promise made to the plaintiff, a similar contract to the advantage of the defendant should also be defaulted. There are obvious difficulties with retribution in kind, and a more civilized method of punishment has been chosen with dollars awarded against the defendant.¹⁸ However, when the expanding role of insurance is considered, it is apparent that in a good number of cases it is not the defendant who is being “injured” by a damage award. It therefore becomes difficult, as far as the defendant's interests are concerned, to state the assumptions which are involved in the principle of awarding compensatory damages, beyond a reaction that such awards are “fair” in that they exact from the person at fault only the amount of the plaintiff's loss—which, of course, is reaching a conclusion by reasoning in a circle.

¹⁸ “The judgment for damages is substituted for the wrongdoer's duty to perform the contract.” *Coughlin v. Blair*, 41 Cal. 2d 587, 598, 262 P.2d 305, 311 (1953).

Perhaps at least two of the ideas in the prior paragraphs express the assumptions underlying a principle of compensating for losses, as well as such assumptions can ever be stated. Such awards are *fair* to the plaintiff; he receives his losses. Such awards are *fair* to the defendant; he was at fault but is not penalized for his actions. When cases arise in which compensation for loss is not the fairest method of determining the size of the money recovery, another principle is selected as the basis of awarding damages. However, in the large majority of cases, the attempt to award compensation—and only compensation—has been the objective of the damage rules which courts have developed.

LIMITATIONS ON APPLICATION OF THE COMPENSATION PRINCIPLE

The compensation principle is an objective which courts attempt to reach through the adoption of several damage rules. It is, however, an objective which is probably seldom realized in its application to specific cases. The reasons that the compensation principle is seldom achieved are inherent in the nature of the problem presented for determination by the court. Each case involves a factual pattern with many variables. These variables affect the dollar recovery awarded and may prevent the award from amounting to full compensation and no more than full compensation. Before the compensation principle is applied in any case, the court must find:

1. *"Fault" on the part of the defendant.* Except for cases involving strict liability, some kind of "fault" on the part of the defendant must be found before an award of compensatory damages is given. For torts, the fault may consist of either intentional or negligent action (or inaction). For contract cases, the equivalent of fault is found in the action (or inaction) which amounts to a breach of contract promise. The fault of the defendant may be clear, both as to the facts and the law; or the fault of the defendant may be a conclusion reached on a bare preponderance of the evidence and only after resolution of genuine doubts as to whether the rule of law was intended to apply to the case before the court; or the fault of the defendant may be determined on some other combination of these factors. Since the compensation objective is a part of the process of determining liability, decisions as to defendant's fault undoubtedly affect the size of the award.¹⁴

¹⁴ That evidence of the defendant's fault affects the size of the award is recognized in those cases in which the court refuses to grant a new trial for damages only, but requires the entire case to be retried. "While the decisions are somewhat in conflict the cases may be reconciled on the grounds that a new trial on the

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2. *Causation between the breach of duty and the loss.* There are many ways to frame substantive rules of law. One common way is to state that the court must find that the defendant, without legal justification, has breached some legal duty owed by the defendant to the plaintiff and that the breach of duty resulted in some loss to the plaintiff. The problem—now of causation—may be contested and the court must decide just what losses of the plaintiff were *caused* by the defendant's wrongful act. Such a decision is bound to be artificial because many factors, among them the wrongful activity of the defendant, combined to produce the claimed loss. Injury is not the result of a single act. Therefore, when a court states that the defendant's wrongful activity *caused* the plaintiff's loss, it is not expressing a law of physics or of the natural order of the universe;¹⁵ it is expressing a policy determination that the defendant ought to pay for the loss.¹⁶ The more strongly the judge feels about the "ought," the more likely he is to allow the jury to speculate as to items of claimed

question of damages alone will be granted when liability is not contested or has been clearly proved by the plaintiff so that the issues may be deemed separable; on the other hand when liability is contested and the issues are so inextricably entwined that a fair trial could not be given one of the parties on the issue of damage alone then a new trial will be ordered on all issues." *Tovrea Equip. Co. v. Gobby*, 72 Ariz. 38, 42, 230 P.2d 512, 515 (1951).

¹⁵ "According to the orthodox view, whether event *A* is the cause of event *B* is a question of objective fact to which all value judgments are irrelevant. What, then, we may ask, is the cause of the injury when a plaintiff and his car have been smashed up by defendant's car? The location and speed of the defendant's car certainly contributed to the accident. So, too, did the location and speed of the plaintiff's car; if plaintiff had stayed in bed instead of driving, he would not have been hurt. Relevant also are the durability and tensile strength of the two cars, the width of the road, the character of the road-surface, the weather, and a host of other more or less important facts. How can we possibly pick out one of these facts, or any combination of them, and say: 'This was the cause of the accident?' Certainly there is no rule of physics, no rule of engineering, and no rule of logic that will enable us to reach such a result.

"What do we actually do? If it turns out that plaintiff was driving on the right side of the road and that the defendant was driving on the left side of the road, we say that the defendant's driving on the left side was the cause of the accident, unless the case arises in England, in which case we say that the plaintiff's driving on the right side was the cause of the accident. From the standpoint of logic or physics the physical collision of the cars had exactly the same physical antecedents whether the collision occurred in England or America. But from the standpoint of the law, the judgment of 'wrongness' or 'carelessness' is an essential part of the judgment that attributes the cause of the accident to some human act. Without such standards, we should find in every accident only the intersection of an infinity of strands of occurrences reaching back into the past without end." Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 252 (1950). See also, B. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 83-85 (1928), and the discussion in J. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 236-239 (3d ed. 1937).

¹⁶ Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956); Edger-ton, *Legal Causes*, 72 U. PA. L. REV. 211, 343 (1924).

damages. The less strongly the judge feels about the "ought," the less likely he is to allow the jury to consider items of claimed damages. Although appellate courts talk in terms of causation and not compensation, this policy decision—whether expressed in terms of legal cause, cause in fact, or damages resulting from breach—affects the size of the award.¹⁷

That causation between conduct and injury is a policy decision, and not a rule of inflexible application, is highlighted by the doctrine of proximate cause. According to this doctrine, only those injuries which are the *proximate* result of the defendant's conduct will be compensated, while *remote* consequences will not be compensated.¹⁸ It therefore becomes important to distinguish the proximate from the remote cause. The difficulty is that there is no inherent method of making this distinction, and definitions are of little help. The common statement that a proximate cause is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the injury would not have occurred¹⁹ only emphasizes

¹⁷ Once a court is convinced that the defendant's wrongful conduct (*e.g.*, breach of contract) caused some loss, the court is more likely to let a jury speculate as to the actual amount of those damages, *Parker v. Levin*, 285 Mass. 125, 188 N.E. 502 (1934), than if it has serious doubt as to whether the conduct caused any loss. *New England Iron Works Co. v. Jacot*, 223 Mass. 216, 111 N.E. 867 (1916). Cases are collected in Annot., 78 A.L.R. 858 (1932).

¹⁸ *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 644 (8th Cir. 1957) (breach of contract); *In re Estate of Talbott*, 184 Kan. 501, 508, 337 P.2d 986, 991 (1959) (breach of contract; "the measure of damage is such as are the natural, direct and proximate result of the breach"); *Carpenter v. Nelson*, 257 Minn. 424, 428, 101 N.W.2d 918, 921 (1960) (tort; no recovery to be allowed for remote, conjectural, or speculative damages); *Belisle v. Wilson*, 313 S.W.2d 11, 17 (Mo. 1958) (tort; "of course a person suffering from a prior impaired condition may not recover for a result not a natural and direct, or proximate, result of the negligence of the defendant"); *Pierson v. Hermann*, 3 Ohio App. 2d 398, 402, 210 N.E.2d 893, 897 (1965) (tort; "if the plaintiff has suffered a measurable injury, the defendant is liable for all direct or proximate results. . .").

¹⁹ Either the statement in the text or slight variations thereof appear in many cases. For example, see *Chatterton v. Pocatello Post*, 70 Idaho 480, 484, 223 P.2d 389, 391 (1950); *Burr v. Clark*, 30 Wash. 2d 149, 158, 190 P.2d 769, 774 (1948). Other definitions have been tried. *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953) (material and substantial factor of injury); *Cedar Falls & Northern R. R.*, 244 Iowa 1364, 1372, 60 N.Y.2d 572, 576 (1953) (act and injury must be a natural whole); *Greenwood v. Vanarsdall*, 356 S.W.2d 109, 114 (Mo. App. 1962) (injuries must have immediate affinity with wrongful conduct). All such definitions fall short of stating a rule of universal application. Perhaps the best that can be done is to state that damages will be awarded only when the defendant's conduct is the "legal cause" of the plaintiff's injuries. Such a statement emphasizes that there is no single rule or definition which can be applied and that the problem involved is that of determining whether the defendant *ought* to be financially responsible for the losses which occurred. See *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

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that the findings of proximate cause (like the finding of cause in fact) is a policy decision.

This, however, does not mean that courts should discard the search for some method of distinguishing between those injuries for which compensation will be granted and those for which no compensation will be allowed. Courts properly do not believe that a defendant ought to be liable for all of the ruinous consequences which, as a matter of hindsight, can be attributed to the defendant's wrongful conduct.²⁰ They have stated this conclusion in different forms, one of which is in terms of proximate causation. Properly understood, this statement can be a useful tool in determining and awarding damages.²¹

As far as the compensation principle is concerned, there is another way in which the doctrine of causation should be considered. The fact determiner can never be certain that the loss complained of would not have occurred even if the defendant had performed the duty which he owed the plaintiff. When a court in a contract action awards damages measured by the value of gains prevented, there is the possibility that other events may have prevented the plaintiff from realizing the gains for which he is now suing.²² Had the defendant performed his promise, the plaintiff would have received the promised consideration. Thereafter, the plaintiff may have mismanaged what he received or may have entered into other arrangements (which he did not enter into because he did not receive the defendant's performance) which in fact would have prevented the gains which he is now awarded.²³ When a

²⁰ "We suppose that, given sufficient information, imagination, and stratospheric reasoning, by omitting any attention to the boundaries which the courts and treatises attempt to set by using the words 'proximate,' 'natural and probable consequence,' 'unbroken chain of circumstances,' 'efficient intervening cause,' and 'remote,' the wrongs which any of us may do can be traced in the ultimate causal connection with injury to a great many others, even those yet unborn; but the law, although a great moral force in itself, does not permit the recovery of damages except for those injuries which have an immediate affinity with actions which produce the wrong." *Greenwood v. Vanarsdall*, 356 S.W.2d 109, 114 (Mo. App. 1962). The most famous case supporting the statement in the text is *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

²¹ "The purpose of the definition of the term [proximate cause] is to keep jurors within correct legal bounds." *Danielsen v. Eickhoff*, 159 Neb. 374, 377, 66 N.W.2d 913, 915 (1954).

²² Note, *The Requirement of Certainty in the Proof of Lost Profits*, 64 HARV. L. REV. 317 (1950).

²³ This factor is emphasized by some courts when they have decided not to award a new business the profits claimed to be lost by reason of a breach of contract or a tort. "Plaintiffs, however, had no assurance that the venture would not prove to be a failure." *Cramer v. Grand Rapids Show Case Co.*, 223 N.Y. 63, 67, 119 N.E. 227, 228 (1918). Subsequent events in that case indicated that, in

court in a personal injury case awards damages measured by the value of plaintiff's lost income, there is a possibility that, had the tort not occurred, the plaintiff may have died or lost his job for reasons wholly unconnected with the tort—or the plaintiff may have unexpectedly been able to accumulate a much larger sum of money than his lost income, simply because he was not lying in a hospital bed. Similar possibilities exist in an action for negligent destruction or conversion of property. Had the tort not occurred, the plaintiff would have had full use of the property and may have lost it or destroyed it through his own negligence or may have been able to use it to an unexpected advantage. These are all *possibilities*. The court can never be *certain* that it is compensating for losses caused by the defendant's wrongful activity. The most that the compensation principle can mean is that the law attempts to compensate for *probable* losses.²⁴

3. *The size of the loss.* Measuring losses is an imprecise process. Not too many difficulties are presented if the court must measure the value of lost income for a relatively short period of time prior to the trial of the case. However, such "simple" problems as determining the value of Blackacre or of a used automobile begin to create difficulties and to make exact computation more doubtful. When the problem becomes more complicated and the court must determine the value of gains, such as profits, which the plaintiff had hoped to receive but did not because of the tort or the breach of contract, the chances of compensation—and no more than compensation—become slight, indeed. Finally, when damages are awarded for pain and suffering or for mental anguish, any equivalence between the dollars awarded and the loss suffered is doubtful; the possibility that the award is compensation, and no more than compensation,

fact, the venture did not prove to be a failure. Nevertheless, lost profits were denied.

²⁴ Another type of case in which compensation is difficult to measure (and not certain as to amount) but where courts affirm reasonable jury verdicts is the wrongful death action for the negligent killing of a minor. Typical of the language found in these cases is: "In making this determination [the amount of damages], no exact rule of reasoning or computation is afforded by law, but the jury has no arbitrary discretion. The finding should be the result of a fair consideration of all the matters that should, under the circumstances of the particular case, properly enter into the estimate and computation. . . . In cases of this character it is left for the jury in the fair exercise of sound discretion in the light of all the information properly available, to ascertain and fix the probable amount of the damage sustained by the plaintiff, or by those whom he represents, 'reserving at all times the authority of the court to guard against manifest injustice by way of excessive estimates.'" *Florida F.C. Ry. v. Hayes*, 67 Fla. 101, 105-06, 64 So. 504, 505 (1914). See Comment, *Damages in Wrongful Death and Survival Actions*, 29 OHIO ST. L.J. 420 (1968).

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for the injury received is all but gone.²⁵ Thus, because compensation is awarded in dollars and because many losses are not easily translated into dollars, exact compensation for losses is seldom achieved.

There are, therefore, many variables in each factual situation. These variables affect the size of the recovery.²⁶ Assuming for the moment that there is some objective standard by which exact compensation can be measured (either in theory or by reference to an omniscient source), still actual damage recoveries would only approximate the results dictated by such a standard. The court, however, has no infallible and objective standard which it can use to measure compensation.²⁷ Thus, doing the best job which it can do, the court attempts to compensate for the *probable* losses which it finds *probably* resulted from the *probably* wrongful conduct of the defendant.²⁸ The court's findings are based, not on a requirement of certainty of the proof, but on a determination that it is more probable than not (1) that the defendant did the wrongful act complained of, (2) that the act caused losses to the plaintiff, and (3) that those losses when measured in dollars are valued at the amount of the award. The compensation principle, more accurately stated, is an objective of compensating for *probable* losses suffered by the plaintiff.

Even with its shortcomings, compensation of the plaintiff remains the best expression of the goal of the damage remedy. This principle

²⁵ See *John A. Brown Co. v. Shelton*, 391 P.2d 259 (Okla. 1964).

²⁶ Those thousands of cases which hold that an appellate court should not disturb a reasonable jury verdict are a recognition that there is not a set standard for determining compensation and that the variations in fact patterns affect the recoveries. These cases include: *Vest v. Gay*, 275 Ala. 286, 154 So. 2d 297 (1963); *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 364 P.2d 337, 15 Cal. Rptr. 161 (1961); *Ward v. Chicago Transit Auth.*, 52 Ill. App. 2d 172, 201 N.E.2d 750 (1964); *Pearson v. Hanna*, 145 Me. 379, 70 A.2d 247 (1950); *Porter v. Funkhouser*, 79 Nev. 273, 382 P.2d 216 (1963); *McPike v. Scheuerman*, 398 P.2d 71 (Wyo. 1965).

²⁷ *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 508, 364 P.2d 337, 343, 15 Cal. Rptr. 161, 167 (1961) ("There are no fixed and absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant"); *Tedrov v. Fort Des Moines Community Services, Inc.*, 254 Iowa 193, 202, 117 N.W.2d 62, 67 (1962) ("There is no rule of thumb by which the amount [of damages] may be measured"); *White v. Rapid Transit Lines, Inc.*, 192 Kan. 802, 806, 391 P.2d 148, 151 (1964) ("The only standard for evaluating the amount of damages resulting from an injury is such amount as reasonable persons estimate to be fair compensation for the injury").

²⁸ The words "probable" and "probably" are (probably) as meaningless as the words of the compensation principle discussed in this section. They were used (and italicized), however, to emphasize that there is no certain yardstick against which the "rightness" or "wrongness" of the size of an award can be measured. The compensation principle, therefore, is not a rule—but an objec-

forms a limiting force on jury verdicts and indicates that American ideas of justice begin by placing emphasis, not on retribution, but on compensation.

ALTERNATIVES TO THE PRINCIPLE OF COMPENSATION

A reading of the court opinions discussed in the prior sections would lead an observer of the American legal system to conclude that compensatory damages are the sole money recovery awarded by courts in this country. Such a conclusion would, of course, be erroneous because it ignores the many cases in which recovery is based upon other principles. In some cases, only nominal damages are awarded. However, these decisions can be rationalized with the objective of compensation in that nominal damages are awarded (1) when there has been a violation of a legal right and that violation has produced no present loss, or (2) when some compensable injury has been shown but the amount of the damage has not been proved. Exemplary (or punitive) damages are awarded to punish the defendant, perhaps with the hope of deterring others from committing a similar offense in the future. Although there are a few cases which attempt to justify exemplary damages on the basis that they are really compensatory in nature,²⁹ the award of exemplary damages generally has punishment—rather than compensation—as its objective.³⁰

There is another group of cases which is not accounted for by the compensation principle: that group in which the plaintiff's recovery is measured not by plaintiff's losses but by the defendant's gains. The types of cases in which this measure is a permissible alternative to compensation are still undefined although they center loosely around what has

tive. The adequacy or inadequacy of a damage award is measured, in the first instance, by the jury's sense of values as to the claimed injury, and controlled, in later instances, by the judges' senses of values as to whether the award falls within an ill-defined area of reasonableness.

²⁹ *Doroszka v. Lavine*, 111 Conn. 575, 150 A. 692 (1930); *Craney v. Donovan*, 92 Conn. 236, 102 A. 640 (1917); *Lucas v. Michigan C. R.R.*, 98 Mich. 1, 56 N.W. 1039 (1893); *Tenhopen v. Walker*, 96 Mich. 236, 55 N.W. 657 (1893); *Bixby v. Dunlap*, 56 N.H. 456 (1876); *Fay v. Parker*, 53 N.H. 342 (1873). Cases are collected in Annot., 16 A.L.R. 793 (1922), s. 123 A.L.R. 1121 (1939).

³⁰ "The theory of the infliction of punitive damages is that they are imposed as a sort of civil punishment by reason of the aggravated circumstances attending the injury, and as a sort of civil penalty so that its infliction may operate as a deterrent of similar occurrences in the future." *Chesapeake & O. Ry. v. Johns' Adm'x.*, 155 Ky. 264, 159 S.W. 822, 824 (1913). The fact that defendant has already been punished for the crime does not bar exemplary damages. *Morris v. MacNab*, 25 N.J. 271, 135 A.2d 657 (1957).

come to be called the law of restitution.³¹ Several restitutionary remedies have been developed, some giving specific relief and others awarding a money recovery.³²

The idea of restitution is that of restoring the parties to the financial position they occupied prior to the tort or breach of contract. Such an idea is probably one of the oldest in any legal system. As with the compensation principle, however, the theoretical justification for such a principle is assumed; its fairness to the parties and value to the economic system have not been tested or opened to critical examination. Justification has been rested on the reaction which the majority of people appear to have to the statement of the restitution objective. The plaintiff has suffered a loss. The defendant has received a gain. What could be "fairer"—what is more theoretically sound—than to remove that gain from the defendant and return it to the plaintiff? As was stated in the *Digest of Justinian*: "For this by nature is equitable, that no one be made richer through another's loss."³³ The basis of restitution remedies rests in the nature of the principle.

The *Digest of Justinian* did not attempt to state an inflexible rule about money recoveries. In not all instances in which a person is made richer through another's losses will it be "inequitable" for the person

³¹ The basic idea underlying restitution in Anglo-American law is usually attributed to Lord Mansfield's opinion in *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760). For a discussion of the history of restitutionary remedies, see J. DAWSON, *UNJUST ENRICHMENT*, Chs. I and II (1951); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53 (1888).

³² There are several restitutionary remedies, the most common of which are the common counts. See discussion in *Oliver v. Campbell*, 43 Cal. 2d 298, 273 P.2d 15 (1954); and *Dentists' Supply Co. v. Cornelius*, 281 App. Div. 306, 119 N.Y.S.2d 570, *aff'd*, 306 N.Y. 624, 116 N.E.2d 238 (1953). These remedies are often referred to as quasi-contractual. Also available are: (1) constructive trust, *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, 71 N.W. 294 (1897); *Matthews v. Crowder*, 111 Tenn. 737, 69 S.W. 779 (1902); (2) equitable lien, *Republic Supply Co. v. Richfield Oil Co.*, 79 F.2d 375 (9th Cir. 1935); *Simmons v. Shafer*, 98 Kan. 725, 160 P. 199 (1916); (3) subrogation, *Emmert v. Thompson*, 49 Minn. 386, 52 N.W. 31 (1892); *Whalen v. Schumacher*, 176 Wis. 441, 187 N.W. 169 (1922); cases collected in Annot., 70 A.L.R. 1396 (1931); and (4) equitable accounting, J. DAWSON AND G. PALMER, *CASES ON RESTITUTION* 77 (1958). Modern versions of ejectment and replevin (see *Ablah v. Eyman*, 188 Kan. 665, 365 P.2d 181 (1961)) may also be restitutionary in nature. Restitutionary remedies are discussed in the *RESTATEMENT OF RESTITUTION* §§ 4, 160 *et seq.* (1937).

³³ *DIGEST OF JUSTINIAN*, 12, 6, 14 (Pomponius), as quoted in J. DAWSON, *UNJUST ENRICHMENT* 3 (1951). 4 S. SCOTT, *THE CIVIL LAW* 141 (1932), offers this translation: "For it is only in accordance with natural equity that no one should profit pecuniarily by the injury of another." Other translations, similar to the two quoted are available in other sources.

to retain those riches. The restitution principle does not require each agreement to be measured to determine whether both parties received mathematical equivalents at the time set for performance. If a purchaser has agreed to pay an amount of money for Blackacre, a used automobile, or a new invention, and it turns out that that amount of money is more (or less) than the "value" of Blackacre, the used automobile, or the invention, the restitution principle has not yet been applied to equalize the value of the promises.

That the statement from *Justinian* is only a principle—and not a rule—should be clear by considering its breadth. Standing alone, the statement could equally be a part of a preamble to a criminal code, to a list of duties for trustees, or to a summation of rules about property. In fact, the restitution objective has probably been used to support many legal rules which are stated to rest on other assumptions.³⁴ When, however, ideas of restitution are applied to money recoveries, the emphasis is placed not on the size of the plaintiff's losses—as it is with the compensation principle—but on the amount of defendant's gains.³⁵ Notice that the thrust of restitution is that no one ought to be made *richer*—in short, that the defendant should not *gain*. Before the gain is inequitable, though, the gain must be generated by the plaintiff's *loss*.³⁶ As neither "loss" nor "gain" is defined, and because no attempt is made to explain the causal relation which must exist between the loss and the gain, the statement set out above should be read as a principle and not as a rule about damages.

In many cases, the compensation and restitution principles reinforce each other. Those are the situations in which the plaintiff has suffered a pecuniary loss by reason of the defendant's invasion of a legal right

³⁴ See Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

³⁵ An example is *Boomer v. Muir*, 24 P.2d 570 (Cal. App. 1933), where the plaintiff was allowed to recover a sum of money in excess of the contract price. Other examples are found in *Ablah v. Eyman*, 188 Kan. 665, 365 P.2d 181 (1961); *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652 (1946); RESTATEMENT OF RESTITUTION §§ 150 *et seq.* (1937).

³⁶ "It has been held that it is not sufficient for the plaintiff to prove that the defendant has committed a tort whereby he has enriched himself. It must further appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus, but a minus quantity." W. KEENER, *QUASI-CONTRACTS* 163 (1893). *Phillips v. Homfray*, 24 Ch. Div. 439 (1883), was the only authority cited to sustain the "plus-minus" argument. See the discussion in *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S.E.2d 231 (1946). *Cf. City of Boston v. Santosuosso*, 307 Mass. 302, 30 N.E.2d 278 (1940).

of the plaintiff, and the defendant has received a gain equal to the plaintiff's loss. In these cases it makes no difference whether the legal system compensates the plaintiff for his loss or removes the defendant's gain—that is, it makes no difference in the result of that particular case.³⁷ There are, however, other cases in which the loss which the plaintiff has suffered is substantially less than the defendant's gain. Sometimes the loss is found only in the invasion of a legal right; yet restitution has been allowed to disgorge the gain of the defendant.³⁸ Likewise, in a proper case the restitution principle has been applied even though the causal relation between the loss and the gain has become extremely attenuated.³⁹

The *Restatement of Restitution* has rephrased the *Digest of Justinian* in terms of unjust enrichment: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."⁴⁰

³⁷ Cases involving conversion of property commonly involve an equality between what was taken and what was lost. In measuring the recovery for the unlawful taking, the compensation and restitution principles enforce each other. However, the theory on which plaintiff seeks recovery is important to the evidence which should be introduced. If he is proceeding on a theory of quasi-contract, the plaintiff should show the value to the defendant and not rely on the cost of the goods to the plaintiff. *Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929). The cost to the plaintiff may, however, be evidence of the value to the defendant. *United States ex rel. Susi Contracting Co. v. Zara Contracting Co.*, 146 F.2d 606 (2d Cir. 1944); *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S.E.2d 231 (1946).

There may, in a specific case, be many reasons—other than the measure of recovery—for selecting a restitutionary remedy. For torts, the restitutionary remedy often chosen is quasi-contract. Because courts treat this remedy as contractual, certain procedural advantages may be received by the party selecting restitution. Sometimes the restitutionary remedy is equitable (as with constructive trust or equitable lien) and advantages of having the case "in equity" may flow to the party selecting restitution. These advantages are outside the scope of this article; thus, no attempt is made to collect cases dealing with the problems. However, they may include: the contractual statute of limitations which is generally longer than the tort statute [*House, Unjust Enrichment: The Applicable Statute of Limitations*, 35 CORNELL L.Q. 797 (1950); York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A. L. REV. 499 (1957)]; the contractual rules as to setoff and counterclaim [*Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929); C. CLARK, CODE PLEADING § 103 at 660-665 (2d ed. 1947) (hereinafter cited C. CLARK)]; the contractual rules as to joinder of causes of action [C. CLARK § 69 at 451-452]; the contractual rules as to survival of causes of action [*Treasurer & Receiver General v. Sheehand*, 288 Mass. 468, 193 N.E. 46 (1934); Evans, *A Comparative Study of the Survival of Tort Claims for and against Executors and Administrators*, 29 MICH. L. REV. 969 (1931)]; and the right to claim ownership or a lien in a specific asset, thereby obtaining priority over other claimants [see e.g., cases collected in Annot., 24 A.L.R.2d 672 (1952)].

³⁸ *Federal Sugar Ref. Co. v. United States Sugar Equalization Bd.*, 268 F. 575 (S.D. N.Y. 1920); *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652 (1946).

³⁹ See *King County v. Odman*, 8 Wash. 2d 32, 111 P.2d 228 (1941).

⁴⁰ RESTATEMENT OF RESTITUTION § 1 (1937).

Although this statement appears more like a rule than does that in the *Digest*, a moment's reflection will make it clear that all that the *Restatement* has done is to state a principle around which more precise applications can be justified. Whether there has been an unjust enrichment depends upon whether the defendant has received a benefit.⁴¹ Since "unjust," "enrichment," and "benefit" are words filled with policy determination and can be expanded or contracted in content to meet the needs of an individual case, the sentence quoted above from the *Restatement* is merely an approval of the restitution objective.⁴²

Therefore, specific rules about money recoveries reflect varying policies, sometimes contradicting and sometimes reinforcing each other. Those policies which can be identified include: (1) awarding at least nominal damages, even though none has been proved, to vindicate the invasion of a legal right; (2) compensating for probable losses; (3) preventing unjust enrichments; and (4) punishing wrongdoers with the hope of deterring the defendant and others from committing similar activity.

CHOICE OF THE MEASURE OF RECOVERY

The struggle of the Anglo-American judicial system to free itself from the writ system has involved a long and complicated history. For several hundred years, the form of action controlled the development of legal thinking as the attention of both the practicing lawyer and the judge was constantly directed at the writ selected by the plaintiff to institute legal

⁴¹ *Id.* comment a.

⁴² Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959); York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A. L. REV. 499 (1957).

Restitutionary remedies are also available even though there is no "fault" on the part of the defendant. Thus, plaintiffs who themselves have breached their contract promise have been allowed to recover the benefit received by the defendant. As to the right of a defaulting vendee to recover payments made prior to breach, see Annot., 31 A.L.R.2d 8 (1954). As to the right of a building contractor who is in default to recover for work done prior to the breach, see Nordstrom and Woodland, *Recovery by Building Contractor in Default*, 20 OHIO ST. L.J. 193 (1959). As to the right of a defaulting buyer of goods to recover for payments made prior to the breach, see UNIFORM COMMERCIAL CODE § 2-718 (2) and (3), hereinafter cited as UCC; Annot., 49 A.L.R.2d 15, 74 (1956). Likewise, where a contract has been rendered impossible of performance, restitution may provide a basis for recovering benefits conferred. 2 RESTATEMENT OF CONTRACTS § 468 (1932). Illegality of the contract causes more difficult problems, *Id.* §§ 598-609.

⁴³ There are many treatises and countless cases dealing with the growth of the common law writ system. Among the treatises are J. AMES, *Appeals*, in LECTURES IN LEGAL HISTORY 47 et seq. (1913); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH

proceedings.⁴³ Choice of the wrong writ was often fatal to the plaintiff's cause of action and, therefore, to his recovery of damages. Thus, during this period in legal history, the form of action was exceedingly important to the amount of recovery.⁴⁴

Since the middle of the nineteenth century, courts and legislatures have attempted to minimize the importance of the form of action. The FEDERAL RULES OF CIVIL PROCEDURE represent the ultimate position in eliminating the formalities of the kind of writ to be chosen by the plaintiff in stating that there "shall be one form of action to be known as 'civil action.'"⁴⁵ These provisions are based upon a belief that the judicial process should not be overly technical in determining the justice of the complaining party's basis for relief;⁴⁶ justice depends upon the substance of the claim and not upon the formalities by which the court's attention is directed to the claim.⁴⁷

Rules of damages have not escaped this belief that the form of action chosen should not control the substance of the claim. Cases contain statements to the effect that the amount of recovery should not and does not depend upon the form of the plaintiff's action. Such a case is *Baker v. Drake*⁴⁸ where suit was brought against stock brokers for a sale of 500 shares of railroad stock, which sale plaintiff alleged was unauthorized. It was not clear whether the suit was for conversion or breach of contract.

LAW 627 et seq. (3d ed. 1923); 1 J. CHITTY, PLEADING (16th Am. ed. 1879); R. Perry, COMMON-LAW PLEADING: ITS HISTORY AND PRINCIPLES (1897). An excellent law review appears in Woodbine, *The Origins of the Action of Trespass* (Pts. 1-2) 33 YALE L.J. 799 (1924) and 34 YALE L.J. 343 (1924). A condensed statement is included in C. CLARK, § 4 at 12-15. Although most American jurisdictions have now discarded the forms of action as used at common law, their impact on modern legal thinking should not be underemphasized. Rhode Island still uses a modified form of common law pleading. *Shanley v. Miletta*, 93 R.I. 98, 171 A.2d 437 (1961); *Ferla v. Rotella*, 92 R.I. 460, 169 A.2d 906 170 A.2d 622 (1961).

⁴⁴ *Mitchell v. McNabb*, 58 Me. 506 (1870) (plaintiff erroneously sued in debt); *Van Santwood v. Sandford*, 12 Johnson 197 (Sup. Ct. N.Y. 1815) (action of covenant held improper); *Kelly v. Lett*, 35 N.C. 53 (1851) (action of case was improper where the complaint was in trespass; discussion of election between trespass and case).

⁴⁵ Fed. R. Civ. P. 2. Even under the Federal Rules it is often necessary to determine the nature of the claim to determine the relief to which the plaintiff is entitled. *National Discount Corp. v. O'Mell*, 194 F.2d 452 (6th Cir. 1952).

⁴⁶ *Thomas v. Camden Trust Co.*, 59 N.J. Super 142, 157 A.2d 355 (1959). Generally, see C. CLARK, §§ 13-16 at 72-90.

⁴⁷ 2 J. MOORE, FEDERAL PRACTICE ¶ 2.01 et seq. at 302 et seq. (2d ed. 1967). In summarizing Rule 2, Moore states: "Substantive rights remain unaltered. Procedurally, however, forms of action are immaterial." *Id.* ¶ 2.06[9] at 395. See Blume, *The Scope of a Civil Action*, 42 MICH. L. REV. 257 (1943).

⁴⁸ 53 N.Y. 211 (1873).

The judge instructed the jury that damages were to be computed on the basis of the highest price of the stock between the time of the sale by the brokers and the trial of the case. On appeal, the court stated that this instruction did not present the proper measure of damages, reversed the judgment for the plaintiff, and ordered a new trial. In the course of its discussion of what the court believed to be the proper rule of damages in this type of case, the court remarked:

[T]he rule of damages should not depend upon the form of action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort; except in those special cases where punitive damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy.⁴⁹

Such a sentiment has a ring of justice. For every factual situation there is one measure of recovery. The plaintiff cannot change this measure by a trick of pleading.⁵⁰ Thus, equity actions have been said to require the same measure of damages as would a law action brought on

⁴⁹ *Id.* at 220. A similar statement appears in *United States Trust Co. v. O'Brien*, 143 N.Y. 284, 38 N.E. 266 (1894). Under the modern pleading rules, these statements are technically accurate (and they are also meaningless) because there is only one *form* of action. The idea of the *Baker* case has, however, been carried over to modern practice with courts stating that the measure of damages should not turn on the remedy plaintiff selects. This article suggests that such statements are too broad in that the theory (or theories) around which a case is tried or defended do affect the amount of recovery. This section does not suggest that this theory must or should be stated in the pleading. *When* the theory of the case or defense must be presented and the *effect* of having a theory are separate problems. See *City of Union City v. Murphy*, 176 Ind. 597, 96 N.E. 584 (1911); C. CLARK, §43 at 259-65 (2d. 1947).

⁵⁰ "Hence, it is our conclusion that although plaintiff may select his remedy when more than one are appropriate to the facts, yet he may not by doing so change the measure of his recovery, from that fixed by the settled law as flowing from the same acts. A contrary rule would render the law inconsistent by limiting the measure of its relief to one litigant adopting one course of procedure and enlarging the same character of relief to another or the same one, dependent upon the remedy employed, and when both causes of action are based on the same facts; and we are convinced that there should be no such uncertain rule." *Falls Branch Coal Co. v. Proctor Coal Co.*, 203 Ky. 307, 312-13, 262 S.W. 300, 303 (1924).

The plaintiff cannot convert a wrongful death action (tort) into a contract action by pleading a contract cause of action in the complaint. See *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). On the right to bring a wrongful death or survival action based on breach of a Code warranty, see *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966), overruled in part in *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

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the same facts.⁵¹ Larger (or smaller) recoveries are not allowed simply because the plaintiff is able to call upon a court's equitable powers.

The principal difficulty with an indiscriminate application of the doctrine of *Baker v. Drake* is that for many factual patterns the courts have said that there is more than one measure of what is "just indemnity" for the wrong done. Facts are but segments of life and do not produce any measure of recovery. Only as those facts are sorted out, some being emphasized and others de-emphasized, and only as some legal policy is applied to those facts (*e.g.*, the policy of compensation, punishment, or restoration), can a court begin to measure recovery. Thus, the theory around which the facts are marshalled can become crucial in determining how much money is required in order that the plaintiff receive a "just indemnity." An example of this point can be found in the typical written contract for the purchase and sale of land, in which the purchaser has paid a part of the purchase price and the vendor has now refused to convey the land to the purchaser. Such a factual pattern does not produce a single remedy or a single measure of recovery. The purchaser may decide not to pursue any damage remedy but seek specific performance.⁵² Certainly, this "form" of action will affect his money award by reducing damages otherwise recoverable.⁵³ On the other hand, if the purchaser

⁵¹ *Osage Oil & Ref. Co. v. Chandler*, 287 F. 848, 852 (2d Cir. 1923) ("in assessing damages, the rule is the same in courts of law and in courts of equity"); *Christensen v. Slawter*, 173 Cal. App. 2d 325, 343 P.2d 341 (1959). To the extent that performance is required by the defendant the amount of damages recoverable are, of course, decreased. *Virginia Pub. Serv. Co. v. Steindler*, 166 Va. 686, 187 S.E. 353 (1936).

Some courts have held that punitive damages will not be granted in an equity action even though they might be awarded on the same facts in a law action. Other courts, and perhaps the trend of the more recent decisions, have recognized that equity courts may award punitive damages. Cases are collected in Annot., 48 A.L.R.2d 947 (1956).

⁵² *McCullough v. Newton*, 348 S.W.2d 138, 144 (Mo. 1961) (a case also dealing with the problem of the theory of the pleading filed by the purchaser, the court finding no inconsistency between specific performance and the pleading: "A specific tract of real estate is treated as *unique* for the purpose of specific performance of a contract to convey, 'irrespective of special facts showing the inadequacy of a legal remedy.'"); *Cummins v. Dixon*, 265 S.W.2d 386 (Mo. 1954); *Gartrell v. Stafford*, 12 Neb. 545, 11 N.W. 732 (1882); *Meyer v. Reed*, 91 N.J. Eq. 237, 109 A. 733 (Ct. Ch. 1920); *Epstein v. Gluckin*, 233 N.Y. 490, 135 N.E. 861 (1922). Cases are collected in 5 S. WILLISTON, *CONTRACTS* § 1419 (Rev. ed. 1936, supp. 1968) (hereinafter cited S. WILLISTON).

⁵³ *McCreary v. Stallworth*, 212 Ala. 238, 102 So. 52 (1924); *Schneidau v. Manley*, 131 Conn. 285, 39 A.2d 885 (1944); *Baker v. Puffer*, 299 Ill. 486, 132 N.E. 429 (1921); *Ratchesky v. Piscopo*, 239 Mass. 180, 131 N.E. 449 (1921); *Stauch v. Daniels*, 240 Mich. 295, 215 N.W. 311 (1927); *Meineke v. Schwepe*, 93 Ohio App. 111, 111 N.E.2d 765 (1952).

wants damages, he has a number of alternatives: (1) he may seek the loss of his bargain as measured by the difference between the market value of the land and the unpaid contract price;⁵⁴ (2) he may attempt to recover expenses made in reliance on the contract;⁵⁵ or (3) he may be satisfied with a return of his down payment.⁵⁶ The factual pattern gives rise to several approaches to money recoveries and the theories around which the purchaser sorts out and emphasizes certain of the facts affecting the measure of his recovery.

Such a case is not unique. Vendors have similar choices when their purchasers default.⁵⁷ Sellers (on default of their buyers) and buyers (on default of their sellers) of goods have a choice among several remedies under the Uniform Commercial Code.⁵⁸ Their choice affects the dollars which they may recover.⁵⁹ On some occasions, the plaintiff also may

⁵⁴ *Beck v. Staats*, 80 Neb. 482, 114 N.W. 633 (1908). In some jurisdictions, the purchaser may recover his loss of bargain only if the vendor acted in "bad faith." Otherwise, the purchaser is limited to a recovery of his down payment plus, possibly, other expenses such as the cost of searching title. *Hammond v. Hannin*, 21 Mich. 374, 387 (1870).

⁵⁵ Cases are collected in Annot., 48 A.L.R. 12 (1927), s. 68 A.L.R. 137 (1930), 17 A.L.R.2d 1300 (1951); 5 S. WILLISTON § 1363A. For a discussion of this measure of recovery, see Fuller and Perdue, *The Reliance Interest in Contract Damages* (Pts. 1-2) 46 YALE L.J. 52, 373 (1936-37).

⁵⁶ *Adams v. Henderson*, 168 U.S. 573 (1897); *Lemle v. Barry*, 181 Cal. 6, 183 P. 148 (1919); *Hall v. Sunberg*, 72 Colo. 90, 209 P. 638 (1922); *City of Tarpon Springs v. Gerecter*, 155 So. 2d 566 (Fla. App. 1963); *Lodi v. Gayette*, 219 Mass. 72, 106 N.E. 601 (1914); *Brokaw v. Duffy*, 165 N.Y. 391, 59 N.E. 196 (1901); *Rugg v. Midland Realty Co.*, 261 Pa. 453, 104 A. 685 (1918). See 5 S. WILLISTON § 1457.

The purchaser may, on default of the vendor, recover his down payment even though it exceeds the value of the property to be conveyed. *Wilkinson v. Ferree*, 24 Pa. 190, 192-93 (1855).

There is also the possibility of treating the vendor as a "trustee" and, if the vendor has sold the land to a good faith purchaser, recovering the amount received on the sale (less any balance unpaid by the purchaser). *Timko v. Useful Homes Corp.*, 114 N.J. Eq. 433, 168 A. 824 (Ct. Ch. 1933).

⁶⁷ Vendors, as a class, have a right to specific performance of contracts for the sale of land. *Freeman v. Paulson*, 107 Minn. 64, 66-67, 119 N.W. 651, 652 (1909). This right is sometimes rested on the doctrine of affirmative mutuality, *Spring v. Sanders*, 62 N.C. 71, 72 (1866), although probably a better explanation lies in the inadequacy of the legal remedy to determine damages and to provide adequate protection of the interests of the vendor upon execution of a judgment for full price. See *McPeters v. English*, 141 N.C. 491, 54 S.E. 417 (1906).

⁶⁸ See Part 7 of Article 2 of the UNIFORM COMMERCIAL CODE. The general remedies of the seller are listed in UCC § 2-703; of the buyer, in UCC § 2-711.

⁶⁹ For example, the seller may, in an appropriate case, elect to sue for the full price under UCC § 2-709, or the seller may resell the goods and, if he follows the requirements of the Code, recover the difference between the resale and contract prices. UCC § 2-706.

Under modern practice, the plaintiff has a right to elect his remedy and the court cannot change the action chosen. *Thomas v. Camden Trust Co.*, 59 N.J.

choose between contract and tort measures of recovery when the activity of the defendant can be classified as either a breach of a contract promise or a tort.⁶⁰ Therefore, the vendor-purchaser case, far from being unique, is typical of the fact that damages may be influenced by the theory around which the plaintiff presents the facts of his case. Thus, the approach to the money recovery must be planned in each case with at least the same care as is devoted to a determination of the substantive rights of the parties.⁶¹

CONCLUSION

Courts and lawyers have not devoted nearly enough critical analysis to the problems involved in determining the size of money recoveries. Too often they have devoted their time and attention to the substantive rules of liability, leaving the amount of recovery to rest on a myriad of assumptions built on further untested assumptions. Those assumptions merit testing, both as to their impact on the parties and on the economic system in which they live.⁶² The tools available to the court now include granting recoveries based upon notions of compensation, restitution, and punishment. Indiscriminate use of these tools can produce arbitrary results in an area where sound economic policy is needed.

Super. 142, 157 A.2d 355 (Super. Ct. 1959). When, however, the measure of damages sought by the plaintiff is, for some reason, inappropriate, and another measure is proper, the court should grant the proper measure. See *Oliver v. Campbell*, 43 Cal. 2d 298, 273 P.2d 15 (1954).

⁶⁰ Often, the choice between a contract and a tort action is a difference between a remedy (that is, some damages) and no remedy (that is, no damages). *Dentists' Supply Co. v. Cornelius*, 281 App. Div. 306, 119 N.Y.S.2d 570, *aff'd* 306 N.Y. 624, 116 N.E.2d 238 (1953), allowed the plaintiff to choose a remedy which was not barred by the statute of limitations as against the tort remedy which was barred.

Where the defendant is immune to an action in tort, damages for breach of contract may be recovered if the facts of the case also include a contract promise which has been breached by the defendant. *Campbell Bldg. Co. v. State Rd. Comm'n*, 95 Utah 242, 70 P.2d 857 (1937). Damages in quasi-contract actions have also been allowed. *Hillsboro County v. Kensett*, 107 Fla. 237, 138 So. 400, 144 So. 393 (1932); *Nelson County v. Coleman*, 126 Va. 275, 101 S.E. 413 (1913). In these cases, the theory by which plaintiff presents his case affects his right to damages.

There are, however, cases in which the court states that the measure of recovery is the same whether the theory of the case is tort or contract. *Bowater v. Worley*, 57 F.2d 970 (10th Cir. 1932); *Lastinger v. City of Adel*, 69 Ga. App. 535, 26 S.E.2d 158 (1943); *Billups v. American Surety Co.*, 173 Kan. 646, 251 P.2d 237 (1952). Generally, however, these statements are made in cases in which the measure of damages is identical in contract and tort.

⁶¹ "When the complainant has the option to choose one of two alternative remedies, she should be permitted to pursue that which is most complete, adequate and expeditious." *Plasman v. Roach*, 43 So. 2d 11 (Fla. 1949). See also, *Lessard v. Darker*, 94 N.H. 209, 49 A.2d 814 (1946).

⁶² See *Birmingham, Damage Measures and Economic Rationality: the Geometry of Contract Law*, 1969 DUKE L.J. 49.