QUANTIFYING DAMAGES IN CASES OF ADVANTAGEOUS BREACH: THE CURIOUS CASE OF MCDONALD'S MILKSHAKES

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I. INTRODUCTION

Perhaps as often as contracts are made, they are breached. When breaches occur, it falls to the innocent party to quantify and make a claim for their losses informally or through the courts (if they choose to do so).[1] An award of compensation under contract law is premised upon the goal of restoring the plaintiff to the position they would have been in had the contract been performed correctly.[2] But what are the remedial consequences if a plaintiff *benefits*, rather than loses, as a result of the breach? What if the benefits arise without any efforts from the plaintiff? This was the situation that arose in the McDonald's franchising saga of the 1950s and early 1960s, all because of a humble milkshake.[3] Textbooks and the wider literature pay little attention to this issue given its practical rarity and the lack of conclusive case law on

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1. For minor breaches, it is often not worth the parties' time to litigate and the breach is either overlooked or the party in breach voluntarily makes amends for their wrongdoing. Countless empirical studies, notably Macaulay's pioneering analysis in 1963, demonstrate that commercial parties typically do not administer their agreements according to the law of contract and seldom resort to its processes when disputes arise. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992) (noting that disputes of the diamond industry are not solved through the courts, but through internal rules); Iain Fraser, *The Role of Contracts in Wine Grape Supply Coordination: An Overview*, AGRIBUSINESS REV., 2003, at 1, 13–14 (explaining the problems associated with contracts in regards to the wine industry); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 62 (1963) (noting the preference of businessmen to settle disputes outside of court); Thomas M. Palay, *Comparative Institutional Economics: The Governance of Rail Freight Contracting*, 13 J. LEGAL STUD. 265, 266 (1984) (involving discussion of informal enforcement of contracts between rail freight carriers and shippers); James J. White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 WASHBURN L.J. 1, 18–19 (1982) (discussing the law and its effect on contract administration).

2. 24 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 64:1 (4th ed. 2018).

3. THE FOUNDER (FilmNation Entm't 2016).

point. This Article examines how contract law in both Australia and the United States quantifies loss and governs compensation in situations of "advantageous breach." Using the McDonald's franchising saga as a case study and through analysis of the relevant case law, this Article provides practitioners and parties with guidance as to the remedial consequences that may flow from advantageous breaches.

Part II explores the McDonald's franchising saga and explains how a humble milkshake came to be the catalyst for the dispute that ensued. Part III briefly examines the different measures of "loss" when a contract is breached and explains how a plaintiff's damages are typically calculated. Part IV discusses the anomalous situation of advantageous breach in which a plaintiff actually derives *benefits* following the defendant's violation of the contract and identifies the remedial consequences. Part V then revisits the McDonald's franchising saga to see how contract law would have affected any claim made by the plaintiffs in that case. Finally, Part VI considers how the benefits enjoyed by a plaintiff in a situation of advantageous breach would affect the quantum of damages where those benefits arose without any mitigatory action from the plaintiff. It also provides a model statement of legal principle which seeks to harmonize the Australian and American approaches in this regard.

II. THE MCDONALD'S FRANCHISING SAGA AND THE CATALYTIC MILKSHAKE

The tale of the McDonald's franchising saga is best told through the critically acclaimed American biographical drama film *The Founder*.[4] The film recounts the story of the establishment and growth of the global fast food chain and provides an excellent case study through which to examine the concept of advantageous breach.[5] In 1954, a traveling salesman, Ray Kroc, set out to investigate the rumored speed, innovative techniques, and subsequent successes of a small drive-in hamburger restaurant in San Bernardino, California.[6] After being impressed with the restaurant's cheap, simple, and tasty menu, as well as its "Speedee

4. *Id.*
5. *Id.*
6. *Id.*

Service System,"[7] he spent several months negotiating with founders and brothers, Maurice (Mac) and Richard (Dick) McDonald, to let him franchise the restaurant. He made them an enticing offer, saying, "Let me open new McDonald's stores and I'll give you half of one percent of the gross sales for the use of the name and the idea."[8] The brothers agreed and a contract was forged, making Kroc the business' head franchisor.[9] Kroc opened his first store in Des Plaines, Illinois in 1955 and, incredibly, oversaw the establishment of the two hundredth restaurant by 1960.[10]

As with typical franchising agreements, Kroc was bound to follow the master business model and endorse the methods and prescribed marketing materials.[11] One such method was the use of ice cream in McDonald's milkshakes.[12] Kroc's outlet and the company's other franchisees stocked drums of ice cream in walk-in coolers that were very expensive to run.[13] Kroc appreciated the financial impact this was having on the franchise and was determined to find a solution.[14] It came during a dinner meeting with one of his franchisees, Minnesota restaurant owner Rollie Smith and Rollie's wife Joan.[15] Rollie mentioned he too was straining under the cost of refrigerating the vast quantities of ice cream in his outlet before mentioning that Joan may have found the solution.[16] Kroc was intrigued, and the following conversation ensued:

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7. *Id.* The Speedee Service System was a system of food preparation and service designed to operate with maximum efficiency. It essentially applied the guiding principles of a factory assembly line to a commercial kitchen, most notably employing one worker to perform an individual task such as grilling, dressing, or wrapping the hamburgers; cooking the fries; and preparing the milkshakes. *See* ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 19–20 (2001).

8. McDonalds Austl., *Macca's Story*, MCDONALDS.COM.AU, https://mcdonalds.com.au/about-maccas/maccas-story (last visited Aug. 15, 2018) (hereinafter *Macca's Story*).

9. THE FOUNDER, *supra* note 3.

10. *Id.*

11. *Macca's Story*, *supra* note 8.

12. THE FOUNDER, *supra* note 3.

13. *Id.* In one scene of the film, employee Fred Turner remarks to Kroc whilst standing with him in the Des Plaines store's walk-in cooler: "It's unbelievable what these suckers cost to run. My pop used to own an ice-cream parlour. He went belly-up from the refrigeration costs." *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

> Joan: What if I told you there was a way . . . all of the owner-operators [could save] literally hundreds of dollars a year in electrical costs . . . [a]nd reduce the time that it takes to make a milkshake by half.
>
> . . .
>
> Kroc: I'll bite.[17]

At this point, Joan reached under the table, fetched her purse, and withdrew a trade magazine, bookmarked at a full-page ad for a product called "Inst-A-Mix." She continued:

> Joan: [It's] a powdered milkshake. Costs a fraction of ice cream, [and there's] no refrigeration necessary.
>
> Rollie: [It contains powdered milk]. Thickening agents and emulsifiers simulate the texture of [ice-cream]. Tastes just like the real thing.
>
> Joan: [I]t's easy as pie to make. You put a packet into a glass of water and stir.[18]

Joan then offered Kroc the opportunity to sample a shake and presented both chocolate and vanilla options. He chose vanilla, and Joan prepared it for him before asking him to taste and review the product. Kroc was astounded, saying, "I think . . . I'm drinking a delicious vanilla milkshake!" Rollie suggested trialing the powdered milkshakes at his restaurant and, if successful, rolling them out across all McDonald's outlets.[19] Kroc was wary of the inevitable backlash from Mac and Dick, and so he pledged to consider the idea before eventually confronting the brothers about it:

> Kroc: [I just found] a way to save you, me, and all our owner-operators literally hundreds of dollars a year in electrical costs!
>
> Dick: And what would that be?
>
> Kroc: Two words: powdered milkshake. [I'm telling you] I recently came across a remarkable product called Inst-A-Mix.

17. *Id.* (emphasis added).
18. *Id.*
19. *Id.*

> Like I say. It's a powdered milkshake, it's a fraction of the cost of ice cream, no refrigeration necessary.
>
> Dick: Ray—
>
> Kroc: [I tell ya,] I tried it [myself], and let me tell you, it is delicious. It tastes just like the real thing. . . . Comes in vanilla or chocolate . . . Me, I'm a vanilla man.
>
> . . .
>
> Dick: [Ray, we] have no interest in a milkshake that contains no milk. . . . Why don't we put sawdust in the hamburgers while we're at it? . . . Frozen French fries!
>
> Kroc: You don't want to save a bundle?
>
> Dick: Not like that.
>
> Kroc: We're talking about the same great taste while boosting your bottom line!
>
> Dick: It's called a *milk* shake, Ray. . . . [Real] [m]ilk. Now and forever.[20]

It took little time for Kroc to go on and disobey[21] Dick and Mac and commenced use of powdered milkshakes in all other McDonald's outlets bar San Bernardino,[22] thereby violating the terms of his franchise agreement with Dick and Mac. The telephone conversation that transpired between the parties following Kroc's defiance is instructive:

> [Kroc: Hiya Dick!]
>
> Dick: I just got a very disconcerting call.
>
> Kroc: Oh?
>
> Dick: From Buddy Jepsen. Our operator in Sacramento.

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20. *Id.*
21. *Id.*
22. Later in the film, Dick is shown in his San Bernardino restaurant opening a package on his office desk addressed to him and Mac. Inside is a silver foil pouch and a note from Ray Kroc saying, "New flavor . . . strawberry. Maybe you'll like this one! Best, Ray." *Id.*

Kroc: I'm well aware of who Buddy Jepsen is.

Dick: He told me he received a shipment this morning.

Kroc: [Oh] it arrived?

Dick: You are way out of line, Ray.

Kroc: [Gee] I figured it wouldn't get there until Friday the earliest.

Dick: Would you mind telling me what you're doing shipping four cases of Inst-A-Mix to one of our operators?

Kroc: If you're not interested in turning a profit, that's fine. But don't stop the rest of us.

Dick: Us?

Kroc: Us. As in everyone but you.

Dick: Who did you send them to?

Kroc: Everyone but you.

Dick: You have no right, Ray. You are to stop this instant. Is that clear?

Kroc: Nah.

. . .

Dick: What the hell's that mean? . . . You will abide by the terms of your deal.

Kroc: I'm through taking marching orders from you . . . You and your endless parade of nos. . . . [Constantly] cower[ing] in the face of progress. . . .

Dick: If phony powdered milkshakes is your idea of progress, you have a profound misunderstanding of what McDonald's is about.

Kroc: I have a far better understanding of McDonald's than you two yokels.

. . .

Dick: [What?] You will do as we say.

Kroc: Nope.

Dick: You have a *contract*.

Kroc: Contracts are like hearts. They're made to be broken.[23]

Despite their efforts and threats of legal action, Dick and Mac eventually conceded defeat and agreed to a buyout from Kroc. For the purposes of this Article, we focus upon the initial breach of the lease agreement; that is, Kroc's intentional rollout of powdered milkshakes against the wishes of Dick and Mac. At this juncture, however, we consider how a plaintiff's losses (such as those incurred by Dick and Mac) following a breach of contract are measured under law.[24]

III. MEASURING LOSS FROM A BREACH OF CONTRACT

The breach of any term of a contract entitles the aggrieved party to claim damages for any loss suffered as a consequence of the breach; for every legal wrong, there is a legal remedy.[25] Nominal damages are therefore awarded in recognition of the fact that there has been a breach of contract, irrespective of the fact that no actual "loss" has been suffered.[26] Where losses are suffered because of the breach, those losses must be categorized, and the courts must determine if and to what extent they are compensable.[27] Typically, an award of damages offsets various types of losses incurred by a plaintiff, each representing discrete categories of legal "interest" that have been violated.[28] Legal texts

23. *Id.* (emphasis added).

24. *Id.*

25. Versata Software, Inc. v. Internet Brands, Inc., 902 F. Supp. 2d 841, 859 (E.D. Tex. 2012); Agricultural & Rural Finance Pty. Ltd. v. Gardiner (2008) 238 CLR 570 (Austl.); Ashby v. White (1703) 92 Eng.Rep. 126, 136.

26. *Versata Software Inc.*, 902 F. Supp. 2d at 860.

27. *See* 22 AM. JUR. 2D *Damages* § 49 (Westlaw through June 2018) (discussing that compensation for losses incurred from a contract breach can be categorized as "cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances").

28. *See* STEVEN W. FELDMAN, 22 TENN. PRAC. CONTRACT LAW AND PRACTICE § 12:2 (Westlaw through June 2018) (discussing that there are three protected interests to compensate for in order to make the plaintiff whole a contract breach).

in both Australia[29] and the U.S.[30] tend to identify those categories as: (1) expectation interest, (2) reliance interest, and (3) restitution interest. These interests are best understood when framed within the context of the overarching principle governing the award of damages for breach of contract.[31]

The fundamental premise of an award of damages under both Australian[32] and U.S.[33] law is to place the aggrieved party as closely as possible to the position they would have been in had the contract been correctly performed.[34] The three categories of

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29. *See*, *e.g.*, J.W. CARTER, CARTER'S GUIDE TO AUSTRALIAN CONTRACT LAW 429–30 (2d ed. 2011) (describing expectation, reliance, and restitution as the three interests that should be assessed in awarding damages); JOHN GOOLEY, PETER RADAN & ILIJA VICKOVICH, PRINCIPLES OF AUSTRALIAN CONTRACT LAW 591 (3d ed. 2014) (identifying that there are four protected interests that may be assessed for awarding damages: (1) expectation; (2) reliance; (3) restitution; and (4) indemnity); N. SEDDON, R. BIGWOOD & M. ELLINGHAUS, CHESHIRE & FIFOOT: LAW OF CONTRACT 1126–32 (10th Australian ed. 2012) (describing the differences between the three interests of expectation, reliance, and restitution).

30. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 591–92 (3d ed. 1987) (identifying the three categories of interest as legally protected); 11 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 55.11, at 40 (Joseph M. Perillo ed., rev. ed. 2005) (discussing the clear divide among the expectation, reliance, and restitution interests); William R. Perdue, Comment, & Lon L. Fuller, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 373, 373, 376, 378 (1937) (discussing that courts intervene in contract breaches due to the protected interests).

31. *See* 22 AM. JUR. 2D *Damages*, *supra* note 27, § 48 (discussing that the overall goal in awarding damages for breach of contract is "to make the injured party whole").

32. *See*, *e.g.*, Tabcorp Holdings Ltd. v. Bowen Inv. Pty. Ltd., (2009) 236 CLR 272 (Austl.) (stating that it is well-established common law that an injured party in a contract breach should be made as whole as money can allow); Commonwealth v. Amann Aviation Pty. Ltd., (1991) 174 CLR 64 (Austl.) ("*Amann*") (stating that a party's loss due to breach should be compensated in order to place them in the situation they would have been in but for the breach); Robinson v. Harman, [1848] 1 Exch. 850, 855 (discussing that it is the practice of common law to award an injured party damages that would put them as close as possible to the position they would have been in had the contract been performed).

33. *See*, *e.g.*, Adams v. Lindblad Travel Inc., 730 F.2d 89, 92 (2d Cir. 1984) (stating that damages are calculated to put the injured party in the economic position they would have obtained, but for the breach); Laurin v. DeCarolis Constr. Co., 363 N.E.2d 675, 678 (Mass. 1977) (defining this idea as the "basic principle of contract damages"); State v. Ernst & Young L.L.P., 902 A.2d 338, 348 (N.J. Super. Ct. App. Div. 2006) (citing 525 Main St. Corp. v. Eagle Roofing Co., 168 A.2d 33 (1961)) (stating that damages should "put the injured party in as good a position as he would have had if performance had been rendered as promised"); Magnet Resources, Inc. v. Summit MRI Inc., 723 A.2d 976, 985 (N.J. Super. Ct. App. Div. 1998). This principle is also reflected in § 1-305(a) of the U.C.C. (stating that remedies must be liberally awarded in order to put an injured party in the position they would have otherwise attained, but for the breach).

34. By extension, an aggrieved party will not be placed in a *better* position than they would have occupied had the breach not occurred. *See*, *e.g.*, Boten v. Brecklein, 452 S.W.2d 86, 93 (Mo. 1970) (quoting Dingman v. Elizabeth Arden Sales Corp., 284 S.W.2d 16, 18 (Mo. Ct. App. 1955)) (finding that legally, a plaintiff cannot be put in a "better position than he would have been had the contract been completed on both sides"); Andersen v. State of South Australia & ORS, (2010) SASCFC 20, 45 (Austl.) (stating that is well established that "a plaintiff cannot recover more than he or she has lost"); *Amann*, 174 CLR 64 (stating that

interest described above are essentially manifestations of this central principle.[35] Expectation damages compensate for the plaintiff's lost profits or gains as anticipated under the contract and, as explained further on, may also extend to physical distress that results from a breach.[36] Reliance damages compensate for costs expended in reliance upon contractual performance—such as the purchase of materials or equipment for particular construction work.[37] Restitution damages are practically a species of reliance damages in that they compensate the plaintiff for benefits conferred upon the defendant by virtue of the plaintiff's correct performance.[38] A classic example is the recovery of deposits or other monies paid to the defendant under the contract.[39]

As such, an award of damages may reflect different types of legal interests whilst ultimately seeking to place the plaintiff in the position they would have been in had the breach not occurred.[40] An apt example demonstrates how the three categories of loss can arise: A contracts with B to purchase B's home for $400,000, subject to loan finance from A's bank being approved. A pays B a deposit of $40,000 as security, and pays the bank $1,500 representing the fee for the loan application. A's bank commissions an appraisal of the market value of B's home, which determines it is worth approximately $470,000. The loan is approved. B subsequently learns of this valuation and repudiates the agreement.

In this example, A's restitution interest is the $40,000 deposit paid; the reliance interest is the $1,500 loan application fee; and the expectation interest is the prospective $70,000 profit on the property. If A were to bring an action for breach of contract against B, assuming B had no legitimate defenses, the total damages payable in order to revert A to the position A would have been in

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damages for breach cannot put the plaintiff in a more superior position than they would have attained but for the breach); Parry v. Cleaver, [1970] A.C. 1 (finding it to be a "universal rule that the plaintiff cannot recover more than he has lost").

35. *Amann*, 174 CLR 64.

36. *See*, *e.g.*, Smith v. Hoyer, 697 P.2d 761, 765 (Colo. Ct. App. 1984) (awarding the plaintiff damages for breach of contract for mental anguish, which manifested into physical symptoms of sleeplessness, loss of appetite, diarrhea, and a rectal itch); CORBIN, *supra* note 30, § 55.11, at 40 (stating that "the prospect of gain from the contract" is shown through the expectation interest).

37. 22 AM. JUR. 2D *Damages*, *supra* note 27, § 62.

38. CORBIN, *supra* note 30, § 55.11, at 40.

39. RESTATEMENT (SECOND) OF CONTRACTS § 373 (AM. LAW. INST. 1981).

40. *See Smith*, 697 P.2d at 765 (awarding the plaintiff expectation damages and separate damages for mental anguish).

had B honored the contractual obligation to proceed with the sale would therefore be $110,000. The reliance interest, being the $1,500 loan application fee, was expended so as to bring about the expectation interest and so this would be excluded from the quantum.[41]

There are some additional, though less common types of loss—which are perhaps best understood as being incorporated within a plaintiff's expectation interest—for which contract law may award damages.[42] These losses are irregular by virtue of the fact that they are *non-economic* losses in the nature of physical or psychological injuries or distress, and injured reputation.[43] Nonetheless, if in the scenario above A had established that she had been physically injured or inconvenienced by the breach, or that one of the objects of the contract was to prevent her from experiencing distress or disappointment, she may be entitled to claim damages for her injured feelings.[44] This is one class of damages that may be relevant when we return to examining the losses suffered by Dick and Mac during the McDonald's franchising saga.[45] For now, we must consider what is perhaps an even rarer situation where a

41. Generally speaking, under Australian and American law, party A in the scenario described would be able to seek an order of specific performance to compel B to sell the property to A. The courts in both jurisdictions are sympathetic to the purchaser in such situations and are willing to order that the B convey the real estate if this is the preferred and most appropriate remedy. *E.g.*, Woliansky v. Miller, 661 P.2d 1145, 1147 (Ark. Ct. App. 1983); LeBaron v. Crismon, 412 P.2d 705, 706 (Ariz. 1966); Hughes v. Melby, 362 P.2d 1014, 1016 (Mont. 1961); Dougan v. Ley, (1946) 71 CLR 142, 146 (Austl.); Pianta v. National Finance & Trustees Ltd., (1964) 180 CLR 146, 151 (Austl.).

42. *See* Giampapa v. Am. Family Mutual Ins. Co., 64 P.3d 230, 237 n.3 (Colo. 2003) (en banc) (discussing that damages can include "noneconomic losses such as lost earnings, mental anguish, [and] impairment of quality of life").

43. *See* COLO. REV. STAT. ANN. § 13-21-102.5 (West 2007) (discussing the category of noneconomic losses to include inconvenience, emotional stress, and pain and suffering).

44. *See, e.g.*, Goldstein v. United Lift Service Co. Inc., No. 09-826, 2010 WL 4236932, at *7 (E.D. Pa. Oct. 25, 2010) (finding that damages for emotional distress are recoverable if the breach of contract causes bodily harm or serious emotional distress was a likely result in the event of a breach); Sexton v. St. Clair Fed. Sav. Bank, 653 So. 2d 959, 960–61 (Ala. 1995) (awarding plaintiffs damages for mental anguish when a lender's improper disbursement of loan funds resulted in plaintiffs being unable to complete construction on their home); Baltic Shipping Co. v. Dillon, (1993) 176 CLR 344, 382 (Austl.) ('Baltic Shipping Co.') (finding that damages can be recovered for disappointment if such protection was understood to be involved in the contract and not too remote); Willshee v. Westcourt Ltd., (2009) WASCA 87 (Austl.) (awarding the plaintiff damages for the inconvenience of having to vacate his home); Jarvis v. Swans Tours Ltd., [1973] Q.B. 233, 238 (Lord Denning M.R.) (appeal taken from Ilford County Court) (stating that damages for mental distress can be recovered for breach of contract involving a vacation or entertainment where disappointment would be foreseeable in the event of a breach).

45. THE FOUNDER, *supra* note 3.

plaintiff actually derives a *benefit* from the defendant's breach of contract.

IV. ADVANTAGEOUS BREACH—WHAT ARE THE REMEDIAL CONSEQUENCES WHEN A PLAINTIFF BENEFITS?

As the case law makes clear, it is quite conceivable, though unlikely, for situations to arise where a plaintiff has benefited from the defendant's breach of the contract between the parties.[46] Such situations are clearly anomalous; a plaintiff is far more likely to incur losses following the defendant's violation of their obligations under the agreement.[47] However, when a plaintiff benefits, the courts must properly assess the amount of damages to award in order to remedy the losses the plaintiff has suffered.[48] Thankfully, case law provides some guidance.

A useful starting point is the old English case of *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd*.[49] The plaintiff, the Railways Company, contracted with the defendant, British Westinghouse, to supply and install eight steam turbines and eight turbo alternators.[50] The machines subsequently turned out to be defective in design and efficiency, costing far more than anticipated under the contract.[51] The defendant experimented with repairs to no avail, at which point the plaintiff purchased and installed a new set of machines.[52] The new machines were far more efficient and costed much less to operate, resulting in increased profits for the plaintiff.[53] The plaintiff then commenced proceedings against the defendant to recover the cost of the new machines from the defendant under the original contract, as well

46. Tony Thornton Auction Serv., Inc. v. Quintis, 760 S.W.2d 202, 206–07 (Mo. Ct. App. 1988); British Westinghouse Elec. & Mfg. Co. Ltd. v. Underground Elec. Rys. Co. of London Ltd., [1912] A.C. 673, 688.

47. Katy Barnett, *Substitutive Damages and Mitigation in Contract Law: Tension between Two Competing Norms*, 28 SACLJ 795, 809–10 (2016) (stating that "the central norm of contractual damages awards" is to find the right compensation "for a plaintiff who has been deprived of performance," meaning situations, such as ones requiring mitigation, where the plaintiff has benefited from the breach are not the central norm).

48. *British Westinghouse*, [1912] A.C. at 690. *See generally* Barnett, *supra* note 47, at 808–09 (commenting that "if the plaintiff gets a *better* product when she buys a substitute in mitigation of her loss, damages will be reduced") (emphasis added).

49. [1912] A.C. at 682.

50. *Id.*

51. *Id.* at 682–83.

52. *Id.* at 684.

53. *Id.* at 688.

as damages for the period of time in which it had to use the defendant's defective machines.[54]

In quantifying the damages payable to the plaintiff, the House of Lords rejected the claim for the cost of the new machines.[55] This cost was offset by the benefits the plaintiff derived from obtaining the new machines in response to the defendant's breach; namely, the reduced costs of operation and higher company profits.[56] The court emphasized one of the fundamental principles of mitigation: that a plaintiff may not recover damages for losses actually avoided.[57] Where, therefore, a party makes efforts to mitigate their losses and is successful in this regard—including situations where they *benefit* from those efforts—this may be taken into account when calculating damages due.[58]

This rule is limited, however, to those benefits stemming directly from the defendant's breach; it does not apply to benefits that accrue independent of, or collateral to, the breach.[59] This line may be quite difficult to draw, and so notions of reasonableness and public policy must be applied to distinguish benefits arising from attempts to mitigate damages from benefits arising independently of such attempts.[60] An example of where the line can be firmly drawn is in the case of sums collected under an insurance policy.[61] Where a plaintiff is indemnified under a policy of insurance so as to guard against contingencies that may cause loss (such as a breach of contract), any sums paid under the policy will not be taken into account for the purpose of compensating damages payable by the defendant.[62] As the court stated in *Transport Accident Commission v. Sweedman*:

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54. *Id.* at 682–83.
55. *Id.* at 687.
56. *Id.* at 688.
57. *Id.* at 689–90.
58. *Id.*
59. *Id.* at 690–91.
60. Ruthol Pty. Ltd. v. Tricon (Austl.) Pty. Ltd., (2005) NSWCA 443 (Austl.); Hussain v. New Taplow Paper Mills Ltd., [1988] 1 A.C. 514, 528.
61. A line of tort cases firmly establishes this principle. *See, e.g.*, Nat'l Ins. Co. of New Zealand Ltd. v. Espagne, (1961) 105 CLR 569, 571 (Austl.) (reviewing whether plaintiff's access to accident insurance implicates what damages can be recovered by the plaintiff); Bradburn v. Great Western Ry. Co., [1874] LR 10 Exch. 1 (discussing how the plaintiff's insurance implicated the damages that he was able to recover). *See* Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61 (Cal. 1970) (exemplifying an American court endorsing this view and the authorities there cited).
62. *Bradburn*, 10 L.R. Exch. 1 at 2.

> Broadly speaking it may be accepted that benefits like insurance which are paid pursuant to contract are not deductible from the amount of damages recoverable where the intention of the contract is that the beneficiary should have the benefits notwithstanding rights of action which he or she may have against the wrongdoer.[63]

The *British Westinghouse* approach to addressing situations of advantageous breach has been followed in subsequent English decisions.[64] In the recent case of *Globalia Business Travel S.A.U. of Spain v. Fulton Shipping Inc. of Panama*,[65] the appellant purchased a cruise ship that had been chartered to the respondent by the previous owners. By a novation agreement, the appellant assumed the rights and liabilities under the charterparty. The charterparty was extended for two years until October 2007. In June 2007, the parties allegedly reached a verbal agreement to extend the charterparty for a further two years until November 2009. The respondent disputed having made this agreement and maintained the right to redeliver the vessel in October 2007. The appellant treated this as a repudiation and terminated the charterparty. Shortly before the vessel was returned, the appellant agreed to sell it to a third-party for $23,765,000 before initiating arbitration proceedings.[66]

On the evidence, the arbitrator found that the oral agreement of June 2007 was indeed made. The arbitrator also found that the vessel was sold at a time when the market was strong; had it been sold at the expiry of the extended charterparty (in November 2009), the market would have been very weak owing to the global financial crisis of the time. The market value of the vessel in November 2009 would have been approximately seven million U.S. dollars. The arbitrator ordered the appellant to account for this difference in value by way of a discount from the damages it was entitled to under its claim for breach of contract—for the unpaid hire from October 2007 through November 2009. Given that the credit was more than the loss of profit claim, the appellant was to receive no damages. The appellant successfully appealed this ruling at first instance before the British Court of Appeal, which

63. (2004) VSCA 162 (Austl.).
64. *British Westinghouse*, [1912] A.C. at 673.
65. [2017] UKSC 43.
66. *Id.*

found for the respondent. The appellant appealed to the British Supreme Court.[67]

The British Supreme Court found in favor of the appellant. The Court accepted, in line with *British Westinghouse*, that benefits enjoyed by a plaintiff may be brought into account provided the benefits have arisen directly from the defendant's breach of contract.[68] However, in the present case, there was no such causal link between the benefit enjoyed by the appellant—the increased value of the vessel when sold prematurely—and the respondent's repudiatory breach of the charterparty. Lord Clarke, with whom the other members of the court agreed, stated:

> On the facts here the fall in value of the vessel was in my opinion irrelevant because the owners' interest in the capital value of the vessel had nothing to do with the interest injured by the charterers' repudiation of the charterparty. . . . The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation.[69]

Lord Clarke went on to explain that the difference in the vessel's market value was not *caused* by the respondent's breach of the charterparty, as opposed to the prospective loss of income from October 2007 through November 2009, which was.[70] The respondent's breach did not make it necessary to sell the vessel at any particular time or at all, and it may well have been sold during the term of the charterparty. Lord Clarke additionally noted:

> If the owners decide to sell the vessel, whether before or after termination of the charterparty, they are making a commercial decision at their own risk about the disposal of an interest in the vessel which was no part of the subject matter of the charterparty and had nothing to do with the charterers.[71]

The premature termination of the charterparty was the *occasion* for selling the vessel; it was not the *legal cause* of it.[72] As such, the appellant was not required to bring into account the

67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 33.

benefit gained by the increase in the vessel's market value at the time of sale.

The *British Westinghouse* approach also appears to have found favor with the Australian courts.[73] *Cardno BSD Proprietary Ltd. v. Water Corp. (No. 2)*[74] is a useful example. There, the respondent water corporation engaged the appellant in late 2002 as a design engineer for a large public infrastructure project involving installation of sewage pipes. The appellant negligently recommended the installation of Class 2 pipes, which were defective and had to be replaced by 2006, thereby violating the contract. The respondent sued for the costs associated with replacement of the pipes. The appellant contended that the respondent had received a benefit that should offset the losses claimed; the latter had managed to refurbish and reuse the defective Class 2 pipes for other projects several years later (at which point the market price of Class 2 pipes was higher). The court held that the water corporation's efforts to mitigate its damage resulted in a net benefit "in not having to buy new Class 2 pipes in 2006 at the 2006 market price, less the costs of the refurbishment work at 2006 cost levels."[75] As such, the extent to which its losses were lessened was deducted from the damages claimed.

In essence, the ordinary principles governing compensation under the English and Australian law of contract make clear that a plaintiff cannot recover more than he or she has lost, and are not to be placed in a superior position through an award of damages.[76] Where a plaintiff effectively profits from a contractual breach, any benefits enjoyed as a direct—and not merely collateral—consequence of the breach are accounted for through the doctrine

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73. *See, e.g.*, Hi-Fert Pty. Ltd. v. Kiukiang Maritime Carriers Inc., (2000) FCA 660 (Austl.) (finding that benefits conferred by a non-breaching fertilizer carrier from purchasing replacement fertilizer were to be considered when calculating total damages suffered by the carrier); Cardno BSD Pty. Ltd. v. Water Corporation, (No. 2), (2011) WASCA 161 (Austl.) (reducing damages awarded to a water corporation after it purchased superior pipes due to a design engineer's breach); Thomas v. Powercor Australia Ltd., (2011) VSC 586 (Austl.) (allowing a plaintiff to recover the full cost of a new, slightly superior shed after the original was destroyed by defendant's negligence).

74. (2011) WASCA 161 (Austl.).

75. *Id.*

76. Commonwealth v. Amann Aviation Pty. Ltd., (1991) 174 CLR 64 (Austl.); Andersen & Anor v. State of S. Australia & ORS, (2010) SASCFC 20 (Austl.); Parry v. Cleaver, [1969] UKHL 2.

of mitigation; the benefits are construed as avoided losses and therefore offset against the losses alleged by the plaintiff.[77]

The American courts appear to apply a similar logic to cases of advantageous breach. As Corbin writes: "A breach of contract may prevent a loss as well as cause one. In so far as it prevents loss, the amount will be credited in favor of the wrongdoer."[78] This statement synthesizes the approach of the U.S. courts in determining how to appropriately compensate a plaintiff in situations where they benefited from the defendant's contractual breach. In *Tony Thornton Auction Service, Inc. v. Quintis*,[79] for example, the increased profits enjoyed by the vendors from the sale of a property were deducted from the damages they claimed from the company engaged to auction the property. The auctioneer, as an agent of the vendors, breached the contract by failing to present the highest bid at auction, and the property was subsequently undersold privately by fifty thousand dollars.[80] However, given the agent was to receive six percent commission on the sale at auction, and that the contract permitted the company to advertise and sell the property on the market if it did not sell at auction (which would have attracted additional costs), the plaintiffs had actually benefited significantly from the breach with the effect that their damages were reduced to zero.[81]

A more recent example comes from *C&O Motors, Inc. v. General Motors Corp*.[82] In 2000, General Motors entered into a contract with C&O to supply the latter with Oldsmobile vehicles for a period of five years.[83] Weeks later, however, General Motors announced its decision to phase out production of its Oldsmobile vehicle line.[84] When C&O was informed of this decision, it acquired the rights to a Nissan dealership to mitigate the anticipated loss of Oldsmobile sales before commencing legal action against General Motors.[85] C&O sought to recover a variety of damages totaling approximately $3.49 million, including the costs incurred in purchasing the Nissan dealership, the cost of renovating the

77. British Westinghouse Elec. & Mfg. Co. v. Underground Elec. Rys. Co. of London, [1912] A.C 673, 690.
78. CORBIN, *supra* note 30, § 57.10, at 294.
79. 760 S.W.2d 202, 207 (Mo. Ct. App. 1988).
80. *Id.* at 203.
81. *Id.* at 207.
82. 323 F. App'x 193 (4th Cir. 2009).
83. *Id.* at 195.
84. *Id.*
85. *Id.* at 195–96.

dealership's facilities, and lost profits from the decline in Oldsmobile sales during the term of the contract.[86] General Motors refuted C&O's damages claim on the basis that it had actually benefited from the breach of the agreement; its Nissan franchise was so successful and appreciated sufficiently in value so as to offset all of the losses claimed.[87]

The Fourth Circuit Court of Appeals cited Section 347 of the Restatement (Second) of Contracts,[88] which reads:

> Measure of Damages in General
>
> Subject to the limitations stated in §§ 350–53, the injured party has a right to damages based on his expectation interest as measured by (a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach[sic], less (c) any cost or other loss that he has avoided by not having to perform.[89]

Specifically, the court made mention of comment (d) to this provision: "If the injured party avoids further loss by making substitute arrangements for the use of his resources that are no longer needed to perform the contract, the net profit from such arrangements is . . . subtracted [from the injured party's damage award]."[90]

The court applied these compensatory principles to the facts and noted that C&O had suffered no economic loss and therefore no legally cognizable damage as a result of General Motors' alleged breach of contract.[91] Its Nissan dealership had appreciated in value to around five million dollars by 2006.[92] This sum did not take into account the company's profits from the sale of at least two

86. *Id.* at 198.

87. *Id.*

88. *Id.* The *Restatement* is merely a statement of law and has no binding force, however it has frequently been cited with judicial approval and regarded as authoritative by the vast majority of jurisdictions within the United States. *See* Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 513 (1998) (concluding that, in almost every case that addressed one of the six Restatement sections studied, courts regularly adopted new rules derived from the Restatement).

89. RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

90. *C&O Motors, Inc.*, 323 F. App'x at 198 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 347).

91. *Id.*

92. *Id.*

thousand Nissan vehicles between 2002 and 2005. As such, the court held: "the Nissan dealership's increase in value has more than compensated C&O for all of its 'mitigation damages' and lost profits. Because there is no loss, C&O's breach of contract claim must therefore fail."[93]

The goal of placing the plaintiff in as good a position as they would have been in had the contract been correctly performed, and the corollary to this goal that the plaintiff will not be placed in a *better* position, is also reflected in Section 1-305(a) of the Uniform Commercial Code (UCC).[94] This provision reads:

> Remedies to be Liberally Administered
>
> (a) The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law.[95]

As such, it appears that there is harmony between Australian and U.S. contract law with respect to the fundamental principles underlying the award of compensatory damages for breach of contract, including cases where a plaintiff has *benefited* from such breaches.[96]

V. RE-EXAMINING THE CURIOUS CASE OF MCDONALD'S MILKSHAKES

With an understanding of the remedial consequences for a plaintiff who benefits from a defendant's breach of contract (an advantageous breach), we now return to the McDonald's franchising saga to examine the curious situation that arose there. You will recall that Kroc violated the terms of his franchise agreement with owners Dick and Mac by authorizing the use of

93. *Id.*
94. U.C.C. § 1-305 (2018).
95. *Id.* (brackets in original).
96. There are, however, some apparent differences with respect to situations where a plaintiff has been prevented from mitigating their losses. It may be more accurate to say that the American courts have directly considered and generated principles regarding such situations before. *See infra* pt. V (analyzing the breach between Ray and the McDonald's brothers and the cases for damages from that breach).

powdered milkshake mixture in all McDonald's stores bar theirs.[97] The brothers threatened litigation, but it never eventuated.[98] Assuming that it had, and that the brothers brought a claim for breach of contract and claimed damages for the losses they incurred from Kroc's violation, how would they have been compensated?

The first and most interesting observation to be made is that, ostensibly, Dick and Mac did not suffer any tangible losses as a consequence of Kroc's breach.[99] Conversely, they enjoyed a significant *benefit* by way of reduced costs; not having to refrigerate voluminous quantities of ice cream in each McDonald's outlet meant the overall profits enjoyed by the company were amplified.[100] Whilst Kroc's behavior—i.e., intentional defiance of Dick and Mac, McDonald's traditions, and the franchise agreement—was reprehensible, it helped rather than hindered. From a contract law perspective, there was no injury to their reliance or restitution interests.[101] There may, however, have been injury to their expectation interest on two fronts.

First, the company *may* have suffered lost profits if, for example, word of Kroc's artificial powdered milkshakes reached the market and patrons were put off by this new practice.[102] If patronage declined due to customer dissatisfaction with one of McDonald's most popular products, this would translate to a financial loss that would be compensable by way of expectation damages. There was, however, no evidence of negative public opinion or a downturn in sales in *The Founder*, and so this is mere speculation.[103]

Second, there is another form of damages which, as alluded to earlier, is perhaps best understood as compensating for injury to one's expectation interest: damages for disappointment and distress following a contract breach. It is an established principle

97. THE FOUNDER, *supra* note 3.
98. *Id.*
99. *Id.*
100. *Id.*
101. RESTATEMENT (SECOND) OF CONTRACTS § 349 (AM. LAW INST. 1981); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 (AM. LAW INST. 2011).
102. THE FOUNDER, *supra* note 3.
103. This is unsurprising given that the powdered milkshakes were reportedly close to identical in taste, consistency, and appearance. *Id.*

under both Australian[104] and U.S.[105] contract law that a plaintiff may, subject to some limitations, recover damages for any physical and psychological injuries incurred as a consequence of the breach. One such limitation is that the general disappointment, which naturally attends the breach of any contractual agreement, is *not* compensable.[106] In both jurisdictions, however, disappointment and distress stemming from a contract breach may be compensated upon two different but related bases.[107]

In Australia, damages may be awarded where an express or implied object of the contract was to provide relaxation, enjoyment, or freedom from distress.[108] Such contracts include those, the object of which is "to provide a service or facility conducive to peace of mind, tranquillity of environment or ease of living."[109] In the U.S., damages may be awarded where the contract affects the plaintiff's "interests of personality," which ordinarily requires an evaluation of the nature of the contract and an assessment as to whether it was intended to gratify a non-pecuniary interest.[110] As stated in *Westervelt v. McCullough*:

> Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject-matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach.[111]

In both jurisdictions, contracts for the provision of recreational services or enjoyable activities (such as vacations) or for emotional

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104. Baltic Shipping Co. v. Dillon, (1993) 176 CLR 344 (Austl.); Boncristiano v. Lohmann (1998) 4 VR 82 (Austl.); Willshee v. Westcourt Ltd., (2009) WASCA 87 (Austl.); Jarvis v. Swan Tours Ltd., [1973] Q.B. 233.

105. Goldstein v. United Lift Serv. Co., No. 09-826, 2010 WL 4236932, at *7 (E.D. Pa. Oct. 25, 2010); Sexton v. St. Clair Fed. Savs. Bank, 653 So. 2d 959, 960 (Ala. 1995); Coffey v. Northwestern Hospital Ass'n., 189 P. 407, 409 (Or. 1920).

106. McClain v. Faraone, 369 A.2d 1090, 1094 (Del. Super. Ct. 1977); Behm v. Cross, No. 252711, No. 253844, 2005 WL 1685102, at *6–7 (Mich. Ct. App. July 19, 2005); Ramsey v. Annesley College, [2013] SASC 72 (Austl.); Burazin v. Blacktown City Guardian Pty. Ltd., (1996) 142 ALR 144 (Austl.); Hamlin v. Great Northern Railway Co., [1856] 156 ER 1261; RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

107. *See generally* Heath v. Brandon Homes, Inc., 825 So. 2d 1262 (LA. App. 2002); *Baltic Shipping Co*., 176 CLR 344; RESTATEMENT (SECOND) OF CONTRACTS § 353.

108. *Baltic Shipping Co.*, 176 CLR 344.

109. *Id.*

110. *Heath*, 825 So. 2d at 1269; RESTATEMENT (SECOND) OF CONTRACTS § 353.

111. 228 P. 734, 738 (Cal. 2d Dist. Ct. App. 1924).

or reputational matters (such as provision of funeral services or admission to public events or transport) are the kinds which are typically involved in cases where a plaintiff seeks damages for disappointment and distress following breach.[112] In each of these cases, it is foreseeable that breach is highly likely to cause some form of serious emotional disturbance.[113] The court in *Sexton v. St. Clair Federal Savings Bank* explained:

> [W]here the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefor[e] be taken into consideration and awarded.[114]

It is obvious from the conversations that transpired between Dick and Mac following Kroc's breach of the franchise agreement that they were deeply distressed and disappointed by this behavior given that it resulted in changes to their traditional food preparation methods (which they prided themselves on).[115] As such, it is plausible that they could have claimed damages to compensate for the same in light of Kroc's breach. A potential obstacle here, however, is the *nature* of the contract involved: it was a franchise agreement and clearly was not designed to safeguard the plaintiffs' emotional well-being or provide them with "enjoyment" in the traditional sense. The fundamental object of the contract was commercial gain. Ordinary commercial agreements are unlikely to satisfy the legal threshold and warrant an award of damages when they are breached.[116] Dick and Mac would have a weak case here.

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112. Coffey v. Northwestern Hospital Ass'n., 189 P. 407, 409 (Or. 1920); Jarvis v. Swans Tours Ltd., [1973] Q.B. 233.

113. Charlotte K. Goldberg, *Emotional Distress Damages & Breach of Contract: A New Approach*, 20 U.C. DAVIS L. REV. 57, 60 (1986).

114. 653 So. 2d 959, 960 (Ala. 1995).

115. THE FOUNDER, *supra* note 3.

116. *See* Alday v. Raytheon Co., 619 F. Supp. 2d 726 (D. Ariz. 2008), *aff'd*, 693 F.3d 772, 779 (9th Cir. 2012) (explaining how, ordinarily, damages are not permitted due to a breach of a collective bargaining agreement); In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litig., 517 F. Supp. 2d 832, 840–41 (E.D. La. 2007) (discussing the grading software service contract at issue and how punitive damages and emotional distress were unavailable); Musumeci v. Winadell Pty. Ltd., (1994) 34 NSWLR 723 (Austl.) (discussing how damages were unavailable for breach of the commercial lease at issue); Falko v. James McEwan & Co. Pty. Ltd., (1977) VR 447 (Austl.) (explaining how,

The brothers might, however, have found joy pursuing expectation damages of a slightly different kind. Earlier it was stated that damages can be recovered for physical injuries caused through a breach of contract.[117] As one scene from *The Founder* depicts, and as did occur in real life, Mac suffered diabetic complications whilst on the phone arguing with Kroc.[118] This argument arose after Kroc incorporated the franchising arm of the McDonald's chain, over which he had control, as his own business. Previously, it was known as Franchise Realty Corporation, however, Kroc later rebranded the company as "The McDonald's Corporation."[119] He sent Dick and Mac a letter featuring the corporate logo of the new corporation in its letterhead, explaining that the previous company name was confusing in that "no one knew it had anything to do with McDonald's."[120] The brothers were once again dismayed at the fact that their family name had been used without their permission to head Kroc's franchising business. After a blunt soliloquy regarding the competitive nature of business and Kroc's desire to maintain his relentless takeover of the McDonald's brand, Mac collapsed to the floor and was rushed to the hospital.[121] A pertinent question is whether Mac could have pursued Kroc for damages for the physical injury he suffered upon Kroc's breach.

Australian case law makes clear that a plaintiff may recover damages for the pain and suffering attending any physical injury caused by a defendant's breach of contract.[122] For example, in *Baltic Shipping Co. v. Dillon*,[123] the plaintiff was awarded damages for the physical injuries she incurred when the cruise ship, owned by the defendant's company, struck a rock and sank on the tenth day of a fourteen-day cruise in the South Pacific.[124] Similarly, in

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in the commercial contract at issue, the plaintiff was not entitled to amount of damages originally awarded).

117. Westervelt v. McCullough, 228 P. 734, 738 (Cal. 2d Dist. Ct. App. 1924).

118. THE FOUNDER, *supra* note 3.

119. *Id.*

120. *Id.*

121. *Id.*

122. In addition to the forthcoming examples, see Woolworths Ltd. v. Crotty, (1942) 66 CLR 603 (Austl.) (holding that a breach of contract can be used as a remedial measure for pain and suffering when a party fails to perform a contractual duty); Cullen v. Trappell (1980) 146 CLR 1 (Austl.).

123. (1993) 176 CLR 344 (Austl.).

124. *Id.* The plaintiff was also awarded damages for the *psychological* injuries (i.e. distress and disappointment) she experienced as a consequence of the defendant's breach.

Grant v. Australian Knitting Mills Ltd.,[125] the plaintiff successfully claimed damages for an allergic reaction to woolen underwear purchased from the defendant and caused by residual chemicals in the fabric. In both cases, the plaintiff had a contractual arrangement with the defendant—by way of cruise ticket in *Baltic Shipping*[126] and sale agreement in *Grant*.[127]

Contract law in the U.S. similarly recognizes that damages may be recovered for physical injuries deriving from a contractual breach.[128] As Corbin notes, legal "injury" in this context extends to *physical* as well as economic losses.[129] Most U.S. cases in which a breach of contract results in physical injury appear to be resolved through the law of tort.[130] Needless to say, "[a]n act that constitutes a breach of contract may also be tortious,"[131] particularly where physical injury occasioned through a defendant's negligence or other civilly proscribed conduct is the "loss" in question. In other cases, contract law has determined the damages payable, and the guiding question, is merely whether the damage which occurred was ultimately within the bounds of foreseeability and therefore not too remote.[132]

An early example comes from *Coffey v. Northwestern Hospital Ass'n*,[133] where the plaintiff successfully claimed damages from the defendant hospital when it wrongly refused to treat her following an erroneous interpretation of its health insurance policy. In *Sullivan v. O'Connor*,[134] the plaintiff was entitled to damages from the defendant plastic surgeon following a botched operation which was meant to improve her appearance but instead left her disfigured. Again, in each case, the parties were in a contractual

125. Grant v. Australian Knitting Mills Ltd., (1935) UKPC 62 (Austl.).

126. *Baltic Shipping Co.*, 176 CLR 344.

127. (1935) UKPC 62.

128. *See* CORBIN, *supra* note 30, § 55.12, at 43–44 (discussing the different meaning of "injury" as it relates to contractual breaches).

129. *See id.* § 55.12, at 42–44 (discussing distinctions made between Latin phrases encompassing types of injury); *see also* Fuentes v. Perez, 66 Cal. App. 3d 163, 168 (Cal. 1st Dist. Ct. App. 1977) (stating that damages from physical injuries that proximately result from a contractor's tortious conduct can be recovered).

130. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (explaining that a plaintiff may recover from a disturbance that is accompanied by a physical bodily injury). For a discussion of the rationale underpinning this trend, see Serwe v. N. Pac. Ry. Co., 50 N.W. 1021, 1022 (Minn. 1892) (discussing how cases that are caused or "founded on contract" result in "an action for tort founded on contract").

131. Acadia, California Ltd. v. Herbert, 353 P.2d 294, 299 (Cal. 1960).

132. *See infra* note 144. Remoteness will be discussed later in the article.

133. 189 P. 407, 409 (Or. 1920).

134. 296 N.E.2d 183, 184 (Mass. 1973).

relationship; a health insurance policy bound the parties in *Coffey*,[135] whereas a contract for the provision of surgical services was the focus of *Sullivan*.[136]

The case law would, in principle at least, support Mac's claim for the physical injury he suffered (diabetic attack) in response to Kroc's breach of the franchise agreement. There is, however, another critical aspect of damages claims for contractual breaches: causation and the concomitant principle of remoteness. Contract law in both Australia and the U.S. requires the plaintiff to establish a causal connection between the defendant's breach and the loss for which compensation is sought.[137]

The Australian jurisprudence demonstrates a balanced approach by asking whether the plaintiff's loss would have been incurred "but for" the defendant's breach and tempering this assessment through the application of common sense to the facts.[138] Causation is ultimately a question of fact; "[a]ll that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm."[139] American case law identifies a need to demonstrate "proximate causation" in the sense that the plaintiff's loss must stem directly, and cannot be too remote, from the defendant's conduct.[140] This conduct must be an active and procuring cause in view of the existing circumstances and conditions.[141] There is thus a conceptual overlap between the Australian and American approaches in that both ultimately seek to determine, through a factual assessment framed

135. 189 P. at 409.

136. 296 N.E.2d at 184.

137. Hunt & Hunt Lawyers v. Mitchell Morgan Nominees Pty. Ltd., (2013) 296 ALR 3 (Austl.); WILLISTON, *supra* note 2, § 64:12.

138. *See*, *e.g.*, *Hunt Lawyers*, 296 ALR 3 (discussing the importance of assessing causation for the purposes of determining damages); March v. Stramare (E. & M.H.) Pty. Ltd., (1991) 171 CLR 506 (Austl.) (explaining how causation is determined in each case by assessing the facts and applying common sense); Alexander v. Cambridge Credit Corp. Ltd. (1987) 9 NSWLR 310 (Austl.) (explaining how common-sense principles are to be utilized in determining cause).

139. Tabet v. Gett, (2010) 240 CLR 537, 578 (Austl.).

140. *See*, *e.g.*, Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank, 392 F.3d 520 (2d Cir. 2004) (discussing how proximate cause in the case at hand was at issue); Crowley Am. Transp., Inc. v. Richard Sewing Mach. Co., 172 F.3d 781 (11th Cir. 1999) (explaining the need to prove proximate causation in order to be awarded damages); Wakeman v. Wheeler & Wilson Mfg. Co., 4 N.E. 264 (N.Y. 1886) (discussing how the party that violates a contract is to be held liable for even damages that were proximately caused).

141. Freeman v. Mercantile Mut. Accident Ass'n, 30 N.E. 1013 (Mass. 1892).

by normative judgment, whether the defendant can be said to have legally caused the plaintiff's loss.

It would seem on either an Australian or an American analysis of Mac's situation that his diabetic attack can be said to have been "caused" by Kroc's verbal tirade over the phone. It was during this phone call that Kroc revealed his considerable breach of the franchise agreement and his plan to continue on his defiant path, at which point Mac's shock overcame him and he collapsed.[142] The stress of this incident could have triggered the release of hormones such as cortisol into Mac's bloodstream, thereby increasing the amount of sugar in his blood and conceivably resulting in a diabetic attack. From a medical perspective, this scenario is quite unlikely.[143] In any event, Kroc's salvation may lie in the related principle of contract law known as *remoteness*.[144] In order for a plaintiff to attain compensation for loss caused by a defendant, it must be demonstrated that the loss was within the bounds of the parties' foreseeability at the time the contract was entered into.[145] That is, the losses claimed cannot be too remote. The concept of remoteness in contract law was best explained in *Hadley v. Baxendale*:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[146]

Being a time-honored English precedent, this formulation has found favor with the Australian superior courts.[147] It is also the

142. THE FOUNDER, *supra* note 3.

143. Though there might be a stronger case to argue that the blood pressure complications were brought about by a stressful incident; but again this is tenuous and would require firm medical evidence.

144. E.H. Schopler, Annotation, *Conflict of Laws as to Elements & Measure of Damages Recoverable for Breach of Contract*, 50 A.L.R.2D 227, § 2(a) (Westlaw through August 19, 2018).

145. Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

146. *Id*.

147. *See, e.g.*, Clark v. Macourt, (2013) 304 ALR 220 (Austl.) (explaining how the plaintiff is responsible for proving genuine and reasonable damages); European Bank Ltd. v. Evans of Robb Evans & Assoc., (2010) 240 CLR 432 (Austl.) (discussing remoteness and how it concerns limiting damages to which the plaintiff is entitled to receive); Commonwealth v.

accepted analysis under American law as reflected in a number of U.S. cases,[148] texts,[149] and Section 351 of the Restatement (Second) of Contracts.[150]

The principle can be seen as having two "limbs": (1) losses occurring in the ordinary course of things, where losses are reasonably foreseeable as a result of the breach of the contractual obligation (direct losses); and (2) losses occurring as a result of special circumstances known to the parties at the time of contracting (consequential losses).[151] Case law in both Australia and the U.S. frequently describes the *Hadley* principle in these terms.[152]

It may be quite problematic for Mac to argue that his diabetic attack satisfies either limb of *Hadley*[153] and was thus a foreseeable consequence of Kroc's breach of the franchising agreement. As to the first limb, the balance of Australian authority stipulates the critical inquiry as being whether the plaintiff's loss was "not unlikely to result" and was therefore a sufficiently natural and

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Amann Aviation Pty. Ltd., (1991) 174 CLR 64 (Austl.) (discussing how the damages that plaintiff receives must be reasonable relative to loss incurred); Gwam Invs. Pty. Ltd. v. Outback Health Screenings Pty. Ltd., (2010) 106 SASC 37 (Austl.) (discussing the test of determining what damages naturally came from the breach in order to determine damages owed to the plaintiff); Grencol Pty. Ltd. v. Viscount Agric. Dev. Pty. Ltd., (2004) VSC 204 (Austl.) (explaining how remoteness is closely related to being reasonably foreseeable); Zylva v. Hill, (2009) NSWCA 435 (Austl.) (explaining that loss that is not a result of the breach is considered "remote").

148. *See*, *e.g.*, Primrose v. W. Union Tel. Co., 154 U.S. 1, 31–32 (1894) (discussing how damages must have been reasonably considered); Howard v. Stillwell & Bierce Mfg. Co., 139 U.S. 199, 208 (1891) (describing remote losses to also be speculative); Gulf States Creosoting Co. v. Loving, 120 F.2d 195, 201 (4th Cir. 1941) (discussing how damages that are not remote are reasonably foreseeable); Hoover Inv., Inc. v. City of Charlotte, No. 1:04-CV-689, 2006 WL 1008650, at *2 (W.D. Mich. Apr. 18, 2006) (discussing how damages that are awarded are usually foreseeable during contract formation); Aprile v. Men of Invention LLC, No. 652726/13, 2016 WL 318519, at *2 (N.Y. App. Div. June 8, 2016) (quoting Brody Truck Rental, Inc. v. Country Wide Ins. Co., 277 A.D.2d 125–26 (N.Y. App. Div. 2000)) (explaining how even additional damages sought must be reasonably foreseeable).

149. *See*, *e.g.*, LARRY DIMATTEO ET AL.,COMMERICAL CONTRACT LAW: TRANSATLANTIC PERSPECTIVES 4 (Larry DiMatteo, Qi Zhou, Séverine Saintier, & Keith Rowley eds., 2013) (discussing how the United States Supreme Court recognized the principles of the "*Hadley* rule"); GREGORY KLASS, CONTRACT LAW IN THE USA 219 (2010); QI ZHOU & LARRY A. DIMATTEO, COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES 347 (Larry A. DiMatteo & Martin Hogg eds., 2016) (explaining that the "*Hadley* rule" states that damages that are unforeseeable are not to be recovered).

150. Refer specifically to § 351(2), which reads: "Loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know."

151. RESTATEMENT (SECOND) OF CONTRACTS § 351 (AM. LAW. INST. 1981).

152. *See supra* note 149 and accompanying text.

153. Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

probable outcome of the defendant's actions.[154] American authorities are harmonious in this regard.[155] It is very difficult, on an impartial objective assessment, to regard Mac's diabetic attack as a natural or direct consequence of Kroc's breach. A severe physiological response to a breach of a commercial lease hardly strikes as a loss the kind of which could reasonably be regarded as "ordinary" in the circumstances.

The second limb of *Hadley*[156] is unlikely to avail Mac either. This limb is premised not upon the *direct* losses stemming from the defendant's breach of contract but upon the *consequential* losses.[157] Whereas direct losses can clearly be regarded as those expected to flow from the breach, consequential losses are those which, though unnatural or unexpected, were nonetheless within the contemplation of the parties at the time the contract was entered into. As explained in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*:

> [W]here knowledge of special circumstances is relied on as enhancing the damage recoverable that knowledge must have been brought home to the defendant at the time of the contract and in such circumstances that the defendant impliedly undertook to bear any special loss referable to a breach in those special circumstances.[158]

As such, whether a consequential loss is compensable depends entirely upon whether or not the defendant can be said to have

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154. *See*, *e.g.*, Flamingo Park Pty. Ltd. v. Dolly Dolly Creation Pty. Ltd., (1986) 65 ALR 500, 524 (Austl.) (noting that a loss of sales likely would have been within a natural outcome of a breach); Commonwealth v. Amann Aviation Pty. Ltd., (1991) 174 CLR 64 (Austl.) (citing Reg. Glass Pty. Ltd. v. Rivers Locking Systems Pty. Ltd., (1968) 120 CLR 516, 523 (Austl.)) (explaining that loss or damage resulting from breach is recoverable only if reasonably foreseeable); National Australia Bank Ltd. v. Nemur Varity Pty. Ltd., (2002) 4 VR 252, 270 (Austl.) (explaining that damages are likely too remote to recover if they do not arise naturally).

155. *See*, *e.g.*, Jab Energy Solutions II, L.L.C. v. Servicio Marina Superior, L.L.C., 640 F. App'x 373, 378 (5th Cir. 2016) (exemplifying that the damages awarded flow directly from a ship being unable to perform); Max-Plank-Gesellschaft Zur Forderung Der Wissenchaften E.V. v. Whitehead Inst. for Biomedical Research, No. 09-11116-PBS, 2010 WL 2900340, at *8 (D. Mass. July 26, 2010) (damages flow according to common understanding as to the natural consequences of a breach); Boylston Hous. Corp. v. O'Toole, 74 N.E.2d 288, 302 (Mass. 1947) (quoting Buchholz v. Green Bros. Co., 172 N.E. 101, 103 (Mass. 1930)) (explaining that damages must not be unforeseeable, but flow from the breach); Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 816 (Tex. 1997) (reiterating that direct damages flow naturally from a breach).

156. 156 Eng. Rep. 145 (1854).

157. *Id.*

158. [1949] 2 KB 528, 538.

foreseen and thereby impliedly assumed the risk of the loss occurring.[159] Put simply, the special circumstances underpinning the loss must have been contemplated when the parties first entered into the agreement. This is the position under contract law in both Australia[160] and the U.S.[161] There is no evidence in *The Founder*, or indeed from extraneous sources, that Kroc had any knowledge of Mac's medical condition until *after* his collapse and subsequent hospitalization.[162] When the parties signed the contract permitting Kroc to establish McDonald's franchises, Kroc was none the wiser. Mac's reaction was both medically rare and objectively unexpected. As such, it is unlikely that Mac would have been successful in his attempt to claim damages for the physical damage he incurred following Kroc's breach of contract.

Perhaps another legitimate claim for Dick and Mac would have been loss of reputation caused by Kroc's breach. This presupposes that word of his use of artificial powdered milkshakes reached the marketplace and negatively affected the company's reputation in the eyes of patrons.[163] However, the brothers may encounter difficulty under the law. The traditional position at common law has generally been that loss of business reputation is not typically recognized as a ground upon which damages may be

159. *Id.*

160. *See*, *e.g.*, McRae v. Commonwealth Disposals Comm'n, (1951) 84 CLR 377, 405 (Austl.) (noting an obligation to pay only as represented at the time of making the contract); Carpenter v. McGrath, (1996) 40 NSWLR 39, 58, 60 (Austl.) (explaining that, for damages to be awarded, this loss must have been contemplated by the parties); Castle Constrs. Pty. Ltd. v. Fekala Pty. Ltd., (2006) 65 NSWLR 648 (Austl.) (explaining loss must be foreseeable or contemplated by parties as a result of a breach).

161. *See*, *e.g.*, LaSalle Talman Bank, F.S.B. v. United States, 64 Fed. Cl. 90, 98 (Fed. Cl. 2005) (quoting Energy Capital Corp. v. United States, 302 F.3d 1314, 1325 (Fed. Cir. 2002)) (explaining that a loss of profits caused by a breach was within contemplation of the parties because either the loss is foreseeable or the breaching party had knowledge of special circumstances at time of contracting); Basic Capital Mgmt., Inc. v. Dynex Commercial, 348 S.W.3d 894, 901–02 (Tex. 2011) (citing Stuart v. Bayless, 964 S.W.2d 920, 921 (Tex. 1998)) (explaining that damages are not recoverable unless contemplated by the parties at the time of contracting or that such damages are a probable result of a breach); Sabraw v. Kaplan, 211 Cal. App. 2d 224, 227 (Cal. 1st Dist. Ct. App. 1962) (noting that recovery of special damages hinges upon whether these damages are foreseeable or contemplated at the time of making a contract); Christensen v. Slawter, 343 P.2d 341, 346 (Cal. 1st Dist. Ct. App. 1959) (expounding that recoverable damages, as a result of a breach, must have been within contemplation of the parties when contracting).

162. THE FOUNDER, *supra* note 3.

163. As mentioned earlier, there is no evidence of this occurring in the story as recounted in *The Founder*. However, for the purposes of examining this head of damages, the assumption must be made.

claimed in an action for breach of contract.[164] However, in limited instances, the courts have permitted recovery for injury to business reputation.[165]

A number of Australian cases are instructive. The plaintiff designer in *Flamingo Park Proprietary Ltd. v. Dolly Dolly Creation Proprietary Ltd.*[166] successfully claimed damages for injury to its business reputation following the defendant's unauthorized use of its fabric design in violation of an exclusivity provision. Similarly, the plaintiff in *Walker v. Citigroup Global Markets Australia Proprietary Ltd.*[167] was awarded one hundred thousand dollars in damages following his dismissal from his position as a resource analyst with the defendant. The employer's repudiation of the employment contract had greatly sullied the plaintiff's professional reputation. One final example comes from *Mothership Music Proprietary Ltd. v. Darren Ayre and Flo Rida (No. 2)*,[168] where an event management company was able to recover damages from American rap artist Flo Rida and his agent Darren Ayre when the former failed to perform at an Australian music festival arranged by the company. The "no show" by Flo Rida was said to have "damage[ed] the trading reputation of the plaintiff, impacting its ability to stage future events, attract patrons and compete with rivals in the music event industry."[169]

There are American cases demonstrating a similar approach. In *Weaver v. Bank of America*,[170] for example, the bank's error in dishonoring the plaintiff's check and her subsequent arrest were deemed to have damaged her reputation and entitled her to damages. Similarly, in *Redgrave v. Boston Symphony Orchestra*,[171] the appellant actress successfully recovered twelve thousand

164. *See, e.g.*, Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 892 (1st Cir. 1988) (citing McCone v. New England Tel. & Tel. Co., 471 N.E.2d 47, 50 (Mass. 1984)) (noting that state law does not permit one to recover for harm to reputation); Wells v. Stone City Bank, 691 N.E.2d 1246, 1249 (Ind. Ct. App. 1998) (citing Greives v. Greenwood, 550 N.E.2d 334, 338 (Ind. Ct. App. 1990)) (noting that damages for loss of reputation are not available in contractual suits); Fink v. Fink, (1946) 74 CLR 127, 144 (Austl.) (explaining that loss of esteem of friends is not recoverable as damages). This is likely due to the fact that loss of business reputation will invariably translate to lost profits, which are more easily quantified and more simply categorized as expectation losses.

165. Flamingo Park Pty. Ltd. v. Dolly Dolly Creation Pty. Ltd., (1986) 65 ALR 500 (Austl.).

166. *Id.*

167. (2006) FCAFC 101.

168. (2012) NSWDC 111.

169. *Id.*

170. 380 P.2d 644, 651 (Cal. 1963).

171. 855 F.2d 888, 890–91 (1st Cir. 1988).

dollars in damages from the defendant company after it cancelled a concert at which she was due to perform. The appellant argued that the indignity of the termination damaged her professional reputation and resulted in a loss of future professional opportunities.[172]

In each of these cases, again, the threshold question is one of remoteness, i.e., whether the injury that occurred to the plaintiff was foreseeable as an ordinary and natural consequence of the defendant's breach or was within the parties' contemplation at the time they formed the contract. Whether or not Dick or Mac could successfully obtain damages for breach of contract ultimately depends first on evidence of such harm subsisting and, subsequently, whether it can fall under either limb in *Hadley*.[173] There would be a good case to argue that McDonald's would lose the support of many of its patrons if it was found to be using artificial products to make its milkshakes and therefore fall within the first limb. The fact that Dick and Mac impressed upon Kroc the importance of their family business reputation and the need to strictly adhere to their instructions and procedures would also arguably bring subsequent reputational damage caused by Kroc's deviation within the ambit of the second limb.

A final comment to make is that, should the brothers have succeeded in claiming damages (under any head) from Kroc for his indiscretions, exemplary damages, i.e., damages aimed at punishing the defendant for their wrongdoing, would not be awarded. The reason for this is because contract damages are entirely compensatory and premised upon returning the plaintiff to their pre-injury position.[174] As stated in *Butler v. Fairclough*:

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172. *Id.* at 893–94.

173. 156 Eng. Rep. 145 (1854).

174. *See, e.g.*, Adams v. Lindblad Travel Inc., 730 F.2d 89 (2d Cir. 1984) (referring to a long settled rule of contract damages being set to put the plaintiff in the position they would have been had the contract been fulfilled); Laurin v. DeCarolis Constr. Co., 363 N.E.2d 675 (Mass. 1977) (stating that contract damages are geared towards restoration of an injured plaintiff to the position they would have been in had the contract been performed); State v. Ernst & Young LLP, 902 A.2d 338 (N.J. Super. Ct. App. Div. 2006) (describing compensatory damages as designed to place an injured party in the position the party would have been in were the contract performed as promised); Commonwealth v. Amann Aviation Pty. Ltd., (1991) 174 CLR 64 (Austl.) (describing Australian precedent stating that compensatory damages are assessed so that the injured party receives damages sufficient to put that party in the place it would have been in had the contract been performed); Tabcorp Holdings Ltd v. Bowen Investments Pty. Ltd., (2009) 236 CLR 272 (Austl.) (relating the proper performance doctrine to a contract dispute between a landlord and a tenant); Robinson v. Harman, [1848] 1 Exch. 850 (describing a common law rule in which parties sustaining losses due to contract breach are to be placed in the situation that

> The motive or state of mind of a person who is guilty of a breach of contract is not relevant to the question of damages for the breach, although if the contract itself were fraudulent the question of fraud might be material. . . . A breach of contract may be innocent, even accidental or unconscious. Or it may arise from a wrong view of the obligations created by the contract. Or it may be wilful, and even malicious and committed with the express intention of injuring the other party. But the measure of damages is not affected by any such considerations.[175]

Again, the American system endorses the same view. In *Thyssen, Inc. v. S.S. Fortune Star*,[176] the court explained the rationale behind this position:

> Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. This rule applies although the breach is intentional or even when it has been effected with malicious intent. Under [Oliver Wendell] Holmes' theory that a contract is simply a set of alternative promises either to perform or to pay damages for nonperformance, the rule would require no other explanation. Nevertheless, a good many have been offered. One is that the law of contracts governs primarily commercial relationships, where the amount required to compensate for loss is easily fixed, in contrast to the law of torts, which compensates for injury to personal interests that are more difficult to value, thus justifying noncompensatory recoveries. Another . . . is that breaches of contract do not cause the kind of "resentment or other mental and physical discomfort as do the wrongs called torts and crimes," and no retributive purpose would be served by punitive damages in contract cases. A third explanation, offered by economists, is the notion that breaches of contract that are in fact efficient and wealth-enhancing should be encouraged, and that such "efficient breaches" occur when the breaching party will still profit after compensating the other party for its "expectation interest." The addition of punitive damages to

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the parties would be in if the contract had been properly performed); U.C.C. § 1-305 (2018) (expressing that remedies provided by the Code are to place an aggrieved party in a position as good as if the contract had been performed but sets limits on these damages).

175. (1917) 23 CLR 78, 89.

176. 777 F.2d 57, 63 (2d Cir. 1985).

> traditional contract remedies would prevent many such beneficial actions from being taken.[177]

As such, notwithstanding Kroc's shameful conduct, it is exceptionally unlikely that damages penalizing said conduct would be awarded against him. His malicious and intentional conduct may well have contravened the doctrine of good faith,[178] however, this discussion is beyond the scope of this Article.[179]

VI. AN ANOMALY? BENEFITS WITHOUT MITIGATORY ACTION

In each of the "advantageous breach" cases examined in Part IV of this Article, the aggrieved party took mitigatory action, whether intentionally or otherwise, so as to counterbalance the losses they had incurred from the defendant's breach of contract. That is, the plaintiff took some affirmative steps which ultimately catalyzed the benefits flowing from the defendant's breach, and those benefits were then "offset" against the plaintiff's purported losses where a sufficient causal connection could be established. The McDonald's franchising saga is intriguing because it was yet another situation of "advantageous breach" in which the plaintiffs,

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177. *Id.*

178. *See* Kirke La Shelle Company v. Paul Armstrong Company, 188 N.E. 163, 167 (N.Y. 1933) (expressing an implied covenant of good faith in all contracts); Renard Constructions (ME) Pty. Ltd. v. Minister for Public Works, (1992) 26 NSWLR 234 (Austl.) (describing that courts in Australia, New Zealand, and the United States trend towards recognition of good faith obligations); Tote Tasmania Pty. Ltd. v. Garrott, (2008) 17 TASSC 86 (Austl.); Butt v. McDonald, [1896] 7 QLJ 67 (describing a generally implied rule that parties to a contract agree to do whatever is needed to ensure the other party benefits from the contract); U.C.C. § 1-304 (establishing that any contract or duty under the U.C.C. imposes a good faith obligation); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) (defining "good faith" and describing good faith in different contexts).

179. For some useful references on point, see JACK BEATSON & DANIEL FRIEDMANN, GOOD FAITH & FAULT IN CONTRACT LAW (1995) (including several discussions from various scholars looking into different aspects of good faith performance in contract law); Steven J. Burton, *Breach of Contract & the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) (examining the duty to perform in good faith and its relation to bad faith performance in contract relationships); Sir Anthony Mason, *Contract, Good Faith & Equitable Standards in Fair Dealing*, 116 LAW Q. REV. 66 (2000) (investigating the transition from common law standards of rejecting good faith doctrines towards wider acceptance of expectations of good faith in contract dealings over time); Elisabeth Peden, *Contractual Good Faith: Can Australia Benefit from the American Experience?*, 15 BOND L. REV. 186 (2003) (comparing the different understandings of good faith in Australia and the United States).

Dick and Mac, purportedly suffered an array of losses[180] stemming from Kroc's breach of the franchising agreement, yet simultaneously enjoyed a significant benefit (by way of heavily reduced electrical costs). However, neither Dick nor Mac actually *did anything* so as to bring the benefit enjoyed to fruition; this happened without their knowledge, as they only became aware of Kroc's rollout of the powdered milkshakes after the fact during another unpleasant phone call with him.[181] Their situation thus differs from the other cases, and it is therefore unclear how the benefit they enjoyed would be accounted for in any award of damages.

The case law in both Australia and the U.S. does not appear to have encountered a case of advantageous breach in which the plaintiff took no mitigatory action whatsoever so as to bring the subsequent benefits enjoyed to fruition.[182] We must therefore hypothesize what the appropriate approach would be. Assuming a plaintiff's inaction was irrelevant to the quantum of damages, it would simply be a case of offsetting the benefits enjoyed by Dick and Mac—the reduced electrical costs—against the losses they purportedly suffered. Given the uncertainty surrounding the brothers' claims for mental distress and physical injury,[183] and the lack of evidence as to any lost profits or injured business reputation

180. *See supra* pt. IV (considering different possible claims and the damages that would give rise to such claims that the plaintiffs could have made against Kroc after his breach of their agreement).

181. *See supra* note 23 and accompanying text (quoting the phone call that the brothers had with Kroc in which they found out that Kroc had already begun rollout of the powdered milkshakes to the rest of the franchisees).

182. Courts have considered cases of advantageous breach in relation to plaintiffs' attempts to mitigate their damages. *See, e.g.*, C&O Motors, Inc. v General Motors Corp., 323 Fed. App'x. 193, 198 (4th Cir. 2009) (showing that successful mitigation may also preclude plaintiffs from recovering some damages from a breach in the United States); Cardno BSD Pty. Ltd. v. Water Corporation (No. 2), (2011) WASCA 161 (Austl.) (describing a situation in which plaintiff's efforts to mitigate damages resulted in a net benefit, lessening the damages that the plaintiff was eventually entitled to); Globalia Business Travel S.A.U. of Spain v. Fulton Shipping Inc of Panama, [2017] UKSC 43 (illustrating English precedent in which benefits that arose from mitigatory action but were not necessarily brought about by the breach do not preclude a plaintiff's ability to recover); *infra* notes 189–196 and accompanying text (describing current considerations in Australia and the United States regarding advantageous breach in which plaintiffs are precluded by defendants from mitigating damages); but there has been no case in which advantageous breach is considered in the specific situation in which no mitigatory action is taken by a plaintiff whatsoever to bring about the benefit enjoyed.

183. *See supra* text accompanying notes 117–136 (describing the circumstances that would give rise to claims of mental distress and physical injury).

stemming from Kroc's rollout of powdered milkshakes,[184] it would be most likely that the losses claimed would be entirely absorbed by the running expenses saved. Keeping in mind that one hundred dollars between 1955–1960 equates to approximately $865 today,[185] and Joan Smith's estimate that the scores of franchisees could each save "hundreds of dollars a year" at the time, the cost savings enjoyed by Dick and Mac could have been quite astronomical and likely greater than any losses claimed.

Importantly, however, where a plaintiff intentionally takes no mitigatory action in response to a loss caused by a breach of contract, the principles of mitigation will ordinarily apply to their detriment.[186] The plaintiff "must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid."[187] In sum, and in accordance with notions of common sense and fairness, the plaintiff cannot recover for avoidable loss. As this Article has explained, where such mitigatory action *is* taken and ultimately results in benefits to the plaintiff, those benefits may be offset against any damages awarded to compensate for the losses caused by the defendant's breach. Corbin succinctly described the legal position as thus:

> Since the purpose of the rule concerning damages is to put the injured party in as good a position as full performance of the contract would have, and that this be done at the least necessary cost to the defendant, the plaintiff never should be awarded damages for losses that could have been avoided by reasonable effort without risk of other substantial loss or injury. Likewise, gains that the injured party could have made by reasonable effort and without risk of substantial loss or injury by reason of opportunities that would not have been available

184. THE FOUNDER, *supra* note 3.

185. H. Brothers Inc., DOLLARTIMES, https://www.dollartimes.com/calculators/inflation.htm (last visited June 27, 2018) (to determine inflation, follow the following instructions: type "$100.00," select "in 1958," select "in 2018," then click "Calculate").

186. CORBIN, *supra* note 30, § 57.11, at 301.

187. Cardno BSD Pty. Ltd. v. Water Corporation (No. 2), (2011) WASCA 161 (Austl.) (citing HARVEY MCGREGOR, MCGREGOR ON DAMAGES ¶¶ 7-004–7-006, at 236 (17th ed. 2003)). For similar statements under U.S. law, see S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 528 n.5 (3d Cir. 1978) (explaining that the plaintiff "is entitled to only those damages which he could not avoid by reasonable effort"); RESTATEMENT (SECOND) OF CONTRACTS § 350 (AM. LAW INST. 1981) ("[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.").

> to the nonbreaching party but for the other party's breach are deducted from the amount that the plaintiff could otherwise recover.[188]

Where, however, a plaintiff takes no mitigatory action due, for example, to a lack of knowledge as to the defendant's breach (as occurred in the McDonald's franchising saga), the remedial consequences are not as clear. The conundrum is thus: what happens if the benefits enjoyed by the plaintiff arise without efforts on their part? It may simply be a matter of extending what is traditionally regarded as one of the fundamental rules of mitigation, as described by McGregor:

> [W]here the loss has been mitigated other than by steps taken by the claimant subsequent to the wrong, the claimant can . . . recover only for the loss as lessened, provided that the benefit gained is not to be regarded as collateral. Put shortly, the claimant cannot recover for avoided loss.[189]

This rule may well provide a basis for the courts to conclusively answer the question posed by this Article; namely, how (if at all) the benefits enjoyed by a plaintiff in a "beneficial breach" scenario affect the quantum of damages.[190] McGregor's rule has been cited with approval by Australian courts[191] and American commentators.[192] Its effect would seemingly be to offset the benefits enjoyed by Dick and Mac against their purported losses, notwithstanding that those benefits arose autonomously and without their knowledge following Kroc's breach.[193]

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188. CORBIN, *supra* note 30, § 57.11, at 301–02.

189. HARVEY MCGREGOR, MCGREGOR ON DAMAGES ¶ 7-006, at 236 (18th ed. 2009).

190. *Cf.* RESTATEMENT OF CONTRACTS § 347 cmt. d. (suggesting that cost avoided is subtracted from expectation interest in damage calculations).

191. Turner v. Kwikshift Pty Ltd., (1993) 113 FLR 8, 14 (Austl.); Young v. Lamb (No. 2), (2001) NSWSC 1014 (Austl.).; *Cardno*, (2011) WASCA 161 (Austl.); Daily Pty. Ltd. v. Wallis, (2013) NSWADT 152 (Austl.).

192. *See, e.g.*, John G. Fleming, *The Collateral Source Rule & Contract Damages*, 71 CAL. L. REV. 56, 75–76 (1983) (referring to McGregor's rule about calculating damages when gains arise from mitigation).

193. *But see* McGregor's subsequent comment:

> In any event, it is suggested that the basic rule is that the benefit to the claimant, if it is to be taken into account in mitigation of damage, *must arise out of the act of mitigation itself*; this approach has been adopted by the courts in quite a number of cases. It may be regarded as simply another way of expressing Viscount Haldane's requirement that the transaction giving rise to the benefit must be one arising out of the consequences of the breach.

There is American jurisprudence suggesting that, in such circumstances, where the defendant (Kroc) has effectively prevented the plaintiffs (Dick and Mac) from taking the steps necessary to avoid the losses they suffered, those losses cannot be regarded as "avoided" irrespective of the corresponding benefits enjoyed by the plaintiff.[194] Some older English decisions do seem to support this view and regard McGregor's rule of mitigation as subject to the plaintiff's affirmative "acceptance" of the benefits conferred.[195] Put simply, a plaintiff should not have their damages reduced where the benefits that flowed to them following the defendant's breach were not anticipated nor wanted. The courts may well be influenced by notions of conscience when encountering a beneficial breach case. As Ogus has noted, judicial "[a]ttitudes and rules have varied according to the nature of the benefit and the nature of the plaintiff's injury."[196] It would seem just in the circumstances not to penalize the plaintiffs in situations where they had no reasonable opportunity to attempt mitigation. Had such an opportunity been acted upon, the ordinary rules of mitigation should then apply.

To legal economists, beneficial breaches are something to be celebrated given they are "Pareto efficient"—or, more accurately, "Pareto superior"—in that they leave neither party worse off once compensation is paid and leave at least one of the parties better off than they would have been had the contract been correctly performed.[197] Indeed, all parties stood to benefit from the powdered

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MCGREGOR, *supra* note 189, ¶ 7-109, at 294 (emphasis added). McGregor's statement can be interpreted as implying that the plaintiff must take some affirmative action in order for subsequent benefits to be included in the calculation of damages, however the subsequent sentence appears to clarify that this is merely a restatement of the general proposition that the benefits must stem directly from, and not independently of, the breach.

194. *See*, *e.g.*, Rull v Rainey, 160 P. 1016, 1017 (Kan. 1916) (holding that plaintiff was absolved from a duty to mitigate because defendant threatened to sue if plaintiff acted); CORBIN, *supra* note 30, § 57.11, at 312-14 ("Losses are not regarded as avoidable if the defendant prevents the plaintiff from taking the steps necessary to avoid them.").

195. *See*, *e.g.*, Smith, Edwards & Co. v. Tregarthen [1887] 56 L.J.R. 437 (Q.B.) (holding that the defendant's subsequent delivery of missing items does not affect the right of the plaintiff to recover damages resulting from breach); Eyre v. Rea [1947] L.J.K.B. 1110 (holding that damages are calculated by the cost of putting the injured party back in the position as if the breach never occurred without considering the increase in value caused by the breach).

196. ANTHONY I. OGUS, THE LAW OF DAMAGES 93–94 (1973).

197. HUGH COLLINS, REGULATING CONTRACTS 119 (1999) (discussing Pareto standard of efficient breach); VILFREDO PARETO, MANUEL D'ÉCONOMIE POLITIQUE 617–18 (2d ed. 1927) (discussing a theory that became known as Pareto-efficient; The theory derives its name from the economist who invented it, Vilfredo Pareto. The theory was first expressed in this work); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.10, at 131 (9th ed. 2014)

milkshake rollout given the McDonald's franchisees enjoyed significantly reduced overheads, translating to higher profits moving up the chain of ownership. As such, Kroc's behavior might be countenanced given the mutual benefits enjoyed by him and the McDonald brothers as a result of his breach of the franchise agreement. Due to scope, this Article does not foray into the economic aspects of beneficial breaches short of saying that, whilst all parties enjoyed some form of "benefit" following Kroc's breach, this does not resolve the subsequent issue of how damages should be appropriately quantified.

In sum, whilst there is no definitive answer that can be drawn from the Australian or American case law, two ostensibly universal statements of principle can be stated with confidence:

1. Where, in response to a defendant's breach of contract, a plaintiff takes steps to mitigate his or her loss (as directly or proximately caused by the defendant's breach), and such conduct directly results in the receipt of benefits, those benefits may be offset against any losses suffered by the plaintiff so as to return the plaintiff to the position they would have been in had the contract been correctly performed, at the least necessary cost to the defendant.

2. Where said benefits do not arise directly from the defendant's breach but rather arise independently of, or collateral to, the breach, those benefits will not be offset against the losses suffered by the plaintiff.[198]

A third statement, it is submitted, seeks to harmonize the approaches under both Australian and American law, and provide a model for the courts and for practitioners in both jurisdictions to adopt when quantifying damages in beneficial breach cases:

(explaining a Pareto superior hypothetical); Frank Cavico, *Punitive Damages for Breach of Contract—A Principled Approach*, 22 ST. MARY'S L.J. 357, 375 (1990) (discussing Pareto-superior allocation of resources); Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, & the Second Restatement*, 81 COLUM. L. REV. 111, 113 (1981) (discussing Pareto-optimality); Nina C. Z. Khouri, *Efficient Breach Theory in the Law of Contract: An Analysis*, 9 AUCKLAND U. L. REV. 739, 740 (2002) (discussing Pareto-efficiency).

198. *E.g.*, British Westinghouse Electric & Mfg. Co. v. Underground Electric Railways Co. of London, [1912] 50 SLR 617, 619 (appeal taken from Eng.) (outlining the principles of damages); *see also* CORBIN, *supra* note 30, § 55.3, at 7 (explaining the American position that the aim of calculating damages is "to put the injured party in as good a position as that party would have been in if performance had been rendered as promised").

> 3. Where the plaintiff takes no mitigatory steps either as a consequence of lack of knowledge of the defendant's breach, or due to the defendant's prevention of the plaintiff taking such steps, and the plaintiff still enjoys benefits arising directly from the defendant's breach, those benefits should not be regarded as avoided losses nor offset against the plaintiff's losses.[199]

This statement of principle is both commercially sensible and innately just; it reflects the law's disdain for parties who wrongfully undermine the cooperative nature of contractual relations and inhibit a plaintiff's efforts to lessen the extent of losses brought about by the violation. It also appreciates that plaintiffs may not always be aware of the benefits they derive from the defendant's breach, whether as a consequence of malevolent disguise on the defendant's part or simply due to the breach not having naturally come to the plaintiff's attention.

VII. CONCLUSION

The McDonald's franchising saga is a useful case study in novel situations that arise in the field of contract law.[200] Specifically, it highlights the anomalous scenario of "beneficial breach" whereby both plaintiff and defendant benefit from the latter's violation of the agreement between the parties. This famous dispute over a milkshake ultimately reveals a potential gap in both the Australian and American law of damages; namely, how to appropriately compensate a plaintiff who has taken no mitigatory steps in response to a contractual breach due either to lack of knowledge of the breach or to the defendant's inhibitory conduct. This Article has sought to examine this issue at length and recommends that the courts, in an appropriate case, provide affirmative guidance as to the extent of the rules of mitigation in beneficial breach cases. The model statement of principle

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199. S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 527 (3d Cir. 1978) (noting that no damages may be awarded "if the loss caused by a breach cannot be isolated from that attributable to other factors"); MCGREGOR, *supra* note 189, ¶ 7-109, at 294 (explaining that the benefit is only taken into consideration in calculation of damages if it "ar[o]se out of the act of mitigation").

200. *E.g.*, CORBIN, *supra* note 30, § 57.11, at 30 (explaining that if the defendant prevents the plaintiff from mitigating, the losses are not regarded as avoidable, and the law does not penalize inaction).

suggested seeks to address the obvious injustice that would arise if the benefits moving to an unwitting plaintiff following breach worked to reduce the damages payable to them. In beneficial breach cases, it seems only fair for the plaintiff to have their milkshake and drink it too.