Damages for Breach of Contract, by Harvin D. Pitch, Toronto: Carswell Company Ltd., 1985. Pp. *xxvii*, 260. $42.00 (hardcover)

Traditionally the subject matter of damages as a remedy for breach of contract has attracted minimal academic scrutiny. Although there is evidence that this situation may be changing,[1] it is apparent that the focus of contractual research has been on examination of the process of contact formation, characterization of contractual terms and exposition of excuses and justifications for non-performance. In this intellectual construct, remedies occupy at best an ancillary and secondary position. Confirmation of the accuracy of this assessment may be discovered by a glance at the leading American, English and Canadian texts on contracts, all of which commence analysis of the contractual relationship with a discussion of offer, acceptance and consideration and conclude with a description of the remedies available upon non-performance.[2] While such a sequence is neither arbitrary nor necessarily illogical, the consequence of such an approach has been the creation of a false dichotomy between the substantive criteria of enforceability and the remedial techniques available to redress losses attendant on the breakdown of the contractual relationship. In short, academic commentary has fostered a questionable division between the reasons why consensual arrangements are to be enforced as contracts and the methods by which such arrangements are enforced through the mechanisms of damages, specific performance and injunctions. This division between the remedial and substantive aspects of contract law has, in turn, engendered the theoretical conviction that the essence of a contract consists in the presence of factors such as consensus and benefit to the promisor or detriment to the promisee. According to this view, a contract is not defined by reference to available remedies; instead, the granting of a remedy is contingent on a prior determination that the formal elements necessary to constitute a contract exist.

The classical separation between the substantive and remedial is not confined to academic consideration but is, as well, reflected in the organizational structure of many of the leading contracts casebooks.[3] Students are thus imbued with the conventional appreciation of contract as a product of offer, acceptance and consideration — in short, as a bargain which may be vitiated by mistake, terminated by a frustrating event or suspended by breach. Attention to remedies, which may be cursory at best, comes only after extensive exploration of the substantive bases of enforceability. In many instances the study of contractual remedies may not occur within the framework of a first year course in contracts but may be deferred in favour of an upper year course concerned with remedies generally, a phenomenon which serves further to rein-

[1]See, for example, K. Swinton, "Foreseeability: Where Should the Award of Contract Damages Cease?" in B.J. Reiter and J. Swan, *Studies in Contract Law* (Toronto: Butterworths, 1980).

[2]See, for example, A.L. Corbin, *Contracts* (Minnesota: West Publishing Co., 1952); G.H. Treitel, *The Law of Contract*, 6th ed. (London: Stevens and Sons, 1983); and S.M. Waddams, *The Law of Contracts*, 2d ed. (Toronto: Canada Law Book Inc., 1984).

[3]See, for example, E.J. Murphy & R.E. Speidel, *Studies in Con* . .: The Foundation Press, 1984); and C. Boyle & D. Percy, *Contracts: Cases and Commenta* Carswell Co. Ltd., 1985).

force the traditional view that substantive and remedial bodies of law exist in distinct and autonomous spheres.

This perspective may be justified on an historical basis. After all, contemporary contract law may be said to originate in 1602 in *Slade's Case*[4] which assimilated simple contract liability to assumpsit. In contrast, the antecedent of modern law concerning recovery of damages for breach of contract occurred as recently as 1854 in the case of *Hadley* v. *Baxendale*[5] which, in integrating principles of causation with those of foreseeability, represents the first significant effort to limit the liability of the contract breaker. While this gap of approximately 250 years may encourage a view of contract remedies as subordinate to the substantive law of contracts, the intellectual dominance of the classical view of contracts has in recent years received serious challenge. Since the publication in 1937 of L.L. Fuller and W.R. Perdue's seminal article[6] it has become acceptable to argue that the remedial and substantive aspects of contract law are integrally related, with the result that it is possible to discern the existence of a contract, not by reference to the largely formal elements of consensus and consideration but by attention to the types of remedies awarded to the injured party. The hypothesis that contract may be defined in terms of remedies relies, of course, on the presupposition that contract remedies are, in a certain sense, distinct from those available in tort or restitution. Whether this assumption is accurate may be questionable; the contemporary convergence of contract and tort may indicate that tortious and contractual tests for assessment of damages and the objectives to be served by such an award are more closely related than traditionally thought. What is material is that the intellectual fusion of the reasons for and methods of enforceability has stimulated a new interest in the area of remedies for breach of contract, particularly in consideration of the underlying bases of an award of damages for breaches of contract.[7]

A recent addition to the growing volume of legal literature concerned with contractual remedies is provided by Harvin Pitch's *Damages for Breach of Contract*. This text does not purport to present a novel view of the operation of an award of damages within the context of a breach of contract. Nor should it be regarded as an effort, such as that undertaken by writers such as E.A. Farnsworth[8], to synthesize the relevant rules governing damages awards within an analytical framework. Rather, it is, in the words of Ian Outerbridge:

> [A] 'red cow' book.... It is a practitioner's book, written for practitioners by a practising litigator....Each chapter of this text is written in a punchy, assertive, fast-moving style which makes it an easy and enjoyable read and at the same time readily absorbable and easily transported and explained to others.[9]

[4] 4 Co. Rep. 92a.

[5] 9 Exch. 341.

[6] "The Reliance Interest in Contract Damages" (1937), 46 *Yale L.J.* 52.

[7] See, for example, Waddams, *supra*, footnote 2; and Swan and Reiter, *supra*, footnote 1.

[8] "Legal Remedies for Breach of Contract" (1970), 70 *Col. L. Rev.* 1145.

[9] H.D. Pitch, *Damages for Breach of Contract* (Toronto: Carswell Co. Ltd., 1985) *iii*.

The aims of the author are modest. It is a text "designed primarily for the assistance of busy counsel who must deal with complicated issues in damages quickly and efficiently and who do not have time to delve deeply into some of the finer points in this area".[10]

The organization employed is that best suited to achieve this limited objective. Pitch has structured his discussion of contract damages in 15 topics which include general principles of compensation, techniques for assessing damages, compensation for non-pecuniary loss, principles of remoteness, mitigation of damages, contributory fault, date of assessment, prejudgment interest, conversion of foreign currency claims and taxation. Each of these and the remainder of the subjects are viewed as discrete and self-contained units. There is little effort to integrate these subjects nor is there any attempt to illustrate the interrelationship of principles of assessment of damages with those of contractual liability. Emphasis is placed on the descriptive rather than the analytical, although the author does endeavour, on occasion, to predict future developments in the law. To characterize the examination of the various areas as descriptive rather than analytical should not be interpreted as perjorative. The author's discussion is succinct, comprehensive and intelligible. The point is simply that if the reader desires stimulation as well as information he or she would be better advised to refer to the works of Fuller and Perdue, Farnsworth, Horwitz, Waddams or Danzig. *Damages for Breach of Contract* would, however, be useful to those readers, both students and practitioners, who wish to discover current law quickly and conveniently.

While Pitch accomplishes his purpose, the text is at times overly simplistic. He accepts without question, for example, the proposition that

> the purposes of contract and tort damage awards differ. The purpose of a tort damage award is to place the plaintiff in the position he or she would have occupied had the wrongful act not been committed....In contrast, the purpose of a damage award in a contract action is to place the innocent party in the position that party would have occupied had the contract been carried out by both parties.[11]

To the extent that this reiteration of orthodox theory would suggest that the purpose of contractual damages is to compensate the plaintiff's expectation interest, its validity is seriously undermined by the growing tendency of contract damages to protect the reliance interest, an interest conventionally associated with tort law.[12] The level of generalization necessitated by the objectives of this text occasionally produces observations which are either misleading or inaccurate. In discussing application of the rules of remoteness Pitch asserts that "[i]t is sufficient if the parties contemplated the type of damage without being required to have predicted the extent of it".[13] This contention, while supported by the decision of *H. Parsons (Livestock)* v. *Uttley Ingham & Co.*[14], is inconsistent with other decisions such as *Victoria Laundry Ltd.* v. *Newman Indust.*

[10] *Ibid.*, at v.

[11] *Ibid.*, at 1.

[12] See, for example, *Esso Petroleum Co. Ltd.* v. *Mardon*, [1976] Q.B. 801 (C.A.).

[13] *Supra*, footnote 9 at 94.

[14] [1978] 1 Q.B. 791 (C.A.).

Ltd.[15] and *Koufos* v. *Czarnikow Ltd.*[16], which at the very least imply that quantum may be a factor governing the ascription of foreseeability. Elsewhere Pitch compares damages for mental distress and aggravated damages: "Both categories of damages are also likely to be awarded if the defendant's conduct is particularly harsh, reprehensible and repugnant to the court".[17] The claim that recovery for damages for mental distress depends on the quality of the defendant's conduct is not borne out by any case and is, moreover, at odds with Pitch's position, set out previously in this section, that mental distress like any other head of damage is governed by conventional rules of foreseeability. Over-simplification and over-generalization are faults which are perhaps inevitable. One cannot hope to acquire a detailed and intensive understanding of contractual damages in a text of 245 pages. The desire "to have the law encapsulated in an easily digested format, one which facilitates the rapid absorption of the law on a particular subject"[18] dictates the sacrifice of subtlety and refinement. At the same time, while these flaws may inhere in the purpose and method of discussion adopted by Pitch, they suggest that caution ought to be applied in relying on the text. *Damages for Breach of Contract* can serve at best only a supplementary function. Its greatest value consists in its description of recent case law in this area. It ought not to be regarded as a substitute for more comprehensive works.

These and related criticisms are concerned with the internal content of the monograph. There is, however, a more fundamental criticism which ought to be addressed. While one must be wary of criticising a work for what it is not, rather than for what it is, it nevertheless is pertinent to question the necessity for a text such as the one under examination. While it is evident that Pitch has expended a great deal of time and effort on this project, the result can charitably be described only as a well-written descriptive compilation of leading cases. Without a sophisticated analytical context, the cataloguing of relevant principles of law may prove too elliptical to be of value to the student and too simplified to be of worth to the practitioner involved on a daily basis with contractual issues. And finally, like any compilation, the work is subject to the risk of premature obsolescence, a defect which can only be remedied by frequent up-dating.

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[15] [1949] 1 All E.R. 997 (C.A.).

[16] [1969] 1 A.C. 350 (H.L.).

[17] *Supra*, footnote 9 at 60.

[18] *Ibid.*, at *iii*.

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