# THE LIMITS OF CONTRACTUAL DAMAGES IN THE SCANDINAVIAN LAW OF SALES

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The Uniform Scandinavian Sale of Goods Act, dating from the beginning of this century, does not lay down any general principles for assessing damages but gives only a few special rules.[1] There are two possible explanations of this attitude: either the legislators considered the principles applicable to be so complex that they could not very well be stated in the Act, or they thought them so obvious as not to need stating. The second explanation seems to be the correct one. At the time when the Act was passed a damage principle was thought by legal writers and probably also by the courts to be indisputably valid in its main features, and the legislative materials indicate that this principle was intended to apply also to such damages as were regulated by the Sale of Goods Act.

To us, viewing the matter sixty years later, the validity of this principle and its guidance in deciding doubtful questions seem less certain. In retrospect, some conclusions drawn from the principle appear arbitrary or even of questionable value. In prospect, we face the problem of possible changes. In the following study attention will be focused on the limits of contractual damages or, in other words, on remoteness of damage as a factor limiting compensation for loss. It will appear, however, that this aspect is intimately connected with other problems of assessment of damages. Moreover, the connection between negligence as a condition for liability and remoteness of damage as a limiting factor stands out as a main problem.

First, some general damage principles and problems will be surveyed. After that, the rules of the Scandinavian Sale of Goods Act and the consequences drawn from them will be analysed. Finally, a critical evaluation will be attempted. The conclusions

[1] The Swedish Act is from 1905, the Danish Act from 1906, and the Norwegian Act from 1907. The relevant sections are 25, 30, 36, 45 and 55.

correspond largely to the first alternative just mentioned: the problems and principles are so complex that there are good reasons for not dealing with them in a comparatively brief statute.

## THE DISCUSSION IN GERMANY AND IN SCANDINAVIA

### *German law*

The starting point of the modern discussion in Germany regarding assessment of damages, and the basis of the Scandinavian rules on the subject, can be found in a work by Friedrich Mommsen, *Zur Lehre von dem Interesse* (1855). That author proposed a general principle for assessing damages, the so-called principle of difference. The "interest" which should normally be compensated when a person is entitled to damages for economic loss—whether in contract or in tort—is the difference between his fortune as it actually is and as it would have been if the event giving rise to the claim had not occurred.[2] The various kinds of losses with which earlier writers dealt are thus subordinated to this general principle.[3] The need for limiting damages is met chiefly by the requirement of a causal connection between the event giving rise to the claim and the damage that is to be compensated. In consequence Mommsen denies the right of damages when the damage would have occurred even if the event giving rise to the claim had not happened.[4] He also denies it when the damage could have been prevented by the reasonable care of the person suffering the loss.[5] Where contractual liability is founded, not on fault, but on the contract regardless of fault, Mommsen—at least for some cases—would restrict damages to the loss that the parties, and in particular the party in breach, contemplated at the time of the making of the contract.[6] On the other hand, he rejects the idea that contractual damages in general should be limited to such loss as could reasonably be foreseen by the breaching party.[7]

[2] Fr. Mommsen, *Zur Lehre von dem Interesse*, 1855, p. 3.
[3] *Op. cit.*, pp. 12, 17 f., 134–7, 265 f.
[4] *Op. cit.*, pp. 146–56.
[5] *Op. cit.*, pp. 157–60, 169 f.
[6] *Op. cit.*, pp. 60 f., 163 f., 166 f.
[7] *Op. cit.*, pp. 164–71.

Mommsen's ideas were in the main accepted by his German contemporaries.[8] They exhibit the unitary form of a general principle that accords so well with the German legal thinking of that time. Special rules for computing damages are subordinated to a general principle, and the criteria for limiting damages are such as are capable of universal application. In fact, this method of assessing and limiting damages is still the dominant one in Continental Europe.

The provisions for assessment of damages in the *Bürgerliches Gesetzbuch* (*B.G.B.*) of 1896 are based on Mommsen's ideas.[9] The provisions appear in the part of the *B.G.B.* which contains rules common to all obligations and therefore common to both contract and tort (sections 249–55). German writings from the time immediately after the adoption of the *B.G.B.* seem largely to take the principle of difference for granted.[1] Objections raised against the principle were mostly founded on the fact that reparation in kind, rather than payment in money, is the principal form of damages according to section 249 of the *B.G.B.*[2] But the majority of writers found no difficulty in reconciling this rule with the principle of difference, and even those who did eventually managed to overcome the difficulty by accepting the principle as applying to the "abstract loss", if not to the "concrete loss".[3]

Section 252 of the *B.G.B.*, which concerns damages for loss of profits, extends the right of such damages to profits that could probably be expected in the light of the general course of events or with regard to the special circumstances of the case. Although one influential commentator (Planck) originally suggested that the section should be read as restricting damages for loss of profits to cases where the possibility of such a loss could be foreseen by

[8] See particularly Windscheid, *Lehrbuch des Pandektenrechts*, vol. 2, 9th ed. 1906, §§ 257 f.

[9] *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das Deutsche Reich*, vol. 2, 1888, pp. 17 f., *Protokolle der Kommission für die zweite Lesung des Entwurfs des bürgerlichen Gesetzbuchs*, vol. 2, 1898, p. 297.

[1] See particularly H. A. Fischer, *Der Schaden nach dem bürgerlichen Gesetzbuche für das Deutsche Reich* (Abhandlungen z. Privatrecht und Civilprozess, hrsg. von O. Fischer, vol. 11), 1903, p. 21, with references.

[2] See Degenkolb, *Archiv f. d. civ. Praxis*, vol. 79, 1890, pp. 1–88, Walsmann, *Compensatio lucri cum damno*, 1900, Oertmann, *Die Vorteilsausgleichung beim Schadenersatzanspruch im römischen und deutschen bürgerlichen Recht*, 1901.

[3] The majority view is developed by Fischer, *op. cit.*, pp. 22–33. As for the minority see Walsmann, *op. cit.*, p. 10, and Oertmann in *Kommentar zum bürgerlichen Gesetzbuch, Recht der Schuldverhältnisse*, 2nd ed. 1906, Vorbemerkung zu §§ 249–54.

the party liable at the time of the breach, this view was rejected by the great majority of writers.[4]

Since the beginning of this century the main innovation in German principles for assessing damages has been the adoption of the theory of "adequate causation".[5] Although this principle for limiting damages had been advanced earlier, it was not accepted by the German Reichsgericht until the first years of the 20th century.[6] As causation was supposed to be a concept not regulated by the *B.G.B.*, there was no obstacle to modifying it. Once again, a principle that was primarily intended for the law of torts came to be considered valid for the law of contracts as well, since the principles prescribed in the *B.G.B.* for assessing damages are applicable to all obligations.[7]

The principle of adequate causation has many variants, and it is not necessary to discuss them here. The formula which was accepted by the Reichsgericht and later by the Bundesgerichtshof states as a condition for liability that the circumstance giving rise to a claim for damages shall have significantly increased the general probability that damage would occur.[8] It is obvious that such a principle, even if it is developed explicitly and implicitly by various means, does not tend to restrict contractual damages to any great extent. It cannot limit the authority of the positive rule in section 252 of the *B.G.B.*, regarding damages for loss of profits.

The unity and simplicity of the principle thus stated are, however, partly illusory. Besides rules for special cases (such as *B.G.B.* section 287 concerning *perpetuatio obligationis*),[9] there are rules and techniques which tend to differentiate compensation much more than appears from a statement of the general principles

[4] See Fischer, *op. cit.*, pp. 68–75 with references. For modern law see particularly Enneccerus & Lehmann, *Recht der Schuldverhältnisse*, 15th revised ed. 1958, p. 74, where it is stated that the view already taken in the first edition of this work had gained so much support that it could now be regarded as the dominant opinion.

[5] For a general survey of the development in German law see Lindenmaier, *Zeitschrift für Handelsrecht*, vol. 113, 1950, pp. 207–43. Regarding later development see Heinrich Lange, *Archiv f. d. civ. Praxis*, vol. 156, 1957, pp. 114–36.

[6] The first decision by the Reichsgericht based on the theory of adequate causation dates, according to Lindenmaier, *op. cit.*, p. 233, from 1902 (R.G.Z. 50, 211), but the theory was not fully developed until 1913 (R.G.Z. 81, 359).

[7] To a foreign observer the mixture of statements regarding contractual damages and damages in tort (e.g. in Palandt, *Bürgerliches Gesetzbuch*, Vorbemerkung vor § 249) seems rather curious.

[8] R.G.Z. 81, 359; B.G.H.Z. 3, 261.

[9] Cf. *infra*, p. 53 at footnote 3.

regarding assessment of damages. Some of these extend compensation, others restrict it.

There are remedies which are not considered as damages in the technical sense and which, therefore, are not subject to the same conditions as apply to a claim for damages. According to German law, an action based on *Rücktritt*—which corresponds roughly to rejection of goods or cancellation of a contract because of non-performance by a party in breach—not only is different from but also excludes an action for damages (*B.G.B.* sections 346–61).[1] The same can be said about *Wandlung* (*B.G.B.* sections 452, 467), which is the equivalent remedy for defects in goods, although in the case of fraud money damages may lie as well (section 463).[2] German law also knows an action for reduction of the price (*Minderung*), derived from the *actio quanti minoris* in Roman law, for defects in goods sold.[3] This remedy can be described as a compensation for reduced intrinsic value of the goods which does not cover loss due to a rise in the price of the goods after the time of the conclusion of the contract. Neither of these remedies agrees with the principle of difference, but their practical functions are partly the same as those of an action for damages.

It has already been mentioned, in connection with Mommsen's views, that he admits a principle of contributory negligence by which the plaintiff may lose part or whole of his right to damages. Under *B.G.B.* section 254, para. 1, the damages in case of contributory negligence are to be mitigated according to the circumstances, in particular to the effects of each party's acts with regard to bringing about the damage. Contributory negligence may also be pleaded if the plaintiff failed to inform the defendant of the risk of an unusually high loss or if he failed to take such measures as could prevent or diminish the loss (section 254, para. 2).

Rules of proof may be of considerable importance in deciding

[1] Damages may be awarded in exceptional cases; see E. Wolf, "Rücktritt, Vertretenmüssen und Verschulden", *Archiv f. d. civ. Praxis*, vol. 153, 1954, pp. 97–144, Larenz, *Lehrbuch des Schuldrechts*, vol. 1, 7th ed. 1964, pp. 300–05. For a comparative survey see Rabel, *Das Recht des Warenkaufs*, vol. 1, reprint 1957, pp. 429–37.

[2] Cf. Rabel, *op. cit.*, vol. 2, 1958, pp. 236–46.

[3] B.G.B. secs. 462, 472; cf Rabel, *op. cit.*, vol. 2, pp. 232–6. As for the relationship between *actio quanti minoris* and an action for damages in Roman law see Mommsen, *Zur Lehre von dem Interesse*, pp. 281 f., Medicus, *Id quod interest*, 1962, pp. 123 ff. *Actio quanti minoris* should be regarded as a special kind of action for damages, which does not include compensation for other loss than the reduced value of the goods.

the amount of damages. The existing presumption that an unfavourable difference between the agreed price and the market price at the time of delivery constitutes a corresponding loss makes an application of the general principle for assessing damages irrelevant in many cases.[4]

The limitation of contractual liability to the loss suffered by a party to the contract excludes from compensation losses suffered by a third party. Although the consequences of this rule are not very clear in detail, they serve as a means of limiting the potential liability of the breaching party.[5]

The principle of difference, moreover, is not so universally accepted as it seemed to be at one time. The methods for assessing damages that were ousted by the principle of difference have had a certain revival in Germany. It is a surprising fact that sometimes ideas that apparently were once discarded altogether emerge again later, often without the connection with earlier law being wholly recognized.

In two codes dating from around 1800, the Prussian *Allgemeines Landrecht* and the Austrian *Allgemeines Bürgerliches Gesetzbuch,* the amount of the damages is differentiated according to the gravity of the fault of the debtor.[6] Various kinds of losses, e.g. direct and indirect loss, loss of value and loss of profits, are distinguished, and full liability for all kinds of loss presupposes intention or gross negligence. The practical effect is to exclude compensation for remote losses whenever the fault is slight or strict liability is imposed. These Prussian and Austrian rules, which were considered to introduce a penal element in damages, were criticized even during the 19th century, and nowadays there is apparently general agreement that they are not suitable for modern law.[7] But the somewhat similar device of not applying general limits of contractual damages in case of fraud, which is found already in the French *Code civil,* article 1150, is still so far

[4] See *Handelsgesetzbuch* sec. 376, para. 2, concerning *Fixgeschäfte.* Cf. Rabel, *op. cit.,* vol. 1, pp. 454–62, von Caemmerer, *Das Problem der überholenden Kausalität im Schadenersatzrecht,* 1962, pp. 8 f.

[5] See particularly Wilburg, "Zur Lehre von der Vorteilsausgleichung", *Jherings Jahrbücher,* vol. 82, 1932, pp. 95–125.

[6] See *Allgemeines Landrecht,* I, 6, §§ 1–16, 79, 85–8, 115, *Allgemeines Bürgerliches Gesetzbuch* §§ 1323, 1324, 1331. Regarding the historical development see Wahle, *Karlsruher Forum* 1959, pp. 59 f.

[7] See, e.g., Förster, *Theorie und Praxis des heutigen gemeinen preussischen Privatrechts,* vol. 1, 2nd ed. 1869, pp. 523–45, Pfaff, Randa & Strohal, *Drei Gutachten über die beantragte Revision des 30. Hauptstyckes im II. Theile des a. b. Gesetzbuches,* 1880.

accepted in modern law as to be included in the Uniform Law on International Sales, and apparently no objection has been raised in German comments on this provision.[8] A more important matter is that some modern writers favour a general possibility of mitigating damages according to the circumstances. Although the gravity of the fault is considered to be the main factor, remoteness of damage becomes an important, if secondary, consideration when deciding whether mitigation should take place.[9] The fact that the proposals are mainly concerned with the law of torts does not seem to constitute any obstacle to extending the principle to contracts as well.[1]

Another method of assessing damages, which was widely used before the emergence of the principle of difference, was to put the loss of the value of goods in a special category. Although German writers on Roman law during the first half of the 19th century differed considerably in their views on computing damages, there was some agreement that the general value of the goods, which was to be found in their market price, should be compensated whenever there was a right to damages, and even if the value of the goods to the party entitled to damages was lower. Whether other loss should be compensated was regarded as much more doubtful and, in the view of some writers at least, should depend on the kind of contract and the kind of breach involved.[2] The distinction between the compensation for loss of value and damages for other sorts of loss, although not accepted in the *Bürgerliches Gesetzbuch,* has to some extent survived to our time, and similar ideas can be found in modern writings, even if the details of the supposed Roman rules are outdated.

The modern proposals generally start with a criticism of the principle of difference based on its consequences in some special cases. Strict adherence to this principle may exclude or reduce

[8] See Uniform Law on the International Sale of Goods (Annex to Convention dated The Hague, July 1, 1964), art. 89.

[9] See, for example, Hermann Lange, *Gutachten für den 43. Deutschen Juristentag,* 1960, pp. 10–15.

[1] *Op. cit.,* pp. 46 ff.

[2] See Hänel, *Versuch einer kurzen und fasslichen Darstellung der Lehre vom Schadenersatze nach heutigem römischen Rechte,* 1823, pp. 83–112, v. Wening Ingenheim, *Die Lehre vom Schadensersatze nach römischem Rechte,* 1841, pp. 273–98, Nussbaumer, *Über das Mass des Schadenersatzes,* 1855, pp. 3–26. Cf. Cohnfeldt, *Die Lehre vom Interesse,* 1865, pp. 1–55, Coing, "Interesseberechnung und unmittelbarer Schaden", *Süddeutsche Juristenzeitung* 1950, pp. 865–72. An historical investigation of Roman law is given by Medicus, *Id quod interest,* 1962.

damages when there is a concurrent cause of the damage besides the one for which the party liable is responsible, when damage to property results in a loss which is considered personal rather than economic, or when the event leading to the loss gives the party suffering the loss some benefits as well.[3] One way of dealing with these cases is to introduce a special rule allowing compensation for the loss of the value of the goods without regard to the circumstances mentioned.[4] Another possible solution is to distinguish between direct and indirect loss and compensate the former more freely than the latter.[5] Either solution will limit damages for lost profits somewhat. The very doubt cast on the principle of difference by these special cases can also open the road to rules which restrict damages for remote losses more generally.[6] The argument may also go the other way: if damages are to be limited because of remoteness of the loss in a way which does not agree with the principle of difference, this principle may also be rejected in the event of concurrent causes, benefits reaped in connection with the loss, etc.[7] The final result is to admit compensation for the value of the goods more freely than other aspects of loss but, it appears, subject to the general conditions of liability for damages, generally the existence of fault.[8]

The theory of adequate causation has also been criticized as being unsuitable for limiting contractual liability. The principal rival in the international field has long been the rule pronounced in the French *Code civil,* article 1150, which has strong affinities

[3] See Neuner, "Interesse und Vermögensschaden", *Archiv f. d. civ. Praxis,* vol. 133, 1931, pp. 277–314, Wilburg, "Zur Lehre von der Vorteilsausgleichung", *Jherings Jahrbücher,* vol. 82, 1932, pp. 51–148, Neumann, "Der Zivilrechtsschaden", *Jherings Jahrbücher,* vol. 86, 1936/37, pp. 277–346, Bydlinski, *Probleme der Schadensverursachung nach deutschem und österreichischem Recht* (Abhandlungen aus dem gesamten Bürgerlichen Recht, Handelsrecht und Wirtschaftsrecht, 28. Heft), 1964, pp. 26 ff.

[4] See Neuner and Wilburg, *op. cit.*

[5] See in particular Coing, "Interesseberechnung und unmittelbarer Schaden", *Süddeutsche Juristenzeitung* 1950, pp. 865–72, Larenz, "Die Berücksichtigung hypotetischer Schadensursachen bei der Schadensermittlung", *Neue Juristische Wochenschrift* 1950, pp. 487–93, and "Die Notwendigkeit eines gegliederten Schadensbegriffs", *Versicherungsrecht* 1963, pp. 1–8. Cf. on the other hand Hermann Lange, "Zum Problem der überholenden Kausalität", *Archiv f. d. civ. Praxis,* vol. 152, 1952–53, pp. 153–68, and *Gutachten für den 43. Deutschen Juristentag,* 1960, p. 28.

[6] See Wilburg, *op. cit.,* pp. 132–48, and *Die Elemente des Schadensrechts* (Arbeiten zum Handels-, Gewerbe- und Landwirtschaftsrecht, No. 84), 1941, pp. 240–52; cf. Medicus, *Id quod interest,* 1962, pp. 308 ff.

[7] See Wilburg, *Jherings Jahrbücher,* vol. 82, pp. 95–108.

[8] See especially von Caemmerer, *Das Problem der überholenden Kausalität im Schadensrecht,* 1962, p. 9, Bydlinski, *op. cit.,* pp. 34–7.

with the English rule in *Hadley* v. *Baxendale*.[9] According to article 1150, damages are normally limited to the loss that the debtor foresaw or could have foreseen at the time of the making of the contract.[1] It will be recalled that Mommsen, although admitting such a restriction for some special cases, in the main refused to limit damages to what was foreseeable at the time of the conclusion of the contract. When, around the turn of the century, a German jurist (only one among a great number writing on this subject) suggested such a rule for German law, referring to the *Code civil,* he met only with scorn.[2] But in the drafts of the Uniform Law on International Sales this criterion was constantly adopted for limiting damages,[3] the principal argument in its support being that it agrees with French, Italian and, in the main, with English law. Suggestions that the concept of causation would be a more suitable criterion were promptly dismissed with the argument that the criterion of foreseeability continues to be universally admitted in practice.[4] The formula finally adopted in the Uniform Law, although it seems to extend the liability somewhat further than would follow from adopting the simple criterion of foreseeability, is still based on what the debtor could foresee as possible at the time of the conclusion of the contract.[5] At the same time, the Uniform Law contains rules regarding compensation for special kinds of loss, which are not explicitly subject to the foreseeability test, but which are *per se* eminently foreseeable.[6] This applies particularly to losses due to changes in the price of goods for which there is a current price (article 84).

[9] (1854) 9 Ex. 341.

[1] The restriction does not apply in case of fraud; cf. *supra,* p. 45 at footnote 8.

[2] See Fischer, *Der Schaden nach dem bürgerlichen Gesetzbuch,* 1903, pp. 75 f., regarding Scherer.

[3] See 1935 draft (*Projet d'une loi internationale sur la vente.* S.D.N. 1935—U.D.P.—Projet I), art. 34; cf. p. 42; 1939 draft (*Projet d'une loi uniforme sur la vente internationale des objets mobiliers corporels et rapport.* S.D.N. 1939—U.D.P.—Projet I (2)), art. 85; *cf.* pp. 107 f.; *Projet d'une loi uniforme sur la vente internationale des objets mobiliers corporels,* 1963, art. 94; cf. pp. 71 f.

[4] See *Note de la Commission spéciale sur les observations présentées par divers gouvernements sur le projet de loi uniforme sur la vente internationale des objets mobiliers corporels,* 1963, p. 25.

[5] Uniform Law on the International Sale of Goods, art. 82 (cf. art. 86): "Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known, or ought to have been known to him, as a possible consequence of the breach of the contract." This formula was first proposed in the English "Donaldson Report" (mimeographed, from October 1963), p. 60.

[6] Arts. 84–6.

The three proposals now mentioned—to open the possibility of limiting damages according to the circumstances, in particular the gravity of the fault, to award compensation for the value of goods more freely than other damages, and to take account of the foreseeability of the damage at the time of the conclusion of the contract—are amalgamated in Rabel's views on assessment of damages, which are specially intended for the law of sales.[7] The obligation to compensate for loss of value becomes an example of the obligation to pay "abstract damages", i.e. damages that are not computed on the individual loss of the party entitled to damages, as opposed to "concrete damages". Abstract damages correspond to the normal loss which should always be compensated, regardless of the circumstances. Concrete damages should only be awarded under certain conditions regarding foreseeability. Rabel, moreover, fits this view of damages into a general conception of remedies in the law of sales, based largely on a comparative survey of several legal systems. Two main ideas appear. One is that the debtor should not be liable for more than he ought to have foreseen when entering into the contract. The other is that the type and content of the contract determines the obligations attached to it.[8]

Rabel first discusses abstract damages and finds that they correspond to the loss due to changes in the market price. Several rules in the legislation on sales in different countries are cited as examples.[9] Concerning the relevant time for computing the value, Rabel takes the position that the date when the contract can first be cancelled is decisive for the computation of abstract damages. Higher damages, based on the price at a later date, should in his opinion be subject to the general test of foreseeability which applies to concrete damages.[1]

Later he discusses concrete loss, and his general conception of the remedies for breach of contract lead him to adopt the French and Anglo-American rather than the German approach, though the results are stamped by his personal view and in some cases lie close to German law. The breaching party should be liable for such consequences of his breach as are connected with the purpose of the contract. "Es ist der Vertrag im Rahmen der Umstände seines Abschlusses und auf dem Hintergrund der Rechtsordnung,

[7] Rabel, *Das Recht des Warenkaufs*, vol. 1, reprint 1957, pp. 446–516.
[8] *Op. cit.*, pp. 446–53.
[9] *Op. cit.*, pp. 453–68.
[1] *Op. cit.*, pp. 462–5.

damit auch der gute Treue und der Verkehrssitte, der die Parteipflichten regelt."—"Der Schuldner, der das Recht des Gläubigers verletzt hat, haftet ihm nicht für alle denkbaren Folgen seines vertragswidrigen Tuns schlechthin, sondern nur für die Einbussen, die den durch den Vertrag geschützten Interessen des Gläubigers zustossen."[2] Rabel admits, in addition, that the party in breach is liable to pay damages even for special losses of the plaintiff when he knew about the risk of such losses and therefore could take it into account before deciding to enter into the contract.[3]

These general ideas form the basis of special rules, of which Rabel gives examples. As for the buyer's gains through resale of the goods, Rabel maintains that account should be taken not only of such sales as were or should be known by the seller at the time when the contract was made but also of such sales as might be considered normal.[4] He also thinks that a seller of machinery to a factory owner should be liable for losses incurred by the buyer because he did not receive the machinery in time and has therefore suffered an interruption of his business, provided that these losses are not unusually high.[5] If the breach leads to a personal loss by the buyer, e.g. if a delay in delivery causes him to undertake a journey later than he would otherwise have done and he is injured during the journey, this loss should not be compensated, as the contract of sale only concerns the buyer's fortune, not his personal safety.[6] Rabel admits that the principle of adequate causation could be employed in such a case but denies that it would give sufficient guidance—a criticism which is perhaps not wholly justified.[7] Rabel also holds that his principle to some extent makes it possible to take into account the gravity of the fault.[8]

Although Rabel's ideas are proposed primarily for the law of Sales, they seem to have their greatest value within the law of torts. Apart from such fairly clear cases as that of the buyer just mentioned, it is difficult to find any real guidance from the general principle suggested for liability in contract, and the results

[2] *Op. cit.*, pp. 495 f.
[3] *Op. cit.*, p. 497.
[4] *Op. cit.*, pp. 498 ff.
[5] *Op. cit.*, p. 500.
[6] *Op. cit.*, pp. 500 ff.
[7] *Op. cit.*, pp. 500 ff. See also von Caemmerer, *Das Problem des Kausalzusammenhangs im Privatrecht*, 1956, pp. 13 f., Hermann Lange, *Gutachten für den 43. Deutschen Juristentag*, 1960, pp. 46 ff.
[8] *Op. cit.*, pp. 502–8.

for special cases—such as the interruption of the buyer's business when he does not receive machinery in time—appear to be justified more by Rabel's personal reaction than by the general principle. It is not easy to see what consequences Rabel would draw from his principle regarding such problems as whether a seller can be entitled to damages for losses due to the fact that he has not received payment of the price in time.[9]

It is submitted that altogether the German discussion suffers from the mixture of typical tort problems with problems specific to the law of sales. The suggested special rule of compensation for the loss of the value of goods refers to such widely different questions as the treatment of concurring causes—which has taxed the theoretical acumen of German jurists for at least a century—and the way of computing damages for changes in the market price in the law of sales—which is an eminently practical problem of how best to serve the business community. The concrete problems which have attracted most attention in German discussion (apart from Rabel's treatment of problems within the law of sales) cannot be considered very important or interesting for the law of contractual damages in general or for the law of sales in particular. Their main importance lies in the fact that they help to prove that the principle of difference cannot provide a solution to special problems of great complexity—a conclusion which many lawyers would be prepared to accept as a postulate for the discussion of any such problem.

### *Scandinavian Law*

Considering the strong influence that German legal writings wielded in Scandinavia during the latter part of the 19th century, the reaction to Mommsen's ideas was, at least in the beginning, surprisingly varied. Several writers pointed out that the unrestricted right to damages for all loss that was caused by a breach of contract or by a tort, which Mommsen proposed, would extend the liability of the debtor too far, and various modifications were proposed.

One principle that was suggested was that of restricting damages to the "normal loss", i.e. to the loss which a party entitled to damages would normally suffer, without regard to the circumstances that influenced the loss of the party in the particular case. The

[9] As far as I can see, Rabel does not discuss this question from the point of view of remoteness of damage and only touches on special aspects; cf. *op. cit.*, vol. 2, pp. 45 f.

normal loss would, if a seller failed to deliver goods which he had sold, include the value of the goods that were not delivered, together with the proceeds normally yielded by the goods during the time when the buyer lacked them. This normal loss should be compensated without special proof, and even if it could be proved that the party entitled to damages had suffered no actual loss.[1]

Against such a principle it was objected that it could not be applied consistently, e.g. not to a contract for work, and that it would be unjust to give the same damages to a man who depended for his living on the goods of which he was deprived as to a man who only used the goods for his pleasure. The principle was also said to be in conflict with such special rules as occurred in statutory law.[2]

Other writers suggested that contractual damages should be computed individually but should be limited to loss that could be foreseen by the party liable at the time when the contract was made.[3] This view was influenced by the French *Code civil,* article 1150. A prominent writer, Jul. Lassen, would, however, admit this restriction only in cases where the right to damages arose on the basis of strict liability and therefore, in his view, the true foundation of the obligation lay in the promise.[4]

Some writers, finally, adopted a principle for limiting damages that resembles what later became known as the principle of "adequate causation". Liability for damages should not cover such loss as at the time of the breach of the contract appeared to be a wholly unforeseeable or unnatural consequence of the breach.[5] Jul. Lassen admitted this restriction for cases where the defendant was in fault at the breach of the contract.[6]

The adoption of the Scandinavian Sale of Goods Act during

[1] See in particular Evaldsen, *Skyldnerens mora,* 1870, pp. 116–31, 156–83; cf. Aagesen, *Forelæsninger over den romerske privatret,* 1882, vol. 2, pp. 110–17.

[2] N. Lassen, *T.f.R.* 1889, pp. 65 ff.; cf. Hagerup, *Om kjøb og salg,* 2nd ed. 1884, pp. 135 f., J. Lassen, *Haandbog i obligationsretten, almindelig del,* 1892, pp. 272–9.

[3] See Hammarskjöld, *Om fraktaftalet och dess vigtigaste rättsföljder,* 1886, p. 81, for the contract of carriage. This principle has undoubtedly had its main importance within the law of transportation, cf. *infra,* footnote 7.

[4] Jul. Lassen, *op. cit.,* p. 275. Lassen realized that by maintaining such a principle he came closer to French and English law than to German law; see p. 276, n. 72. The main explanation of Lassen's attitude is no doubt to be found in his general view that the basis of an obligation should also decide its content. Cf. also N. Lassen, *op. cit.,* pp. 89 ff.

[5] N. Lassen, *op. cit.,* pp. 77–88.

[6] Jul. Lassen, *op. cit.,* pp. 275 f.

the first decade of the century did not mark any departure in the discussion. The restriction of damages to the "normal loss" is still mentioned as a possibility, but it is not accepted, except for special fields where it is prescribed by statute, such as the law of transportation.[7] In the main, Lassen's ideas, with the differentiation between cases where liability to pay damages is founded on fault and cases where the debtor is liable irrespective of the fault because of the contract, were accepted by the leading writers. Lassen himself maintains them, and they were accepted by Almén, in his commentary on the Swedish Sale of Goods Act, and by Ussing. Professor Rodhe takes the same view.[8] All these writers hold that where liability is based on fault the question of foreseeability should be judged on the basis of the circumstances at the time of the breach, whereas if the liability is strict the party in breach should be liable only for loss that was foreseeable at the time of the making of the contract.[9]

Almén does not mention the theory of adequate causation (which was not generally accepted at the time when the first edition of his work appeared), but his conclusions do not differ much from that theory. Jul. Lassen and Ussing both adopt the theory, apparently as a new term for a notion that was accepted in Scandinavian law long before.[1] Adequate causation is discussed, with special regard to liability in contract, in the main Swedish work on the law of obligations in general, Rodhe's *Obligationsrätt* (1956).[2] To Professor Rodhe, however, adequate causation is merely a term which may cover several different criteria for lim-

[7] See particularly Ussing, *Dansk obligationsrett, almindelig del,* 2nd ed. 1942, pp. 165 f. As for transportation law, sec. 120 of the Scandinavian Maritime Code is of special interest. It stipulates (in accordance with the law of other countries, e.g. German *Handelsgesetzbuch* secs. 658, 659) that compensation for missing or damaged goods is to be computed on basis of the value that the goods would have had if they had been delivered at the right time and at the right place. This rule does not exclude a considerable variation in the assessment of damages for value, nor the awarding in exceptional cases of damages for further losses. See Selvig, *Erstatningsberegningen ved lasteskader* (Handelshögskolans i Göteborg skrifter 1962: 2), 1962, especially the English summary at pp. 50 ff.

[8] Lassen, *Haandbog i obligationsretten, almindelig del,* 3rd ed. 1917–20, pp. 404–12, Almén, *Om köp och byte av lös egendom,* 1st ed. 1906–08, 4th ed. by Eklund, 1960, § 25 at footnotes 1–12, Ussing, *op. cit.,* pp. 164 f., 167 f. See Rodhe, *Obligationsrätt,* 1956, § 28 at footnote 20.

[9] Ussing was aware that this opinion had been criticized by Rabel, but he nevertheless maintains it, though without giving any specific reasons, see *op. cit.,* p. 165.

[1] See Jul. Lassen, *op. cit.,* p. 405. Ussing, *op. cit.,* p. 164.

[2] Rodhe, *op. cit.,* § 28 at footnotes 11–19.

iting damages. Other writers have adopted this principle as well. In Scandinavian, as well as in German, legal literature the principle of adequate causation is often brought up with regard to one special question which had already caught the interest of the Roman lawyers, the problem of *perpetuatio obligationis*. The question is whether a seller who is liable to pay damages because he has not delivered in time is also bound to repair the loss caused by the goods perishing, through no fault of the seller's, after the delay occurred, a loss which generally does not adequately result from the delay in delivery. In the discussion of this subject, the principle of adequate causation is often taken for granted as the main rule for limiting damages.[3]

A proposal for limiting damages considerably has been advanced by Professor A. Vinding Kruse.[4] At the same time as he accepts the limits contained in the theory of adequate causation, he wants to restrict compensation for individual loss more than this theory admits. His ideas have certain affinities with the older proposal of limiting compensation to "normal loss", but the main result is more connected with that found in French and Anglo-American law. A party entering into a contract should at the time of its conclusion already be able to foresee the risks that he runs by the contract, even in case of breach. The consequence is that damages should be limited to the loss that is normal, if such a loss can be estimated, and if not to a sum that is reasonable in the circumstances. This principle should apply not only in case of strict liability, but also when the breaching party is guilty of fault.[5]

Under Scandinavian law, damages can be reduced if the party suffering the loss failed to take reasonable measures to reduce the loss.[6] Damages can also be mitigated because of the contributory negligence of the plaintiff.[7] The main scope of this latter rule is in the law of torts,[8] but it is supposed to apply to the law of contracts as well. The relationship between these two principles is not very clear, but it has been suggested that the former principle is the primary one, as it fits more closely into the general

[3] See particularly Hult, *Juridisk debatt*, 1952, pp. 137–81 with references, Karlgren, *T.f.R.* 1955, pp. 361–85.

[4] *Misligholdelse af ejendomskøb*, 2nd ed. 1962, pp. 15–19, 25–35.

[5] *Op. cit.*, pp. 33 f. Cf. also Gomard, *Forholdet mellem erstatningsregler i og uden for kontraktsforhold*, 1958, pp. 353–60.

[6] See, e.g., Ussing, *op. cit.*, pp. 167 f., Rodhe, *op. cit.*, § 46, footnote 2.

[7] See Ussing, *op. cit.*, pp. 166 f., Rodhe, *op. cit.*, § 47 at footnote 36.

[8] See Grönfors, "Apportionment of Damages in the Swedish Law of Torts", *Scandinavian Studies in Law* 1957, pp. 93 ff.

pattern of computing damages.[9] Under this principle, damages are reduced with a view to the specific action which the plaintiff should have taken but did not. The principle of contributory negligence should then be applied only when there is not sufficient ground to establish the relevant action of the plaintiff and its results. Mitigation because of contributory negligence generally results in the apportionment of the loss in two fractions, one of which is to be borne by the defendant and the other by the plaintiff.

It has lately been suggested that the methods of limiting damage by the criterion of adequate causation and by the principle of contributory negligence should be supplemented by others. One such method, proposed mainly for the law of torts but illustrated largely by examples drawn from the law of contracts, uses the notion of "plaintiff's own objective risk".[1] The plaintiff is supposed to bear the risk of certain kinds of losses himself, including those due to the fact that property damaged was particularly valuable, regardless of the fact that there was no contributory negligence and even if there was adequate causation in the strict sense. It is likely, however, that other writers will regard this limitation as being just one aspect of the principle of adequate causation, which is then taken in a wider sense.

In Scandinavian law, particularly in the law of sales, liability to pay damages is strictly separated from other remedies for breach of contract. *Hävning,* which is here translated as "cancellation" of a contract,[2] means that each party is relieved of his duty to perform—in the case of a seller to supply the goods, in the case of a buyer to pay the price—and what has been supplied or paid must be returned.[3] This remedy may be coupled with liability to pay damages, if the conditions for such liability are fulfilled, but can also occur separately. In this way it is possible to keep the conditions for cancellation and the conditions for liability to pay damages entirely apart, which is in fact what is done in the law of sales. Cancellation is generally subject to a test of fundamental breach of contract, whereas liability to pay damages is sometimes but not always subject to a condition of negligence on the part of the defendant, as will be explained more fully later.

[9] Rodhe, *op. cit.*, § 47 at footnote 39.

[1] Trolle, *T.f.R.* 1965, pp. 245–70, cf. the same author, *Risiko og skyld,* 1960, pp. 362 ff., and *U.f.R.* 1965 B, pp. 145–9.

[2] Cf. Uniform Commercial Code § 2–106 (4).

[3] The same remedy is called "to declare the contract avoided" in the Uniform Law on International Sales.

There is hardly any counterpart in Scandinavian legal theory to the German attempt to throw doubt on the principle of difference by establishing its consequences when there are concurrent causes of the same damage.[4] It is admitted that the rules regarding concurrent causes may be hard to reconcile with the principle of difference, but the issue is generally limited to this separate problem.[5] On the other hand, it is sometimes stressed that the principle of difference must be adjusted in various ways, with regard to difficulties of proof and also on material grounds, in order to allow for the details of special rules. This device makes it possible to include practically any rule regarding assessment of damages within the conceptual scheme provided by the principle of difference.[6]

## THE SCANDINAVIAN SALE OF GOODS ACT

### *Rules regarding Damages*

Three main types of breach of contract are treated in the Scandinavian Sale of Goods Act: the seller's failure to deliver the goods at the time agreed (sections 21–27), the buyer's failure to pay the price at the time agreed (sections 28–32), and defects in the goods (sections 42–54). It is clear that the same principles for assessing damages are to apply in all three cases, with such adjustments as are necessary owing to the differences between the situations. It is also clear that the principles for assessing damages are the same regardless of whether the sale was a commercial one, i.e. both the parties were merchants who entered into the contract for their business (section 4), or not, and regardless of whether the sale was for generic goods or for specific goods, two distinctions that are important for other questions within the law of sales. The conditions under which a claim for damages arises are, on the other hand, subject to rules which differ according to whether the obligation is of a generic type (including one to pay money)

[4] See, however, e.g. Ussing, *Erstatningsret*, 2nd ed. 1947, p. 170 (regarding the law of torts), and A. Vinding Kruse, *Juristen* 1958, p. 299; both deal with the question very briefly.

[5] The issue is treated at great length by Ulf Persson, *Skada och värde*, 1953, especially pp. 135–261. Cf. Rodhe, *op. cit.*, § 28.

[6] See particularly Rodhe, *op. cit.*, §§ 44–7. This view has been criticized by the present writer, *Nordisk Försäkringstidskrift* 1957, pp. 248–58, as leading to a complicated statement of the rules and obscuring the practical issues. Cf. also A. Vinding Kruse, *Juristen* 1957, pp. 298–302.

or is one dealing with specific goods. In the former case there is strict liability, in the latter case liability is based on fault, but in both cases there are certain modifications of these principles.[7] The principle for computing damages is the same whether the contract is cancelled or not, although the application may differ considerably in these two cases.

From these rules it is possible to infer that the legislators intended a general principle for computing damages to be applied in all cases where damages are awarded. This conclusion is substantiated by the legislative materials which, in addition, have some remarks on remote losses.[8] The Danish materials contain a statement regarding the limits of damages which echoes the views of Jul. Lassen.[9] In the Swedish materials it is said that damages do not cover such loss as is entirely unforeseeable.[10] The extent to which the Swedish legislators considered themselves bound by general principles for assessing damages is indicated by the rejection of a proposal in an earlier draft, according to which the buyer should be compensated for special expenses due to a defect in goods bought, regardless of whether he had a right to other damages. The reason given for the rejection of this proposal was that it was impossible to draw a line between such compensation and damages in general.[1] A special limitation of the right to contractual damages follows from statements in the legislative materials, according to which the rules regarding liability for defects in goods do not apply to injury to person or to property caused by the goods, since liability for such injury constitutes a general problem not peculiar to sales.[2]

[7] For generic obligations, there are exceptions for *force majeure* and similar events (secs. 24, 30 and 43). In case of delay in the delivery of specific goods, the seller is liable only for negligence, but he has the burden of proving that there was no negligence (sec. 23). When specific goods are defective, the seller is liable if the goods lacked a quality that could be considered to be guaranteed or if the defect arose after the conclusion of the contract because of lack of care on the part of the seller (sec. 42, para. 2).

[8] See, e.g., the Norwegian materials, *Motiver til udkast til lov om kjøb*, 1904, p. 37.

[9] See *Udkast til lov om køb*, 1904, p. 47.

[10] *N.J.A. II 1906* No. 1: 1, p. 80. In an earlier draft the regular expression was that "all damage" should be compensated, but this expression was criticized and eventually rejected, because it was considered to give the impression that even entirely unforeseeable losses were included. See *N.J.A. II 1901* No. 1, pp. 69 f.

[1] *N.J.A. II 1906* No. 1: 1, p. 79. Cf. Almén, *Om köp och byte av lös egendom*, vol. 2, 1908, § 42 at footnotes 103–14.

[2] For Swedish law see *N.J.A. II 1906* No. 1: 1, p. 80, for Danish law, *Udkast til lov om køb*, p. 70, for Norwegian law, *Motiver til udkast til lov om kjøb*, p. 58.

The only rules which are really informative concern changes in the market price when a sale is cancelled. In section 25, which deals with failure to deliver goods, the damages, lying when there is no evidence regarding the actual loss of the buyer, are stated to amount to the sum by which, at the time when delivery should have been made, the market price of the goods exceeded that agreed upon in the contract. The corresponding rule for non-payment by the buyer is that damages shall amount to the sum by which the agreed price of the goods exceeded the market price of the goods at the time when the buyer came into default (section 30). Section 45, which refers to defects in the goods, states that the same principle as is laid down for failure to deliver shall correspondingly apply in case of a defect.

From these rules it appears that damages are largely concerned with the effects of changes in the price of goods sold. Conversely it follows that unless a party is entitled to damages, he is not entitled to compensation for losses due to changes in the market price. In sections 42 and 43 it is stated that when there is a defect the buyer is entitled to a reduction of the price corresponding to the defect. This particular remedy, like the German *Minderung*, is not considered to constitute damages in the technical sense and is awarded regardless of the special prerequisites for damages.[3] It does not cover loss due to a rise in the market price of the goods delivered.

The special rules regarding changes in the market price (sections 25, 30, 45) were considered to be justified by their practical importance and by the fact that similar rules could be found in earlier statutes from other countries. However, in Scandinavian law these rules are supposed only to create presumptions, and therefore either party can prove that the loss is greater or smaller.[4] Reduction of the price was a new remedy, at least in Danish and Swedish law, but it was pointed out that it was admitted in most legal systems.[5]

From sections 36 and 55 it appears that a party who has taken care of goods in the other party's interest (in the seller's case when the buyer refuses to accept them, in the buyer's case when he has rightfully rejected them) is entitled to compensation for such care.

[3] Cf. *supra*, p. 43 at footnote 3. See further Rodhe, *infra*, pp. 161 ff.
[4] See for Swedish law *N.J.A. II 1906* No. 1: 1, pp. 50 ff.
[5] *Op. cit.*, pp. 76 ff. Earlier there had been considerable resistance to the introduction of this remedy: see *N.J.A. II 1901* No. 1, pp. 81 ff.; cf. Almén, *T.f.R.* 1904, p. 407.

This right exists even where a breach does not give rise to a claim for damages in the technical sense, and it can be inferred that it does not constitute damages in this sense.

This survey shows that although the German principles were by no means accepted uncritically in Scandinavia, at the time when the Sale of Goods Acts were passed they strongly influenced the attitudes of the legislators. Whenever damages are awarded, they are supposed to cover the whole loss, and the rules are accordingly based on an all-or-nothing principle. If a party is to have compensation for incidental expenses caused by the breach of the other party, he is also to have compensation for losses due to a change in the market price, for loss of profits and for extraordinary expenses. The only exceptions are the reduction of the price, and compensation for care of the goods in the interest of the other party; these are not considered to constitute damages at all. Although the legislative materials carry the assumption that there are some limits to the liability for unforeseeable losses, it is very uncertain what these limits are. As has appeared, legal writers have suggested various kinds of limits, and the courts have considered themselves free to introduce such restrictions as seem suitable to them.

The restrictions on contractual damages based on the duty to take reasonable measures to reduce the loss and on contributory negligence, which have already been mentioned, apply to the law of sales as well. It is also sometimes said that the proof of remote loss may be so difficult as in practice to exclude compensation for it.[6]

### *The Practice of the Swedish Courts*

Statements regarding the principles for assessing damages are rare in Swedish cases on the law of sales. Such as are to be found date mostly from the first years that the Sale of Goods Act was in force. At that time there were important problems of principle that were not yet settled, and actions regarding the law of sales were not uncommon in the courts. The situation has largely changed. The most important problems of principle have been settled, and litigation concerning commercial sales is rare in the courts, since most cases go to arbitrators.

Statements of principle regarding remote losses follow Almén's opinion fairly closely. The point raised is whether the loss ex-

[6] See for example Almén, *op. cit.*, § 25 at footnote 3.

ceeded that which the debtor should reasonably have foreseen at the time of the conclusion of the contract.[7] There is, however, no evidence that any attention is paid to the fact whether the debtor was at fault or was liable irrespective of fault. But since the issue is put in such general terms the result is not, in itself, very informative. In any case, the consequences drawn from the alleged principle do not tend to restrict damages to any considerable extent.

In what follows some practical problems connected with remoteness of damages will be mentioned.

If a buyer pays damages to a second buyer to whom he has sold the goods, and in his turn claims damages from the first seller who is in breach, the position taken by the courts is that the loss of the first buyer is, in principle, to be compensated. The same applies to a penalty that is paid to the second buyer.[8] Such claims have, however, been dismissed in some cases, without its always being clear whether the reason was that it was not sufficiently proved that the first buyer was really forced to pay the damages or penalty, or that he could have avoided the loss by a cover transaction when the seller failed him, or that the seller could not reasonably have foreseen that the first buyer would have to pay damages or a penalty of the size actually required.[9]

A similar problem arises when the buyer does not pay and the seller cancels the contract and pays damages to a subseller or a commission to a third party. The position taken by the Swedish courts appears to be similar to that just mentioned: the loss is to be compensated, but subject to conditions regarding proof, possibility of avoiding the loss, and foreseeability.[1]

Another question is whether a buyer is entitled to compensation for the profit that he would have made by selling the goods to a second buyer. The general position of the Swedish courts seems to be that such a loss of profits can be compensated, although the defence that the loss could be avoided by a cover transaction is often available.[2] The plea that the lost profits on the secondary sale should not be compensated because they were unforeseeably

[7] 1913 N.J.A. 276, 1918 N.J.A. 629 (Court of Appeal), 1919 N.J.A. 486 (dissenting opinion of Kóersner and Sundberg, JJ.); cf. 1928 N.J.A. 567 (dissenting opinion of Wedberg, J.). Cf. Rodhe, *op. cit.*, § 28 footnote 20.

[8] 1913 N.J.A. 276, 1913 N.J.A. 347.

[9] 1916 N.J.A. A No. 658, 1920 N.J.A. 452; cf. 1918 N.J.A. 629, 1925 N.J.A. 219.

[1] 1905 N.J.A. 151, 1918 N.J.A. 629, 1919 N.J.A. 486.

[2] 1907 N.J.A. 445, 1909 N.J.A. 85, 1915 N.J.A. 117, 1918 N.J.A. 551.

high does not seem to have been presented to the Swedish courts in the reported cases.

In the same way a seller can be entitled to compensation for the profits that he would have made on the sale. In this case he can less often be met by the defence that he could have resold the goods, since if there is a limited market the seller can often claim that by a resale of goods once sold he diminishes his other possibilities of selling goods of the same kind. In fact the courts seem to be generous towards the seller when he claims damages for loss of profits.[3]

If the buyer is to employ the goods in his business and thus does not buy for resale, he is generally entitled to compensation for special expenses and for interruption in his business if the goods have not been delivered in time or are defective.[4] There does not seem to be any case where the seller successfully contended that he did not foresee that the breach would cause this kind of loss. It must be kept in mind that injury to the person or property of the buyer is in general not subject to the contractual liability founded on the law of sales.[5]

A corresponding problem on the seller's side is whether he is entitled to damages because he does not receive payment of the price in time and therefore suffers a loss. This problem sometimes arises when the seller is to convert the money into another currency and there is an unfavourable change in the rate of exchange after the agreed time of payment. In such cases the Swedish courts have taken a position favourable to the seller; not only can such a loss be compensated in principle but the proof required regarding foreseeability is not great.[6] In one case—not concerning a sale but adjudicated on a principle that could also be employed in the law of sales—it was suggested, on the basis of the legislative materials of the Instruments of Debt Act, that such losses should be compensated without employing any special test based on a principle of adequate causation.[7]

[3] 1915 N.J.A. 508, 1917 N.J.A. 109, 1920 N.J.A. 248, 1953 N.J.A. 14; cf. Rodhe, *op. cit.*, § 46 at footnote 43. A case where the seller let the goods perish without attempting to resell them and accordingly was denied full recovery of the price is 1906 N.J.A. 154.

[4] See, for example, 1923 N.J.A. 443, 1942 N.J.A. 542, 1947 N.J.A. 82, 1949 N.J.A. 680, 1951 N.J.A. 271, 1916 N.J.A. 274. See also Almén, *op. cit.*, § 25 at footnote 61, Rodhe, *op. cit.*, § 45 at footnote 22.

[5] *Supra*, p. 56 at footnote 2.

[6] 1920 N.J.A. 479, 1928 N.J.A. 252; cf. Almén, *op. cit.*, § 38 footnote 55 c, Rodhe, *op. cit.*, § 45 at footnotes 31–9 with references.

[7] 1951 N.J.A. 444 (opinion by Walin, J.).

It might happen that the seller suffers a special loss because he has not received his money in time and his goods have been seized for payment of his debt, or because he fails to perform an important contract when he lacks the money that was due to him. There does not seem to be any Swedish case where the issue was whether the seller was entitled to compensation for such a loss, but it seems unlikely that it could be compensated.[8]

The impression gained from the decisions now mentioned is that the Swedish courts are in general inclined to give the creditor full damages for any loss that can be proved, and recovery is only denied where the loss is of a kind that a buyer could normally have avoided by a cover transaction or, in the case of a seller, that he could have avoided by a resale. The question of foreseeability in the special case is rarely raised, but the reason may lie in the scarcity of reported cases concerning unusually high losses.[9]

## GENERAL DISCUSSION

### *Various Kinds of Losses*

The prevailing German and Scandinavian view on assessing damages in the law of sales can be summarized as follows. A general principle, applicable both to the law of torts and to the law of contracts in general, gives the main guidance. This principle is, however, modified by special rules concerning requirement of proof, adequate causation, contributory negligence, failure of the plaintiff to take reasonable measures to reduce the loss, concurrent causes of the damage, benefits reaped in connection with the loss, restriction of contractual liability to loss suffered by the other party, exceptions to the contractual liability for injury to person or property caused by goods sold, etc. Where the principle fails to give sufficient guidance because of its vagueness, it may also have to be made more precise in various directions, e.g. by the use of presumptions.

It is submitted, however, that a clearer view of the issues in this

[8] Cf. Rodhe, *op. cit.*, § 45 at footnote 14, Almén, *op. cit.*, § 98 at footnotes 55–55 b with further references. According to Almén such a loss should be compensated only if the debtor had special reason to foresee it.

[9] Cf. 1934 N.J.A. 424, 1946 N.J.A. 338. In none of these cases (which do not concern sales) did the failure to inform about the possibility of a high loss impair the right to full damages.

field can be gained by distinguishing between special kinds of losses. The effect of the modifying rules differs considerably for the various types of loss, and the questions of policy are also different. Moreover, it will be argued here that the importance of negligence as a prerequisite for liability is not always the same. There seem to be good reasons for applying it, if it should be applied at all, only to special kinds of loss.

The main dividing lines will be drawn here between compensation for a difference in price or value, incidental damages and consequential damages. The two last-mentioned expressions are derived from Anglo-American law, especially from the Uniform Commercial Code,[1] but the intention is to reserve the question of what kind of compensation is to be given under each heading.

### *Compensation for Difference in Price*

A common situation where damages are awarded occurs when goods of a fungible kind (such as cereals, silk, cotton, coal, vegetable oils) are rightfully rejected because of non-delivery, late delivery, or defect. The damages will then normally consist in compensation for the difference in price between what was agreed in the contract and what was current at the time of the promised delivery or at some other date. It is also possible that the difference between the price agreed and the price of an actual cover transaction will constitute the amount of the damages. In the former case one can speak of abstract computation, in the latter of concrete computation of the compensation for difference in price.

Such compensation may serve the purpose of indemnifying the buyer for the loss of a bargain incurred as a result of having bought goods which later rose in price or for some other reason were not to be acquired on such favourable terms. If one assumes that the buyer has sold goods to a second buyer at a price calculated on the original price, and in other similar circumstances, the compensation can perhaps more correctly be said to refer to the loss which he suffered by the rise of the market in combination with the breach of the contract by the seller. Whichever view is more appropriate in the special case, the compensation serves to locate the risk of price fluctuations with the seller who is in breach. The compensation may also indemnify the buyer for a loss that he incurs by

[1] See U.C.C. §§ 2-706—2-708, 2-710—2-715; cf. Uniform Law on International Sales, arts. 82—89.

having to undertake the cover transaction at a higher price in order to get immediate delivery, or by having to procure the goods in a market which is less favourable than the one in which the original purchase was made.

Of course, several problems of assessing damages may arise in these cases, e.g. regarding the connection between the original contract and an alleged cover transaction, concerning the time and the manner of a cover transaction on which compensation may be based, concerning the effect of delay by the buyer in making up his mind or in giving the seller notice of his decision, concerning the market and the time that shall be taken into account if compensation is computed abstractly, and concerning the effect of a demand by the buyer for performance of the contract when he knew that delivery was or should be delayed or after the seller refused delivery. The principle of difference gives no guidance for solving these problems, since all solutions can be fitted into this principle in one way or another.

Nor have these problems any connection with the foreseeability of the loss, since, irrespective of the solution chosen, the seller can foresee the possibility that the buyer will incur such a loss. The foreseeability is, for instance, the same whichever date is chosen for computation of abstract damages,[2] since the seller must count on the buyer's choosing the date which is most advantageous to himself. From a systematic point of view it is desirable to consider such compensation for a difference in price as a type of its own and not to distinguish, e.g., between compensation based on the date when the buyer could first reject the goods and other damages.[3]

If the price rises to an unforeseen level because of a war or a similar event, the seller may be relieved of his duty to perform the contract (or from his liability to pay damages), but this possibility must be judged according to principles of impossibility, *force majeure*, frustration, etc. Foreseeability may be relevant in deciding the effect of such events, but in general the question is

[2] In English law the relevant date is when the goods were or should be delivered (Sale of Goods Act, secs. 51, 53), in American law it is the date when the buyer learned of the breach (U.C.C. § 2-713), in Scandinavian law the date when the goods should be delivered (secs. 25, 40), according to the Uniform Law on International Sales the date when the buyer cancelled the contract (art. 84), and according to the 1963 draft of the same law the date when the buyer first became entitled to cancel the contract (art. 96). See further Rodhe, *infra*, pp. 153 ff.

[3] Cf., on the other hand, regarding the view of Rabel, *supra*, p. 48 at footnote 1.

then whether the event could be foreseen, not the rise of the prices in consequence of the war or similar event.

If it can be assumed that neither the principle of difference nor the criterion of foreseeability gives any guidance for the solution of the problems arising here, the next question will be what considerations are relevant. One may point to the measure of freedom of choice (whether to reject the goods or to demand performance) that should be given to the buyer, the measure of activity that should be demanded from the buyer in order to keep the seller informed of his decision, the risk that either party will speculate at the cost of the other, and, perhaps above all, the desire to keep the loss as low as possible from the point of view of both parties and of the community as a whole. The outcome will be found in rules regarding the date for computation of abstract damages, the duty of the buyer to reduce the loss of the seller by a cover transaction, etc.

A special question is whether abstract compensation for difference of price should be awarded even if the seller can prove that the buyer's loss was smaller, because, e.g., he made a favourable cover transaction.[4] The answer to this question will depend on such considerations as whether it is permissible for the buyer to profit from a breach of contract by the seller, what advantage can be gained by having strict criteria that cannot be rebutted by attempts to prove that the loss was smaller, etc. But one should not try to answer this question by invoking a principle that the value of goods should be in a special position as regards compensation.[5]

The problem of concurrent causes is probably not very important in this field. Another matter, which has also troubled those who want to apply the principle of difference consistently, appears to be more significant. The damage may confer a benefit as well as a loss on the buyer, e.g. if by the cover transaction he saves transportation costs in comparison with the original transaction. Regardless of what may apply to other cases where the damage confers benefits as well as losses, there does not seem to be any reason why the expenses saved should not be taken into account in this case.[6]

Compensation for a difference in price will generally be awarded in Scandinavian law in the cases where it is important, i.e. where

[4] Cf. *supra*, p. 44 at footnote 4, p. 57 at footnote 4.
[5] Cf., on the other hand, the German writers cited *supra*, pp. 45–48, 50 f.
[6] Cf. U.C.C. §§ 2-712 (2), 2-713 (1).

price fluctuations are common. Goods for which price fluctuations are common are generally sold as generic goods, in which case liability does not depend on negligence.

If goods are sold as specific goods, on the other hand, the seller is generally liable only for negligence (although the details of the rules differentiate between failure to deliver and late delivery, on the one hand, and defect in the goods, on the other hand).[7] This means that the risk of price fluctuations will lie on the seller who is in breach rather than on the buyer who is the aggrieved party.[8]

In discussing this rule we may first consider the situation where the failure to deliver in time or the defect is not due to a mishap which has happened to the goods. The rule applying to specific goods seems to be of doubtful value in this situation, and it may even in some cases have the consequence that the breach leads to an advantage for the seller. Suppose that the seller has sold a machine at a price which at the time of delivery turns out to be low and that there is a defect which the buyer cannot repair. The buyer rejects the goods. Then he has to buy another machine at a higher price. However, the seller, who manufactures such machines, may repair the defective one and sell it at an enhanced figure, because of the rise in prices. The situation may be rather uncommon, but nevertheless it is a typical example of the possible results of applying a test of negligence to compensation for a difference in price in case of specific goods. It is submitted that the risk of a change in price should lie on the party in breach rather than on the aggrieved party, or in other words, the seller should be liable to pay compensation for a difference in price even if he was not negligent.

If we consider next the situation where specific goods have been destroyed or damaged in an accident, the rule that the seller is not liable even to pay compensation for the difference in price may seem better justified.[9] In such a case—at least if the burden of proving the accident lies on the seller—there is little probability

[7] When there is delay in the delivery of specific goods, the seller is liable only for negligence, but he has the burden of proving that there was no negligence (Scandinavian Sale of Goods Act, sec. 23). When specific goods are defective, the seller is liable only if the defect arose after the conclusion of the contract because of lack of care on the part of the seller, or if the goods lacked a quality that could be considered to be guaranteed (Sale of Goods Act sec. 42, para. 2). Cf. *supra*, p. 56 footnote 7.

[8] As pointed out before, the reduction of the price does not cover loss due to a change in the price after the conclusion of the contract.

[9] This result is reached even under the common law, see English Sale of Goods Act, sees. 6, 7; U.C.C. § 2-613. Cf. Rodhe, *infra*, p. 162.

that he may draw an advantage from the fact that the goods are not delivered or are defective. But it still seems open to doubt whether the risk of a change in the market price should lie on the buyer. The main loss due to such an accident is not allocated by the rules regarding damages at all but by the rules regarding passing of risk. If the risk has passed to the buyer, he is bound to pay the price to the seller, and there will be no question of liability of the seller at all. The problem now discussed can therefore arise only when the risk has not yet passed on to the buyer when the accident occurs, and it refers only to the amount which exceeds the price of the goods, since the seller will always bear the risk of the price. Should one have a sort of extra rule of risk which applies to the difference in price, generally due to a rise in the market? The reason for having such a rule is open to doubt, and indeed there is a strong argument against it. Since the seller normally covers the risk corresponding to the price by insurance on the goods, it seems most suitable that he should cover in the same way the risk for a loss due to a rise in the price, which at least in most cases should be easier for him to do than for the buyer.

The circumstances now mentioned suggest that the restriction of the seller's liability for a difference in price to cases of negligence under Scandinavian law depends on a false analogy from torts and from such contracts where the situation resembles that in tort. In other legal systems a basis—which is no stronger—may be found in the principle that a contract which refers to a non-existing thing is void.[10] The problem looks different if we realize that the compensation now discussed presents a special, limited problem which should not be isolated from the rules regarding passing of risk. In Scandinavian legal theory it is often said that the main principle for liability to pay damages in the law of sales is the negligence rule, as appears in the rules regarding the seller's duty to deliver specific goods, and that the strict liability imposed for generic obligations is explained by the freedom of choice inherent in fulfilling such an obligation. But even if it is admitted that the peculiar features of generic obligations constitute an important reason for imposing strict liability, it is nevertheless possible that this reason is only a subsidiary one: the suitable main principle appears within the field of generic obligations, and the less suitable rule regarding specific obligations is acceptable only

[10] See *Code civil*, art. 1302, English Sale of Goods Act, secs. 6, 7.

because it is practically less important and can be set aside by various devices (the most important one in Scandinavian law being the fictitious guarantee of the qualities of goods admitted by section 42, para. 2, of the Sale of Goods Act).[11] The fact that standard contracts in the law of sales often have widely differing rules may, of course, also obscure the issue regarding the statutory rules.

If we now turn to the situation where the buyer fails to pay the price in time, the position of the seller in claiming a compensation for a difference in price is in many ways similar to that of the buyer just discussed. The issue is mainly the allocation of a risk of a change in the market price. But no question regarding a difference between sales of generic goods and sales of specific goods appears in Scandinavian law, since the starting point is that the breach of contract by the buyer consists in the failure to pay the price, which concerns a generic obligation and as such is subject to strict liability. No question of alleviating the liability of the buyer where specific goods perish after risk has passed to him can therefore arise.

As in the similar case of the seller's breach of contract, the amount of compensation will depend largely on the importance attached to keeping the total loss of the parties as low as possible. But the relevant considerations are not entirely the same in both situations. When deciding whether one should impose on the buyer a duty to proceed to a cover transaction, one must take into account the interest that he may have in procuring exactly the goods which he had bought from the original seller. When judging whether the seller should be compelled to make a resale, no such consideration is relevant, since all money is the same; and from this point of view it does not make any difference whether the seller cancels the original sale and resells the goods to another buyer while claiming damages for the difference from the first buyer, or adheres to the original contract and claims the price. In both cases he will be dependent on the solvency of the original buyer for securing the profit from the transaction. In other respects, too, a difference between the buyer's and the seller's positions will appear. It is often most convenient for the buyer to reject the goods and make a cover transaction when the seller does not supply the goods according to the contract, whereas for the seller the simplest way out is to offer the goods to the buyer and demand payment of the price. The conclusions drawn from

[11] *Cf. supra*, p. 65, footnote 7.

these circumstances may, however, differ. One line of argument is that one should not deprive the seller of the opportunity of claiming the price, which is the most convenient remedy for him. Another possible view is that the law must prevent the seller from using this convenient remedy and force him to make a resale, wherever it is possible, in order to keep the loss of the parties as low as possible. The former line of reasoning appears to be natural for Scandinavian lawyers, whereas in the United States the Uniform Commercial Code is very strict in imposing on the seller the duty to resell the goods whenever possible.[12]

*Incidental Damages*

By incidental damages is here understood indemnification for charges, expenses and commissions incurred for taking care of the goods when the other party is in breach, or for effecting a cover transaction or a compensatory sale or otherwise as a result of the breach of the other party.[1] The intention is not to investigate in detail what costs are to be indemnified under this heading but to discuss on what principles damages should be awarded.

The principle of difference may be of considerable importance for deciding when such costs should be indemnified. When a party is entitled to damages for the profits which he made on the original transaction, he should not be allowed to claim damages for such expenses as he would have had even if the original contract had been correctly performed, since he would have had to cover such expenses out of the profit made on the contract.[2] Whether such expenses should be indemnified can therefore be decided on the basis of a comparison between the situation as it would have been with correct performance and the situation as it is after the breach of the contract.

In other situations, however, the principle of difference cannot be applied in order to decide whether incidental damages should

[12] The U.C.C. allows the seller to claim the price of the goods only if he "is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such an effort will be unavailing", § 2-709 (1) (a). The Scandinavian Sale of Goods Act gives no indication of any duty of the seller to attempt a resale. The Uniform Law of International Sales has parallel rules for the seller and the buyer, since the buyer's duty to make a cover transaction and the seller's duty to resell both depend on such a transaction being in conformity with usage and reasonably possible (art. 25; art. 61, para. 2).

[1] Cf. U.C.C. § 2-710 concerning seller's incidental damages and § 2-715 concerning buyer's incidental damages.

[2] Cf. Almén, *op. cit.*, § 25 at fotnotes 59–60, Rodhe, *op. cit.*, § 45 at footnotes 19–20.

be given. Suppose that a buyer has made an unprofitable bargain because the price of the goods fell after the conclusion of the contract, but that the seller is in breach and the buyer cancels the contract. The buyer should then be allowed to claim incidental damages without regard to the fact that he has gained an advantage by the seller's breach, which enabled him to cancel an unfavourable contract.[3] Neither the principle of difference nor general rules regarding benefits connected with a loss seem relevant here. The most important consideration appears to be that if the seller could set off the benefit which the buyer makes by cancelling an unprofitable contract, he could let the buyer bear any expenses, as long as these would not exceed the amount that the buyer saved by being relieved from the contract.[4]

Questions of foreseeability seem to have little scope when assessing incidental damages, since costs of the kind here contemplated are regularly foreseeable. On the other hand, an important question will often be whether the party aggrieved acted reasonably or not. It may be a matter of dispute whether any particular expense was reasonable, say for a journey for negotiations with the other party or for disposing of the goods as quickly as possible.

The role of negligence may be discussed for this case, too. A survey of the Scandinavian rules shows that in most cases negligence is not a prerequisite. Where liability is strict, the party in breach will have to indemnify special expenses along with other loss suffered by the plaintiff. If specific goods are sold and the buyer rejects the goods, he is entitled to compensation for his expenses for care and custody of the goods (section 55 of the Scandinavian Sale of Goods Act). In the same way the seller may be entitled to compensation for expenses which he incurs when taking care of the goods in the interest of the buyer (section 96).

The remaining cases are those in which the seller is not strictly liable and at the same time either the buyer does not reject the goods (because he is not entitled to rejection or because he prefers not to avail himself of this remedy), or the buyer has expenses which are not immediately related to the care of the goods. Even in some of these cases the buyer may be entitled to compensation for expenses. The reduction of the price (sections 42, 43 of the Scandinavian Sale of Goods Act) must be considered.

[3] Almén, however, opposes this rule, see *op. cit.*, § 25 at footnotes 68–88 a.
[4] Cf. Arnholm, *T.f.R.* 1941, pp. 514 f.

The difference between this remedy and incidental damages may often depend chiefly on the character of the goods and of the defect. If potatoes which have been sold are defective and cannot be used for human consumption but only as food for pigs, a proportional reduction of the price is a suitable remedy and in a sense the primary one. But if wood products contain too much moisture, the primary compensation to the buyer is the cost of drying the goods. If a machine has a defect, the primary compensation is the cost of repairing or exchanging the defective part. It is not impossible that the courts will award compensation for such expenses under the heading of reduction of the price.[5] As said earlier, reduction of the price is available whenever there is a defect, whereas liability to pay damages for a defect generally presupposes negligence. There does not seem to be any reason why compensation for the expenses now mentioned should be awarded on other conditions than those typical for cases of reduction of the price.

In view of these circumstances it seems justifiable to take the rather insignificant step of giving the buyer as well as the seller the right to claim incidental damages regardless of negligence, as was proposed regarding defects in goods in the first draft of the Scandinavian Sale of Goods Act. The criticism then raised—that it was impossible to distinguish such damages from other damages—was surely exaggerated.

### *Consequential Damages*

It has been argued that questions of foreseeability have no great importance for the kinds of loss so far considered, and that liability for such losses should not depend on negligence. If this view is accepted, it follows that the main scope both of foreseeability and of negligence is to be found in the losses that are yet to be considered.

Even among these losses it seems necessary to distinguish between several types, for which different considerations apply. In what follows, the main line of division will be drawn between the seller's and the buyer's situations. Concerning the buyer's situation, one can distinguish between cases where he has bought for resale and through the breach of the seller incurs liability towards the second buyer or loses a profit, cases where he bought the goods to use them in his business, and cases where he bought

[5] See, e.g., 1963 N.J.A. 239 (Court of Appeal), where the court appears to have been generous to the plaintiff in assessing the reduction of the price.

them as a private consumer. Concerning the seller's situation a distinction will be made between cases where the contract is cancelled and those where it is not.

(1) When *the buyer buys for resale*, it is often possible for him to cancel the original contract when the seller is in breach (i.e. to reject the goods) and make a cover transaction, and the very possibility that he may make an important profit on a resale, or incur heavy liability towards the second buyer, may be a special reason why he should cover. Accordingly, the main consideration in this case—as in the case of compensation for a difference in price—will be whether the buyer should have made a cover transaction or not.[6] Where it cannot be held against the buyer that he failed to cover, he may consequently be entitled to compensation for loss of profits or for damages paid to the second buyer.

The situation may then be that the seller did not know or should not have known that a cover transaction was impossible in case of his breach, or that the profit on the resale (or the damages due to a failure to fulfil the second contract) would be unusually high. In the first case the buyer generally could not foresee the possibility of such a loss either, and there seems to be no reason to let him bear the loss alone. Only in the second case does there appear to be any good reason for taking into account the seller's lack of knowledge regarding the possibility of a loss.

When *the buyer buys the goods for use in his business*, as may be the case with a machine or with raw materials, the possibility of cancelling the contract and making a cover transaction may also be relevant. But in important respects the situation differs from the one just discussed. If the contract concerns a machine or other goods which must fulfil the special requirements of the buyer, the possibility of a cover transaction may be smaller than when the buyer buys for resale. A more important matter is that the outside limits of a possible loss, in circumstances that are fairly normal, are so much greater in this case than in the one considered above. Whether the business of the plaintiff will be interrupted at all, how long such an interruption may last, and what the effect on the plaintiff's business will be, are matters which are often entirely unpredictable. In the classic case of *Hadley* v. *Baxendale*[7] a mill had to suspend production because a shaft

[6] No position is taken here on the issue whether failure to make a cover transaction should bar the buyer from recovery for lost profits altogether, or result in a reduction of the damages otherwise due to him.

[7] *Supra*, p. 47, footnote 9.

was not delivered in time. The outcome will in many cases depend on whether the buyer has a spare part or possibly a machine in reserve. It might be argued that a buyer himself contributes to his loss if he makes himself dependent on a single piece of machinery that is to be delivered on a particular day. Yet it would often be too hard on the buyer to regard him as having contributed negligently towards the loss each time that he relied on the seller's fulfilling his obligation according to the contract.

The loss can be calculated in many different ways, e.g. by inquiring what extra expenses have been incurred and whether these are set off by other expenses that have been avoided, or by comparing the profit after the breach with the profit that would have occurred had there been no breach.

In standard contracts the right to damages in such situations is often limited or even excluded altogether, and there may be more or less good reasons for these provisions. When discussing the rules that should apply in the absence of special clauses, it is hardly possible to follow the lead of the contracts. Not only may the contracts go too far in relieving the seller of liability for damages, but the solutions will often depend strongly on the kind of goods or transaction involved.

If *the buyer buys the goods for his private consumption*, the possibility of a corresponding loss will often be much smaller, or the loss will be on the borderline between a personal and an economic loss. If there is a defect in a car and the buyer cannot use the vehicle until the defect has been repaired, the result will often be that he has to use public transport or to content himself with an inferior car which he hires or which the seller places at his disposal. If a refrigerator or a washing machine does not function, the loss will often consist in extra work or in personal inconvenience. The question whether such loss should be compensated and how, is altogether a different problem from the one concerning the high economic losses for interruption of business. A buyer may, on the other hand, suffer a substantial economic loss if the goods cause injury to his person or property. This special problem will be mentioned later.

To summarize the three situations now mentioned, the main cases where the limits of contractual damages cause problems seem to be those where a buyer has bought for resale and has lost high profits or incurred heavy liability for damages against a third party, and where he has bought goods for use in his business and the breach has caused his business to be interrupted. To these may

be added the cases where a private consumer has suffered a loss which is on the borderline between an economic loss and a personal one.

In these and similar situations there seem to be good reasons for limiting the damages to some sort of normal or typical loss, i.e. to an amount that seems reasonable when considering the type of goods, the price, the average loss in such situations, the buyer's general situation, his possibilities of protecting himself by having spare parts or spare machines, etc. Although these situations may at first seem to be particularly suitable for considerations of foreseeability, it seems arguable that the amount of damages cannot be decided with regard only to the party in breach. The numerous variations in the plaintiffs' positions should be influential in themselves, not only as reflected in what the defendants knew or should have known. In view of the fact that in most situations where such a loss occurs the contract will contain provisions regarding the damages, it seems justifiable in the other cases to let the courts decide at their discretion what the amount should be.

If in this way damages are limited discretionarily with a view to the normal loss, it is impossible to reduce the problem of protecting the party in breach against being burdened with unreasonably high damages to one of foreseeability at the time of the conclusion of the contract or foreseeability at the time of the breach. Although there are good grounds for the view that a party should be able even when entering into a contract to survey the risk of paying damages that he incurs by the contract, there are also good grounds for imposing special care on a party who after the conclusion of the contract learns that the other party stands to lose unusually much through a breach. On the other hand, even if the seller did know at the time of the making of the contract that the buyer might incur an unusually high loss through the breach he should not be deprived of the possibility of mitigation of the liability.

It follows that in the opinion of the present writer it is too simple and too rigid a solution to let the limits of damages depend on what a party did know or should have known at the time of the conclusion of the contract. The same applies to rules which hold the defendant liable for all loss that he should have foreseen at the time of the breach and to rules which impose liability for all but the most unforeseeable consequences of the breach. The wish to provide a clear-cut solution of the whole problem must

not close our eyes to the desirability of taking into account both what the seller knew or should have known at the time of the conclusion and what he learned later. In addition, all these formulas do not restrict damages sufficiently where the loss is very high and the seller could foresee the possibility thereof even at the time of entering into the contract. As mentioned before, the buyer's position should also be taken into account on its own merits.

Like foreseeability, the principle of difference has considerable importance when deciding the limits of consequential damages, especially in the case of interruption of the buyer's business. The computation of the loss must depend on a comparison between the result of performance according to the contract and the result of the breach, and it will be necessary to look much deeper into the plaintiff's economy than when deciding merely whether there was an unfavourable difference in price, or additional expenses that were not to be covered out of profits. The shortcomings of the principle of difference will, however, appear where the difference can be computed in several ways, as will often be the case when the buyer's business was interrupted. The principle then fails to provide a ground for choosing between the various ways.

The question whether liability for damages should depend on negligence can rightly be raised for this kind of loss. Even though a discretionary reduction of the damages may make it easier to accept such liability, it is not sufficient to dispense with the whole problem whether negligence should be a requirement or not. Not even if the degree of negligence is taken into account when the discretionary limits are decided can it be taken for granted that negligence should not also be a prerequisite for liability for consequential damages as a whole. On the other hand, the importance of the distinction between specific goods and generic goods is considerably diminished if liability for consequential damages is treated separately. The reasons given for limiting consequential damages apply to sales of generic goods as well as to sales of specific goods.

No position will be taken here on the issue whether negligence should be a condition for liability for consequential damages. It will only be pointed out that if consequential damages alone are made to depend on negligence, we are back to a state of affairs which strongly resembles that which existed before Mommsen's principle of difference had been accepted, since the principle of negligence in the law of sales is applied only to "indirect loss".

So far the problem of *liability for injury to person or property caused by the goods* ("products liability") has been left aside. As mentioned earlier, Scandinavian law does not apply the rule of strict liability for defects in generic goods to such cases. In the main it seems desirable to treat products liability as a subject by itself and not regard it merely as a special case of liability for consequential damages in the law of sales, since the whole field is strongly influenced by considerations typical of the law of torts. This is not to say that the Scandinavian principle of imposing only liability for negligence is to be approved; the problem is far too complicated for such a simple solution.

It must be admitted, however, that there are borderline cases. Suppose that a part for a machine is delivered and found to be defective. If the machine does not function at all with the defective part, it is a clear case falling within the law of sales. If, on the other hand, the part if put into use would injure the machine, it might be suggested that the case is one of products liability. But it seems hard to find any reason why the seller should be treated more leniently in the second situation than in the first. Some adjustment between the principles therefore seems necessary.

(2) Let us now turn to the seller's position as regards consequential damages. If the *seller claims damages for lost profits on a cancelled contract*, the position resembles that of the buyer claiming damages in a similar situation. But as already indicated when discussing the Swedish cases, the seller may be entitled to damages for profit on the sale, since he diminishes his opportunities of selling other goods in a limited market. Such profit will generally be foreseeable to the buyer, and since the profit was to be gained by the seller on a transaction with the buyer himself, he will rarely be able to plead that it was unforeseeably high or was so high that it should not be taken into account.

If the seller cannot make a compensatory sale, i.e. if he must dispose of the goods in some other, less satisfactory way, the loss can be computed in different ways. One way is to start from the price agreed and investigate what costs the seller has saved by not having to fulfil the contract. It is also possible to start from the costs that the seller has had and add to these the profit that he would have made from the contract. Both methods agree with the principle of difference. In theory they ought to lead to the same result, but owing to difficulties of proof the outcome may differ. The role of foreseeability appears to be insignificant.

Normalizing the amount of damages cannot in this case be

justified by the wide scope of the possible loss, which was found in the corresponding case in which the buyer suffered an interruption in his business. But particularly when goods are to be manufactured by the seller and because of the breach by the buyer he has to suspend production, the difficulties of computing the loss may be a good reason for normalizing the damages. An important consideration will be—in this case just as when the seller made a compensatory sale—what account should be taken of the profit that the seller would have made on the original contract in comparison with the profit that he will make on another contract which he will make instead of the first one. This question in its turn leads to another: What account should be taken of the seller's opportunities of selling goods of the kind involved and the price trends for such goods? Limiting the damages due to a seller in such a situation, on the more or less clear assumption that he will make the same amount of profit out of another contract which he can perform instead of the one cancelled may be perfectly justified if there is a good and steady market for the goods that he manufactures. But if the market is falling, restriction of indemnification for profits lost on the cancelled contract will hit the seller badly and lay the risk of the market on him. Whether the buyer could foresee this development seems wholly irrelevant. Although these damages are consequential, the foreseeability of the loss can, at least in general, be disregarded.

If *the seller does not cancel the contract but accepts payment*, he will normally make the same profit as he would have done had there been no breach, and the main indemnification will be the interest on the price. Such interest is generally computed on strict rules which take little account of the individual loss. The most important question regarding damages for individual loss is probably whether the seller should receive compensation for loss due to a change in the rate of exchange between the currency in which payment is made and some other currency during the time of delay. This is a rather special problem, which perhaps should be separated from the principles of sales law entirely, and be judged on rules intended for this very subject. As has appeared earlier, there is the primary question whether such losses should be compensated at all; and, if this is answered affirmatively, there is also the question whether any test of remoteness should be applied to this kind of loss.

If the seller maintains that because of non-payment or delayed payment he has suffered a loss by not being able to meet his other

obligations or by missing the opportunity of making another, favourable contract, it seems very doubtful whether he should be entitled to compensation for such loss. Even if the buyer was aware of the importance for the seller of receiving payment, it is not obvious that he should have to compensate the loss. This, however, is a point on which opinions may differ considerably.

In Scandinavian law the buyer's liability for consequential damages does not depend on negligence, and there seems to be little reason to introduce such a prerequisite. Whether the buyer pays in time or not is generally the result of a conscious decision on his part, and then the question of negligence does not arise. In the few cases where there is real negligence—the buyer has forgotten that the debt fell due or he has misdirected the remittance, etc.—it seems unlikely that the consequences will be serious. What might correspond to a test of negligence would be an evaluation of the circumstances which prevented the buyer from paying in time, or the appropriateness of the reasons which made him decide not to fulfil the contract. But it seems clear that if such circumstances are to be taken into account at all—which in itself seems doubtful—they must be judged discretionarily.

If we compare what has been said about consequential damages due to a buyer and such damages due to a seller, we find considerable differences. Not to receive goods in accordance with the contract and not to receive money are two different things, and the consequences of the difference appear more strongly with regard to consequential damages than with regard to any other kind. An attempt to impose formally and literally the same rule on both parties will therefore lead either to superficiality and obfuscation of the issues involved or to impractical and unsuitable rules. If we want to achieve some kind of real equilibrium, so that the rules favour neither sellers nor buyers and function as well as possible, we must analyse the problems for each situation and put up with rules that superficially may appear rather complicated.

## *Conclusions*

The results of this study, as regards remoteness of loss, can now be summarized and compared with some ideas that have been advanced in earlier writings.

Breaking up the subject into several minor questions, each referring to the assessment of damages in a special situation, demonstrates the variety of the problems, considerations and solu-

tions. Not unexpectedly, remoteness of loss proves to be principally a problem regarding "consequential damages". As for compensation for a difference in price, foreseeability is generally irrelevant, and it should not be employed as a test for deciding when "concrete" instead of "abstract" damages should be granted. The most important issue for limiting such compensation is that of what duty one should lay on a buyer or a seller to diminish the loss, generally by making a cover transaction or a resale. For incidental damages foreseeability is also irrelevant; the principal consideration when limiting such damages is whether the plaintiff acted reasonably in undertaking the acts which led to the expenses.

But even within the field of consequential damages, the problem is not unitary. Remoteness of loss is particularly important as a limitation when a buyer's business is interrupted because of a breach of contract by the seller, consisting in non-delivery, late delivery, or a defect in the goods. The importance is apparently also considerable when the buyer has resold the goods and incurs liability towards a second buyer because of the breach of the first seller. In both cases the seller's opportunity of foreseeing the loss is an important consideration, but it has been argued here that the problem of dealing with remoteness should not be limited to one of deciding the effect of foreseeability at the time of the conclusion of the contract or at the time of the breach. A discretionary reduction of the damages has been suggested as the solution for the cases where the contract does not contain express provisions. Even so, the duty of a buyer to diminish his own loss —in this case, too, generally by making a cover transaction—will often be particularly important.

When the buyer is in breach and accordingly the question is whether the seller should receive consequential damages and, if such damages are granted, how they should be limited, the situation differs from that existing when the seller is in breach. Since money is eminently fungible, the fact that the seller does not receive money has other consequences than the fact that the buyer does not receive goods, which are always more or less specialized, and money is employed in a different way from goods. Foreseeability is therefore of minor importance when the seller did not receive money in time. The interruption of the seller's business because of the breach of the contract by the buyer is another matter. It generally results from a withdrawal of an order by the buyer, and it will then take the form that the seller must break

off production of goods ordered by the buyer and produce goods for someone else. A restriction on the damages in such a case is an altogether different matter from a reduction of the damages when the buyer's business is interrupted.

Several problems that might be seen from the standpoint of remoteness of loss in the law of sales can also, and perhaps more profitably, be dealt with by introducing special rules. This is the case with products liability and with the seller's loss when he has received payment after the agreed time and there is a change in the rate of exchange between currencies in the meantime. But even so there will always be a question of how to adjust the liability to that arising under the law of sales.

It may well be argued that the type of contract determines not only the kind of problems that arise but also how these problems should be solved. Indeed, most of the arguments offered here have gone in the direction of paying heed to the circumstances of the situation. But this issue does not only concern special problems, such as that arising when a breach by one party causes the other party to undertake a journey later than he intended and so to suffer an injury which he would otherwise have escaped. Even the typical problems of assessment of damages in the law of sales—where there is no doubt that the loss was one against which the law of sale should afford protection—must be considered individually and not by applying mechanically any abstract principle. For such problems the aim of the contract of sale may give some guidance, but it can also be surmised that some problems and solutions might be similar in other contractual relations. Products liability should, for instance, be judged in the same way when goods are leased as when they are bought.

The approach taken here and the tentative conclusions drawn both point in the direction of adopting the outlook of Anglo-American law, in particular of the Uniform Commercial Code, rather than sticking to the traditional principles of Scandinavian law, as developed under German influence. This applies chiefly to the technique of breaking up the general principle into special rules; the practical solutions found in English and American law will often appear foreign to Scandinavians and must be considered carefully before any definite opinion on their desirability can be reached. In view of the complexity of the problems, it should, perhaps, be considered an advantage that the Scandinavian Sale of Goods Act does not contain any explicit rules which prevent each situation from being judged on its own merits.