The restitution measure of damages seeks to return to the plaintiff the value of any benefit conferred on the defendant. In this sense, the restitution remedy attempts to do justice by preventing unjust enrichment of the defendant. Generally, a breaching party is not allowed to sue for a breach of contract. However, in certain cases, a court will allow a breaching party to sue for restitution in an amount equal to the benefit that it conferred on the non-breaching party (less, of course, the amount of damages suffered by the non-breaching party). Technically, a suit by a breaching party for restitution would not be a suit based on contract but instead would be denominated a suit in quantum meruit.

In lieu of proving the amount of damages at trial, some contracting parties agree in advance on a liquidated damage amount that may be payable in case the contract is breached. In general, a court will enforce an agreement setting a liquidated damage amount provided that the (i) the agreed amount is a reasonable pre-estimate of damages, (ii) the agreed amount is not considered a “penalty” for breach, and (iii) at the time of contracting it is expected that it would be difficult to calculate actual damages in the event of a breach.

In addition to using a liquidated damages amount to limit damages, sometimes parties use contract provisions to limit damages in other ways. For example, a contract may purport to limit liability for consequential damages. Alternately, sometimes parties use a contract provision to increase damages. For example, a contract may provide that the prevailing party in litigation will receive attorney’s fees. Such a provision changes the default American rule that each party pays their own legal fees.

This chapter includes cases that focus on the expectation measure of damages and on specific performance. The next chapter includes cases that focus on the reliance and restitution measures, and on liquidated damages and related contract provisions that attempt to set the parameters of damages in advance of a breach.

The calculation of expectation damages and the considerations that allow the remedy of specific performance raise a number of issues that students should identify in the following cases. The general issues raised by the particular cases presented are indicated by subheadings in this chapter. Students should use these headings to help them identify relevant sections in the Restatement (Second) and the Uniform Commercial Code that cover the same topics. The point of this exercise is to give students practice locating relevant sections in R2d and the UCC. As you look for detailed sections, you should start with R2d § 344 and Part 7 of Article 2 of the UCC. For each case, in class students will be asked to identify the relevant sections in R2d and the UCC.

A. Distinguishing the Expectation Measure from the Reliance Measure

**HAWKINS v. MCGEE**

146 A. 641 (N.H. 1929)

**BRANCH, J.**:

[*642] 1. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff’s right hand and the grafting of skin taken from the plaintiff’s chest in place thereof. The scar tissue was the result of a severe burn caused by
contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office and that the defendant in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four, then the boy can go home, and it will be just a few days when he will go back to work with a [[*643*] good hand." Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred per cent perfect hand or a hundred per cent good hand." The plaintiff was present when these words were alleged to have been spoken, and if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering into any "contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e., "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant based upon "common knowledge of the uncertainty which attends all surgical operations" and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred per cent perfect" would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant, that he sought an opportunity to "experiment on skin grafting" in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

2. The substance of the charge to the jury on the question of damages appears in the following quotation: "If you find the plaintiff entitled to anything, he is entitled to recover for what pain and suffering he has been made to endure and what injury he has sustained over and above the injury that he had before." To this instruction the defendant reasonably
excepted. By it, the jury was permitted to consider two elements of damage: (1) Pain and suffering due to the operation, and (2) positive ill effects of the operation upon the plaintiff’s hand. Authority for any specific rule of damages in cases of this kind seems to be lacking, but when tested by general principle and by analogy, it appears that the foregoing instruction was erroneous.

"By ‘damages’ as that term is used in the law of contracts, is intended compensation for a breach, measured in the terms of the contract." Davis v. Company, 77 N. H. 403, 404, 92 A. 732, 733. The purpose of the law is to “put the plaintiff in as good a position as he would have been in had the defendant kept his contract.” 3 Williston Cont. § 1338, Harche-Tynes Mfg. Co. v. East Cotton Oil Co., 150 N. C. 150, 63 S. E. 676, 134 Am. St. Rep. 899. The measure of recovery “is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended.” 3 Williston Cont. § 1341. “The only losses that can be said fairly to come within the terms of a contract are such as the parties must have had in mind when the contract was made, or such as they either knew or ought to have known would probably result from a failure to comply with its terms.” Davis v. New England Cotton Yarn Co., 77 N. H. 403, 404, 92 A. 732, 733, Hurd v. Dunsmore, 65 N. H. 171.

The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work. In such cases, the usual rule of damages for breach of warranty in the sale of chattels is applied and it is held that the measure of damages is the difference between the value of the machine if it had corresponded with the warranty and its actual value, together with such incidental losses as the parties knew or ought to have known would probably result from a failure to comply with its terms. Hooper v. Story, 155 N. Y. 171, 175, 49 N. E. 773; Adams Hardware Co. v. Wimbish, 201 Ala. 548, 78 So. 902; Isaacs v. Jackson, etc., Co., 108 Kan. 17, 193 P. 1081; Paducah Hosiery Mills Co. v. Proctor, 210 Ky. 806, 276 S. W. 803; Pioneer Co. v. McCurdy, 151 Minn. 304, 186 N. W. 776; [644] Christian, etc., Co. v. Goodman, 132 Miss. 786, 96 So. 692; Hardie, etc., Co. v. Easton, etc., 150 N. C. 150, 63 S. E. 676, 134 Am. St. Rep. 899; York Mfg. Co. v. Chelten, etc., Co., 278 Pa. 351, 123 A. 327; General Motors, etc., Co. v. Shepard Co., 47 R. I. 88, 129 A. 825; Cavanagh v. Stevens Co., 24 S. D. 349, 123 N. W. 681; Foutty v. Chalmax Co., 99 W. Va. 300, 128 S. E. 389.

The rule thus applied is well settled in this state. "As a general rule, the measure of the vendee’s damages is the difference between the value of the goods as they would have been if the warranty as to quality had been true, and the actual value at the time of the sale, including gains prevented and losses sustained, and such other damages as could be reasonably anticipated by the parties as likely to be caused by the vendor’s failure to keep his agreement, and could not by reasonable care on the part of the vendee have been avoided." Union Bank v. Blanchard, 65 N. H. 21, 23, 18 A. 90, 91; Hurd v. Dunsmore, supra; Noyes v. Blodgett, 58 N. H. 502; P. L. c. 166, § 69, subd. 7. We, therefore, conclude that the true measure of the plaintiff’s damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract. 1 Sutherland, Damages (4th Ed.) § 92. Damages not thus limited, although naturally resulting, are not to be given.