

This thesis is a reproduction of one submitted in December, 1969. I found that, when I came to prepare the reproduction, I was faced with a difficulty, namely, that my own views differed somewhat from those of the original author.

THE NATURE OF DAMAGES IN CONTRACT

should follow. I decided that it would be more prudent to adopt the line suggested by the original author, and this I have accordingly done.

BY

Richard Lawson

I have certainly endeavoured to incorporate those views wherever this was possible.

This thesis is my own original work.

*Richard Lawson*

Richard Lawson

I have approached this thesis.

I have long felt (and here I was greatly influenced

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In this sense, therefore, I must also acknowledge the influence upon myself of the judgments of the majority.

PREFACE

This pattern of influence upon myself when I first had to deal with the problem of the

This thesis is a resubmission of one submitted in earlier years. I was advised that the reasons December, 1969. I found that, when I came to prepare a particular judgment offered a totally the resubmission, I was faced with a difficulty; namely, inadequate explanation for the decision. But it is here that my examiners differed somewhat as to the course I also that my approach meets its greatest test since I should follow. I decided that it would be more prudent appear to be, if only contradicting, and almost ignoring, to adopt the line suggested by the majority, and this I the stated views of the majority. I have accordingly done. I hope, however, that I have shown due sensitivity to the proposals of the minority approach does help to reveal the real nature of the view: I have certainly endeavoured to incorporate them in certain. This thesis is my own original work.

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Richard Lawson

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I have long felt (and here I was greatly influenced by Dr. Stoljar, my supervisor) that divining the true nature of legal principles is often a matter, not of accepting a judgment at face value, but of "reading between the lines". The written judgment often seems to be an inadequate expression of those reasons which, subconsciously, perhaps, prompted a judge to reach a particular decision.



In this sense, therefore, I must also acknowledge the influence upon myself of the American Realists.

PREFACE

This pattern of thought shows its greatest impact upon myself when I turn to deal with the problem of the

This thesis is a resubmission of one submitted in the carrier. Here, I became convinced that the reasons given in a particular judgment offered a totally inadequate explanation for the decision. But it is here that my examiners differed somewhat as to the course I also that my approach meets its greatest test since I should follow. I decided that it would be more prudent appear to be flatly contradicting, and almost ignoring, to adopt the line suggested by the majority, and this I the stated views of the judiciary. Nevertheless, this have accordingly done. I hope, however, that I have seeking heresy notwithstanding, I do believe that my shown due sensitivity to the proposals of the minority approach does help to elicit the real nature of damages view: I have certainly endeavoured to incorporate them in contract. wherever this was possible.

It also behoves me to explain something of the way I have approached this thesis.

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A. & E.	Adolphus & Ellis' Reports
A.L.R.	Argus Law Reports
A.L.T.	Australian Law Times
All E.R.	All England Reports
All E.R. Rep.	All England Reports Reprint
App. Cas.	Appeal Cases
B. & Ad.	Barnewall & Adolphus' Reports
B. & C.	Barnewall & Crosswell's Reports
B. & F.	Bocanquet & Fuller's Reports
B. & S.	Best & Smith's Reports
Beav.	Beavan's Reports
Bing.	Bingham's Reports
Bing. (N.C.)	Bingham's Reports, New Cases
Burr.	Burrough's Reports
(C/A)	Court of Appeal
C.B.	Common Bench
C.B. (N.S)	Common Bench New Series
C. & J.	Crompton & Jervis' Reports



C. & K.	Carrington & Kirwan's Reports
C. & M.	Crompton & Mason's Reports
C. M. & R.	Crompton, Mason & Roscoe's Reports
Cab. & El.	Campbell's Reports
Camp.	Campbell's Reports
(i) <u>As References to Cases</u>	
Car.	Carrington & Payne's Reports
A.C.	Appeal Cases
Ch. D.	Chancery Division
A. & E.	Adolphus & Ellis' Reports
C.L.	Common Law
A.L.R.	Argus Law Reports
C.L.R.	Commonwealth Law Reports
A.L.T.	Australian Law Times
Com. Cas.	Commercial Cases
All E.R.	All England Reports
De Cely.C.C.C.	De Cely's County Court Cases
All E.R. Rep.	All England Reports Reprint
De G. & J.	De Gex & Jones' Reports
App. Cas.	Appeal Cases
B. & Ad.	Barnewall & Adolphus' Reports
B. & C.	Barnewall & Cresswell's Reports
B. & P.	Bosanquet & Puller's Reports
B. & S.	Best & Smith's Reports
El. & El.	Ellis & Ellis' Reports
Beav.	Beavan's Reports
Bing.	Bingham's Reports
Bing. (N.C.)	Bingham's Reports, New Cases
Burr.	Burrough's Reports
(C/A)	Court of Appeal
C.B.	Common Bench
C.B. (N.S)	Common Bench New Series
C. & J.	Crompton & Jervis' Reports

KEY TO ABBREVIATIONS



C. & K.	Carrington & Kirwan's Reports
C. & M.	Crompton & Meeson's Reports
C. M. & R.	Crompton, Meeson & Roscoe's Reports Council
Cab. & El.	Cababe & Ellis' Reports
Camp.	Campbell's Reports
Car. & P.	Carrington & Payne's Reports
Ch. D.	Chancery Division's Bench
C.L.	Common Law, Queen's Bench
C.L.R.	Commonwealth Law Reports
Com. Cas.	Commercial Cases Queen's Bench
De Coly. C.C.C.	De Colyar's County Court Cases
De G. & J.	De Gex & Jones' Reports
Dow. L. Rep.	Dow's Reports Law Reports
E. & B. Rep.	Ellis & Blackburn's Reports
East.	East's Term Reports Reports
E.B. & E.	Ellis, Blackburn & Ellis' Reports
El. & El.	Ellis & Ellis' Reports Reports
Esp.	Espinasse's Reports
Ex.	Exchequer Western Reporter (U.S.A.)
F. R.	Federal Reporter (U.S.A.)
G.L.R. (S.C.)	Gazette Law Reports (Supreme Court)
(H/L)	House of Lords
H.L.C.	House of Lords Cases Superior Court Reports
H. & N.	Hurlstone and Norman's Reports
Hill	Hill's Reports (U.S.A.)
	Page & Bell's Chancery Cases

Hodg.	Hodges' Reports
Q.B.D.	Queen's Bench Division
Ir. Rep.	Irish Reports
R. & M.	Ryan & Moody's Reports
(J/C)	Judicial Committee of the Privy Council
S.A.L.R.	South Australia Law Reports
Jur.	Jurist
S.A.S.R.	South Australian State Reports
K.B.	King's Bench
S.L.T.	Scott's Law Times
L.J. Ex	Law Journal, Exchequer
S.C.R. (N.S.W.)	Supreme Court Reports (New South Wales)
L.J. K.B.	Law Journal, King's Bench
Sol. Jo.	Solicitor's Journal
L.J. Q.B.	Law Journal, Queen's Bench
S.R. (N.S.W.)	State Reports (New South Wales)
L.R. C.P.	Law Reports Common Pleas
Scott	Scott's Reports
L.R. Q.B.	Law Reports Queen's Bench
Stark.	Stark's Reports
L.T.	Law Times
L.T. (O.S.)	Law Times, Old Series
T.L.R.	Tasmanian Law Reports
LL. L. Rep.	Lloyd's List Law Reports
T. Rayn	Sir T. Raymond's Reports
Lloyd's Rep.	Lloyd's Law Reports
Taunt.	Taunton's Reports
M. & M.	Moody & Malkin's Reports
The Times	The Times Newspaper
M. & W.	Meeson & Welsby's Reports
V.L.R.	Victorian Law Reports
Man. & G.	Manning & Granger's Reports
V.R.	Victorian Reports
N.Y.S.	New York Supplement
Ves. Jun.	Vesey Junior's Reports
N.W.	North Western Reporter (U.S.A.)
W.A.R.	Western Australian Reports
N.Z.L.R.	New Zealand Law Reports
W.L.R.	Weekly Law Reports
N.Z.L.R. (S.C.)	New Zealand Law Reports (Supreme Court)
W.N. (N.S.W.)	Weekly Notes (New South Wales)
P.	Probate, Divorce & Admiralty
Pa. Bl.	Sir William Blackstone's Reports
Pa. Super	Pennsylvania Superior Court Reports
Price	Price's Reports
W.W. & A'B	Wyatt, Webb & A'Beckett's Reports (Victoria)
Y. & C.C.C.	Younge & Collyer's Chancery Cases

Q.B.D.	Queen's Bench Division
Ry. & M.	Ryan & Moody's Reports
S.A.L.R.	South Australian Law Reports
S.A.S.R.	South Australian State Reports
S.L.T.	Scots Law Times
S.C.R. (N.S.W.)	Supreme Court Reports (New South Wales)
Sol. Jo.	Solicitor's Journal
S.R. (N.S.W.)	State Reports (New South Wales)
Scott	Scott's Reports
Stark.	Starkie's Reports
Tas. L.R.	Tasmanian Law Reports
T.L.R.	Times Law Reports
T. Raym	Sir T. Raymond's Reports
Taunt.	Taunton's Reports
The Times	The Times Newspaper
V.L.R.	Victorian Law Reports
V.R.	Victorian Reports
Ves. Jun.	Vesey Junior's Reports
W.A.R.	Western Australian Reports
W.L.R.	Weekly Law Reports
W.N. (N.S.W.)	Weekly Notes (New South Wales)
Wm. Bl.	Sir William Blackstone's Reports
W.R.	Weekly Reporter
W.W. & A'B	Wyatt, Webb & A'Beckett's Reports (Victoria)
Y. & C.C.C.	Younge & Collyer's Chancery Cases





Whatever conclusion there is reached, is bound to have a direct effect on the problem of damages. Last of all Goodhart pointed out that both in contract and tort, the law relating to the recovery of damages is of comparatively recent date. Hadley v. Baxendale goes back only to 1854, while re Polemis, decided in 1921, is thus of

INTRODUCTION

Lord Justice Atkin once remarked that the law of damages is 'a branch of the law on which one is less guided by authority

Even so we must not consider the law of contract damages laying down definite principles than on almost any other matter 'a lawless science', subject to endless judicial vagaries.

that one can consider'.<sup>1</sup> When Professor Goodhart later made the same complaint he wondered why this should be so, but concluded

indeed, as McGregor has aptly pointed out: 'The more cases I have read, the more I have been impressed by the way in which that there were three fundamental reasons.<sup>2</sup> First, the nature of the subject matter is such as to make it impossible to elicit

was consistent with principle, although often unaccompanied by a rule capable of doing absolute justice to all concerned. For no plaintiff is fully compensated for the breach unless he

discovers what the principles are, it is often much harder to recovers for every item of loss which stems directly or indirectly, determine why they are what they are. To explain just this

foreseeably or unforeseeably, from the breach. And yet, argued Goodhart, it would plainly be intolerable for any wrongdoer to be saddled with such extremes of liability. Second, until the basic

They too deplore, in Nietzsche's phrase, 'the most common theories of contract, or tort, are fully worked out, it will be stupidity which consists in forgetting what one is trying to do'. impossible to develop consistent principles in the law of damages,

which after all are only part of the major substantive body of rules. Take tort, he says, and the debate as to whether fault is

or is not an essential ingredient of liability: it., 1961) p. ix.

<sup>1</sup> 'The Reliance Interest in Contract Damages' (1936) 46

<sup>2</sup> The Susquehanna [1925] P.196, 200.

<sup>2</sup> 'Two Cases on Damages', (1937) 2 U.T.L.J. 1.

Whatever conclusion there is reached, is bound to have a direct effect on the problem of damages. Last of all Goodhart pointed to the fact that both in contract and tort, the law relating to the recovery of damages is of comparatively recent date. Hadley v. Baxendale goes back only to 1854, while re Polemis, decided in 1921, is thus of even fresher date.<sup>3</sup>

Even so we must not consider the law of contract damages 'a lawless science', subject to endless judicial vagaries. Indeed, as McGregor has aptly pointed out: 'The more cases I have read, the more I have been impressed by the way in which in decision after decision the conclusion reached by the Court was consistent with principle, although often unaccompanied by a statement of principle'.<sup>4</sup> Still, even if it is possible to discover what the principles are, it is often much harder to determine why they are what they are. To explain just this 'why' of contract damages was the burden of Fuller and Perdue's pioneering work.<sup>5</sup>

They too deplore, in Nietzsche's phrase, 'the most common stupidity which consists in forgetting what one is trying to do'.

<sup>3</sup>

And of course The Wagon Mound (1961) is still more recent.

<sup>4</sup>

Mayne & McGregor, The Law of Damages (12th edit., 1961) p.ix.

<sup>5</sup>

'The Reliance Interest in Contract Damages' (1936) 46 Y.L.J. 53, 373.



The cases, they remark, constantly speak of 'measuring' and 'determining', of 'causal connections' and 'items of damage', of 'injuries' and so forth; but nothing is clearer than that behind this so-called 'measuring' or 'determining' the Courts simply make decisions according to what they think is right. Take for instance the 'normal' rule of contract damages, that a plaintiff should receive the value of the defendant's promised performance. Often, say Fuller and Perdue, this is couched in terms of 'compensating' the plaintiff for the 'loss' he has suffered. But how can he be 'compensated' for 'losing' something he never had? Because, they say, a loss is a loss only when understood with reference to an unstated ought. It follows then that giving the plaintiff the value of the promised performance is not simply to measure a quantum, but to seek an end, however vaguely conceived that end may be. contract damages might instead be . . .

The conclusion must be that the nature of contract damages cannot be revealed so long as the larger body of motives and policies which constitutes the general law of contracts is not revealed. The questions which arise - Why the value of the promised performance? - cannot be answered without first discerning the reasons underlying the enforcement of promises generally: and just how our authors achieve this goal is the subject of this opening chapter of the thesis. expenditure and the unrelieved on promise but never the promisee who has rendered full or part

The Three Types of Contract Damages: 'Both historically and logically contracts precede contracts consensus'; 'The False Dicta' An award of contract damages, begin Fuller and Perdue, 64 Y.L.J. 515, 521.

might have any one of three objects or 'interests' in view. If, for example, the promisee has relied to his detriment on the promise of another, as the purchaser of land might when he spends money investigating the seller's title, then the award will be designed to protect his reliance interest and to restore him to the position he was in before the contract was made. Again, the Courts might intervene to protect 'an aggravated version' of the reliance interest,<sup>6</sup> a restitution interest, if the promisee's reliance has had the additional effect, as when he has performed his side of the bargain, of conferring a benefit upon the promisor: not only will the aim be to cure the promisee's detrimental reliance, and so again restore him to his pre-contract position, but more importantly to stop the promisor enjoying an unjust enrichment.<sup>7</sup> Finally, an award of contract damages might instead be designed to protect an expectation interest, an interest, that is, representing nothing more than the value of the bargain to

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6

Fuller, 'Consideration and Form' (1941) 41 Col. L.R. 799, 815.

7

Not only do Fuller and Perdue describe the restitution interest as presenting the 'strongest case for relief', op. cit., pp.56-7, but it is as Fuller later said, the 'contractual archetype'; 'Consideration and Form' supra n.6 at p.815. In other words, a system of contract enforcement could logically ignore reliance expenditure and the unrelieved-on promise but never the promisee who has rendered full or part performance. As Stoljar pointed out: 'Both historically and logically contracts re precede contracts consensu'; 'The False Distinction between Bilateral and Unilateral Contracts' (1955) 64 Y.L.J. 515, 521.

the promisee and where, in the absence of any detrimental reliance, 'the justification for legal relief loses its self-evident quality'.<sup>8</sup>

One could always argue as a justification for this relief the anger which the promisee feels at being 'deprived' of something that is 'his'. But this psychological approach, as Fuller and Perdue agree, provides only an answer but not the answer, for no legal system has ever attempted to visit every promise with juristic sanction, and the selection of promises to be enforced has never been made with reference to the degree of resentment aroused by their breach.

Nor can one find a more satisfactory answer resting on the 'will theory' of contract law. For however attractive it may be to look upon the State as implementing a kind of private law established between the parties, it is a private law which, except in the exceptional case of a promise to pay a definite sum of money, fails to state the penalties due on its violation. The Courts therefore would be free to devise their own methods of effectuating its purposes, and there would be 'no necessary contradiction between the will theory and a rule which limited damages to the reliance interest'.<sup>9</sup>

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Op. cit., p.57.

9

Op. cit., p.58.



Far better, counsel our authors, to seek an answer in the notion of credit, for the essence of the modern credit economy is its blurring of the distinction between present and future goods. It becomes inevitable for a society wherein credit has become a 'pervasive institution' to look upon the expectancy derived from an enforceable promise as a kind of property, and a breach of that promise as an injury to that property-right. They concede, however, a circularity in this argument for promises will have assumed the status of present values only because the law has enforced them; it is certainly an historical fact that promises were enforced long before the advent of a general system of credit.

Plainly then one is entitled to regard the development of the credit system as in a high degree beholden to the 'juristic development' preceding it. Hence to their fourth and final reason which is that since the law is not the creature but the creator of social institutions, the protection accorded the expectation interest must be found in the various policies of the Courts. These policies, say Fuller and Perdue, are (a) to cure and prevent the harms occasioned by reliance and (b) to facilitate reliance upon business contracts, in short to facilitate reliance upon a reliance.

This fourth reason, which views credit from its 'rational' side, and the third reason, which views it from its

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in the text.  
11  
Op. cit., p.53.

'institutional' side, together explain why the Courts should ever protect the unrelieved-on promise. For there has, conclude our authors, been an interaction between law and society: 'The law measures damages by the expectancy in part because society views the expectancy as a present value; society views it as a present value in part because the law (for reasons more or less consciously articulated) gives protection to the expectancy'.<sup>10</sup>

where the claim incorporated what they call an essential  
The Relationship of the Reliance and Expectation Interests  
 reliance (i.e., one representing some necessary or essential

However, our authors were not only concerned to account for the protection of an expectation interest, perhaps their distinguished from protection of the expectation interest. major purpose was to reveal the independent existence of a reliance interest 'as a possible measure of recovery in suits for breach of contract',<sup>11</sup> and especially where that measure would exceed the amount indicated by the expectation interest.

Of course, our authors did not argue that this reliance interest should make for greater recovery in all situations. In the first place, it would not apply where the plaintiff's claim merely concealed a losing bargain. For example, if a manufacturer agreed to construct a machine for \$1,000, unaware that he would need to spend \$1,500 in tearing down and replacing a wall of his plant in order to remove the machine once completed, then, say as, for instance, in foregoing the opportunity to enter other contracts; op. cit., p.78.

<sup>10</sup> Op. cit., p.63. The words underlined are italicised in the text.

<sup>11</sup> Op. cit., p.53.

accomplished before the breach; it might appear, they say, Fuller and Perdue, were his recovery not restricted to the contract price, he would be shifting the burden of a losing contract on to the defendant.<sup>12</sup> And this of course would infringe a basic rule that in a suit for the recovery of reliance damages no one should be placed in a better position than he would have occupied had the contract been performed.<sup>13</sup>

In the second place, a reliance interest would not appear where the claim incorporated what they call an essential reliance (i.e., one representing some necessary or essential outlay), since protection of that reliance could not be distinguished from protection of the expectation interest.<sup>14</sup>

Take the case of a builder, say our authors, who claims for the profit he would have made on the contract as well as for the work

breach when the defendant failed to hand over the warehouse, the

<sup>12</sup> Op. cit., p.76 the amount laid out in stock (£500). The

<sup>13</sup> Op. cit., p.79. Although it is possible, say Fuller and Perdue, that the courts might wish to punish a particularly inexcusable breach by allowing the greater amount of reliance damage; op. cit., p.80.

<sup>14</sup> Laying in of stock was in no way necessary to a perfection of Our manufacturer above offers an illustration of essential reliance. Further instances, say Fuller and Perdue, are 'the performance of express and implied conditions in a bilateral contract, the performance of the act requested by an offer for a unilateral contract, the preparations to perform in both the cases just mentioned, and the losses involved in the contract itself, as, for instance, in foregoing the opportunity to enter other contracts; op. cit., p.78.

Restatement of Contracts, Sec. 33, comment (a). And of course the same point obtains when the law protects the restitution interest.

<sup>17</sup> (1664) T. Raym. 77.



accomplished before the breach: it might appear, they say, that his claim incorporates both reliance and expectation interests, but, they point out, since his expectancy would have comprised both reimbursement for his necessary expenses and a profit in addition, then it follows that his claim is founded entirely on the expectation interest.<sup>15</sup> And it further follows, as the American Restatement has seen, that a judgment for essential reliance alone 'is a judgment for a portion of the value promised by the defendant'.<sup>16</sup>

A third situation, however, in which a reliance interest was meant to apply was rather one of incidental reliance, an example of which is offered by the early case of Nurse v. Barns.<sup>17</sup> Here the plaintiff leased a warehouse from the defendant for £10 and laid in a stock of goods worth £500 in reliance. Suing for breach when the defendant failed to hand over the warehouse, the plaintiff recovered the amount laid out in stock (£500). The question is whether the decision can be upheld. According to Fuller and Perdue it can, for unlike the case of essential reliance the laying in of stock was in no way necessary to a perfection of the plaintiff's right under the contract, and it followed therefore that a greater measure of this incidental reliance (£500 as against

<sup>15</sup> Op. cit., p.74.

<sup>16</sup> Restatement of Contracts, Sec. 33, comment (a). And of course the same point obtains when the law protects the restitution interest.

<sup>17</sup> (1664) T. Raym. 77.

an expectancy worth £10) did not of itself entail a losing bargain.<sup>18</sup> Accordingly, the decision did not mean that the plaintiff thereby shifted the burden of a losing contract.

But one objection to Nurse v. Barns is that, in Sedgwick's terms, the contract should always furnish the measure of compensation:<sup>19</sup> as the promisor offers nothing beyond his promise so its value should mark the limit of his liability. The promisee might well rely upon that promise, but, the other might argue, that can hardly alter the extent of his (the promisor's) original obligation, and if he is held to its monetary equivalent he then acquits himself of any responsibility he ever assumed towards the promisee.

A second objection is that in any case it is wrong to suppose that there can be such an event as a separate loss by reliance. If, for example, a vendor fails to deliver books, after the vendee has obtained a bookcase in reliance, then one of two things can happen: the vendee might either retain the bookcase

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And as they further point out, the one necessary limitation, that recovery be restricted to the value of the contract to the plaintiff, is in practice seldom likely to be of real significance since it will rarely be possible in cases like Nurse v. Barns to judge with any accuracy what the fate of the venture would have been had it not been interrupted by the breach of contract, op. cit., p.79.

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<sup>20</sup> Damages (6th edit., 1874) p.36.

In chapter 5 we shall suggest a possible defence of Nurse v. Barns, but this in no way affects our rejection of that case as far as it permits recovery on the basis of a separate reliance interest.

or else he might sell it, perhaps for less than the price he paid. In the first situation, of course, where he still retains the bookcase, the vendee clearly loses nothing more by the breach than the value of the promised books. To argue otherwise, that he does sustain a reliance loss, is to argue that he ought both to retain the bookcase and yet regain its purchase price. That, of course, is unacceptable.

In the second situation, the vendee still can claim only for the loss of an expectancy simply because (and this may seem the most obvious objection to Nurse v. Barns) reliance expenditure is expenditure which would have been incurred even had the contract been performed. In the present case this means that if the vendor had delivered the books the vendee would have retained a bookcase worth £x in the market: the vendor did not deliver the books, the vendee sold the bookcase, and so has the £x instead. The breach, in other words, 'compelled' him only to liquidate an illiquid asset: it did not involve him in any 'loss' greater than that which he would have incurred even had the contract been performed.

Judged then by these objections, Nurse v. Barns (the report of which contains no indication as to how the plaintiff came to 'lose' his stock) can only be regarded as a wrong decision.<sup>20</sup> This does his reliance expenditure and his expectation interest. Since this

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In chapter 5 we shall suggest a possible defence of Nurse v. Barns, but this in no way affects our rejection of that case as far as it permits recovery on the basis of a separate reliance interest.



not mean, however, that we cannot accept a fourth, and final situation where, say our authors, with just the briefest of references, a separate reliance interest appears. Take the case of a farmer, they say, who inadvertently buys a sickly cow which then contaminates the rest of the herd: his loss can properly be called a reliance loss since it would not have occurred 'if the plaintiff had not entered and relied on the contract'.<sup>21</sup>

But this is a species of reliance loss which is very different from that represented in Nurse v. Barns. It is true, of course, that in both cases the plaintiff's reliance would always have taken place, whether there had been a breach or not: in the one case, the plaintiff would always have spent his £500; in the other, he would always have placed his cow with the herd. But the point of distinction is that, while the £500 would always have been spent, breach or not, the cows would never have died (other things, of course, being equal) if the contract had not been broken.

The significance of this distinction appears if we make the point another way. In cases such as Nurse v. Barns, it would be wrong (unless we are to incorporate the element of punishment into contract damages) to give the plaintiff the full measure of both his reliance expenditure and his expectation interest. Since this

<sup>21</sup> Op. cit., p.75. Street, too, refers to this as a reliance loss: Principles of the Law of Damages (1962) p.245.

would give him the full value of the contract and a return of an outlay he would have incurred even if the contract had never been broken, such an award would put the plaintiff in a position better than that which he would have occupied had there been no breach at all.<sup>22</sup> But this is not so with the unfortunate farmer: indeed, he could justly claim to be under-compensated were his award of damages not to encompass both reliance and expectation interests. To give him simply the value of his expectancy (i.e. the difference in value between the cow as it was, and as it should have been) is plainly inadequate, since it would leave unredeemed the value of his lost herd. But it would be equally unsatisfactory to give the farmer his reliance loss only: the effect of this would be to restore the farmer to the status quo ante; to put him, in other words, in the position he would have occupied had there never been a contract at all.

We come to see, therefore, that the only way the farmer can receive his just dues is if he receives an award of damages embracing both reliance and expectation interests. It is only in this way that he will be placed in the position he would have enjoyed had the contract been performed.<sup>23</sup> Nurse v. Barns

<sup>22</sup> This term will be fully elucidated at the appropriate stage;

<sup>23</sup> The issue of "double compensation" will be the subject of close scrutiny in chapter 5.

<sup>23</sup> Those situations where reliance and expectation interests can properly be joined in the same award are discussed in chapter 6.

is different: an award of reliance and expectation interests in that case would have been "double compensation".

The conclusion must be, then, that only in situations such as those which assailed the hypothetical farmer can it ever be possible to isolate a reliance interest which merits individual protection, and which is not at the same time hostile to the protection of the expectation interest. But the distinction between this species of reliance interest and the expectation interest is not a new one: indeed, it is one that has long been known as that existing between losses caused and gains prevented; in classical terms, between lucrum cessans and damnum emergens. It is, furthermore, a distinction reflected not just in damages, but in damage awards, for as Fuller and Perdue themselves would say, a system of law which heals the breach of an unrelieved-on promise could only ignore the loss from one relied on at the cost of a vicious inconsistency.

Hence our discussion hereafter is broadly patterned on this distinction. First, we shall consider gains prevented and take them in the two groups into which they naturally fall. To begin with, we shall examine recovery of what we might call "loss of bargain".

This term will be fully elucidated at the appropriate stage; suffice it for the moment to say that "loss of bargain" encompasses claims, not for the profits which might have been earned from the other



contracts dependent on or collateral to the contract being sued upon, but rather for the cash equivalent of whatever it was the defendant bound himself to provide. Chapter 2, in short, deals with claims for what might usefully be described as a "monetary" specific performance.

Chapters 3 and 4 take up the problems associated with the recovery of resale profits and user profits (profits, that is, which derive from the use of a profit-earning machine). Hereabouts, we shall present a thoroughgoing analysis and re-appraisal of the great case, Hadley v. Baxendale.

These opening chapters, therefore, deal with gains prevented. Losses caused, or "reliance losses" (losses, that is, such as resulted from the hypothetical purchase of a sickly cow) are dealt with in chapter 6. Here we shall consider two broad categories of loss; physical damage to person or property, and the damages and costs paid by a vendee to a sub-vendee in some previous litigation. Here too we shall revert to a former theme and assess once more the impact and application, this time in a somewhat different field, of the decision in Hadley v. Baxendale.

The intervening chapter deals with expenditure, a measure of damage which sits astride any formal distinction between losses caused and gains prevented. We could not, for example, categorically describe as belonging to one group rather than the other

the sums incurred by the vendee in obtaining whatever the vendor failed to deliver. Nor indeed could we make any final classification of expenditure such as was incurred in Nurse v. Barns. In consequence, we bring both these heads of expense together and discuss them in chapter 5.

If then the thesis appears to fall informally into two parts, we shall add a third consisting of chapter 7: herein we shall briefly discuss the extent to which fault attaching to either party can affect the possible measures of recovery. It is suggested, however, that the learned judge had a considerably more limited aim in mind.

Robinson v. Harman was a case where the defendant had failed in his obligation to sell a particular piece of land to the plaintiff. The latter thereupon recovered in an action for breach of contract the current market value of the estate less the price he would have paid to obtain it.<sup>2</sup> This put him in the position of having in his hands the cash equivalent of the very price he would have paid to obtain it. In the case of the private seller,

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Robinson v. Harman (1848) 7 Ex. 850, 855.

2 See, for example, Robinson v. Harman (1848) 7 Ex. 850, 855. The rule in Robinson v. Harman (1848) 7 Ex. 850, 855 limits the buyer's recovery in actions for breach of a contract to sell land to the expenses he had incurred in investigating the title. Robinson v. Harman case within the exception to this rule, an issue which is discussed in chapter 7. (1848) 7 Ex. 850, 855; Robinson v. Harman (1848) 7 Ex. 850, 855; Robinson v. Harman (1848) 7 Ex. 850, 855; Robinson v. Harman (1848) 7 Ex. 850, 855.

item which he was promised under the contract; he did not recover (indeed, the case did not involve) any dependent or collateral profits which Chapter 2 have been anticipating.

for example, RECOVERY FOR LOSS OF BARGAIN the land in question.

Parke B. meant to say, it is believed, only that the victim of a breach of contract is always entitled to have in his hand of contract is entitled, so far as money can do it, to be the monetary equivalent of the subject-matter of the broken contract: whether he is also entitled to the profits which been performed.<sup>1</sup> This is a dictum of great potency: it seems that subject-matter could, or would, have earned for him was an to imply that every item of loss resulting from a breach of issue which lay neither within the scope of his decision nor the contract is compensable in an action for damages. It is ambit of his dictum. It is this proposed right of the plaintiff suggested, however, that the learned judge had a considerably to recover the value of the bargain between himself and the more limited aim in mind.

defendant, to obtain what we might call a "monetary specific Robinson v. Harman was a case where the defendant had performance", that now requires elaboration.

failed in his obligation to sell a particular piece of land to 1. The Seller's Loss of Bargain.

the plaintiff. The latter thereupon recovered in an action for The Sale of Goods Act, 1893, states that, where a buyer breach of contract the current market value of the estate less wrongfully declines to accept the contract goods, the prima the price he would have paid to obtain it.<sup>2</sup> This put him in the facie measure of damages is the amount by which the contract position of having in his hands the cash equivalent of the very price exceeds the market price." In the case of the private seller,

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3 Robinson v. Harman (1848) 1 Ex. 850, 855.

2 Sec. 50(3). This, of course, is a reference to the United Kingdom. The rule in Flureau v. Thornhill (1776) 2 Wm. Bl. 1078. The limits of the buyer's recovery in actions for breach of a contract to sell land to the expenses he had incurred in Goods Act investigating the title. Robinson v. Harman came within the exception to this rule, an issue which is discussed in ale of Goods Act chapter 7, s. 54(3); Western Australia, Sale of Goods Act, 1895, s. 49(3); New Zealand, Sale of Goods Act, 1908, s. 51(3).



item which he was promised under the contract; he did not recover (indeed, the case did not involve) any dependent or collateral profits which he might have been anticipating, for example, from a profitable resale of the land in question. Parke B. meant to say, it is believed, only that the victim of a breach of contract is always entitled to have in his hand the monetary equivalent of the subject-matter of the broken contract: whether he is also entitled to the profits which that subject-matter could, or would, have earned for him was an issue which lay neither within the scope of his decision nor the ambit of his dictum. It is this proposed right of the plaintiff to recover the value of the bargain between himself and the defendant, to obtain what we might call a "monetary specific performance", that now requires elaboration.

1. The Seller's Loss of Bargain.

The Sale of Goods Act, 1893, states that, where a buyer wrongfully declines to accept the contract goods, the prima facie measure of damages is the amount by which the contract price exceeds the market price.<sup>3</sup> In the case of the private seller,

<sup>3</sup> Sec. 50(3). This, of course, is a reference to the United Kingdom Act. Identical provisions exist in the Australian Capital Territory, Sale of Goods Ordinance, 1954, s.53(3); New South Wales, Sale of Goods Act, 1923, s.52(3); South Australia, Sale of Goods Act, 1895-1952, s.49(3); Queensland, Sale of Goods Act, 1896, s.51(3); Victoria, Goods Act, 1958, s.56(3); Tasmania, Sale of Goods Act, 1896, s.54(3); Western Australia, Sale of Goods Act, 1895, s.49(3); New Zealand, Sale of Goods Act, 1908, s.51(3).

with only one article to sell, this is a correct estimate of his loss; but the dealer or manufacturer, on the other hand, with several articles to sell is in a different position. He might protest that any resale which he made in the market is one which he could have made even if the contract had been performed, that the buyer's refusal had permanently deprived him of the sale of one unit, and that his loss is not the difference between the contract and market prices of the unit, but the contract price less the cost of manufacture and procurement. His contention would accordingly be that the prima facie rule laid down by the Sale of Goods Act should be ignored. Co. v. Haynes. This

This argument is well illustrated, first of all, by two decisions of the English Court of Appeal. In the earlier, Re Vic Mill,<sup>4</sup> the defendant had ordered the manufacture of certain goods, some of which had been completed, and some of which had not, by the date of his refusal to take delivery. The plaintiffs then sold those manufactured after making some alterations. They were held entitled to the cost of those alterations and also to the contract price less the cost of production; for it was wrong, said Hamilton L.J., to suppose that 'the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders and both profits'.<sup>5</sup> As

<sup>4</sup> [1921] 1 K.B. 377.

<sup>5</sup> Ibid [1913] 1 Ch. 465 (C/A); affg. [1913] 1 Ch. 183.

[1913] 1 Ch. 465, 474.

between a hiring and sale of goods, rejected Pilcher J.'s for the goods which were not yet manufactured, the profit reliance on Haynes' case and held that the present defendant per unit was also recouped, because, this time in the words could not be credited with a sale of the goods. of Buckley L.J., 'The defendant failed to produce any evidence to show that if the works had been employed to execute the orders under the contract the [plaintiffs] would have been unable to execute other orders which they had received'.<sup>6</sup>

The second of our cases, Interoffice Telephones, Ltd v. Robert Freeman, Ltd,<sup>7</sup> vindicated Re Vic Mill in the face of a conflict of authority that had come about through Salter J.'s decision in British Automatic Stamp Co. v. Haynes.<sup>8</sup> This judge had found that where the defendant repudiated a contract to hire certain machinery the plaintiff could recover only the rent which he would have earned up to the time when he ought reasonably to have re-let those goods: he thought it introducing matters 'too remote' to argue that the plaintiff could have supplied both this new customer and the present defendant.<sup>9</sup> Re Vic Mill does not appear to have been cited, and the present Court of Appeal, declining to see any difference in these matters

<sup>6</sup> is different, however, in the case of a manufacturer: if there [1913] 1 Ch. 465, 474.

<sup>7</sup> had been no breach "he would have had two sales and two profits".<sup>12</sup> [1957] 3 All E.R. 479 (C/A).

<sup>8</sup> [1921] 1 K.B. 377.

<sup>9</sup> Supra n.7 at p.482. See too Parker L.J. ibid., at p.485.

<sup>11</sup> Ibid., at p.381. [1930] S.A.S.R. 402.

<sup>12</sup> Ibid., at p.409. It made no difference, the Chief Justice said, that the case concerned, not a manufacturer, but a dealer.



between a hiring and sale of goods, rejected Pilcher J.'s  
 The plaintiffs were, therefore, entitled to the price payable  
 reliance on Haynes' case and held that the present defendant  
 by the defendants less their own cost of procuring the chassis;  
 could not be credited with a notional re-hiring of the goods.  
 in other words, their loss of bargain.  
 The reason, said Jenkins L.J. was that the 'substituted cus-  
 The Argument in Hill v. Shovel  
 tomer would simply be taking on hire the machine taken back  
 The rule in De Vic Mill does of course leave it open for  
 from the hirers instead of another machine which, as the  
 a resale to be taken into account, and two cases (the only two  
 evidence shows, the owners could have provided'.<sup>10</sup> Accordingly,  
 cases) where this position has been reached are Charter v.  
 the sum of rent was allowed in full less only the plaintiff's  
Sullivan and Blythwood Motors v. Basside.<sup>15</sup> In the first of  
 installation and maintenance costs.

these, the plaintiff sold in a matter of days a vehicle which  
 The final words can be left to Murray C.J. in Cameron v.  
 the defendant had declined to accept. The issue, said Jenkins L.J.,  
Campbell & Worthington, Ltd.<sup>11</sup> In this case, the defendants  
 saying repeated stress on the point, was resolved from the concept  
 had wrongfully refused to accept delivery of a chassis from the  
 the plaintiff conceded he could sell all the cars he could get  
 plaintiffs, who were motor-car dealers. The plaintiffs managed  
 to sell the chassis elsewhere; and so the defendants (observing  
 Similar cases are: Dominion Motors Ltd v. Gale [1943] 1  
 also that there was no market for the goods) claimed that damages  
 V.L.R. 49; White Trucks Pty. Ltd v. Elley (1953) 66 T.L.R. 117  
 should be nominal only. The Chief Justice rejected this plea:  
 Telephone Rentals v. R.C.A. Photophones Ltd (Feb 5, 1957) cited  
 in the case of an "ordinary person", his argument ran, who simply  
 The Times, 18th Dec.  
 wishes to turn some article of his to money, "no actual damage is  
 [1957] 2 Q.B. 117 (Q/A).  
 suffered from the failure of the purchaser to carry out the  
 [1966] S.L.T. (Sheriff Court Reports) 15.  
 contract" if the vendor manages to find some other purchaser. It  
 The opposite of saying observed  
 is different, however, in the case of a manufacturer: if there  
 p. 134.  
 had been no breach "he would have had two sales and two profits".<sup>12</sup>

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Supra n.7 at p.482. See too Parker L.J. ibid., at p.485.

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[1930] S.A.S.R. 402.

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Ibid., at p.409. It made no difference, the Chief Justice  
 said, that the case concerned, not a manufacturer, but a dealer.

The plaintiffs were, therefore, entitled to the price payable by the defendants less their own cost of procuring the chassis; in other words, their loss of bargain.<sup>13</sup>

The Argument in Hill v. Showell

The rule in Re Vic Mill does of course leave it open for a resale to be taken into account, and two cases (the only two cases) where this position has been reached are Charter v. Sullivan<sup>14</sup> and Blythswood Motors v. Raeside.<sup>15</sup> In the first of these, the plaintiff sold in a matter of days a vehicle which the defendant had declined to accept. The issue, said Jenkins L.J., laying repeated stress on the point, was resolved from the moment the plaintiff conceded he could sell all the cars he could get:<sup>16</sup>

Similar cases are: Dominion Motors Ltd v. Grieves [1936] N.Z.L.R. 766; Eclipse Motors Pty. Ltd v. Nixon [1940] V.L.R. 49; White Trucks Pty. Ltd v. Riley (1949) 66 W.N. (N.S.W.) 101; Thompson v. Robinson (Gunmakers), Ltd [1955] Ch. 177; Telephone Rentals v. R.C.A. Photophone, Ltd (Feb 5, 1957) cited in the Interoffice Case; Sparshatt & Sons, Ltd v. Regan (1959) The Times, 18th Dec.

<sup>14</sup> [1957] 2 Q.B. 117 (C/A).

<sup>15</sup> [1966] S.L.T. (Sheriff Court Reports) 13.

<sup>16</sup> The opposite of saying, observed Sellers L.J., that he could 'get all the cars he could sell'; supra n.14 at p.134.

<sup>17</sup> Supra n.14 at p.130

<sup>18</sup> Because cars were sold at fixed retail prices.

<sup>19</sup> Supra n.15 at p.15.

another, that all subsequent purchasers would have been 'if that is right', he said, 'it inevitably follows that he sold the same number of cars and made the same number of fixed profits as he would have sold and made if the defendant had duly carried out his bargain'.<sup>17</sup> Thus the plaintiff could recover nominal damages only as there was no difference in the contract and market rates.<sup>18</sup>

The court in Blythwood v. Raeside, however, did not have the benefit of any such admission and had to determine for itself whether in fact a resale had really been lost. In this case the defender had declined to take delivery of a car when demand was at its peak. But instead of attempting to make an immediate resale, the pursuer retained the car and only disposed of it when public demand had tumbled. The sheriff-substitute thought that the question could only be decided by examining the seller's trade over a period of a year; for supply and demand, he said, are averaged out over a full year's trading, cars being held in stock in winter to meet the brisker market of spring. He concluded that: 'Looked at generally and over a period of time the pursuers have made one sale less than they would have done'.<sup>19</sup>

The sheriff overruled him: he agreed that the unit of account was correct, but argued that had the car been immediately resold then the person who did in fact buy it would have been supplied with be given, but first the Court of Appeal, and now a majority of the House of Lords, overruled him.

<sup>17</sup> Supra n.14 at p.130

<sup>18</sup> Because cars were sold at fixed retail prices.

<sup>19</sup> Supra n.15 at p.15.



another, that all subsequent purchasers would have been supplied, and that in the result 'the pursuer's profits over the whole period have not been diminished by the defender's default'.<sup>20</sup>

This conclusion, however, seems hardly to fit the facts, for it is virtually explicit in what the sheriff says that the pursuer always had, or had available, at least as many cars as there were purchasers; and if this assumption is correct it can only follow that the pursuer was deprived of a sale through the defender's breach. But more pertinently, Lord Dunedin had earlier argued in Hill v. Showell<sup>21</sup> that this was the only decision that could be reached in cases like Blythswood v. Raeside. He said it was entirely misconceived to suppose that a manufacturer (and his logic applies equally to a dealer, as we shall see) could ever be required to set-off his earnings from a third party against the defendant's total debt. His colleagues had held otherwise, ruling that evidence could be given of alternative earnings which a manufacturer was alleged to have obtained through the breach.<sup>22</sup> But this, said Lord Dunedin, is

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Supra n.15 at p.16.

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(1918) 87 L.J.K.B. 1106 (H/L).

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Bailhache J. had held that any such evidence could not be given, but first the Court of Appeal, and now a majority of the House of Lords, overruled him.

wrong. It assumes that a factory's productive capacity is before a proper decision could be reached on whether he had akin to the capacity of a pint-pot which can never be made really lost the sale he claimed. Perhaps Sellers L.J. did to hold more than a pint; 'but this is not the case..... one concedes that the matter just could not be traced out [f]actories', he explained, 'are more or less elastic. And 'ad infinitum', but he went on to say that it 'would be further, the contracts secured in lieu of this one might decided on the probabilities of the case and having regard to have been such that they could have been farmed out else- the nature<sup>23</sup> extent and circumstances of the dealer's trading'.<sup>26</sup> where'.<sup>23</sup> Re Vic Mill, he said, was properly decided but Even on this restricted basis still we might ask with Lord any indications it contained that second sale might Dunedin: 'On what sort of enquiry are you going to embark?'<sup>27</sup> sometimes be called into account were, in his view, wrong. For there still appears to be<sup>24</sup> need to evaluate various vague Subsequently McCormick,<sup>24</sup> as well as the American and imprecise<sup>25</sup> factors - what, for instance, are we to make of Restatement,<sup>25</sup> adopted this position. There are also two the 'circumstances' of a dealer's trade?' - and in particular points to make about the car-dealer cases which tend to to assess, even if over a shorter period, the vagaries of future confirm Lord Dunedin in his observations. To begin with, trends in supply and demand. Had this case not been resolved it would logically be necessary to follow through the questions by the plaintiff's timely concession that 'he could sell all the of supply and demand to the end of the dealer's trading days cars he could get', it is difficult to see just where the enquiry

<sup>23</sup> mentioned by Sellers L.J. would have led.

Supra n.21 at p.1110.

<sup>24</sup> The second point to make is that there is, in Blythwood v. A manufacturer, he said, 'could, in addition to and along with the particular contract, carry on an indefinite number of similar contracts. Consequently, if the particular contract is repudiated by another person, the latter should take no credit for profits earned or earnable by the contractor on other jobs'; Handbook on the Law of Damages (1935) p.149.

<sup>25</sup> Considering the questions of supply and demand he need not 'Manufacturing facilities', runs sec. 336(i)(c) of the Restatement of Contracts, 'can usually be expanded to meet all demands; therefore profits made on the manufacture and sale of a second article are not deducted'.

<sup>26</sup>

Charter v. Sullivan supra n. 14 at p.135.

<sup>27</sup>

Hill v. Showell supra n. 21 at p.1110.

before a proper decision could be reached on whether he had really lost the sale he claimed. Perhaps Sellers L.J. did once concede that the matter just could not be traced out 'ad infinitum', but he went on to say that it 'would be decided on the probabilities of the case and having regard to the nature, extent and circumstances of the dealer's trading'.<sup>26</sup> Even on this restricted basis still we might ask with Lord Dunedin: 'On what sort of enquiry are you going to embark?'<sup>27</sup> For there still appears to be a need to evaluate various vague and imprecise factors - what, for instance, are we to make of the 'circumstances' of a dealer's trade?' - and in particular to assess, even if over a shorter period, the vagaries of future trends in supply and demand. Had this case not been resolved by the plaintiff's timely concession that 'he could sell all the cars he could get', it is difficult to see just where the enquiry sanctioned by Sellers L.J. would have led.

The second point to make is that there is, in Blythswood v. Raeside, inferential support for Lord Dunedin's view that capacity is sufficiently elastic to cope with any amount of demand. This was brought out by the sheriff-substitute when he said that in considering the questions of supply and demand he need not confine himself to cars of the contract brand: as he rightly

<sup>26</sup> Charter v. Sullivan supra n. 14 at p.135.

<sup>27</sup> Hill v. Showell supra n. 21 at p.1110.



explained, intending purchasers have in mind the purchase of the case of a dealer, manufacturer or tradesman generally, a car generally and are not irrevocably committed to any one his loss of bargain can be reckoned as the permanent loss make or model. But given that such a wider view can be of a sale.

taken it then becomes impossible to believe that a dealer can

2. The Buyer's Loss of Bargain  
ever exhaust his stock of cars and the supply of vehicles

If the seller fails to make delivery of the goods, or open to him. It was inevitable therefore that after making delivers them in a defective condition, then the prima facie his broader survey (and one on which the sheriff made on rule, runs the Sale of Goods Act, 1893, is that the buyer may comment) the sheriff-substitute should find that: 'No recover the market price less the contract price in the first limitation of supply to meet such demand has been shown'.<sup>28</sup>

place,<sup>30</sup> and the difference between the value of the goods Lord Dunedin would seem therefore to offer a sounder as they are, and as they should have been, in the second.<sup>31</sup> view of the law, and, since the authorities are generally

No measure is laid down where the seller is late with delivery inconclusive - even in Hill v. Showell Lord Parmoor conceded but a good general rule, we suggest, is that the plaintiff that the inquiry he was proposing might produce no practical oug<sup>29</sup> to receive a sum which represents the depreciation result<sup>29</sup> - Re Vic Mill should be interpreted to mean that in

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Supra n.15 at p.14. The words of Mann C.J. in Eclipse Motors Pty. Ltd v. Nixon [1940] V.L.R. 49, 54 are very much in point: "it is a characteristic of commerce in such articles as motor cars, which are sold to the public not by the manufacturer but by the dealer, that the demand is never equal to the supply.....from the point of view of dealers and distributing agents there is always an unlimited supply because they get manufacturers to supply them when the demand is made." In this case, it was held that the breach of an agreement to buy a car involved the dealer in the complete loss of a sale although the car in question was resold. (3); A.C.R., 8.56(3); New Zealand, 8.54(3).

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Supra n.21 at p.1114.

of the goods over the period of delay.<sup>32</sup>

the case of a dealer, manufacturer or tradesman generally, his loss of bargain can be reckoned as the permanent loss of a sale.

## 2. The Buyer's Loss of Bargain

If the seller fails to make delivery of the goods, or delivers them in a defective condition, then the prima facie rule, runs the Sale of Goods Act, 1893, is that the buyer may recover the market price less the contract price in the first place,<sup>30</sup> and the difference between the value of the goods as they are, and as they should have been, in the second.<sup>31</sup>

No measure is laid down where the seller is late with delivery but a good general rule, we suggest, is that the plaintiff ought to receive a sum which represents the depreciation

measure of damages set out in the various Sale of Goods Acts.

But an argument such as this overlooks not least the fact

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Sec. 51(3). This, again, is a reference to the United Kingdom enactment. Corresponding sections in those statutes and ordinances referred to supra at n.3 are: New South Wales, s.53(3); Victoria, s.57(3); South Australia, s.50(3); Western Australia, s.50(3); Queensland, s.52(3); Tasmania, s.55(3); A.C.T., s.54(3); New Zealand s.52(3).

<sup>31</sup>

Sec. 53(3). Corresponding sections are: New South Wales, s.54(3); Victoria, s.59(3); South Australia, s.52(3); Western Australia, s.52(3); Queensland, s.54(3); Tasmania, s.57(3); A.C.T., s.56(3); New Zealand, s.54(3).

not unlike the one suggested in the text when he gave the plaintiffs only interest on the gross capital value of the goods. For an account of the difficulties involved in estimating damages for delay see Stanger, 'Ultimate Performance in the Law of Contract', (1955) 71 L.Q.R. 527, 528.

<sup>32</sup> supra at n.33. See also Tranby v. Gall (1945) 1 Q.B. 142, 152, per Lord Evers.

of the goods over the period of delay.<sup>32</sup>

The displacement of any one of these measures is possible, as we shall see in later chapters, where the buyer claims a greater amount of damages by way of resale or user profits. But there are two other situations, it has been suggested, where the buyer, if he recovers anything at all, should recover less than the value of the bargain.

(a) — The first such situation arises where the buyer has resold the goods at a price below that prevailing in the market at the time of the seller's breach. The argument has often been heard that, in such a case, the buyer should not recover more than the resale price less the contract price, for this is all he can be said to have lost. He should not, in other words, be permitted to claim the prima facie measure of damages set out in the various Sale of Goods Acts.

But an argument such as this overlooks not least the fact that the buyer's loss may encompass more than just a loss of, then the only proper course must be to ignore the resale

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That line of dicta (for it has never been settled conclusively) which argues for a 'normal' measure based on the market price at the time of due delivery less the market price at the time of actual delivery, e.g., Elbinger A.G. v. Armstrong (1874) L.R. 9 Q.B. 473, 477, per Blackburn J., must be wrong, for the only loss which that can protect is the loss of a resale profit. In The Heron II [1967] 3 All E.R. 686 (H/L), the trial judge took the line not unlike the one suggested in the text when he gave the plaintiffs only interest on the gross capital value of the goods. For an account of the difficulties involved in estimating damages for delay see Stoljar, 'Untimely Performance in the Law of Contract', (1955) 71 L.Q.R. 527, 528.

<sup>33</sup> Supra n.33 at p.523. See also Brading v. McNeil [1946] 1 Ch 145, 152, per Evershed J.



resale profit if the seller's default obliges him in turn to pay damages to his sub-vendee. If, for example, the resale is expressly made to be of the very goods purchased from the seller, it is plain that the seller's non-delivery will lead to an identical breach in due course by the buyer. The counter proposition, therefore, must be that if the resale is to be taken into account the seller must be liable for all the damages arising from it or else he must ignore it altogether: what he cannot do is select only those incidents of the resale which suit himself. In Williams v. Agius,<sup>33</sup> for example, where the resale price was below the market price at the time of breach, the seller claimed to be liable for nothing beyond the loss of resale profit. But this is to forget, said Lord Dunedin, the breach of contract between the buyer and sub-buyer and the damages likely to be paid; and if the seller cannot be liable for those damages,<sup>34</sup> he went on, then the only proper course must be to ignore the resale altogether and award damages instead for a normal loss of bargain.<sup>35</sup>

A second argument was also raised in Williams v. Agius, again by Lord Dunedin. It could have been, he said, that the

<sup>33</sup> [1914] A.C. 510 (H/L).

<sup>34</sup> Because in the circumstances it was impossible to say in advance how they would be computed; ibid., at p.523. This objection would probably hold good in many cases.

<sup>35</sup> Supra n.33 at p.523. See also Brading v. McNeil [1946] 1 Ch 145, 152, per Evershed J.

resale was of the specific goods contained in the principle contract; but if it was not it was absurd 'to suppose that a contract with a third party as to something else, just because it is of the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover'.<sup>36</sup>

The point is that when the goods have not yet been specifically committed to the third party there has really been no resale at all. The buyer retains the right to supply his man from stock or other market resources: he can still, if he so desires, sell the contract goods elsewhere at perhaps more favourable prices or indeed divert them to his own use. Furthermore, if, because of the seller's non-delivery the buyer now has to resort to the market to supply his own buyer (the possibility of which the seller can hardly ignore if he chooses to make reliance on the 'resale' in the first place) this is one more reason for arguing that a buyer in the present situation should always receive at least his normal loss of bargain.

However, before we can argue against the seller in every case like Williams v. Agius, there needs to be another argument to overcome the obvious limitations of these previous two: for if the resale is one of specific goods and is at the same time

Oddly enough, the first case to decide that a sub-contract

<sup>36</sup> Supra n.33 at p.523. The resale in Williams v. Agius was not a resale of specific goods; see Viscount Haldane L.C. ibid., at p.518, and Lord Moulton, ibid., at p.523.

Op. cit., p.662. There were, he pointed out, several American decisions supporting this view, e.g.: Foss v. Heinegan (1910) 128 N.W. 881; Kaye v. Eddystone Ammunition Corp. (1918) 150F. 654.

v. Milburn,<sup>38</sup> did so on grounds that are not wholly convincing. conditioned upon the buyer's procuring the goods from the seller. In this case a carrier protested that since the shipper had resold the missing goods at below the current market value then seller fails to deliver, there is apparently much to commend the resale price marked the full extent of his liability: in McCormick's belief that 'the buyer's damages should be but the Court of Appeal dismissed this claim, explaining the difference between the original contract price and the (without any reference to the fact that this was a conditional resale price, which most accurately represents his actual sale of specific goods) that since a resale above the market price loss'.<sup>37</sup> could not have increased the measure of damages, then neither could Thirdly then, and of much the greatest significance, we need to one below the market price have decreased the measure of damages. expose as fallacious the very idea that a buyer can ever lose

less, for all that he may lose more, than the normal value of his bargain: for if the seller has bound himself to deliver certain goods to the buyer how then, we must ask, can the buyer ever be entitled to less than possession of those goods, and so be denied their current market value? This is what the seller promised to give him, this is what the buyer has not received, and this is what must therefore, quite apart from any additional resale profit, mark the very least amount of his loss: to argue otherwise, as McCormick has argued, is in effect to adopt the plainly untenable stance of saying that in a situation such as existed in Williams v. Agius, the seller can be freed from performance of the contract.

Oddly enough, the first case to decide that a sub-contract could not cut down on the normal measure of damages, Rodocanachi

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Op. cit., p.669. There were, he pointed out, several American decisions supporting this view, e.g.: Foss v. Heinemann (1910) 128 N.W. 881; Kaye v. Eddystone Ammunition Corp. (1918) 150F. 654.



v. Milburn,<sup>38</sup> did so on grounds that are not wholly convincing.

In this case a carrier protested that since the shipper had resold the missing goods at below the arrived market value then the resale price marked the full extent of his liability:<sup>39</sup> but the Court of Appeal dismissed this claim, explaining (without any reference to the fact that this was a conditional sale of specific goods) that since a resale above the market price could not have increased the measure of damages, then neither could one below the market price have decreased the measure of damages.<sup>40</sup>

<sup>38</sup> Rodocanachi v. Milburn (1886) 18 Q.B.D. 67 (C/A); reversing (1886) 17 Q.B.D. 316.

<sup>39</sup> On its facts, Rodocanachi v. Milburn seems to be unique: there is apparently no corresponding case in either Australia or New Zealand.

<sup>40</sup> See especially supra n.38 at p.77, per Lord Esher M.R. and ibid., at pp.78-9, per Lindley L.J. No cases were cited in the judgments, and, although Rodocanachi v. Milburn was the first of its type, there was still some sort of authority to which the court could usefully have referred. In Rawlings v. Morgan (1865) 18 C.B. (N.S.) 776, for example, the defendant lessee had failed to keep premises in good repair, but pleaded that as the plaintiff had contracted with another to demolish the property at the end of the lease, then the plaintiff had suffered no loss. But that, said Erle C.J., 'was not a matter that I should have directed the jury to take into account'; ibid., at p.782. See too the similar cases of Davis v. Underwood (1857) 2 H. & N. 507; Morgan v. Hardy (1886) 17 Q.B.D. 770. A later case, applying the same principles, is Joyner v. Weeks [1891] 2 Q.B. 31. Now, however, the Landlord and Tenant Act, 1927, s.18(1) lays down that no damages are recoverable for a breach of covenant to repair if those repairs would not be carried out because the premises are to be demolished or structurally altered.

[1926] All S.R. Rep. 763. See chapter 4.

Supra n.33.

<sup>43</sup> [1946] 1 Ch. 145.

<sup>44</sup> Supra n.33 at pp.530-1. See too Lord Dunedin, ibid., at pp.522-3.

But if by this we are to understand as the basis of Rodocanachi v. Milburn a belief that resales can never be taken into account, it follows that, while this might have been a fair reflection on the prevailing situation, it has been subsequently overtaken by decisions such as Hall v. Pim.<sup>41</sup> If, however, the Court of Appeal meant only to say that resales must be ignored in the absence of contemplation (and this is not a point they ever mention) then the decision is equally suspect by implying that in the presence of contemplation the damages could be less than the normal measure. So, whichever way we take it, the given explanation of Rodocanachi v. Milburn is a dubious one.

Nevertheless the decision itself is right, and the broader rationale of Rodocanachi v. Milburn, which was indicated first in Williams v. Agius,<sup>42</sup> was later revealed with greater clarity in Brading v. McNeil.<sup>43</sup> In the earlier case Lord Moulton stressed that, whatever the buyer intended to do with the goods, he was at all events 'entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market

price'.<sup>44</sup> In the second case the buyer purchased land and that the buyer would have been employed to manage the premises and works assigned to the third party and had therefore been deprived of a valuable contract of employment, though:

<sup>41</sup> [1928] All E.R. Rep. 763. See chapter 4.  
<sup>42</sup> In the present case'; ibid., at p. 153.

<sup>43</sup> Supra n.33.

<sup>44</sup> [1946] 1 Ch. 145.

<sup>44</sup> Supra n.33 at pp.530-1. See too Lord Dunedin, ibid., at pp.522-3.

equipment which he then assigned to a third party: because of this, the seller argued, his breach had involved the buyer in no loss. But Evershed J., although he first doubted if Rodocanachi v. Milburn was an altogether logical decision, ended by applying it and bringing out the principle on which it clearly lay: his decision, he said, must be for the normal measure of damages for 'when the offer was made the defendant company contemplated giving and intended to give the plaintiff a benefit of monetary value substantially equivalent to the difference between the value of the property and its contract price'.<sup>45</sup>

(b) But Rodocanachi v. Milburn deals with only one situation. As we said at the beginning, there are two wherein it has been argued that a buyer should recover less than the normal measure of damages. The second of these is again concerned with resales and in particular with this proposition; that whenever the buyer manages to earn his resale profit in full, despite the breach of contract, then the effect of this is to extinguish the initial breach.

<sup>45</sup> Supra n. 43 at p.153. He was also impressed by the fact that the buyer would have been employed to manage the premises and works assigned to the third party and had therefore been deprived of a valuable contract of employment, though: 'I do not forget that that way of estimating damages is not open in the present case'; ibid., at p.153.



By its very nature such a proposition cannot apply to non-performance, only to mis-performance. Indeed, as far as delayed delivery is concerned, there is the strong supporting authority of Wertheim v. Chicoutimi Pulp Co.<sup>46</sup> In this case the sellers were late in delivering wood-pulp which had been purchased at the rate of 25/- a ton, and which the buyers intended to sell to various purchasers at the rate of 65/- a ton. When the goods should have arrived the market rate was 70/- a ton, but, at the date of actual receipt, it had fallen to 42/6. The delay notwithstanding (perhaps because it was small enough not to interfere with their delivery schedules) the buyers successfully completed their sub-sales. Nonetheless they still sought compensation for the 27/6 drop in the market rate. The Privy Council rejected this. The market value of the goods, said Lord Atkinson, is only presumed to be their true value to the purchaser, and, if that presumption is rebutted by a resale beyond the market rate, 'the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been in if the contract had been performed, but in a much better

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[1911] A.C. 301 (J.C.).

Ibid., at p.20.Ibid., at p.22.

position'.<sup>47</sup> The buyer, concluded the judge, could recover chartered from seller to third party. To this extent therefore, only the difference between the market price of the goods that the buyer can buy now, and the price at which they should have arrived, 70/- a ton, and the price at which they were resold, 65/- a ton, for this, he said, marked 'the loss actually sustained'.<sup>48</sup>

Attractive as it may seem, this opinion has subsequently drawn substantial criticism, not the least from Scrutton L.J. in Slater v. Hoyle & Smith.<sup>49</sup> The court, he said, had overlooked entirely the fact that the 'resale' was not a sale of specific goods and that the buyers 'were under no obligation to deliver the goods of the original contract to the sub-buyer'.<sup>50</sup> Lord Dunedin, he continued, had been entirely correct in what he said; for it was absurd to suppose that a sale of similar goods to a third party, just because they were result attained by the Judicial Committee is indeed a hybrid similar goods, could ever affect the measure of damages arising under the principal contract.<sup>51</sup>

However, in the special context of Wertheim v. Chicoutimi Pulp Co., this attack appears as less than convincing. The nature of the breach does allow the goods to become specified, Wertheim v. Chicoutimi Pulp Co. and Rowland v. Divina.

<sup>47</sup> Atkinson expressly said there was none, and repeated his  
Supra n.46 at pp.307-8.

<sup>48</sup> Ibid., at p.307. Wertheim v. Chicoutimi Pulp Co. was followed in Pastor v. Lindner (1931) 253 N.Y.S. 184.

<sup>49</sup> [1920] 2 K.B. 11 (C/A).

<sup>50</sup> Ibid., at p.20.

<sup>51</sup> Ibid., at p.22.





view in Williams v. Agius - to argue otherwise, he said, 'must arise from a confusion of thought'<sup>54</sup> - but even so it is difficult to find any argument against the buyer in Wertheim v. Chicoutimi Pulp Co. which does not apply with equal force, or lack of it, to Rodocanachi v. Milburn.

For example, the Judicial Committee argued generally that the market price was the accepted standard for measuring damages since this was presumed to be the value of the goods to the purchaser, but that this presumption was displaced by a resale above the market rate: this demonstrated the real value of the goods and necessitated therefore an alteration in the assessment of loss.<sup>55</sup> But since the presumption must be displaced by any resale, above or below the market rate, it must also have been displaced in Rodocanachi v. Milburn: and if the real value of goods to the buyer is to be the proper criterion for recovery then the buyer in Rodocanachi v. Milburn ought to have received no more than the resale price.

It was also argued by the Judicial Committee that were the buyer not to be governed by the resale price he would then be placed in a better position than he would have been in had the contract been performed.<sup>56</sup> But this, of course, was just the

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Supra n.33, at p.529.

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See the judgment cited in the text supra p.36.

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See supra pp.36-37.

Wertheim's case the buyer still received more than he ought by way of damages.

objection which McCormick and a number of American decisions made about Rodocanachi v. Milburn:<sup>57</sup> there too, it was said, the buyer profits from the breach since he collects more in damages than he would have earned by way of resale profit had the contract been performed.

The point is of course that there can be no account of Wertheim v. Chicoutimi Pulp Co. which does not bring it into conflict with Rodocanachi v. Milburn. This is so because there can be no relevant difference between delay and non-delivery. The basis of Rodocanachi v. Milburn (as we explained it) was that the buyer of goods is always entitled to have his contract performed, and it can hardly be said that his right to performance depends on the type of breach complained of. The buyer in Wertheim v. Chicoutimi Pulp Co. might well have recovered his full resale profits, but that is an entirely independent matter: what he did not get was what he paid for, namely the delivery of goods at a particular time; and as far as it suggests that resales can, if only partially, affect the buyer's right to full performance, Wertheim v. Chicoutimi Pulp Co. ought not to be followed.<sup>58</sup>

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See supra p. 32

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This does not mean though that the buyer in Wertheim v. Chicoutimi Pulp Co. should have received the difference in market prices; he should instead have received some allowance as depreciation for the period he had been kept out of his goods: see supra p. 28. Paradoxically this would appear to mean that in Wertheim's case the buyer still received more than he ought by way of damages.

But this said, it must be conceded that, as far as defective delivery can, for present purposes, be likened to delayed delivery, there is strong support for Wertheim v. Chicoutimi Pulp Co. to be found in Devlin J.'s judgment in Biggin v. Permanite.<sup>59</sup> To be sure, it had been earlier held in Slater v. Hoyle & Smith<sup>60</sup> that the sale and successful resale of defective goods could not be put up in the reduction of the normal measure of damages, but this was because of three distinguishing factors: the resale did not appear to be of the specific goods sold under the original contract, since this concerned unbleached cloth where the resale dealt with bleached;<sup>61</sup> the buyer appeared to rest under a liability to pay damages to the buyer from him;<sup>62</sup> and finally the resale had not, apparently, been contemplated by the original seller.<sup>63</sup> If, however, (Devlin J. was later to argue) a resale is within the contemplation of the parties, then "the damages must be assessed by reference to it, whether the plaintiff likes it or not [and] if it is the

<sup>59</sup> [1951] 1 K.B. 422.

<sup>60</sup> Supra n.49.

<sup>61</sup> See especially Bankes L.J. ibid., at p.15.

<sup>62</sup> The judgments appear to believe that the buyer had avoided liability altogether, but it is clear that the third party was claiming against the buyer although no definite proceedings had been commenced; see Scrutton L.J. ibid., at p.19.

<sup>63</sup> See e.g., Warrington L.J. ibid., at p.17.



plaintiff's liability to the ultimate user that is contemplated as the measure of damages and [the goods are] used without injurious results so that no such liability arises, the plaintiff could not claim the difference in market value, and say that the sub-sale must be disregarded".<sup>64</sup> He held, therefore, that where the defendants had sold defective roofing adhesive knowing that it would be resold, and this adhesive had been used as to part without any injurious effect, then, as to that part, "the plaintiff can claim nothing".<sup>65</sup>

This cannot be supported for precisely those reasons that Wertheim v. Chicoutimi Pulp Co. cannot be supported. It might even be added that in the case of defective delivery, there is less cause to reduce the damages since the seller's breach is more substantial than the often merely technical breach by delay. Furthermore, if ever an argument could be made out for reducing the damages below the normal loss of bargain it is difficult to appreciate the relevance of contemplation. As Williston has said: 'If his [the buyer's] damages are restricted to the smaller sum, it is because that gives him full compensation for what he has as we saw from both Wertheim v. Chicoutimi Pulp Co. and Biggin v.

<sup>64</sup>

Supra n.59 at p.436.

<sup>65</sup>

Ibid., at p.437. The judgment was partially overruled, but not on grounds here relevant; see [1951] 2 K.B. 314 (C/A).

<sup>66</sup>

Williston on Sale (Revised edit., 1948) p.317. Williston in fact declined to say definitely whether it would be right to permit a measure of recovery below the normal rate.

<sup>67</sup>

Supra p. 45.

suffered from the breach, and this does not depend on the seller's knowledge'.<sup>66</sup>

Still, the contemplation formula is not entirely without a role to play in this area of gains prevented. As may be recalled, it was by stressing that a seller contemplated giving a particular performance that Evershed J. once made it clear that the equivalent of that performance was the least to which the buyer was entitled.<sup>67</sup> But this, as we shall see, is not to employ that formula in quite the way the Court of Exchequer intended: hence the principles discussed in this chapter have not been those of Hadley v. Baxendale but those instead of Robinson v. Harman.

There was, as we saw, no attempt ever to say that a seller could demand less than a 'monetary specific performance'. The problem instead was the essentially practical one of assessing just what it was he could be said to have lost. Nor was there any direct attack on the buyer's right of performance, rather it was subverted by a misguided notion of what constituted the buyer's real or actual loss. The real basis of Rodocanachi v. Milburn, as we saw from both Wertheim v. Chicoutimi Pulp Co. and Biggin v. Permanite, was not always fully appreciated, and even such a distinguished commercial lawyer as Scrutton L.J. could once profess himself unable to reconcile Williams v. Agius with

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Williston on Sale (Revised edit., 1948) p.317. Williston in fact declined to say definitely whether it would be right to permit a measure of recovery below the normal rate.

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Supra p.35.

a case such as Hall v. Pim<sup>68</sup> where a party had successfully claimed for a loss of resale profits.<sup>69</sup> The point is,

of course, that one concerned a claim for more than the normal measure of damages, while the other less; and,

as McGregor has said: 'Different considerations may well apply in these different situations'.<sup>70</sup>

had on the position prior to 1854. Lord Campbell C.J.,

Lord Upjohn and Williston<sup>5</sup> all declare that it extended

the sphere of contractual liability, while McCormick<sup>6</sup> and

and the judges began to be called in to settle the law, by ruling

<sup>1</sup> (1854) 9 Ex. 341; 2 W.R. 302; 23 L.T. (O.S.) 69, 23 L.J. Ex. 179; 20 Law Review 196; The Times, 24 February. Except where stated all citations will be from the Exchequer Report.

<sup>2</sup> Hadley v. Baxendale was immediately accepted as authoritative abroad as well as at home: see, for example, Thompson v. Marshall (1866) 3 W.M. & A.B. (L) 150; Doyle v. Jacobs (1872) 11 S.C.R. (N.S.S.) 77; McNab v. McNecken (1866) Macassay's New Zealand Reports, 446.

<sup>3</sup> <sup>68</sup> Supra n.41.

<sup>69</sup> Finlay v. Kwik Hoo Tong [1929] 1 K.B. 400, 411. Both Greer and Sankey L.JJ. found the same difficulty; ibid., at pp.415 and 417 respectively.

<sup>70</sup> Op. cit., § 377. See too § 166.

<sup>5</sup> Contracts (Revised edit., 1937) Vol.5, § 1356.

<sup>6</sup> Handbook on the Law of Damages (1935) p.565.



Washington<sup>2</sup> disagree and argue that its effect was precisely the reverse. The dispute is more than just an academic one,

### Chapter 3

for the answer, as we shall see, given by the keenest of insights into the aims and nature of contract damages.

#### THE RULE IN HADLEY V. BAXENDALE

If jurists are at one in saying that Hadley v.

Baxendale<sup>1</sup> is the leading authority on the recovery of profits,<sup>2</sup> still they cannot agree as to the effect it had on the position prior to 1854. Lord Campbell C.J.,<sup>3</sup> in the sixteenth<sup>4</sup> and seventeenth<sup>5</sup> centuries, he said, the jury Lord Upjohn<sup>4</sup> and Williston<sup>5</sup> all declare that it extended was entirely unfettered as to the amount of compensation<sup>6</sup> it gave, the sphere of contractual liability, while McCormick<sup>6</sup> and but as the judges began to rein in on this discretion, by ruling

<sup>1</sup> On the admissibility of evidence, or by granting new trials in (1854) 9 Ex. 341; 2 W.R. 302; 23 L.T. (O.S.) 69, 23 L.J. Ex. 179; 20 Law Review 196; The Times, 24 February. Except where stated all citations will be from the Exchequer Report. of rules and formulations with regard to contract damages.

<sup>2</sup> It Hadley v. Baxendale was immediately accepted as the seller of authoritative abroad as well as at home: see, for example, Thompson v. Marshall (1866) 3 W.W. & A'B (L) 150; Doyle v. Jacobs (1872) 11 S.C.R. (N.S.W.) 77; McNab v. McMeckan (1866) Macassey's New Zealand Reports, 446. by the buyer in investigating

<sup>3</sup> Smeed v. Foord (1859) 1 El. & El. 602, 608. The reports in of this case at 28 L.J.Q.B. 178 and 7 W.R. 266 contain no similar observation. Hereafter, except where stated, citation is from the nominate report.

<sup>4</sup> The Heron II [1967] 3 All E.R. 686, 714-5, approving Lord Campbell C.J.; supra n.3. Common Law' (1931) 47 L.Q.R. 5345; (1932) 48 L.Q.R. 90.

<sup>5</sup> Contracts (Revised edit., 1937) Vol.5, § 1356.

<sup>6</sup> Ibid.  
<sup>9</sup> Handbook on the Law of Damages (1935) p.565.

Flureau v. Thornhill (1776) 2 Wm. Bl. 1078; this case will be discussed in chapter 7.

Washington<sup>7</sup> disagree and argue that its effect was precisely the reverse. The dispute is more than just an academic one, for the answer, as we shall see, gives us the keenest of insights into the aims and nature of contract damages.

The Recovery of Profits prior to 1854

The modern law on contract damages results, as Washington has shown,<sup>8</sup> from the extended control of judge over jury. In the sixteenth and seventeenth centuries, he said, the jury was entirely unfettered<sup>12</sup> as to the amount of compensation it gave, but as the judges began to rein in on this discretion, by ruling on the admissibility of evidence, or by granting new trials in the event of excessive or inadequate awards, there was a natural growth of rules and formulations with regard to contract damages.

It had, for example, been established by 1776 that the seller of land, who had failed to make out a good title, was liable for nothing beyond the expenses incurred by the buyer in investigating the title;<sup>9</sup> in 1810 it was ruled that the giving of interest in

damage awards "should be confined to bills of exchange and such view espoused in *De Witt v. Bank* and *Booth v. Swan*, however, eventually predominated.

<sup>7</sup> *Page v. Havens* (1817) 2 B. & C. 348; *Page v. Havens* (1817) 2 B. & C. 348; *Foster* 'Damages in Contract at Common Law' (1931) 47 L.Q.R. 345; (1932) 48 L.Q.R. 90. *Eastern Fly Co.* 81893] A.C. 429. Interest on damages awards is now allowable, at the discretion, under the Law Reform (Miscellaneous Provisions) Act, 1934, s.3(1).

<sup>8</sup> *Flureau v. Thornhill* (1776) 2 Wm. Bl. 1078; this case will be discussed in chapter 7. (1818) 8 Tenth. 540; *Gainsford v. Carroll* (1824) 2 B. & C. 624; *Boorman v. Nash* (1829) 9 B. & C. 145.

<sup>12</sup> *Op. cit.*, pp.97-102.

like instruments",<sup>10</sup> and by the first quarter of the nineteenth century the right to resort to the market in the event of non-delivery or non-acceptance of goods had been established in just about its modern form.<sup>11</sup> But there had not, by 1854, been any broad statement of principle on contract damages; and in the absence of such, Washington declared, the 'rule' as to the recovery of profits was simply that the promisee was entitled to recover all his real damages.<sup>12</sup>

But as an examination of the cases shows, this is an almost entirely misguided diagnosis. It was, to begin with, quite clearly established, well before 1854, that whenever

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De Havilland v. Bowerbank (1807) 1 Camp. 50, 53 per Lord Ellenborough C.J. See too the remarks of the same judge in Gordon v. Swan (1810) 12 East. 419, 420. It had been stated earlier by Lord Mansfield that where money is payable at a specific time, "this is a contract to pay interest for it from the given day, in case of failure of payment at that day." Robinson v. Bland (1760) 2 Burr. 1077, 1086. See too Blaney v. Hendricks (1771) 2 Wm. Bl. 761; Craven v. Tickell (1789) 1 Ves. Jun. 60; Mountford v. Willes (1800) 2 B. & P. 337. The stricter view espoused in De Havilland v. Bowerbank and Gordon v. Swan, however, eventually predominated. See: Higgins v. Sargent (1823) 2 B. & C. 348; Page v. Newman (1829) 9 B. & C. 378; Foster v. Weston (1830) 6 Bing 709. This stricter view was accepted in London, Chatham & Dover Rly Co. v. South Eastern Rly Co. [1893] A.C. 429. Interest on damages awards is now allowable, at the court's discretion, under the Law Reform (Miscellaneous Provisions) Act, 1934, s.3(i).

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(1810) 2 Taunt. 260.  
See, e.g., Leigh v. Paterson (1818) 8 Taunt. 540; Gainsford v. Carroll (1824) 2 B. & C. 624; Boorman v. Nash (1829) 9 B. & C. 145.

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Op. cit., pp.97-102.



the profits arose from some venture collateral to, and dependent on, the principal contract then the prospects for recovery were non-existent. Certainly Willes J. could later reminisce about a blacksmith who failed to shoe a horse properly and who was held liable, the rider arriving too late for his wedding to an heiress, for the bridegroom's loss when his fickle bride promptly wed another;<sup>13</sup> but such a case would seem in more ways than one perhaps to be unique. Tindal C.J., for instance, could counter with another recollection, of a man who failed to recover for an appointment he had lost when a ferryowner refused to take him across a river,<sup>14</sup> and all the reported cases (such as they are) adopt a similar attitude on collateral profits.

In the earliest of them, McArthur v. Seaforth,<sup>15</sup> the plaintiff gave a bond conditioned to replace five per cent stock on a given day. The defendant failed to honour his

<sup>13</sup> British Columbia & Vancouver Island Spar Lumber & Saw Mill Co. Ltd v. Nettleship (1868) L.R. 3 C.P. 499. This said the judge, took place about two hundred and fifty years ago; ibid., at p.508.

<sup>14</sup> Walton v. Fothergill (1835) 7 Car. & P. 392, 394.

<sup>15</sup> (1810) 2 Taunt. 260.

Dennis C.J., 'in all the law of the world I believe this is  
 bargain and the plaintiff lost the chance of a government  
 option by which he could be paid off at par and take three  
 per cent stock. The plaintiff claimed the sum which would  
 have been produced from the three per cent stock had he  
 been able to avail himself of the government offer. Counsel  
 argued that a favourable decision would permit every creditor  
 to recover for the loss of every opportunity of advantageously  
 investing the money. Chambre J. agreed: 'This claim of special  
 damages', he said, 'is perfectly collateral'.<sup>16</sup>

But of far greater interest is the judgment in Clare v.  
 Maynard.<sup>17</sup> The plaintiff bought a horse, resold it, and then  
 on delivery found it to be unsound. He lost his resale profit  
 and claimed compensation from the defendant. But, he said, answered:

'To obtain compensation for the other party not having

<sup>16</sup> supra in. 15 at p. 265.<sup>22</sup> In Walton v. Eothergill supra be  
 n. 14 Tindall C.J. said: 'If I contract to transfer stock and  
 do not, the party with whom I contracted has no right to  
 tell me a month afterwards that if I had transferred the stock  
 he could have bought an estate with the money'; ibid., at  
 p. 394. In Archer v. Williams (1846) 2 C. & K. 26, the defendant  
 detained the plaintiff's shares, and the latter claimed that he  
 was thus deprived of the means of paying up his deposits and  
 that this deprived him of an allotment of shares. But, said  
 Creswell J., 'he cannot have damages for that, it is too remote';  
<sup>17</sup> ibid., at p. 28. referred to Cox v. Walker then pending before  
 court, where again the plaintiff had resold a horse which  
 turned (1837) 7 Car. & P. 741. The jury had directed that they  
 could adopt the resale price as evidence of the value of a sound  
 horse. The issue of a misdirection was ultimately compromised.

<sup>20</sup> (1837) 6 A. & E. 519, 524.  
<sup>21</sup> (1848) 8 H.L.C. 381.  
<sup>22</sup> Ibid., at p. 402.

Denman C.J., 'in all the law of the world I believe this is that of deciding the amount of damage which the party has a new point'.<sup>18</sup> The plaintiff, he conceded, could recover suffered by the breach of contract'. To adopt the for the lower value of the horse but he could not recover English principle, he continued, that damages are only his loss of profit.<sup>19</sup> Nor was a different decision reached the excess in market rates at the time of breach, would on appeal, although this time the claim was for the monies 'destroy that rule, and lay down another, which according allegedly spent on improving the horse. Said Coleridge J.: to my opinion, is less calculated to do justice to all 'The plaintiff is seeking to recover for a good bargain lost parties'. Washington simply refers to Lord Cottenham's which, it is admitted, cannot be done'.<sup>20</sup> strictures without detailing them, and in the context of his

The significance of this case is clear. It shows that argument creates the impression that they were directed well before 1854 no party could ever recover for the loss of against the largesse of English law. As we have seen, this his collateral profits. This in turn led to Lord Cottenham, was very far from the case.

in the Scottish case of Dunlop v. Higgins,<sup>21</sup> offering some There is, however, another class of profits, i.e., trade, trenchant criticisms of the situation then obtaining in England. business or user profits, and here, as Washington rightly He asked: 'What does a party come to court for?' He answered: showed, English law had never been slow to adopt the Scottish 'To obtain compensation for the other party not having line. In Ward v. Smith, for instance, the defendant refused performed his contract'.<sup>22</sup> Obviously resale profits must be to deliver up a house to be used for trade purposes and was recovered for: 'No other rule is reconciliable with held to the plaintiff's loss of profits. Washington also cited justice nor with the duty which the jury has to perform -

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 18 Supra n.21 at p.403.  
 24 Supra n.17 at p.744.  
 19 Ibid., at p.404. The pursuer therefore was held  
 entitled Denman C.J. referred to Cox v. Walker then pending before the court, where again the plaintiff had resold a horse which turned out unsound. His lordship had directed the jury that they could adopt the resale price as evidence of the value of a sound horse. The issue of a misdirection was ultimately compromised.  
 20 Op. cit., p.104.  
 26 (1837) 6 A. & E. 519, 524.  
 21 (1822) 11 Price 19.  
 (1848) 8 H.L.C. 381.  
 22 Ibid., at p.402.



that of deciding the amount of damage which the party has suffered by the breach of contract'.<sup>23</sup> To adopt the English principle, he continued, that damages are only the excess in market rates at the time of breach, would 'destroy that rule, and lay down another, which according to my opinion, is less calculated to do justice to all parties'.<sup>24</sup> Washington simply refers to Lord Cottenham's strictures without detailing them, and in the context of his argument creates the impression that they were directed against the largesse of English law.<sup>25</sup> As we have seen, this was very far from the case.

There is, however, another class of profits, i.e., trade, business or user profits, and here, as Washington rightly showed, English law had never been slow to adopt the Scottish line. In Ward v. Smith,<sup>26</sup> for instance, the defendant refused to deliver up a house to be used for trade purposes and was held to the plaintiff's loss of profits. Washington also cited

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Supra n.21 at p.403.

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Ibid., at p.404. The pursuer therefore was held entitled to the profits he would have earned from the resale of pig-iron. The damages aspect was not in fact the main feature of the case, which was concerned primarily with matters of offer and acceptance.

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Op. cit., p.104.

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(1822) 11 Price 19.

Waters v. Towers<sup>27</sup> where the defendants were sued for not fitting up mill-gearing in a proper manner and in a reasonable time. Here too the plaintiffs recovered business profits. Thirdly, there was the important decision in Bridge v. Wain.<sup>28</sup> The defendant agreed to deliver goods required for use in the China trade but delivered worthless goods instead. The plaintiff was entitled to recover his lost value, said Lord Ellenborough C.J., and by value is to be understood whatever he 'would have received had the declaration sought only general. Graham,<sup>29</sup> however, defendant fully performed his contract'.<sup>29</sup> Now, if Washington wishes to argue that these are 'extreme' individual whose custom has been lost"; supra n.26 at pp.26-7. decisions (that they would, in other words, have been decided differently after Hadley v. Baxendale) he has two objections to overcome. In the first place, there is nothing to suggest that the profits allowed were other than the normal profits to be earned in the ordinary course of business. In Ward v. Smith, because the test of unexpectedness is not at the time of the pleading", op. cit., para 971. At any rate, whatever might have business profits; not the loss of any particular, or exceptionally us here: it need only be noted that the award was for loss of general business profit, and from that point of view Ward v.

<sup>27</sup> (1853) 8 Ex. 401; 22 L.J. Ex. 186.

<sup>28</sup> (1816) 1 Stark. 504.

<sup>29</sup> Ibid., at page 506.

lucrative, contract.<sup>30</sup> Waters v. Towers differed in that the plaintiff was awarded the loss on a specific contract, but even then the contract was only one which was made in the ordinary course of the plaintiff's trade. As Lord Ellenborough C.J. and Lord Abinger C.B. had said earlier, there is naturally much difficulty in estimating trading the damages may be assessed accordingly'.<sup>32</sup>

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The defendant had objected to the claim on the ground that the claim asked for special damages, where the declaration sought only general. Graham B., however, answered that loss of customers and general damages "may have been given in evidence under this declaration: for it charges general loss, without specifying any particular individual whose custom has been lost"; supra n.26 at pp.26-7. See too Richards C.B. at p.25.

McGregor has pointed out that Ward v. Smith is noteworthy for allowing the recovery of consequential loss on a claim for general damage. But he proffers the explanation that: "Even if an item of damage is special for the purpose of liability because not representing a normal loss, [which here would be the market price of the goods less the contract price] it may yet be general damage for the purpose of pleading, because the test of unexpectedness is not at the time of the making or breaking of the contract but at the later time of pleading", op. cit., para 971. At any rate, whatever might have been recovered had a special loss been claimed need not detain us here: it need only be noted that the award was for loss of general business profit, and from that point of view Ward v. Smith offers no support for Washington.

had said: 'We should have made such and such a contract if the defendants had performed theirs', and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendants' breach of contract, ibid., at p.403. The observation was made arguendo, there being nothing in the judgment beyond a statement of the decision.



profits;<sup>31</sup> and one obvious way to overcome this difficulty is to take in evidence whatever normal trade contracts might be found. The jury, said Alderson B. in Waters v. Towers, 'are not bound to adopt any specific contract that may have been made; but if reasonable evidence is given that the amount of profit would have been made as claimed the damages may be assessed accordingly'.<sup>32</sup>

But Washington of course was not so much concerned about the amount of profit, rather he was objecting to the fact

related to the plaintiff's millinery business, and was itself

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See Bridge v. Wain supra n.28 at p.506, per Lord Ellenborough C.J., and Startup v. Cortazzi (1835) 2 C.M. & R. 165, 168, per Lord Abinger C.B. Said the judge in this second case: 'I am not aware of any rule for estimating damages for speculative profits, besides taking the interest on the money advanced'. In this case the plaintiff had bought and paid for certain goods which he agreed to pick up in Odessa, but which the defendant subsequently failed to deliver. The plaintiff claimed for loss of possible profits but the jury, properly it was held, found as sufficient a sum paid into court representing the value which the goods would have had on due arrival in England plus a sum of interest on the pre-paid purchase price. In Bridge v. Wain the jury gave damages of £350, against a purchase-price (not pre-paid) of £904.

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(1853) 22 L.J. Ex. 186, 187-8. The report in (1853) 8 Ex. 401 (Washington citing from the Law Journal report) reads thus: 'The existence of a contract is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said: 'We should have made such and such a contract if the defendants had performed theirs', and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendants' breach of contract, ibid., at p.403. The observation was made arguendo, there being nothing in the judgment beyond a statement of the decision.

under the heading: 'Damages where article bought for a known purpose'. The case is also cited by Blackburn J., with apparent approval, in Elbinger v. Armstrong (1874) L.R. 9 Q.B. 473, 476.

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(1854) 23 L.J. Ex. 179, 181.

that profit was taken into account in the first place.<sup>33</sup> Yet if we look again at the cases we can find in each of them - and this the crucial point - a necessary contemplation by the defendant of the damages which would arise from his breach. In Bridge v. Wain, for example, where the goods were sold for use in the China trade, the seller could scarcely know to anything else but that their value to the buyer was their value in China.<sup>33</sup> Similarly, in Ward v. Smith the house leased by the plaintiff stood in Regent Street, was well-suited to the plaintiff's millinery business, and was itself equipped as a shop: in these circumstances (even if we make the improbable assumption that the defendant was not claimed specifically acquainted with the plaintiff's intentions) he would obviously be aware that the premises were to be used for business purposes. Last of all, Parke B. said of Waters v. Towers in Hadley v. Baxendale itself that: 'In a contract to build a mill the builder knows that a delay will result in a loss of business'.<sup>34</sup> We might fairly conclude, then that, far from overruling these decisions, Hadley v. Baxendale gave them all a complete measure of endorsement by its espousal of the contemplation formula. In short, it will be agreed, of our

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Mayne, Treatise on Damages (11th edit., 1946) p.205, approves of Bridge v. Wain under the heading: 'Damages where article bought for a known purpose'. The case is also cited by Blackburn J., with apparent approval, in Elbinger A.G. v. Armstrong (1874) L.R. 9 Q.B. 473, 476. pp. 49-50

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(1854) 23 L.J. Ex. 179, 181.

The polarity which had thus been established by 1854, between cases like Clare v. Maynard, where the defendant would be quite unaware of the plaintiff's intentions, and Waters v. Towers, where he would be equally certain of them, was lucidly summarised by Nelson C.J. in Masterton v. The Mayor of Brooklyn.<sup>35</sup> In this case the plaintiffs had contracted to procure, manufacture and deliver all the marble necessary for a public building to be erected by the defendants, and had agreed with a third party for the latter to deliver marble to the plaintiffs ready to be manufactured. After they had received some of the manufactured marble, the defendants declined to receive any more, and the plaintiffs now claimed for the price agreed to by the defendants less their own cost of performance. It is true, said the Chief Justice, that the books do contain examples of the disallowance of profits, but 'they usually have reference to dependent and collateral engagements entered into on the faith and expectation of the performance of the principal contract'.<sup>36</sup> These, he agreed, are too remote. But, he added, 'profits and advantages which are the direct and immediate fruits of the contract entered into between the parties [a perfect description, it will be agreed, of our

<sup>35</sup> (1845) 7 Hill 61 (a decision of the Supreme Court, New York State).

<sup>36</sup> Ibid., at p.68. He referred here to Clare v. Maynard and Cox v. Walker, supra pp. 49-50



cases above] stand upon a different footing. These are part and parcel of the contract itself, entering into and both constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement'.<sup>37</sup> This was so with the present case, he concluded, and consequently the plaintiffs could claim their loss of profits.

Origins of the Contemplation Formula - of Pothier and the Civil Law

By setting off Clare v. Maynard from Waters v. Towers, nineteenth century generally, as Allen has said,<sup>41</sup> was a time when considerable reliance was placed upon the European codes, apparent inclination toward a doctrine of contemplation. But while it was only on 'apparent inclination', and not a matter of express formulation, here perhaps was not the most obvious source of the Court of Exchequer's later ruling.

<sup>37</sup> Damages (2nd ed. 1852) p. 62. Supra n. 35 at p. 69. Beardsley J. also noted that: 'Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of this description. A right to damages equivalent to such profits results directly and immediately from the act of the party who prevents the contract from being performed'; ibid., at p. 74.

<sup>41</sup> 'Precedent and Logic' (1925) 41 L.Q.R. 329.

A more direct line of 'authority' lay in the writings of Common Lawyers such as Sedgwick<sup>38</sup> and Chitty snr,<sup>39</sup> both of whom agreed with Kent's remark that: 'Damages for breaches of contract are only those which are identical to, and directly caused by, the breach, and may reasonably be supposed to have entered into the contemplation of the parties'.<sup>40</sup> Since their authorities were only those discussed above, these writers were obviously being a shade too dogmatic in their presentation of the law. Still, since it was a not unreasonable commentary on the cases, their opinions would have much impressed the later court.

A second, apparently more influential, source of reference for the Court of Exchequer lay in the opinions of Civilians and the provisions of the Civil Law itself. The nineteenth century generally, as Allen has said,<sup>41</sup> was a time when considerable reliance was placed upon the European codes, and their commentators, to fill up lacunae in the Common Law; particularly, he went on to say, were the early years of the century influenced by the writings of Pothier and Domat.

res non habitas, a kind of damage which the parties must have

<sup>38</sup> Damages (2nd edit., 1852) p.60.

<sup>39</sup>

Treatise on the Laws of Commerce (1824) Vol. (iii) p.628.

<sup>40</sup>

Commentaries (1848) Vol.ii, p.480. Chitty jnr, however, observed that: 'In assumpsit...the jury may consider consequential injury...if such injury be the fair and natural result of the defendant's violation of his agreement': Contracts not under Seal (1834) pp.682-3.

<sup>41</sup>

'Precedent and Logic' (1925) 41 L.Q.R. 329.

in time and so lost his year's business. The defaulter should Domat, for one, had argued that the end of contract not be bound to make good this consequential damage; if, however, damages was never a full and complete compensation for the the horse had been specifically sold to reach the canon to innocent party, but rather a discrimination 'between that reach his benefice in time than recover what he had, for portion of the loss which must be borne by the offending in that latter case the damage would be split by the parties party, and that which must be borne by the sufferer'.<sup>42</sup> contemplated. Similarly, he said, a landlord, who evicts a tenant, is not bound to make good the loss of the to it a contemplation formula as the fairest way of achieving goodwill of a trade which the tenant may have raised in the this division of loss. The defendant, he argued, is not house, unless, as in the last case, the house had been bound to make good, indiscriminately, every loss occasioned expressly let as a shop in which to carry on that business; for by the non-performance of the contract, but only those so here again, the loss would have been such as was contemplated connected with the contract that the parties, when making the by both parties. (In passing it should be noted just now contract, may be supposed to have contemplated them: and in much support Pothier's arguments and illustrations offer to general, he said, the parties must be taken to contemplate those cases which were decided prior to Hadley v. Baxendale).<sup>43</sup> those consequential damages which relate to the subject matter of the contract itself, not the collateral effect on other property of the party injured. Pothier put two instances. If of the 'striking evidences' of the respect in which Pothier's a party contracts to sell a horse and makes default, he is work was held<sup>44</sup> - there was the further great influence of the liable to make good the higher price which the purchaser has to give in order to procure another; for that was, propter ipsam Baxendale, is the 'sensible rule' that damages for breach of rem non habitam, a kind of damage which the parties must have contemplated. But, says Pothier, if the purchaser were a canon, who for want of a horse was unable to reach his benefice

<sup>42</sup> It is clear, for instance, that Pothier would take Had v. 11th, supra p. 51 as being correctly decided.

<sup>43</sup> Loix Civiles (1705) book (iii) tit 5, sec. ii, §2.

Op. cit., p. 103.



in time and so lost his year's revenue, the defaulter should not be bound to make good this collateral damage; if, however, the horse had been specifically sold to enable the canon to reach his benefice in time then recovery could be had, for in that latter case the damage would be such as the parties contemplated. Similarly, he said, a landlord, wrongfully evicting a tenant, is not bound to make good the loss of the goodwill of a trade which the tenant may have raised in the house, unless, as in the last case, the house had been expressly let as a shop in which to carry on that business; for here again, the loss would have been such as was contemplated by both parties.<sup>43</sup> (In passing it should be noted just how much support Pothier's arguments and illustrations offer to those cases which were decided prior to Hadley v. Baxendale).<sup>44</sup>

Finally, as well as the influence of these jurists - Washington found the Court of Exchequer's decision to be one of the 'striking evidences' of the respect in which Pothier's work was held<sup>45</sup> - there was the further great influence of the Code Napoleon: contained therein, said Parke B. in Hadley v. Baxendale, is the 'sensible rule' that damages for breach of

<sup>43</sup>

Traite's des Obligations (1781) Partie 1, Cap. 2, Art 3, sects 159-62.

<sup>44</sup>

It is clear, for instance, that Pothier would take Ward v. Smith, supra p. 51 as being correctly decided.

<sup>45</sup>

Op. cit., p. 103.

contract are confined to those which the wrongdoer foresaw, or which he ought to have foreseen, at the time of the execution of the contract.<sup>46</sup>

Here then are all the various factors - the Civil Law, the writings of Civilians and Common Lawyers, the decided cases, which combined to produce the decision in Hadley v. Baxendale. As Lord Campbell C.J. aptly said, the rule there laid down was 'in accordance with the Code Napoleon, with Pothier, with Chancellor Kent, and with all the other authorities'.<sup>47</sup>

Carriers - an Account of Hadley v. Baxendale

However, when the Court of Exchequer came to formulate and apply the doctrine of contemplation, it did so in a way which could 'fairly and reasonably be considered

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Supra n.1 at p.346. The relevant sections of the Code Napoleon are liv, iii. tit. iii. ss. 1149, 1150, 1151. In the report of Hadley v. Baxendale (1854) 23 L.J. Ex. 179 Parke B. is recorded only as saying: 'I wish the rule was established, that the damages were confined to what the parties reasonably anticipated'; ibid., at p.184. In this report there appears no additional mention of the Code, instead Parke B. is said to make approving reference to Sedgwick's advocacy of a notion of contemplation.

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Smeed v. Foord supra n.3 at p.613, (much of the argument in this case being based on Pothier). See too Pollock C.B. in Wilson v. The Newport Dock Co. (1866) L.R. 1 Ex. 177. 'That decision (i.e., Hadley v. Baxendale) was not presented as any new discovery in jurisprudence, but we think it put in a clearer, and more distinct light, a principle which had been recognised in prior cases and the want of which in English law had been pointed out'; ibid., at p.189.

curious and distinctive fashion. Hadley v. Baxendale was a case where the plaintiff mill-owners had asked the defendant carriers to take a broken shaft to its manufacturer to serve as the pattern for a replacement. The mill was at a standstill in the absence of a spare, and since the defendants were late in delivering the shaft this meant in turn a delay in receipt of a replacement.<sup>48</sup> A claim was made for the business profits lost during that period of delay. The exceptional talents of Parke, Martin and Alderson BB., to paraphrase Pollock C.B., took 'several weeks' over their judgment, bestowing 'great pains' upon it;<sup>49</sup> eventually they held that there could be no recovery since the stoppage of a mill, through delay in the carriage of a mill-shaft, was not a result which could 'fairly and reasonably be considered

<sup>48</sup> It does not appear from the report if the defendants, or another company, had the task of bringing back the new shaft.

<sup>49</sup> Wilson v. The Newport Dock Co. *supra* n.47 at p.189. It is 'due to Lord Wensleydale (Parke B.)', Pollock C.B. continued, 'and the late Baron Alderson to say that a more extensive and accurate knowledge of decisions in our law books, and a more acute power of analysing them and discussing them, and, as far as my brother Martin is concerned, a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist at the formation of any decision', *ibid.*, at p.189.



either (i) arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or (ii) such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it'.<sup>50</sup>

If the 'special circumstances' under which the contract was made, said Alderson B., had been 'communicated by the plaintiffs to the defendants' then recovery would have been allowed;<sup>51</sup> but here, he said, the particular 'special circumstances', the absence of a spare mill-shaft, had not been communicated to the defendants at the time the contract was made. The mill was stopped, that the shaft must be delivered immediately and that a special entry, if necessary, must be made to hasten its delivery'. Furthermore, Crompton J., who presided at first instance

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Supra n. 1 at p.354, per Alderson B., reading the judgment of the court: the numeration has been added to denote what are often referred to as the first and second rules in Hadley v. Baxendale. The various reports of the decision repeat this language although the report in (1854) 23 L.T. (O.S.) 69 refers to such damages 'as may fully and reasonably...', presumably the reporter's mishearing. The Exchequer version did once omit the word 'either' but this was later amended: see Smith's Leading Cases, (1929) Vol.2, p.541. The present writer recalls that, as an undergraduate, he came across a decision where Alderson B. himself pointed out that the Exchequer Report omitted the word 'either'; but despite his diligent efforts, he has since been unable to rediscover the location of that comment.

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Supra n.1 at p.355.

was made and so the loss could not have been contemplated by the carrier.<sup>52</sup> shaft, or that the mill might have been stopped. Now, (quite apart from any possible inconsistency with its own second rule)<sup>53</sup> there lies the further problem that the Court of Exchequer's verdict does not seem entirely consistent with the terms of its first. Alderson B. was another shaft available? Not Crompton J., otherwise he would

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Supra n.51. However, one of the great mysteries about Hadley v. Baxendale is whether Alderson B. was correct in finding that the defendant had not been forewarned. The Exchequer headnote clearly says that the defendant was aware of the urgency of the situation (see Asquith L.J.'s comments on this in Victoria Laundry v. Newman Industries [1949] 1 All E.R. 997, 1001) and the headnote in (1854) Vol.20 Law Review p.196 is quite adamant about it; 'the defendant's clerk', it said, '...was told that the mill was stopped, that the shaft must be delivered immediately and that a special entry, if necessary, must be made to hasten its delivery'. Furthermore, Crompton J., who presided at first instance in Hadley v. Baxendale, later observed that: 'I think we must not extend the rule in Hadley v. Baxendale to the facts in that case'; Smeed v. Foord (1859) 7 W.R. 266. In the same case Lord Campbell C.J. said: 'I do not say how far it applies to the circumstances of that case, and to the manner in which the verdict was entered'; ibid. The whole vexed problem was yet further confused when Martin B., who sat, of course, in the Court of Exchequer, flatly contradicted Alderson B., saying the defendants 'were told that the mill was stopped in consequence of the shaft being broken'; Wilson v. The Newport Dock Co. supra n.47 at p.184. In view of all this confusion it can only be regretted that counsel did not realise their threat 'of going to a court above this'; (1854) 23 L.T. (O.S.) 69, 70. The writer would like here to record the unavailing attempts of various research workers in London to discover the result of the re-trial (if indeed such re-trial were held) ordered by the Court of Exchequer. Judge went on to say that the loss in Hadley v. Baxendale was 'an indirect consequence'. But from a causal point of view every loss of an expectancy must be a direct loss: Lord Reid was thus right to contradict Alderson B. when he said in The Heron II that Hadley's loss of profit was 'clearly' a direct consequence of the breach: supra n.54 at p.691.

quite right to suggest that the plaintiffs might have possessed another shaft, or that the mill might have been stopped for reasons quite unrelated to the absence of a shaft,<sup>53</sup> but it was just as likely (indeed, more so) that the mill's production should be halted through the absence of a spare. For who is to say that every mill-owner has another shaft available? Not Crompton J., otherwise he would not have given the profits at first instance: not Lord Reid, since he later argued that the loss of profits in Hadley v. Baxendale was at least 'a serious possibility' or a 'real danger'.<sup>54</sup> But more importantly, not even Alderson B. since he effectively conceded the point arguendo: 'Suppose the perfect shaft had been delayed', he said, 'in that case the defendant may have been liable'.<sup>55</sup> But how can he argue this way and yet give the decision he did? If the absence of a shaft is once a 'special circumstance' it must always be so, whether the original is being sent to the manufacturer or whether its copy is being returned. That Alderson B. failed to appreciate this

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Supra n.1 at pp.355-6.

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The Heron II [1967] 3 All E.R. 686, 695.

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(1854) 7 W.R. 302, 303. The judge went on to say that the loss in Hadley v. Baxendale was 'an indirect consequence'. But from a causal point of view every loss of an expectancy must be a direct loss: Lord Reid was thus right to contradict Alderson B. when he said in The Heron II that Hadley's loss of profit was 'clearly' a direct consequence of the breach: supra n.54 at p.691.



amounts to an open recognition that the loss in Hadley v. Baxendale could be described as arising naturally and in the usual course of things.

However, this had not been the first time that an English Court had looked to the contemplation formula as a way of restricting recovery even for a 'natural' loss. In Black v. Baxendale<sup>56</sup> carriers were given goods which should have arrived in time for the Saturday market, although they had no notice that the goods had been sent for that purpose. The goods arrived late and the plaintiff's clerk was sent to care for them and to remove them to another market for sale. The jury was directed that the expense of removing the goods and the clerk's expenses and wages were compensable if they thought fit. This, said the Court of Exchequer,<sup>57</sup> was no misdirection. But, said Pollock C.B.: 'If the carriers had had distinct notice that the goods would be required to be delivered at a particular time, perhaps they would have been liable for those expenses, for which, without such notice they would not otherwise be liable'.<sup>58</sup> This dictum, as well as being

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(1853) 8 Ex. 410.

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Consisting of Pollock C.B. Parke and Alderson BB.

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Supra n.56 at p.412.

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Ibid., at p.411. This being a reference to the costs of sending a man to look after the goods.

and are likewise damages which can be easily classified the first to contain an express recognition of a contemplation (more easily perhaps than the loss of profit in Hadley v. Baxendale) as arising naturally and in the ordinary course assumes that those expenses resulting from the goods being destined for the Saturday market, namely the expenses in and about the removal of the goods to another market, were too remote: but if this is right it then becomes difficult to see how the trial direction was sustained.<sup>59</sup> Second, and of more immediate importance, the dictum assumes, equally plainly, that the expenses somehow rank as 'special' and that recovery can only be had, as the modern law would put it, under the second rule in Hadley v. Baxendale. But herein lies just the difficulty experienced with the later case, for the sending of goods to a particular market seems nothing more than an ordinary carriage of goods only, and not for their inherent value or likely profitability. The seller, is paid for the value or any expenses arising from a frustration of that object are, in Parke B.'s words, 'reasonable consequences' of the breach,<sup>60</sup>

<sup>59</sup> Unless of course it is misreported. Perhaps there is some indication of this in the fact that the discussion in the Court of Exchequer referred only to the costs involved in sending a man to look after the goods, and makes no reference to the expenses of removal to another market; see counsel (the future Martin B.) and Parke B., supra n.56 at p.411. This may imply that it was only the first class of expense which had in fact been allowed. (The right to recover such expense is discussed in chapter 5).

<sup>60</sup> The plaintiffs in Black v. Baxendale did in fact lose profit. Ibid., at p.411. This being a reference to the costs of sending a man to look after the goods. that their chances of success were small?

and are likewise damages which can be easily classified which might be lost, and so charged against the defaulter, (more easily perhaps than the loss of profit in Hadley v. Baxendale) as arising naturally and in the ordinary course of things.<sup>61</sup>

Suppose, said Martin B. during the argument in Black v. Baxendale and Hadley v. Baxendale, that a carrier fails to deliver a delicate piece of machinery whereby the whole of an extensive mill is thrown out of work: 'if the carrier is to be liable for the loss in that case, he might incur damages to the extent of £10,000'.<sup>62</sup> For the point can be taken that the reward accruing to a carrier under his contract of carriage is often likely to bear no "relationship" to the burden sought to be imposed on him. This would especially be so where he failed to deliver, or was late in delivering, goods which the consignee intended

The Court of Exchequer, however, instead of setting out expressly to correct an imbalance, achieved this end by denying a factory. The carrier, unlike the seller, is paid for the carriage of goods only, and not for their inherent value or entirely artificial set of special circumstances which had so likely profitability. The seller, is paid for the value or profitability of the goods. Should he fail to deliver, he

would find that a "relativity" did obtain between his reward

(the sale price) and the damages claimed from him (the loss of their own safeguards and so exclude or limit their liability profit based on the resale price). If, too, we note that the clauses are essentially a modern phenomenon; and while such an rewards to be made by the carrier and seller differ, even where is proposed to discuss modern attitudes to the carrier in the self-same goods are concerned, and where therefore the profits Hadley v. Baxendale, in fact, could be looked upon as the judiciary supplying a limiting clause where the carrier had

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<sup>63</sup> The plaintiffs in Black v. Baxendale did in fact lose profits as well as incur expenses, but made no claim for the former. Was it because they realised that their chances of success were small?



was struck. Thus, the real effect of the judgment was to which might be lost, and so charged against the defaulter, argue covertly what was later argued expressly, namely remain the same, it becomes readily apparent just why the carrier might be looked upon as meriting a degree of curial solicitude.<sup>62</sup> Suppose, said Martin B. during the argument in Hadley v. Baxendale, that a carrier fails to deliver a delicate piece of machinery whereby the whole of an extensive mill is thrown out of work: 'if the carrier is to be liable for the loss in that case, he might incur damages to the extent of £10,000'.<sup>63</sup> Hadley v. Baxendale perhaps was not such an extreme example as this, but there is still 'imbalance' enough about a reward of £2.4.0. and a liability of £50.

The Court of Exchequer, however, instead of setting out expressly to correct an imbalance, achieved this end by denying that an 'ordinary' loss was an ordinary loss, and by creating an entirely artificial set of special circumstances which had to be brought to the defendant's attention at the time the bargain

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It could be objected, of course, that carriers, being businessmen acquainted with the commercial world, should supply their own safeguards and so exclude or limit their liability when a contract is entered into. But exclusion or exemption clauses are essentially a modern phenomenon; and while such an objection might well bear weight against today's carrier (it is proposed to discuss modern attitudes to the carrier in chapter 4), it is much less tenable against the carrier of 1854. Hadley v. Baxendale, in fact, could be looked upon as the judiciary supplying a limiting clause where the carrier had supplied none.

<sup>63</sup>

Supra n.1 at p.347.

was struck. Thus, the real effect of the judgment was to argue covertly what was later argued expressly, namely, that mere knowledge on the part of the carrier is not enough; that it must instead be knowledge which is revealed to him as the basis of the contract, and under such circumstances that there arises the equivalent of an express agreement to pay for whatever profits might be lost. But the Court of Exchequer, by preferring to state the law in a neat, codified form after the manner of the Code Napoleon, and by leaving it to later courts to develop this form of protection for the carrier, paradoxically laid the ground for a considerable amount of confusion and apparent inconsistency in contract damages. Accordingly, there will be seen to be much more insight than is often realised in Wilde B.'s celebrated dictum, 'that although an excellent attempt was made in Hadley v. Baxendale to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases; and when the matter comes to be further considered, it will probably turn out that there is no such thing as a rule, as to the legal measure of damages, applicable to all situations'.<sup>64</sup>

#### Conclusion

Washington summed up his view of the 'old law' by saying

<sup>64</sup>

Gee v. Lancs & Yorks Rly (1860) 6 H. & N. 211, 221.

that 'damnum' was apparently the equivalent of 'iniuria', and that the one 'criterion' of contractual liability would seem to be nothing more than mere physical causation.<sup>65</sup> Such a view was wrong: a clear restraint did exist before 1854, as was evidenced by Clare v. Maynard, and it seems quite beyond argument that by its doctrine of contemplation Hadley v. Baxendale ratified each and every one of its predecessors, with the barely possible exception of Black v. Baxendale. But not only did Hadley v. Baxendale ratify these cases, it went even further and said that henceforth recovery could be had in Clare v. Maynard if the 'special circumstance' of resale were communicated to the seller when the contract was made. Indeed, it is most significant that the judgment in Hadley v. Baxendale should be prefaced by a quotation from Alder v. Keighley<sup>66</sup> which reads: 'the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken'.<sup>67</sup>

<sup>65</sup> Op. cit., p.102.

<sup>66</sup> (1846) 15 M. & W. 117.

<sup>67</sup> Ibid., at p.120, per Pollock C.B., cited in Hadley v. Baxendale, supra n.1 at p.344, per Alderson B. Palles C.B. later said: 'in the well-known case of Hadley v. Baxendale it was attempted to lay down a rule for the application of this principle'; Hamilton v. Magill (1883) 12 L.R. Ir. 186, 202. See also Banco de Portugal v. Waterlow [1932] A.C. 452, 474-5, per Viscount Sankey. It should be remembered that Pollock C.B.'s (continued on p.72)



However, there was nothing in cases such as Clare v. Maynard to deny the plaintiff recovery in Hadley v. Baxendale and to that extent there was always the possibility, even if it were never actually realised, of an 'excessive' charge being taken against the carrier under the old law. But with the decision in Hadley v. Baxendale, and its distinctive and tendentious conception of what constituted 'special circumstances', provision was made for restraining and checking that potential excess.

Now the answer to the original problem is clear. Hadley v. Baxendale in effect drew a tacit line between carrier and seller, and in so doing it both restricted and extended the possible sphere of contractual liability.

Up to a point the courts are right to argue for a unitary approach to Hadley v. Baxendale, if only because this would seem to be fostered and encouraged by the case itself: if the defendant did not contemplate a special loss, said

(footnote continued from p. 71)

dictum, and a similar one by Parke B. in Robinson v. Harman (1848) 1 Ex. 850, 855, do not support Washington's theory of excess, since these dicta meant to say nothing more than that the plaintiff is always entitled to receive his simple loss of bargain (see chapter 2); it was rather Alderson B. who expanded the meaning of these dicta to embrace the recoupment of profits.

Greenough v. Mersey Navigation Co.; Greenough v. Mersey Navigation Co. (1857) 15 Q.B.D. 85, 92; per Bowen L.J.; Victoria Laundry Ltd v. Newman Industries Ltd [1949] 1 All E.R. 997, 1002, per Asquith L.J.; and generally in The Heron II [1967] 3 All E.R. 686 (H/L).

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Biggin v. Permanite [1951] 1 K.B. 422, 436, per Devlin J.

Chapter 4

THE RECOVERY OF PROFITS SINCE 1854

The courts have often condemned as an 'ultra-analysis' that view of Hadley v. Baxendale which regards it as laying down two rules for the collection of damages.<sup>1</sup> Profits, it is agreed, might arise either in the ordinary course of events or else only as the result of some special circumstance or situation. But in either case, it is said, the criterion of responsibility is the same, namely the 'reasonable prevision' of the parties.<sup>2</sup>

Up to a point the courts are right to argue for a unitary approach to Hadley v. Baxendale, if only because this would seem to be fostered and encouraged by the case itself: if the defendant did not contemplate a special loss, said Alderson B., then he contemplated only what would arise in

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The phrase is Lord Shaw's in Hall v. Pim [1928] All E.R. Rep. 763, 769. See too Herring v. Tomlin (1854) 23 L.T. (O.S.) 92, per Erle C.J.; Smith v. Green (1875) 1 C.P.D. 92, 95, per Brett J.; Hobbs v. L. & S.W. Rly Co. (1875) L.R. 10 Q.B. 111, 117, per Cockburn C.J.; Grebert-Borgnis v. Nugent (1885) 15 Q.B.D. 85, 92, per Bowen L.J.; Victoria Laundry Ltd v. Newman Industries Ltd [1949] 1 All E.R. 997, 1002, per Asquith L.J.; and generally in The Heron II [1967] 3 All E.R. 686 (H/L).

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Biggin v. Permanite [1951] 1 K.B. 422, 436, per Devlin J.

been derrick not for its normal use as a coal store, but the usual course of things.<sup>3</sup> Still, to adopt a completely for the much more profitable purpose of transshipping coals single view would be analytically unwise, for it obscures direct from colliers into barges. The plaintiff had not the progress and development of the contemplation formula, informed the defendant of this special use and so claimed and, most important of all, it fails to bring out the very only those damages he would have earned employing the clear distinction that emerges between carriers and sellers. derrick as a coal store: this the defendant resisted,

### Recovery of Profits Generally

arguing that since he contemplated one use and the plaintiff The line of cases represented by Waters v. Towers was another, their minds were not ad idem, and so no damages of course naturally re-affirmed by the decision in Hadley v. Baxendale. Just as Parke B. had referred in the later case their view the damages sought were no more than were to the earlier, and said that the builder of a mill knows 'contemplated' as 'naturally resulting' from the breach of full well that delay will produce a loss of business,<sup>4</sup> so contract.

Cockburn C.J. pointed out that when a profit-earning chattel is sold 'there is one thing which must always be in the

Supra n.5 at p.191, per Meller J. See too Coffey v. knowledge of both parties, which is, that the thing is bought allowed on the sale of a defective juke-box: such an item, for the purpose of being in some way or other profitably Similarly, an innkeeper once recovered the profits lost to applied'.<sup>5</sup> Cory v. Thames Ironworks Co. illustrated the point

neatly: in this case the plaintiff purchased a floating are: Fletcher v. Taylor (1855) 17 C.B. 21; Wilson v. General Ironscrew Colliery Co. (1878) 47 L.J. Q.B. 239; Stear Herring Fleet v. Richards (1901) 17 T.L.R. 731. Victoria Laundry v. News (1854) 9 Ex. 341, 355. In Watson v. Gray (1900) 46 T.L.R. 308, Kennedy J. who presided in Stear Herring Fleet v. R (1854) 23 L.J. Ex. 179, 181. See chapter 3, p.55. on the delayed delivery of plates required for building barges. This, he Cory v. Thames Ironworks Co. (1868) L.R. 3 Q.B. 181, 187. See too Saint Line Ltd v. Richardson, Westgarth & Co. Ltd [1940] 2 K.B. 99. A delay in the delivery of a trading vessel, said. Atkinson J., would deprive the plaintiff 'thereby of the obvious opportunity of making profits'; ibid., at p.104.d. If (Footnote continued p.76)



boom derrick not for its normal use as a coal store, but for the much more profitable purpose of transshipping coals direct from colliers into barges. The plaintiff had not informed the defendant of this special use and so claimed only those damages he would have earned employing the derrick as a coal store: this the defendant resisted, arguing that since he contemplated one use and the plaintiff another, their minds were not ad idem, and so no damages could be given. But the court rejected this argument; in their view the damages sought were no more than were 'contemplated' as 'naturally resulting' from the breach of contract.<sup>6</sup>

<sup>6</sup> Supra n.5 at p.191, per Mellor J. See too Coffey v. Dickson [1960] N.Z.L.R. 1135 where loss of revenue was allowed on the sale of a defective juke-box: such an item, it was said, was obviously a "revenue-producing asset". Similarly, an innkeeper once recovered the profits lost to his business through the purchase of a defective billiard table; Doyle v. Jacobs (1872) 11 S.C.R. (N.S.W.) 77. Other cases recognising the right to user or general trade profits are: Fletcher v. Tayleur (1855) 17 C.B. 21; Wilson v. General Ironscrew Colliery Co. (1878) 47 L.J. Q.B. 239; Steam Herring Fleet v. Richards (1901) 17 T.L.R. 731. Victoria Laundry v. Newman [1949] 1 All E.R. 997 (C/A). In Watson v. Gray (1900) 16 T.L.R. 308, Kennedy J., who presided in Steam Herring Fleet v. Richards, disallowed a claim for profits arising from the delayed delivery of plates required for building barges. This, he said, would necessitate intricate inquiries into the plaintiff's business, to discover, for instance, whether he would have taken on contracts at that period; ibid., at p.308. This would indicate that the ratio of his decision was the absence of any clear proof that such damage was sustained. If (footnote continued p.76)

However, such user profits do not concern us here since, being in effect absorbed into the first rule in Hadley v. Baxendale, their recovery is nothing new: indeed, the important developments have rather arisen outside this rule and especially in connection with a not infrequent liability for loss of resale profits.

#### Resale Profits - A Question of Probability

This liability, Mayne once explained, derives from the fact that in many cases - and he instanced the sale of goods in quantities larger than a buyer would ordinarily require for his own purposes - the seller would, without any express communication, contemplate the buyer's loss of profits 'as the probable result of his breach'.<sup>7</sup> But

(footnote continued from p.75)

he meant more than this (and no cases allowing this type of profit had been brought before him) his view had obviously altered by the date of the later decision. Less obvious cases recognising the right to business profits are: Marcus v. Myers (1895) 11 T.L.R. 327 (loss through wrongful failure to continue plaintiff's advertisement); Fechter v. Montgomery (1863) 33 Beav. 22; Bunning v. Lyric Theatre (1894) 71 L.T. 396; Marbe v. Edwards [1928] 1 K.B. 269; Clayton v. Waller & Oliver [1930] A.C. 209 (H/L); Withers v. G.T.C. Ltd [1933] 2 K.B. 536; Miller v. Cecil Film Ltd (1937) 53 T.L.R. 544; Tolnay v. Criterion Film Productions Ltd [1936] 2 All E.R. 1625; Fielding v. Moiseiwitch (1946) 174 L.T. 265; (all dealing with damages for loss of publicity, such as not allowing the plaintiff to perform an agreed role).

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Op. cit., p.71.

Mellish L.J. did once lay it down that whatever was anticipated must be anticipated as 'reasonably certain',<sup>12</sup> Hadley v. Baxendale's 'probable', Lord Pearce later said, but Lord Diplock, reporting what had long been regarded as settled law declared in the case of Hadley v. Baxendale that it has been the subject of continuous re-interpretation: it may, in official eyes, mean something which is 'likely to happen',<sup>8</sup> but 'inevitably', he said, 'there is some evolution of thought in such matters, and such as there was tended in the direction of taking a wider view of probability'.<sup>9</sup> were concerned, a reference to something

Just why such evolution should be inevitable Lord Pearce declines to say, but nonetheless his conclusion is the right one. Lord Esher M.R. certainly said that liability would follow if a resale was 'sure to be made',<sup>10</sup> but this, he made clear, was not to be an exclusive proposition since Alderson B. had referred not to 'inevitability' but to 'probability'.<sup>11</sup> On the other hand, Thol v. Henderson (1882) 8 Q.B.D. 456.

<sup>8</sup> Supra at p.717. See too Lord Reid ibid., at p.694, Concise Oxford Dictionary.

<sup>9</sup> For further criticisms of the view that 'probable' means 'certain' or 'inevitable' see The Heron II [1967] 3 All E.R. 686, 711. Strictly speaking there cannot be a wider view of probability which must always bear the same meaning: what Lord Pearce means to say is that probability has been substituted by an entirely different criterion.

<sup>10</sup> Hammond v. Bussey (1887) 20 Q.B.D. 79, 89. This case concerned not a claim for profits, but for the damages and costs paid to a sub-buyer: it is therefore discussed in chapter 6. See also Wainwright & Road Metal Co. v. Wainwright (1903) 3 B.R. (N.S.W.) 215, respectively.

<sup>11</sup> Ibid., at p.88. [1920] All E.R. Rep. 763 (H/L).



Mellish L.J. did once lay it down that whatever was anticipated must be anticipated as 'reasonably certain',<sup>12</sup> but Lord Upjohn, repeating what had long been regarded as settled law, declared in The Heron II that a resale need never be 'a near certainty or an odds-on probability'.<sup>13</sup>

But here is no indication of any wider view of probability, and, as far as Lord Campbell C.J. and Stephen A.C.J. were concerned, a reference to something 'probable' was, just as the dictionary stated it to be, a reference to something which was 'likely to happen'.<sup>14</sup> But in the later case of Hall v. Pim<sup>15</sup> there began that gradual displacement of probability in favour of some less stringent

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The Parana (1877) 2 P.D. 188, 193; followed in New Zealand Shipping Co. v. Black (1885) 3 N.Z.L.R. (S.C.) 288. See too Williams v. Reynolds (1865) 6 B. & S. 495; Thol v. Henderson (1882) 8 Q.B.D. 456.

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Supra n.9 at p.717. See too Lord Reid ibid., at p.694, Lord Morris ibid., at p.701 and Lord Hodson ibid., at p.708. For further criticisms of the view that 'probable' means 'certain' or 'reasonably certain' see: Lepla v. Rogers [1893] 1 Q.B. 31, 37, per Hawkins J.; Hall v. Pim [1928] All E.R. Rep. 763, 769-70, per Lord Shaw; Monarch Steamship Co. v. A/B Karkshamns Oljefabriker [1949] 1 All E.R. 1, 20, per Lord du Parc; Victoria Laundry v. Newman Industries Ltd [1949] 1 All E.R. 997, 1004, per Asquith L.J.; The Heron II [1966] 2 All E.R. 593, 605, per Diplock L.J. and ibid., at p.612, per Salmon L.J.

14

See Smeed v. Foord (1859) 1 El. & El. 602, 614 and Emu Gravel & Road Metal Co. v. Gibson (1903) 3 S.R. (N.S.W.) 204, 215, respectively.

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[1928] All E.R. Rep. 763 (H/L).

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test to which Lord Pearce referred.<sup>16</sup>

This was a case in which wheat had been sold and resold down a line of buyers and sellers. The defendant failed to deliver and the plaintiff then sought from him both his resale profit and the damages which he might have to pay his sub-purchaser for his own failure to deliver. In the Court of Appeal, Hewart C.J. noted the arbitrator's finding that the 'chance of its [the wheat] being resold as a cargo and of its being taken delivery of by [the buyer] were about equal' and concluded that 'therefore.....it is idle to speak of a likelihood or a probability of resale'.<sup>17</sup>

If this was right enough, the House of Lords nevertheless found for the plaintiff instead. Lord Dunedin gave probability a legal designation differing substantially from its statistical: 'to make a thing probable, he said, it is enough, in my view, that there is an even chance of its happening [therefore] I think there was here in the contemplation of the parties the probability of a resale'.<sup>18</sup>

<sup>16</sup>

Or at least it apparently began with Hall v. Pim. For the fact that it was not included in the Law Reports, said Lord Pearce, [it was reported instead at (1928) 33 Com. Cas. 324, and (1928) 30 Lloyd's Rep. 159] indicates that the observations contained therein were nothing new: The Heron II supra n.9 at p.711. See too Lord Reid, ibid., at p.693.

<sup>17</sup>

See Lord Dunedin's judgment, Hall v. Pim, supra n.15 at p.767.

<sup>18</sup>

Supra n.15 at p.767.



Had the House been content to regard an even chance<sup>19</sup> as the lowest register of probability the extension proposed by Lord Dunedin might not have been great. But Lord Shaw went further, viewing with favour damages which were a 'not unlikely' occurrence,<sup>19</sup> i.e., something with less than a 50-50 chance of happening. So, as Lord Reid later summarised: 'Hall's case must be taken to have established that damages are not regarded as too remote merely because, on the knowledge available to the defendant when the contract was made, the chance of the occurrence of the event which caused the damage appeared to him to be rather less than an even chance'.<sup>20</sup>

But 'not unlikely' did not mark an end to the widening process. A yet further extension came with another House of Lords decision (which did not cite Hall v. Pim); Monarch Steamship Co. v. A/B Karlshamns Oljefabriker.<sup>21</sup> Lords Porter and Wright adhered to the statistical view of probability and referred only to what was 'likely to happen',<sup>22</sup> but Lord

<sup>19</sup> Supra n.15 at p.769.

<sup>20</sup> The Heron II, supra n.9 at p.693.

<sup>21</sup> [1949] 1 All E.R., 1. The discussion of probability is the only aspect of this case which concerns us here. Since the claim was not for profits but for expenditure, the details of the Monarch case need not be revealed until chapter 5.

<sup>22</sup> Ibid., at pp.7 and 13 respectively.  
 Lord Pearce. See two frozen products Ltd v. Adams Bruce Ltd [1954] N.Z.L.R. 486.



Morton argued that a 'grave risk' alone would suffice,<sup>23</sup> followed, held the Court of Appeal, from an application and Lord du Parcq agreed that a 'serious possibility' was enough.<sup>24</sup> This further weakening of probability was neatly brought out in The Heron II. Take a pack of well-shuffled cards, Lord Reid said, and turn the top one up: there is a 'real danger' or 'serious possibility' that it will be the nine of diamonds, but no one, he said, would pretend that it was 'not unlikely'.<sup>25</sup>

Asquith L.J., however, thought this even wider view acceptable as an approach to probability. 'It is enough', he argued in Victoria Laundry v. Newman Industries,<sup>26</sup> 'if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger"'. For short he said, adding yet more phrases to what was becoming a semantic battleground, 'we have used "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy'.<sup>27</sup> It

<sup>23</sup> Supra n.21 at p.20.

<sup>24</sup> Ibid.

<sup>25</sup> Supra n.9 at p.695.

<sup>26</sup> [1949] 1 All E.R. 997 (C/A).

<sup>27</sup> Ibid., at p.1003. He expressly recognised his debt to Lord du Parcq. See too Frozen Products Ltd v. Adams Bruce Ltd

[1954] N.Z.L.R. 486.

their lordships displayed, apart from the decision itself, followed, held the Court of Appeal, from an application of these criteria, that the buyer could recover the profits lost to his laundry business through the late delivery of a boiler: as the defendant well knew, the plaintiff had wanted the boiler for immediate use.<sup>28</sup>

### The Heron II

The Court of Appeal's, however, was not the final examination of probability, nor indeed the most comprehensive. Rather, it was the House of Lords in The Heron II which gave what has been to date the most thorough-going analysis of likelihood since the process commenced in Hall v. Pim. This recent case dealt with a carrier who agreed to take sugar to Basrah, knowing it to be sugar, but unaware that it was for sale in the Basrah Market. During his nine-day period of delay the price in the market fell, and for this loss of profits, said the House of Lords, the plaintiff could recover.

The Court of Appeal had similarly found for the shipper but in so doing had endorsed Asquith L.J.'s expression 'on the cards':<sup>29</sup> rejecting it was virtually the only unanimity which

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But recovery was only allowed for general business profits: we shall later see that recovery was not allowed for certain lucrative Ministry of Supply dyeing contracts; infra n.71.

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[1966] 2 All E.R. 593, 605 and 610, per Diplock and Salmon L.JJ. respectively.

Where then was the line to be held? 'It is here' their lordships displayed, apart from the decision itself. said Lord Morris, 'that words and phrases begin to sound in and compete [and] I do not think it is possible to arise to express a preference as to any definite word as between the words and phrases that were submitted'.<sup>30</sup> His advice fell on deaf ears.<sup>31</sup> Lords Pearce and Upjohn opted Asquith L.J.'s criteria of 'real danger' and 'serious possibility'.<sup>32</sup> while Lord Hodson approved 'likely to result' as not being 'possible'.<sup>33</sup> improve on'.<sup>37</sup> Lord Morris, also emphatically rejected.<sup>33</sup> Lord Morris, faithful to his view that a settled choice was unnecessary,

<sup>30</sup> Supra n.9 at pp.701, 711 and 717 respectively.

<sup>31</sup> Ibid., at pp.694 and 717 respectively.

<sup>32</sup> Ibid., at pp.695-6.

<sup>33</sup> See The Parana, supra n.12. Although this case was not overruled until The Heron II it had long been evaded. For example, Dunn v. Bucknall [1902] 2 K.B. 614 (C/A) got round it by saying that the basis of the decision had been the uncertainty in the days of sailing-ships of the duration of a voyage, and that with the advent of more predictable journees the basis for the decision had gone. Consequently, the plaintiff could recover for the loss of a particular market to which the defendant knew the goods were destined. But such a reason had not been given in The Parana, and, as Lords Reid and Hodson said, it is difficult to see what uncertainty of duration has to do with it; The Heron II, supra n.9 at pp.696 and 720 respectively. The Parana was also distinguished in Sargant v. S.E. Asiatic Co. (1915) 32 T.L.R. 119 and Grove v. Union Steamship Co. Ltd [1920] N.Z.L.R. 601 where the carrier took the goods past the agreed destination before returning thereto. The Parana was held not to apply where the fall in the market occurred after the carrier refused delivery. Lastly, The Parana was distinguished in Smith v. Tregarthen (1887) 56 L.J. Q.B. 437 where goods shipped on the wrong vessel arrived late, the market having fallen during the period of delay. The court gave damages for non-delivery, with the later acceptance of the goods going in reduction of the damages.



Where then was the line to be held? 'It is here', said Lord Morris, 'that words and phrases begin to crowd in and compete [and] I doubt whether the necessity arises to express a preference or any definite preference as between the words and phrases that were submitted'.<sup>34</sup> His advice fell on deaf ears.<sup>35</sup> Lords Pearce and Upjohn adopted Asquith L.J.'s criteria of 'real danger' and 'serious possibility',<sup>36</sup> while Lord Hodson approved 'liable to result' as not being 'possible to improve on'.<sup>37</sup> Lord Morris, faithful to his view that a settled choice was unnecessary, threw out a welter of diverse phrases, describing the loss at one stage as being 'liable to result or at least not unlikely',<sup>38</sup>

<sup>34</sup>

Supra n.9 at pp.698-9. 'As a practical businessman', said his lordship, '[the carrier] would not have paused to reflect on the possible nuances of any one of these phrases. Nor would he have sent for a dictionary'; ibid., at p.701.

<sup>35</sup>

And so it should have, says Dr Burrows, for 'there are differing degrees of likelihood and the law must adopt one as the correct standard in this particular context; having fixed on one, the only way it can be communicated is through words, and it is undeniable that at least some of the words listed by Lord Morris (see text) have different shades of meaning. Undoubtedly words "may sometimes be given a dominance which is above their status", but they are the only means we have of expressing concepts and ideas'; 'Damages in the Law of Contract' (1968) 3 N.Z.U.L.R. 71, 73.

<sup>36</sup>

Supra n.9 at pp.711 and 717 respectively.

<sup>37</sup>

Ibid., at p.708.

<sup>38</sup>

Ibid., at p.705.

degree of probability advocated in Hall v. Pin; 'not at another that it 'was likely'<sup>39</sup> and, finally, that it unlikely or some similar words'.  
was 'very likely'.<sup>40</sup>

Still, whatever view one takes of The Heron II, Lord Reid flatly disagreed with the views of the majority. 'Liable' must go, he said, as it is 'vague' and would extend responsibility to a 'very improbable result'.<sup>41</sup> Nor did it disturb him that what Asquith L.J. and Lord Hodson had in mind was an interpretation of 'liable' as equivalent to a 'real danger' or a 'serious possibility'. Lord Reid rejected even these tests as being overly generous to the claimant. They had, he argued, never represented the test in contract. He pointed out that the situation which was the subject of contemplation in Monarch v. Karlshamns Oljefabriker, i.e., the outbreak of war, was in the words of Sir Winston Churchill, quoted by Lord du Parc, something which would happen 'in all human probability'. 'So', concluded Lord Reid, 'there was no need for him to go further than the existing law and I do not think courts are now in, observing that The Heron II offered four he intended to do so'.<sup>42</sup> The proper test, he said, was the

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<sup>39</sup> Supra n. 7 at p. 696.

<sup>40</sup> Supra n. 9 at p. 701.

<sup>41</sup> Aruna Mills, Ltd v. Shanrajee Gobindram [1968] 1 Llo. Ibid. Rep. 304, 313. The buyers agreed to pay the

<sup>42</sup> Ibid., at p. 694. reference, if any, in the Exchange rate prevailing on the date and the date when the price was

<sup>43</sup> Ibid., at p. 695. After delivery was due the Indian rupee was devalued. The quotation is from the Second

World War (1st edit., 1948) Vol. 1, p. 270. delay: a right to reject devaluation was something which the defendants should have

contemplated as 'liable' to happen. . . at p. 303. The type of difficulty which this semantic dispute involves is neatly

illustrated by the headline which declared that the loss was not such as to 'likely' to result.

degree of probability advocated in Hall v. Pim; 'not unlikely or some similar words'.<sup>43</sup>

Still, whatever view one takes of The Heron II, and has confessed his own predilection for Lord Reid's whether the majority or minority view, it is clear that 'not unlikely'. But he came to no final decision a legal probability now connotes something with a less because: 'I do not think that a different result would than even chance of occurrence; and assuming that be arrived at on the facts of this case, whichever be Alderson B. had in mind an interpretation akin to 'likely chosen' to happen', it is equally clear that the rule laid down

A Suggested Solution  
in Hadley v. Baxendale has undergone a drastic modification.

Once the courts begin paring down probable from its It is not clear, however, given the disagreement in The Heron II, and in particular Lord Morris' forceful denial of that no convincing argument exists against making a man allegiance to either camp, just which of the interpretations liable for any event which, on the facts as they appeared ought now to be accepted as law. Donaldson J. has adopted to his, was only possible. If he is assumed to have taken the majority view and alighted upon 'liable to result', the risk of a 'probable' event, of a 'not unlikely' event provided that the phrase is defined by reference to one or and of a 'serious possibility', then it can be maintained that both of the other two phrases 'serious possibility' or 'real danger'.<sup>44</sup> Megaw J., however, has pointed out the difficulties which, on the facts, seemed only 'possible' courts are now in, observing that The Heron II offered four

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Supra n.9 at p.696.

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Aruna Mills, Ltd v. Dhanrajmal Gobindram [1968]

1 Lloyd's Rep. 304, 313. The buyers agreed to pay the difference, if any, in the Exchange rate prevailing on the date of the contract and the date when the price was paid. After delivery was due the Indian rupee was devalued and the buyers paid the additional sum; they succeeded in claiming this as damages for delay: devaluation was something which the defendants should have contemplated as 'liable' to happen.

difficulty which this semantic dispute involves is neatly illustrated by the headnote which declares that the loss was not such as was likely to result.



views on probability - a 'real danger', 'serious possibility', 'liable to result' and 'not unlikely' - and has confessed his own predilection for Lord Reid's 'not unlikely'.<sup>45</sup> But he came to no final decision because: 'I do not think that a different result would be arrived at on the facts of this case, whichever be chosen'.<sup>46</sup>

#### A Suggested Solution

Once the courts begin paring down probable from its fundamental meaning of 'likely to happen', it is arguable that no convincing argument exists against making a man liable for any event which, on the facts as they appeared to him, was only possible. If he is assumed to have taken the risk of a 'probable' event, of a 'not unlikely' event and of a 'serious possibility', then it can be maintained that he must also be said to have assumed the burden of an event which, on the facts, seemed only 'possible'.

<sup>45</sup>

Allan Peters (Jewellers), Ltd v. Brocks Alarms, Ltd [1968] 1 Lloyd's Rep. 387, 392.

<sup>46</sup>

Ibid., at p.392. The plaintiffs' business was burgled but, because the alarms installed by the defendants were faulty, the plaintiffs' insurers legitimately declined payment. Megaw J. refused to allow this loss of claim as damages a) because the equipment, even if properly installed, would not have prevented the burglary, and b) because the defendants could not be expected to know that the insurers would have the right to reject responsibility. The loss, he concluded, could not be called 'not unlikely' or 'liable to result', ibid., at p.393. The type of difficulty which this semantic dispute involves is neatly illustrated by the headnote which declares that the loss was not such as was likely to result.

to satisfy the demands of likelihood.<sup>47</sup> In this case,

Diamond v. Campbell-Jones,<sup>48</sup> the plaintiff claimant  
against a repudiating seller of land the profits he

The rationale of the contemplation formula is that a  
would have made upon conversion of the premises into offices  
contract-breaker makes good a "probable" or "not  
and flats. Buckley J. rejected this claim even though it  
unlikely" loss because the particular damage was present  
was common knowledge that the land was ripe for conversion.  
to his mind as a risk of breach when the contract was made,  
Requith L.J.'s 'on the cards', said the judge, refers not  
and one against which he could therefore have guarded  
'to possible circumstances which might be relevant to  
himself. Should he have failed to take due precautions,  
assessing the loss likely to arise from a breach of contract,  
(as by using exclusion clauses or charging an amount  
but to the reasonable probability of a possible loss arising  
commensurate with the burden which might fall on his  
from a given state of knowledge of actual relevant  
shoulders) the loss is fairly sheeted home to him. But it  
circumstances... [he could not impute] to the vendor know-  
is further arguable that where a risk is present to the  
ledge that the purchaser was a person whose business it was  
mind of a contracting party, albeit as a possibility only,  
to carry out such conversions, or that he intended, or was  
the mere fact of his being able to speculate on the risk  
sees likely to convert the house himself for profit'.  
should again suffice to put him on his guard: and  
Certainly, he said, the context of the bargain says well.  
should proper precautions not then be effected, the guilty  
justify such an imputation but this will rarely be possible  
party is once more properly charged with the loss in  
question.

There is more support for this idea than first might  
discussion of 'probability', includes Lynn v. Fuchs (1920)  
be thought. To begin with an observation of a general  
Patrick v. Russo-British Grain Export Co. [1927] 2 K.B. 535;  
character, in only one case where the probability test has  
Exporters [1947] 1 K.B. 217. All of these cases concern dealings  
been canvassed, and then under circumstances which allow of  
appear to have been any communication as to an intended resale.  
explanation, has it been applied to defeat the plaintiff; a  
Haller (1922) 115 L.R. 992 and Beale v. Whiting & Finley (1918)  
fair indication, perhaps, that the courts, have found it easy

<sup>47</sup> [1960] 1 All E.R. 583.  
<sup>48</sup> [1944] 1 K.B. 597.

to satisfy the demands of likelihood.<sup>47</sup> In this case, Diamond v. Campbell-Jones,<sup>50</sup> the plaintiff claimed<sup>48</sup> against a repudiating seller of land the profits he would have made upon conversion of the premises into offices and flats. Buckley J. rejected this claim even though it was common knowledge that the land was ripe for conversion. Asquith L.J.'s 'on the cards', said the judge, refers not to possible circumstances which might be relevant to assessing the loss likely to arise from a breach of contract, but to the reasonable probability of a possible loss arising from a given state of knowledge of actual relevant circumstances.....[he could not impute] to the vendor knowledge that the purchaser was a person whose business it was to carry out such conversions, or that he intended, or was even likely to convert the house himself for profit.<sup>49</sup> Certainly, he said, the context of the bargain may well justify such an imputation but this will rarely be possible market although they had no notice of this. The hops arrived

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Cases where resale profits have been allowed, apparently because 'probable', but where there has been little, if any, discussion of 'probability', include: Lyon v. Fuchs (1920) 2 LL. L.R. 333; Henry F. Moss Ltd v. Fisher [1921] G.L.R. 47; Patrick v. Russo-British Grain Export Co. [1927] 2 K.B. 535; Beavey v. Hirst [1944] 2 K.B. 24; Household Machines v. Cosmos Exporters [1947] 1 K.B. 217. All of these cases concern dealings among businesses and businessmen, and in none of them does there appear to have been any communication as to an intended resale. Apparently there was an express communication in both Mott v. Muller (1922) LL. L.R. 492 and Beale v. Huggins & Finley (1918) S.A.L.R. 15 but since each was a 'business' case, profits would doubtless still have been allowed even in its absence.

<sup>48</sup> all times known to the defendants.

[1960] 1 All E.R. 583.

<sup>49</sup> Ibid., at p.591.



in the case of land.<sup>50</sup> But the vital, clinching, argument against the plaintiff was that he failed to show that he ever intended to use the land for the alleged purposes. As Buckley J. pointed out, the plaintiff had conceded his preference to dispose of the property instead of developing it, and his already having negotiated to that effect.<sup>51</sup> His claim, in other words, was not just speculative, but almost imaginary, since the evidence was that he never intended to earn the profits which he said he had lost.<sup>52</sup>

But apart from any indirect evidence that the courts might be disposed to accept a mere possibility as sufficing, there is a fair degree of direct support as well. In the early case of Collard v. S.E. Rly.,<sup>53</sup> for example, Martin B. appeared to adopt reasoning not unlike that advanced here. Hops had been sent by the defendant carriers for sale in the market although they had no notice of this. The hops arrived late and the plaintiff sought compensation for the lower rates prevailing. Notwithstanding the absence of notice, the judge

<sup>50</sup> Supra n.48 at p.591.

<sup>51</sup> Ibid., at pp.587-8.

<sup>52</sup> In Cottrill v. Steyning & Littlehampton Building Society [1966] 1 W.L.R. 753 loss of profits was allowed to the would-be purchaser of land. His intention to develop the land was at all times known to the defendants.

<sup>53</sup> (1861) 7 H. & N. 79.

held the claim good, because, on the facts of the case, the carriers 'must have known that they [the hops] were sent for one of two purposes, either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit'.<sup>54</sup> Martin B. certainly thought a

sale was 'more likely' but, by stressing the defendants' awareness of the alternatives, he seemed to indicate that likelihood was not significant so much as the defendants' clear acceptance of the risk - or possibility - of the consignor having sent for purposes of sale.

Perhaps this interpretation of Collard v. S.E. Rly Co. may appear tendentious, but there is also authority more straightforwardly adopting the view that a lone possibility suffices. Scrutton L.J., for example, once argued vigorously that resales could never ever affect the measure of damages unless the seller contemplates them as a 'possibility'.<sup>55</sup>

<sup>54</sup> Supra n.53 at p.86.

<sup>55</sup> Finlay v. Kwik Hoo Tong [1929] 1 K.B. 400, 411. This case perhaps is better known as an authority on mitigation (the principle of which is discussed in chapter 7). Goods were delivered late to the plaintiff and, though he could have compelled his sub-buyer to take them, it was held that so to act would have ruined the plaintiff's commercial reputation. He could, therefore, refrain from such an act of mitigation and succeed in his claim for the normal measure of damages. [Quaere, however, the assumption that if the resale had been performed the defendant's breach would have been nullified: see chapter 2].

Supra n.9 at p.701.

Supra n.15 at p.770.

And Lord Morris, even in The Heron II, found it quite impossible to believe that a man could escape responsibility 'by saying that he would only be aware of a possibility of loss but not of a probability or certainty of it'.<sup>56</sup>

Hall v. Pim, however, seems much the most interesting case. Contained within the contract between buyer and seller were express provisions in regard to resales (stipulating, for example, the procedure to be employed in case of arbitration). Neither Lord Shaw nor Lord Dunedin gave this matter any attention, but the majority found it central to their decision. Lord Phillimore, in particular, argued that certain damages 'are, at the time of making the contract, recognised by the parties as those which in a particular case may result from a failure....they reckon that those damages may flow from that breach. I designedly used the word "may". There may be cases where the word to be used might be "will", but there are also cases, and more common cases where the word to use is "may"'.<sup>57</sup> The present case, he said, was particularly clear in view of the express provisions; because of them the sellers must be taken to have known that the buyers 'might well sell [the wheat] over again',

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Supra n.9 at p.701.

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Supra n.15 at p.770.



and they 'must be taken to have consented to this state of things and thereby to have made themselves liable to pay the damages claimed'.<sup>58</sup> This is a clear statement that a possibility should be considered enough; and since there can be no difference, other than one of form, between a possibility written into the contract, as it was here, and one merely evident in the circumstances of the contract, and since Lord Phillimore's represents the majority view,<sup>59</sup> Hall v. Pim must offer the strongest support for the 'possibility' theory.<sup>60</sup>

#### The Carrier Re-examined

But while the courts have thus been consistently downgrading their requirements of probability at least to the level of a 'real danger', and arguably beyond that to a mere 'possibility' there has been at the same time developing a

<sup>58</sup>

<sup>58</sup> Supra n.15 at p.771. See also Viscount Haldane L.C.: 'Whether [the plaintiff] was likely to enter into such sub-contracts is not material. It is enough that the contract contemplated by its terms that he should have the right to do so if he chose'; ibid., at p.766.

<sup>59</sup>

<sup>59</sup> Lord Blanesburgh took the line of Viscount Haldane and Lord Phillimore but indicated that he agreed with 'the rest of your lordships' who decided the case on the more general ground; supra n.15 at p.774.

<sup>60</sup>

<sup>60</sup> All the judges in The Heron II referred to Hall v. Pim if the but only Lords Morris and Pearce mentioned its special facts. Lord Pearce made no further comment, while Lord Morris added that, in the light of the express provisions, the seller must have 'recognised' that the buyer 'might have to pay damages to his sub-purchaser'; supra n.9 at pp.711 and 705 respectively.

(footnote continued on p.95)

But from cases which simply repeated Hadley v. Baxendale small, but significant, group of cases where even the we would learn little more about its basic policies. These higher degrees of probability have been held insufficient. could not really emerge until the courts produced some special This apparent inconsistency can only be explained by factor which was not the failure to keep a stock of goods in recalling that the aim of Hadley v. Baxendale, and in hand. We might then begin our re-examination of the carrier's particular its arbitrary conception of 'special circumstances', position with one of the more famous instances; Horne v. Midland Rly Co.<sup>61</sup>

protect him from an 'excessive' measure of liability.<sup>61</sup>

This was a case where the plaintiff had sent shoes to One set of authorities which inevitably followed another in pursuance of a contract made at the rate of 4/- Hadley v. Baxendale were those wherein the facts were broadly a pair: the shoes were delivered late and when the consignee the same. In both Le Peinteur v. S.E. Rly Co.<sup>62</sup> and Gee v. Lancashire and Yorkshire Rly Co.<sup>63</sup> they were sold in the open market at 2/9 a pair. Hence, loss of profit was claimed was suspended through the carrier's delay in delivering supplies, at the rate of 1/3 a pair.

and in both of them his failure to maintain some stock in hand

Now, the plaintiff had told the defendant of his forward was reckoned a special circumstance. Said the court in contract and had stressed the urgency of a punctual delivery. Le Peinteur's case: 'This case is governed by Hadley v. Baxendale and we could not grant a rule without overruling that Hadley v. Baxendale the plaintiff would be entitled to recover decision'.<sup>64</sup>

his resale profit, and that were he not to be allowed to do

<sup>61</sup> it could only be, as Pigott B. realised, 'by reason of We are not overlooking the fact that The Heron II dealt with a carrier; we shall have more to say on this infra pp.116-117.

<sup>62</sup> (footnote continued from p.94)

(1860) 2 L.T. 170.

<sup>63</sup> suggested that even in those cases where notice of some special circumstance was given after the contract was struck,

<sup>64</sup> all this might suffice if the defendant thereafter

Supra n.62. However, it was said in Gee's case that if the trial judge (who had directed the jury to find for the plaintiff mill-owners) were to re-direct them not to find for the plaintiffs unless they found it to be commonly understood that mill-owners worked hand-to-mouth, the plaintiffs might on this basis still recover their profits; supra n.63 at pp.218 and 221, per Bramwell and Wilde BB. respectively. Bramwell B. further

(footnote continued on p.95)

But from cases which simply repeated Hadley v. Baxendale we would learn little more about its basic policies. These could not really emerge until the courts produced some special factor which was not the failure to keep a stock of goods in hand. We might then begin our re-examination of the carrier's position with one of the more famous instances; Horne v. Midland Rly Co.<sup>65</sup>

This was a case where the plaintiff had sent shoes to another in pursuance of a contract made at the rate of 4/- a pair: the shoes were delivered late and when the consignee rightfully declined to accept them they were sold in the open market at 2/9 a pair. Hence, loss of profit was claimed at the rate of 1/3 a pair.

Now, the plaintiff had told the defendant of his forward contract and had stressed the urgency of a punctual delivery. It would follow, therefore, that on a literal reading of Hadley v. Baxendale the plaintiff would be entitled to recover his resale profit, and that were he not to be allowed to do so it could only be, as Pigott B. realised, 'by reason of

(footnote continued from p.94)

suggested that even in those cases where notice of some special factor was given after the contract was struck, still this might suffice if the defendant thereafter persisted in breaking his contract; ibid., at p.218. This has never found favour, and was specifically rejected in Kollman v. Watts [1963] V.R. 396. We shall return to this in chapter 7.

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(1872) L.R. 7 C.P. 583; (1873) L.R. 8 C.P. 131.

68 See, e.g., (1872) L.R. 7 C.P. 583, 590, per Willes J.; (1873) L.R. 8 C.P. 131, 141-2, per Blackburn J.



his with liability for whatever loss of profit accrues some artificial rule established by the decisions, or from his breach. If he has failed to avail himself of some ground of public policy'.<sup>66</sup> Obliging, Blackburn J. any forewarning, then he could be said to have taken the then stated this policy in what is a most interesting risk of the plaintiff's loss being in some way exceptional. observation: 'The real meaning', he said, 'as to the That the court did not adopt this approach is, perhaps, limitation of damages is that the defendant shall not be some evidence of a desire to safeguard a carrier from found to pay more than he received [as] a reasonable "excessive" damages.

consideration for undertaking the risk at the time of making the contract'.<sup>67</sup> recovery of any resale profit, regardless of the price Thus, the aim of the court was clear: to save the involved, if as well the sale had been made at rates then carrier from an 'excessive' degree of liability. But first prevailing - there is ample evidence that in Horne's case this meant finding some 'special factor' which ought to this was so - then naming the resale price as a special have been brought before the defendant at the time the circumstance involves an inconsistency. If there had been contract was made. This, the court agreed, should be the some abnormal fluctuation in the market during the delay particularly good price at which the plaintiff had resold;<sup>68</sup> the court would have paid no attention to this and would still and since there had been no communication of this the have awarded damages based on the difference formula. Now, defendant was to be held only to the drop in the market price

between the time when the goods should have arrived and when they did arrive. But it is as well to note that in Hall v. Pitt, Lords contended that recovery could not have been allowed without some (presumably notice of the resale price) if the

This decision is open to criticism. First, the suggestion can be advanced that, once a party anticipates

See, e.g., (1872) L.R. 7 C.P. 583, 590, per Willes J.; (1873) L.R. 8 C.P. 131, 143. found no evidence that the market price at the time of sale in Horne v. Midland Rly Co, that should suffice to saddle contract was made, or when it was broken; (1873) L.R. 8 C.P. 131, 135.

<sup>66</sup> (1873) L.R. 8 C.P. 131, 143.

<sup>67</sup> Ibid., at pp.132-3. The word 'as' is omitted from the report but it, or some equivalent, is plainly intended.

<sup>68</sup> See, e.g., (1872) L.R. 7 C.P. 583, 590, per Willes J.; (1873) L.R. 8 C.P. 131, 141-2, per Blackburn J.

him with liability for whatever loss of profit accrues if the carrier would (rightly) be expected to take his from his breach. If he has failed to avail himself of chance with the market in this case, he ought also, as any forewarning, then he could be said to have taken the a matter of simple consistency, be expected to do so in risk of the plaintiff's loss being in some way exceptional. all cases, provided only that in the case of a resale, That the court did not adopt this approach is, perhaps, such resale was contemplated. It surely cannot be a some evidence of a desire to safeguard a carrier from ground for distinction that in one case a carrier is "excessive" damages.<sup>69</sup>

Second, while this argument preceding would mean a loss of market amounts to) while in another he is sued recovery of any resale profit, regardless of the price for one that was. Either is as likely to produce the involved, if as well the sale had been made at rates then larger measure of damages since markets are equally prone prevailing - there is ample evidence that in Horne's case to fluctuate and, as Pigott B. said, what more is there this was so<sup>70</sup> - then naming the resale price as a special in this case than that the market had fluctuated and circumstance involves an inconsistency. If there had been fallen between the time when the contract was made and the some abnormal fluctuation in the market during the delay time for delivery? the court would have paid no attention to this and would still

have awarded damages based on the difference formula. Now,

(1873) L.R. 8 C.P. 131, 144. Nonetheless, the idea that exceptionally good resale prices are 'special', even if made at rates then prevailing, has proved a popular one: see e.g.,

<sup>69</sup> But it is as well to note that in Hall v. Pim, Lords Shaw and Dunedin contended that recovery could not have been allowed without more (presumably notice of the resale price) if the sales had been made at better than market rates; supra n.15 at pp.767 and 768 respectively.

<sup>70</sup> See, e.g., (1872) L.R. 7 C.P. 583, 590, per Willes J; (1873) L.R. 8 C.P. 131, 144, per Pigott B. Only Kelly C.B. found no evidence that the market price at the time of sale differed from the (lower) rate obtaining when the carriage contract was made, or when it was broken; (1873) L.R. 8 C.P. 131, 135.

In this case it was held down that the value of a dredger is to be assessed as its value to the owner as a going concern; and in making that assessment regard must naturally be (footnote continued p. 99)

But while we may be critical, the court also seemed if the carrier would (rightly) be expected to take his chance with the market in this case, he ought also, as next step was to fall back upon the principle embedded in a matter of simple consistency, be expected to do so in Hadley v. Baxendale (though of course the court did not see it in this light) and argue that, quite apart from the such resale was contemplated. It surely cannot be a question of contemplation, no additional liability should be imposed upon the carrier in the absence of something sued for a resale which might have been (which is what equivalent to a contract on his part to be liable to such a loss of market amounts to) while in another he is sued for one that was. Either is as likely to produce the larger measure of damages since markets are equally prone to fluctuate: and, as Pigott B. said, what more is there in this case 'than that the market had fluctuated and

fallen between the time when the contract was made and the time for delivery?'<sup>71</sup>

<sup>71</sup> (1873) L.R. 8 C.P. 131, 144. Nonetheless, the idea that exceptionally good resale prices are 'special', even if made at rates then prevailing, has proved a popular one: see e.g., The Arpad [1934] P.189 (C/A); Household Machines Ltd v. Cosmos [1946] 2 All E.R. 622; Victoria Laundry Industry v. Newman Industries Ltd [1949] 1 All E.R. 997 (C/A); Heskell v. Continental Express [1950] 1 All E.R. 1033. We might add a further criticism, beyond those which might be drawn from the text, of the Victoria Laundry case. The plaintiff here was denied recovery for 'exceptionally lucrative' dyeing contracts, although they were such as were obtained by the plaintiff as an ordinary part of his business, and although the rate of payment seemed to be normal for that type of contract. This seems to be inconsistent with Liesbosch Dredger v. S.S. Edison [1933] A.C. 449 (H/L). In this case it was laid down that the value of a dredger is to be assessed as its value to the owner as a going concern; and in making that assessment regard must naturally be (footnote continued p. 99)



But while we may be critical, the court also seemed to recognise the fallibility of its argument. For the next step was to fall back upon the principle embedded in Hadley v. Baxendale (though of course the court did not see it in this light) and argue that, quite apart from the question of contemplation, no additional liability should be imposed upon the carrier 'in the absence of something equivalent to a contract on his part, to be liable to such damages'.<sup>72</sup> Notice, agreed Blackburn J.; 'must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss'.<sup>73</sup>

earned from a profit-earning chattel.  
(footnote continued from p.98)

paid to pending engagements, profitable or not; ibid., at pp.463-5, per Lord Wright. But if the owner of a dredger is entitled to its real value to himself as part of his business, it seems only right to say that one who purchases a boiler for use in his laundry business should be entitled to its value to himself as part of his business. (We might note, in passing, that the seller of a profit-earning chattel, as much as the carrier, is exposed to the danger of 'excessive' damages. This could well explain the Court of Appeal's decision).

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(1873) L.R. 8 C.P. 131, 139-40, per Martin B.

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Ibid., at p.141. Kelly C.B. agreed and added that since the defendant was a common carrier, who could not decline to deliver ~~the~~ goods, it would be well nigh impossible ever to say that such a contract had been made; ibid., at p.137. Pigott B. and Lush J. dissented since they believed that the common carrier could decline to carry if an abnormal amount of liability were sought to be imposed upon him: if he accepts the contract after such notice, they argued, he must then be assumed to have accepted responsibility for the consignor's loss; ibid., at pp.143 and 145 respectively. This would be arguable if their initial premise were correct, but (footnote continued on p.100)

(1858) L.R. 3 C.P. 499.

However, this was not the first occasion on which such a proposition had been put. The clearest, and best-known exposition of the 'special contract' theory, had earlier fallen from Bovill C.J. and Willes J. in British Columbia Saw Mill Co. v. Nettleship.<sup>74</sup> Unlike Horne v. Midland Rly Co. this case did not concern resale profits, but rather user profits, and because of that its sympathy for the carrier is so much more visible; for while an exceptionally good resale price may at least appear to be 'special', there is little which one might recognise as 'special' about the ordinary business profits which might be earned from a profit-earning chattel.

The carrier in this case had agreed to take from England to British Columbia machinery which he knew was to be used in the erection of a saw-mill. A vital part of the machinery was lost and the plaintiffs had to send to England for a replacement. This took nearly a year to arrive and during that time the mill was at a standstill: hence, the plaintiffs sought the profits they had so lost.

(footnote continued from p. 99)

it seems well accepted that a carrier has in fact no such right to decline; see, e.g., Bauer, 'Consequential Damages in Contract' (1931-2) 80 U.P.L.R. 687, 689; Mayne, op. cit., p.29; Kahn-Freund, The Law of Carriage by Inland Transport (4th edit., 1965) chapter 8; The Heron II [1966] 2 All E.R. 593, 603, per Diplock L.J.

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(1868) L.R. 3 C.P. 499.

There are three distinct parts to the court's claim to judgment. First, Willes J., who delivered the leading judgment, ridiculed the plaintiffs' claim. They seek, he suggested, 'the full profits they might have made by use of the mill if the trade were successful and without a rival!'<sup>75</sup> It would, he continued, 'involve speculations of the wildest kind, if we are to take into consideration the plaintiffs' intention to erect a mill, and to set up for the first time a trade the probable profits of which are wholly incapable of calculation or approximation'.<sup>76</sup> But neither point can affect the legal standing of the claim: if a plaintiff is entitled to profits then he must receive them, regardless of amount,<sup>77</sup> and regardless of the difficulty involved in their estimation.<sup>78</sup> The point is, of course, that

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<sup>75</sup> Supra n.74 at p.508. The emphasis is that of Willes J.

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<sup>76</sup> Ibid., at pp.509-10. See too Bovill C.J. ibid., at p.506.

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<sup>77</sup> 'The general rule is, therefore, to be applied to the present case, and ought, like all other general rules, to be fairly, candidly, and impartially applied. It has been said that the damage sustained here has been very great. Now, I am clearly of opinion that this ought to be no element whatever in the application of the rule, and whether the damage be £10 or £10,000 is immaterial'; Wilson v. The Newport Dock Co. (1866) L.R. 1 Ex. 177, 185, per Martin B.

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<sup>78</sup> This had been established by the House of Lords in Hall v. Ross (1833) 1 Dow 219, cited with approval by Lord Reid in The Heron II supra n.9 at p.694. The principle that difficulty in estimation is no bar to the recovery of profits was re-affirmed in Chaplin v. Hicks [1911] 2 K.B. 786 (C/A). See too Wilson v. Matthews [1913] V.L.R. 224; Howe v. Teefy (1927) 27 S.R. (N.S.W.) 301; Bowen v. Blair [1933] V.L.R. 398. It is interesting to note that as well as Willes J., ibid., at pp.508 and 509, make reference to the works of Pothier.



the court was clearly determined not to allow the claim to succeed. The defendant, he said, perhaps did appreciate

these various factors, but even so, it was not 'under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he should be liable for all the consequences in the event of a breach'.<sup>79</sup> He knew, of course, the use to which the machinery would be put, but the 'fact of knowledge' any portion of it failed to arrive'.<sup>79</sup> Another was that he could never impose upon him 'a greater degree of liability than would otherwise have been cast on him'.<sup>80</sup> Such knowledge, he continued, 'must be brought home to the party who took pains to say, the carrier was, as he knew, shipping all the machinery for the mill;<sup>81</sup> he must then have known that, in the nature of things, some of the items carried would be indispensable to the running of the mill. And since the defendant was, after all, shipping the machinery out from England to Canada, it is reasonable to suppose that he appreciated that England was the only, or at any rate the most convenient, source of supply.

<sup>83</sup> Sensible, perhaps, of these objections, Willes J. in effect conceded that the 'special circumstances' were no special circumstances and finally turned to the 'special contract' judgment, 'the subject having been exhausted by my Lord and my brother Willes'; *ibid.*, at p.510.

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Supra n.74 at p.509, per Willes J.

80

Ibid.

81

Ibid., at pp.502-3. It is interesting to note that both sets of counsel, as well as Willes J., ibid., at pp.508 and 509, make reference to the works of Pothier.

theory. The defendant, he said, perhaps did appreciate these various factors, but even so, it was not 'under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he should be liable for all the consequences in the event of a breach'.<sup>82</sup> He knew, of course, the use to which the machinery would be put, but the 'mere fact of knowledge' could never impose upon him 'a greater degree of liability than would otherwise have been cast upon him'.<sup>83</sup> Such knowledge, he continued, 'must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it....Knowledge on the part of the carrier', Willes J., concluded 'is only important if it forms part of the contract'.<sup>84</sup>

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Supra n.74 at p.509.

83

Ibid., at pp.508-9.

84

Ibid., at p.509. See as well Bovill C.J. ibid., at pp.506 and 507. Byles J. delivered a short concurring judgment, 'the subject having been exhausted by my Lord and my brother Willes'; ibid., at p.510.

The Carrier - Some Areas of Comparison

Cases such as these, it is suggested, tend to show attitudes to other contracts where there is also the risk that the burden sought to be imposed on a party favour of carriers. Asquith L.J. has argued that the rules of contemplation are not, whatever appearances might be, bent in favour of the carrier. The apparent trend in favour of that body of tradesman, he suggested, arose in breach.

because: "A carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods, or about other "special circumstances" which may cause exceptional loss if due delivery is withheld".<sup>85</sup>

We have suggested, however, that a close analysis of such cases as Horne v. Midland Rly Co. and British Columbia v. Nettleship lends credence to an argument that "special

circumstances" are sometimes deliberately constructed on behalf of the carrier, with the result, therefore, that Asquith L.J. could be said to have "viewed the process from the wrong end."<sup>86</sup> But for this charge to enjoy greater

<sup>85</sup> Victoria Laundry v. Newman Industries [1949] 1 All E.R. 997, 1001.

<sup>86</sup> It can also be objected that some carriers habitually work for a particular consignor, and that it would be wrong to ascribe to them an ignorance as to the merchandise they carry.

See chapter 3 p.49.



have bought an estate with the money".<sup>88</sup>

Yet in cases where substantial sums are involved, it credibility, it is appropriate to investigate curial attitudes to other contracts where there is also the risk, that the burden sought to be imposed on a party will be disproportionately heavy. If there is any consistency in judicial attitudes, we ought to find that, here also, the courts have leant in favour of the party in breach.

We might usefully begin by looking at contracts to pay or lend money, and agreements of a broadly similar nature. The value of so doing is that, in such cases, there is always the chance that failing to perform the contract will deprive the innocent party of profits which he might otherwise have been able to derive from use of the promised funds. This was recognised as the rule, even if criticised as such, by Jessel M.R. in Walbis v. Smith.<sup>89</sup> It has

always appeared, he argued, that "the doctrine of the English law It will be recalled that, in the years prior to Hadley v. Baxendale, the attitude of the courts was strongly against allowing claims for lost profits where the loss arose from the failure to transfer stock.<sup>87</sup> The dictum of Tindal C.J. was cited that: "If I contract to transfer stock and do not, the party with whom I contracted has no right to tell me a

month afterwards that if I had transferred the stock he could

Walton v. Fothergill (1835) 7 Car. & P. 392, 394. The other cases mentioned were: McArthur v. Seaforth (1810) 2 Taunt. 87; Archer v. Williams (1846) 2 C. & K. 36. that the plaintiff  
89 See chapter 3 p.49.  
Fletcher v. Tayleur (1855) 17 C.B. 21, 29.  
90 (1882) 21 Ch.D. 243 (C/A).  
91 Ibid., at p.257.

have bought an estate with the money".<sup>88</sup>

Yet in cases where substantial sums are involved, it should always be readily apparent to the party who is obliged to pay or repay that his failure to perform could deprive the other party of putting the money to some intended use. Businessmen are not prone to have idle funds. In later terms, such losses of profit could be accommodated with facility under the heading of "real danger" and "serious possibility".

Even so, we find evidence that an attitude favourable to the contract-breaker in cases similar to those above persisted after 1854. Willes J. once declared that "in case of non-payment of money, the measure of damages is the interest of the money only".<sup>89</sup> This was recognised as the rule, even if criticised as such, by Jessel M.R. in Wallis v. Smith.<sup>90</sup> It has always appeared, he argued, that "the doctrine of the English law as to non-payment of money - the general rule being that you cannot recover damages .... is not quite consistent with reason. A man may be utterly ruined by the non-payment of the sum of money on a given day, the damages may be enormous, and the other party may be wealthy".<sup>91</sup>

<sup>88</sup> Walton v. Fothergill (1835) 7 Car. & P. 392, 394. The other cases mentioned were: McArthur v. Seaforth (1810) 2 Taunt. 260; Archer v. Williams (1846) 2 C. & K. 26.  
<sup>89</sup> Fletcher v. Tayleur (1855) 17 C.B. 21, 29.  
<sup>90</sup> (1882) 21 Ch.D. 243 (C/A).  
<sup>91</sup> Counsel suggested this but Rigginbotham C.J. arguendo did not appear. Ibid., at p.257.

was entitled to the value of the chance of earning those profits, if not to the profits themselves. It is paradoxically, indicating the policy which arguably lies suggested, then, that Woolcott v. Mitchell illustrates the behind the rule: for the loss may often be large, and out often (as, perhaps, here) half-felt wish of the courts not of all proportion to whatever the defendant might have to approve a measure of damages which could place a burden gained. And not every contract-breaker is wealthy.

Here, then is some evidence - admittedly very slender - of the "carrier syndrome" being found in other fields.

Turning aside from contracts to pay and repay money, Woolcott v. Mitchell,<sup>92</sup> however, is perhaps stronger evidence there is some evidence that in contracts for services - that the broad class of contract now being discussed is contracts, that is, which are of the same genus as carriage subject to such an influence. In this case, a contractor was prevented from tendering for a contract because of the (requires) what we have termed the "carrier syndrome". defendant's wrongful withdrawal of an overdraft guarantee. The

Take, to begin with, the interesting decision in Sanders v. Stuart.<sup>90</sup> The defendant in this case collected messages for telegraphic transmission to America and other places. He share in the profits which the plaintiff hoped to earn. was entrusted by the plaintiff with a message in cipher, and Nevertheless, despite the presence of this knowledge, and hence unintelligible to him, for transmission to America. despite the fact that the plaintiff would have submitted the

lowest, and probably the successful, tender, the damage arising from the loss of anticipated profits on the intended contract

See the cases cited supra p. 78. In Trans Trust Ltd. v. Danubian Trading Co. [1952]-2 was dismissed as "too remote".

The judgment contains no reasoned analysis. It may have been thought that the plaintiff would not have been a successful tenderer;<sup>93</sup> but this would properly have meant that the plaintiff

92 (1876) 1 C.P.D. 326.  
(1888) 10 A.L.T. 187.

93 Counsel suggested this but Higginbotham C.J. arguendo did not appear to agree; ibid.



was entitled to the value of the chance of earning those profits, if not to the profits themselves.<sup>94</sup> It is suggested, then, that Woolcott v. Mitchell illustrates the often (as, perhaps, here) half-felt wish of the courts not to approve a measure of damages which could place a burden on a contract-breaker which is large in comparison with his reward.<sup>95</sup>

Turning aside from contracts to pay and repay money, there is some evidence that in contracts for services - contracts, that is, which are of the same genus as carriage contracts - there is to be found (as consistency, indeed, requires) what we have termed the "carrier syndrome".<sup>98</sup>

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<sup>94</sup>

See the cases cited supra n.78.

<sup>95</sup>

In Trans Trust S.P.R.L. v. Danubian Trading Co. [1952] 2 Q.B. 297 (C/A), there were indications that, in the right circumstances, viz., where an application of the contemplation formula would allow, damages could be given in actions for the non-payment of money; see e.g., Denning L.J. ibid., at p.306. These dicta may be seen as evidence of the trend, discussed further infra at pp. 114-117, away from protecting parties who might be liable to "disproportionate" damages.

<sup>96</sup>

(1876) 1 C.P.D. 326.

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<sup>96</sup>

(1876) 1 C.P.D. 326.

of contract closely resembling a contract of carriage, to put the defendant on inquiry, and if he chose to take Goods had been deposited with the defendants for safe-keeping: the plaintiff was a commercial traveller; and taken to have made himself responsible for whatever damages the goods consisted of patterns which were essential to his trade. The patterns were lost and the plaintiff might ensue".<sup>99</sup> At any rate, it can surely be pleaded with some certainty that if a seller were to have the type of claimed the value of the patterns, and his salary and circumstantial knowledge possessed by the defendant here, expenses during the time he had to wait for fresh patterns he would be held liable in a claim by a buyer for loss of profit.

It was held by the Court of Exchequer that the plaintiff was entitled to nothing beyond the value of the patterns. The first evidence we have that the defendant was not a telegraph company, but rather one who potentially "disproportionate" liability excited sympathy in collected messages for such a company: a party, in other words, whom it would be "unfair" to saddle with a high measure of damages. Here the words of his counsel are very much in

point: "The defendant is not to incur damages which may ruin him and for which the consideration may be quite inadequate".<sup>100</sup>

More significant than Sanders v. Stuart (whose value really relies on reading between the lines of the judgment) is Anderson v. N.W. Rly Co.<sup>101</sup> This was a case of bailment, a type

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<sup>102</sup> Supra n.96 at p.326.

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Ibid., at p.327. This leaves open the question whether the telegraph company would have escaped had the fault been its own. It might not be "ruined" by the damages but the consideration would, no doubt, be "inadequate". Perhaps this would have sufficed for the court to contrive a decision in its favour.

101

(1861) 4 L.T. 216.



of contract closely resembling a contract of carriage. Goods had been deposited with the defendants for safe-keeping: the plaintiff was a commercial traveller; and the goods consisted of patterns which were essential to his trade. The patterns were lost and the plaintiff claimed the value of the patterns,<sup>102</sup> and his salary and expenses during the time he had to wait for fresh patterns to be sent.

It was held by the Court of Exchequer that the plaintiff was entitled to nothing beyond the value of the patterns. The first evidence we have that the defendants potentially "disproportionate" liability excited sympathy is counsel's indication that the defendants "had notice of the nature of the goods and the avocation of the plaintiff".<sup>103</sup>

But the most remarkable observations (remarkable, that is, in view of what has already been said as to carriers) are those in the judgments of Pollock C.B. and Bramwell B. They are worth extensive quotation. The former judge distinguished between carriers and warehousemen: "[w]here a carrier is employed it is known, and must be assumed that the goods are

<sup>102</sup>

Their value, that is, assessed as material, and not their value to the plaintiff. A claim for lost profits of £50 was dropped at the trial.

<sup>103</sup>

Supra n.101.

<sup>107</sup>

Supra n.101. See too Seamans v. Hunter [1918] Q.L.R. 515. (footnote continued p.113)

going for some purpose, and so far it is notice which may render the carrier responsible for damages resulting from loss of the goods beyond their actual value;<sup>104</sup> but the simply depositing a parcel at a warehouseman's cannot be notice which shall affect the warehouseman in case of the loss of the parcel beyond the actual value of the article.....there is no undertaking to be answerable except by special contract".<sup>105</sup>

The unconscious irony of this judgment is that Pollock C.B. excepts carriers from the "carrier syndrome";<sup>106</sup> but that apart, he does offer strong evidence that it, or some

(footnote continued from p.112)  
similarly named sentiment, does exist beyond the realm of carriers. In Brown v. The Hand-in-Hand Fire Insurance Society (1895) Bramwell B. offers further support. The decision, he suggest, is in conformity with Hadley v. Baxendale: "but", (and surely this "but" implies that the decision is not in conformity with Hadley v. Baxendale, at least as far as a straightforward reading of that case is concerned), "it would be monstrous if a railway company, sued as warehousemen only, were to be held liable to such a measure of damage as is contended for.....where would it stop?"<sup>107</sup>

<sup>104</sup> See the similar argument of Martin B. in Collard v. S.E. Rly. supra pp.90-91.

<sup>105</sup> Supra n.101.

<sup>106</sup> The decision, of course, became before Horne v. Midland Rly Co. and British Columbia Saw Mill Co. v. Nettleship.

<sup>107</sup> Supra n.101. See too Semmens v. Hunter [1918] G.L.R. 515. (footnote continued p.113)

In these few cases, it is suggested, evidence might be found for believing that some classes of contract-breaker do excite judicial sympathy. Sometimes this is stated openly: more often it is to be discovered from reading between the lines. But it is submitted that when these cases are taken together with contracts of carriage, and placed alongside contracts for the sale of goods, the outlines of a distinctive judicial policy do become relatively clear. <sup>108</sup>

(footnote continued from p.112)

In Brown v. The Hand-in-Hand Fire Insurance Society (1895) 11 T.L.R. 538 goods, which were stored with the defendants, were damaged by leaking water. The goods were samples, and the plaintiff recovered the loss of profits he consequently suffered. Kennedy J. reached his conclusion after pointing out that "the defendants knew the object for which the room was taken, and the character of the business carried on by the plaintiff, and the nature of the goods stored"; ibid., at p.539. This seems to be no more than the defendant's knowledge in Anderson v. N.E. Rly Co., which was not cited. Again, it is possible to explain away the later case as indicating the modern tendency not to sympathise with contract-breakers: see infra pp. 114-117. <sup>108</sup>

There seem to be no further cases in point. There are no other bailment or telegram cases of value: nor, unfortunately, are there any relevant master and servant, principal and agent cases: any such decisions would have provided useful touchstones of judicial attitudes. And, surprisingly, there appear to be no building cases or vendor-purchaser contracts, beyond those cited supra pp. 89-90 worth mentioning. It is, however, useful to make reference back to the criticisms offered of the Victoria Laundry case; supra n.71.

(1886) 2 T.L.R. 817.

Ibid., at p.818.

Ibid.



This decision may, perhaps, mark only a slight move  
Modern Attitudes

away from the British Columbia case, but there are several  
 In retrospect the British Columbia case, together with  
 other authorities which go considerably further. In

Horne v. Midland Rly Co., seem to mark the period when the  
Simpson v. L. & N.W. Rly Co.,<sup>109</sup> for example, the plaintiff  
 carrier's protection was taken to its highest level.

despatched samples from one place to another. He did  
 Bowen L.J., in the surprisingly neglected decision in Levi  
 not say that the goods were samples, but he did state that  
v. S.E. Rly Co.,<sup>109</sup> later agreed with Willes J. that 'one  
 his intention was to exhibit them at their destination. He  
 ought to be very careful about imposing additional burdens.....

did, however, write on the consignment - "Must be at  
 upon carriers'. He believed too that it must first be made  
 Newcastle on Monday certain". The court held that in these  
 plain to the carrier that he is expected to shoulder the

circumstances the defendant must have realised both that the  
 additional burden.<sup>110</sup> But this would not, he said, prevent

him awarding profits against the carrier in the present case.

The plaintiff had sent a very large parcel containing samples  
 to 'the verge of the law',<sup>114</sup> but there are two other decisions  
 by Grande Vitesse on a line normally used for passengers, not

goods, and had made an extra payment to ensure prompt delivery.

In view of this, thought the judge, it could be fairly deduced  
 held enough for the recovery of profits that the goods were  
 by anyone that this was in some way a 'business parcel': and

although the carrier was neither told the purpose for which  
 the samples were sent, nor indeed that they were samples, he

was prepared to take his 'own line' and give the plaintiff not  
 the £400 he had lost but £25 instead, as compensation for the  
 carrier's delay.<sup>111</sup>

See also Cheshire & Fifoot, Law of Contracts (5th edit., 1960) p.508.  
 in assessing the difficulty was irrelevant.

<sup>109</sup> (1886) 2 T.L.R. 817.

<sup>110</sup> Ibid., at p.818.

<sup>111</sup> Ibid.

the 1. This decision may, perhaps, mark only a slight move away from the British Columbia case, but there are several other authorities which go considerably further. In Simpson v. L. & N.W. Rly Co.,<sup>112</sup> for example, the plaintiff despatched samples from one showground to another. He did not say that the goods were samples; nor did he state that his intention was to exhibit them at their destination. He did, however, write on the consignment - "Must be at Newcastle on Monday certain". The court held that in these circumstances the defendant must have realised both that the goods were samples and that they were sent for purposes of display.<sup>113</sup> Now this, say some learned authors, is to go to 'the verge of the law',<sup>114</sup> but there are two other decisions which follow - perhaps go further than - the case which they deplore. In Schulze v. G.E. Rly Co.,<sup>115</sup> for example, it was held enough for the recovery of profits that the goods were marked as 'samples'; and in Jameson v. Midland Rly Co.,<sup>116</sup>

British Columbia Sewall v. Nettleship and Horne v. Midland Rly Co.

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in sex (1876) 1 Q.B.D. 274. Lord Upjohn went so far as to say

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that See esp. Cockburn C.J., ibid., at p.277 and Field J. ibid., at p.278. The court was unanimous in finding that the difficulty in assessing the damages was irrelevant.

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Cheshire & Fifoot, Law of Contracts (5th edit., 1960) p.508.

115 n to have overruled Candy v. Midland Rly Co., (1876) 38 L.T. 226. (1887) 3 T.L.R. 635.

116 expenses incurred awaiting the arrival of goods delayed, it was held (1884) 50 L.T. 426. have labelled them 'Travellers' Goods. Deliver immediately'

the label 'W.H. Moore & Co. Stand 23, Showground', was said to be 'very reasonable notice' of the fact that the goods, again, were samples sent for purposes of display.<sup>117</sup> If, then, we take these three cases together, and compare the ease with which profits were recovered here as against their blank refusal in British Columbia Sawmill v. Nettleship, it is abundantly clear that much of the old stringency has gone.

This process it would seem, has culminated in The Heron II: for it is not just that their lordships allowed a simple loss of market, but rather that they did so in a particular way. The Parana, they said, was finally overruled, and henceforth criteria such as 'grave danger' or 'serious possibility' were applicable to the carrier as much as to the seller. The effect of this argument, if rigorously applied, would mean a certain end to the carrier's special status, and place the authority of some of the earlier cases, in particular British Columbia Sawmill v. Nettleship and Horne v. Midland Rly Co. in serious doubt: indeed, Lord Upjohn went so far as to say that these cases arguing that liability be made a term of the

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Supra n.116 at p.427 per Coleridge C.J. This case must be taken to have overruled Candy v. Midland Rly Co., (1878) 38 L.T. 226. In a claim by a commercial traveller, not for profits, but for expenses incurred awaiting the arrival of goods delayed, it was held insufficient to have labelled them 'Travellers' Goods. Deliver immediately'.



contract 'ought not to be followed'.<sup>118</sup> But whether the spirit, if not the letter, of Hadley v. Baxendale has thus been overruled is a doubtful matter: cases like the British Columbia case may never recur since contracts now commonly contain limitations on liability<sup>119</sup> (and in the case of the nationalised industries such limitations are imposed by statute).<sup>120</sup> But if there were to be a recurrence of cases such as this, it is always possible that what we have described as the basic policy of Hadley v. Baxendale (that is, its sympathy with the carrier) could still be re-asserted; not, perhaps, through any advocacy of a special contract theory, but rather through the familiar search for "special circumstances".

### Conclusions

By way of complete contrast to its negative implications, the positive aspect of the 'special circumstance' formula has received almost no development at all. Two cases may be cited

(1877) De Goly, C.C.C. 195.

118

Supra n.9 at p.715. In this he expressed agreement with 'the learned editor of 11 Halsbury's Laws of England (3rd Edn.) p.243 note (m)'; ibid.

119

A person who limits his liability to a specific sum, Atkin L.J. once said, takes a 'very ordinary business precaution'; Cellulose Acetate Silk Co. v. Widnes Foundry Ltd [1933] A.C. 20, 25. The defendants here had so limited their liability when supplying the accessory to the plaintiff's plant.

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See generally Kahn-Freund, op. cit., chapter 14.  
Speed v. Fooks (1859) 1 El. & El. 602.

123

County Court Chronicles, Vol.vi, p.292.

but neither of them are wholly convincing illustrations.

The first of these is a little-known County Court case,

Barratt v. London, Brighton and South Coast Rly Co.<sup>121</sup>

The defendants were specifically told by the plaintiff that he wanted his fruit delivered at Brighton in time for sale at the races.

The defendants were late delivering and the plaintiff was thus deprived of his profit. In view of his express communication, said Judge Stonor, the plaintiff could recover what he would have earned at the races.

'The question', agreed Cleasby B. on appeal, 'was what was the value of the fruit to the plaintiff at the time when it ought to have been delivered'.<sup>123</sup>

But although stress was laid on the express communication, it was not perhaps as important as it seems. The point is that any reasonable carrier, knowing no more than the ordinary man would know, would assume that the fruit he was carrying at that time was

<sup>121</sup> Without such introduction, no doubt, recovery could not have been had.

(1877) De Coly, C.C.C. 195.

<sup>122</sup> Ibid., at p.198. The County Court Judge, one suspects, was not too favourably disposed toward the carriers: 'the defendants' he said, 'were rather so ill-advised as still to ignore the plaintiff's claim'; and he refers also to 'their most ungracious defence'; and to the fact that 'a more proper and moderate demand cannot be conceived'; ibid., at p.196. On the further point, that the plaintiff should have obtained fruit at Brighton, the judge said the plaintiff was unaware of any possible market nor did the defendants tell him of one. This may seem dubious, but, as he went on to say, the defendants continued to assert, even after the breach, that the goods would arrive in time; ibid., at p.196. For a similar point see Smeed v. Foord (1859) 1 El. & El. 602.

<sup>123</sup>

have often been recovered since 1854, but almost always in  
destined for sale at the races. If it be right to say this,  
cases where loss of profit was probable. It is not  
then the express communication merely fortified a decision  
unfair to say that in all such instances the same result  
which would have been reached under those principles  
would have been reached before Hadley v. Baxendale as after:  
examined under the heading of 'probability'.  
the courts which sanctioned recovery in Bridge v. Hain would

The second possible illustration, following one year  
unquestionably have sanctioned recovery in cases like Hadley v. Baxendale  
after the earlier, is Hydraulic Engineering Co. v. McHaffie.<sup>124</sup>  
In this case the plaintiff agreed to manufacture a machine for  
others as mentioned previously. The type of case to be  
a third party and sub-contracted with the defendant for the  
really looking for, one where the buyer in a Stare v. Hayward  
construction of a part. The defendant was so late in his  
situation has regained his profit, does not once to have  
performance that the third party ultimately declined to accept  
occurred.  
the machine. The plaintiff recovered his loss of profit as his  
But what of the restrictive side of Hadley v. Baxendale?  
contract with the third party had been contemplated at the  
Several times it had been employed to protect the carrier but  
time that the contract had been made. It had been contemplated,  
the great point is that many of the cases so using it, such  
however, not because of any express communication, but because  
notably Home v. Highland Kay Co. and British Columbia Sawmill  
it was the third party himself who had introduced the buyer to  
v. Nettleship, added to their decisions a 'special contract'  
the seller as someone capable of making the required part.  
theory to check the excesses apparently inherent in Hadley v.  
Without such introduction, no doubt, recovery could not have been  
Baxendale. This, parenthetically, leads to the conclusion,  
had, but still the case falls short of an application of the  
that had Hadley v. Baxendale never been decided that some future  
'special circumstance' rule such as was envisaged in Hadley v.  
case would have revealed the contemplation of resale and that  
Baxendale itself, then at least the case succeeding) the 'special

The 'expansionist' side of Hadley v. Baxendale seems  
contract theory.  
therefore to have had remarkably little effect. Resale profits

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124  
(1878) 4 Q.B.D. 670 (C/A).



have often been recovered since 1854, but almost always in cases where loss of profit was 'probable'. It is not fair to say that in all such instances the same result would have been reached before Hadley v. Baxendale as after: the courts which sanctioned recovery in Bridge v. Wain would unquestionably have sanctioned recovery in cases like Hall v. Pim, Patrick v. Russo-British Grain Export Co. and the others we mentioned previously.<sup>125</sup> The type of case we are really looking for, one where the buyer in a Clare v. Maynard situation has regained his profit, seems not once to have occurred.

But what of the restrictive side of Hadley v. Baxendale? Several times it had been employed to protect the carrier but the great point is that many of the cases so using it, most notably Horne v. Midland Rly Co. and British Columbia Sawmill v. Nettleship, added to their decisions a 'special contract' theory to check the excesses apparently inherent in Hadley v. Baxendale. This, parenthetically, leads to the conclusion, that had Hadley v. Baxendale never been decided then some future case would have revealed the contemplation formula and (if not perhaps itself, then at least the case succeeding) the 'special contract' theory.

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Supra n.47.

We might sum up thus: Hadley v. Baxendale was the first case to state the broad principles of recovery, and did in that sense open up a 'new chapter' in contract damages. It did not, however, thereby change the course of contract damages and force it from one channel into another: This view, espoused by Washington and others, is wrong. Hadley v. Baxendale rather stands as the first landmark in a stream which has continuously flowed in the same direction and to which, by an accident of history, it has lent its name. To conclude with an adaptation of a phrase Lord Porter once used, Hadley v. Baxendale is 'historically significant' but 'causally irrelevant'.<sup>126</sup>

<sup>126</sup> Monarch S.S. v. Karlshamns Oljefabriken, supra n.21, at p.6.

One of the oldest rules in contract damages is that in the absence of performance by the seller, a buyer can resort

## Chapter 5

### THE RECOVERY OF EXPENDITURE

The courts have consistently held that, quite apart from the measures already discussed, protection of the expectation interest means recoupment as well of two particular classes of expenditure: (i) the cost of substituting the defendant's performance, and (ii) the expenses incurred in reliance on that performance. To these we shall add a third, an anomalous group of cases where recovery stands on a restitution, rather than an expectation, basis; namely, the cost of maintenance, up-keep and improvement.

These are the matters to be discussed in this chapter, and we shall take them in the order given. Then, in a fourth, and final section, we shall examine the issue

raised when recovery of expenditure is linked to recovery of loss of profit or loss of bargain; in short, the problem of 'double compensation'. (H/L).

#### 1. The Recovery of 'Performance' Expenditure

One of the oldest rules in contract damages is that in the absence of performance by the seller, a buyer can resort to the cost of replacement. The



Lord Porter agreed: the respondent, he said, was not to be to the market and charge the defaulter with the expense of restricted to the selling price in Sweden less the selling so doing.<sup>1</sup> In such a well-settled part of the law definitive price in Glasgow, as the appellant had suggested, since: 'it illustrations of this 'performance' expenditure are naturally appears to have had the right to require the goods to be few and far between. But one modern instance is the leading delivered to the place stipulated'.<sup>2</sup> case of Monarch S.S. Co. v. Karlshamns Oljefabriker.<sup>2</sup> In this

But if it is clear that the victim may duplicate the case a British ship, in which the appellant was carrying a essential features of a broken contract, there is no such clarity cargo of beans to Sweden, took it instead to Glasgow,<sup>3</sup> and the with regard to its non-essential features; in particular, there respondent, a Swedish company who was the consignee of the is much uncertainty as to whether a right exists to have the cargo, transhipped it to Sweden and claimed the cost for this. substitute contract performed as near as possible to the time. The claim for damages, said Lord Wright, was justified, for it set out for performance in the original contract.<sup>6</sup> This is gave effect to the basic principle that a party ought to where the major difficulty under the head of 'performance expenditure' has arisen. occupy the position he would have occupied had the contract been performed: 'In that respect', he went on, 'this case is singularly clear, because the contract entitled the respondent to have beans delivered to Karlshamn, and the damages claimed and awarded represent simply the sum necessary to effect that result, namely, the cost of transhipment from Glasgow to Sweden'.<sup>4</sup>

transpires that it goes no further and the party is forced to

<sup>1</sup> See e.g., Barrow v. Arnaud (1846) 8 Q.B. 609, 610 per Tindal C.J.

<sup>2</sup> [1949] 1 All E.R. 1 (H/L).

<sup>3</sup> The reason why the vessel went to Glasgow is discussed in the following chapter.

<sup>4</sup> Supra n.2 at p.12. In the present case, he added 'the compensation claimed is what is the most obvious and natural. The cost of transhipment is the most natural form of reparation'; ibid., at p.15.

Lord Porter agreed: the respondent, he said, was not to be him to A by midnight; while a flight from B will land him restricted to the selling price in Sweden less the selling at his destination exactly at 8p.m. The question then price in Glasgow, as the appellant had suggested, since: 'it arises as to which alternative the traveller could take and appears to have had the right to require the goods to be then charge to the contract-breaker delivered to the place stipulated'.<sup>5</sup>

It could be argued that the innocent party should be But if it is clear that the victim may duplicate the allowed to take the more expensive choice, and so obtain a essential features of a broken contract, there is no such clarity performance as near as possible to the contract time, not as with regard to its non-essential features; in particular, there of right, but only when it is the reasonable course to is much uncertainty as to whether a right exists to have the pursue. If, in other words, a late arrival is relatively substitute contract performed as near as possible to the time unimportant, the choice should be to take the less expensive set out for performance in the original contract.<sup>6</sup> This is option.

where the major difficulty under the head of 'performance expenditure' has arisen.

#### The Time of Performance

To see the problem consider a hypothetical situation. A party buys a ticket from a railway company for a journey to A, performance promised him by the carrier. On this argument the arrival time to be 8p.m. When the train gets as far as B, it transpires that it goes no further and the party is forced to leave the train. He then discovers that a bus from B will take of performance. A traveller, for example, who is presented with

<sup>5</sup> train which takes him to his destination by X.p.m., and a

<sup>6</sup> Supra n.2 at p.9, 'What the respondent wanted' agreed Lord Wright, 'was the consignment of beans; their value at Glasgow or Sweden where no beans are on the market would have been a poor consolation'; ibid., at p.12.

That time is not prima facie of the essence is laid down in The Sale of Goods Act (1893), U.K. sec.10(i) and its equivalents in Australia and New Zealand. arisen in Monarch v. Karisshamns Oljefabriker, supra n.2, had there been a market in Sweden in which to buy the beans. Since buying them in would probably have been the cheaper course to follow, the respondent would have been obliged to adopt this course and not resort to transshipment.

him to A by midnight; while a flight from B will land him at his destination exactly at 8p.m. The question then arises as to which alternative the traveller could take and then charge to the contract-breaker.

It could be argued that the innocent party should be allowed to take the more expensive choice, and so obtain a performance as near as possible to the contract time, not as of right, but only when it is the reasonable course to pursue. If, in other words, a late arrival is relatively unimportant, the choice should be to take the less expensive option.

One could object to this, and say that if a carrier promises to take someone to A. by X.p.m., then that other should always have the right to get to A. by X.p.m. (or as near to X.p.m. as possible) simply because this was the performance promised him by the carrier. On this argument the criterion of reasonableness would be restricted to cases where a choice lies between competing, but equally effective, methods of performance. A traveller, for example, who is presented with a train which takes him to his destination by X.p.m., and a later flight which does the same, would have to take the cheaper alternative.<sup>7</sup> If, on the other hand, the flight gets him there

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Another example might have arisen in Monarch v. Karlshamns Oljefabriker, supra n.2, had there been a market in Sweden in which to buy the beans. Since buying them in would probably have been the cheaper course to follow, the respondent would have been obliged to adopt this course and not resort to transshipment.



sooner, then, this argument runs, he can take the flight, an indiscriminate 'close as possible' argument. In this case the plaintiff booked a journey from London to Hull, but found at Grimby no train ready to take him on to Hull as promised. He waited for the next available train, perhaps be better to endorse the views expressed in the former argument. For whatever his strict theoretical rights, the plaintiff, when choosing between a later (cheaper) expenditure, said, Alderson B., because: 'The principle is performance and an earlier (costlier) one, where the time-lag is small and the inconvenience therefore minimal, ought perforce to abdicate those rights in favour of the more general principle that damages be kept to their lowest possible level. However, since this is a 'derogation' from the contract it ought to be tolerated only where time is not of the essence. In other situations, it is suggested, the plaintiff must be entitled to whatever alternative would give him a time of performance as near as possible to that set out in the original contract. It follows from this, of course, that since such a performance amounts only to a 'restoration' of the original contract it ought to be irrelevant that at the time the contract was made the defendant was unaware that time was a vital factor.

#### An Examination of the Cases on Time of Performance

The early case of Hamlin v. G. N. Rly Co.<sup>8</sup> seemed to favour

(1856) 26 L.J. Ex. 20, 23. This dictum is not contained in Norman's report.

<sup>8</sup> (1856) 1 H. & N. 408; 26 L. J. Ex. 20. Except where stated citation is from the former report.

an indiscriminate 'close as possible' argument. In this case the plaintiff booked a journey from London to Hull, but found at Grimsby no train ready to take him on to Hull as promised. He waited for the next available train,<sup>9</sup> but the company then declined to honour his ticket, compelling him to buy one afresh. He was entitled to recover this expenditure, said, Alderson B., because: 'The principle is that if the party does not perform his contract, the other party may do so for him as near as may be, and charge him for the expense in so doing'.<sup>10</sup>

However, the Court of Appeal took issue with this dictum in Le Blanche v. L. & N. W. Rly Co.<sup>11</sup> In this case the plaintiff had booked a journey from Liverpool to Scarborough. His train was delayed en route and arrived at York at 7 p.m., too late to make the planned connection. The plaintiff declined to await the 8 p.m. train, which arrived in Scarborough at 10 p.m., and hired instead a special train from another railway company which reached Scarborough approximately one hour earlier. The observations in Hamlin's case, the Court of Appeal agreed, were

<sup>9</sup> absolute and applicable to all cases'; ibid., at p. 324, per Baggallay J.A. He did in fact stay overnight at an hotel; this point will be discussed infra p. 135.

<sup>10</sup> ibid., at p. 323, per Mellish J.J. The same test was applied in (1856) 26 L.J. Ex. 20, 23. This dictum is not contained in Hurlstone and Norman's report. (1877) 2 Com. Cas. 106. The

<sup>11</sup> plaintiff in Le Blanche v. L. & N. W. Rly Co. had in fact only (1876) 1 C.P.D. 286. to see whether he could charge the expense of it upon the company; see Baggallay J.A., ibid., at p. 324.

the possible further requirement of prior communication to broadly correct, but were not applicable to all cases in all the defendant. In *Hinde v. Liddell*,<sup>12</sup> for example, the circumstances: we must first determine, said Baggallay J.A., 'whether the taking of a special train was a reasonable thing he planned to ship on a particular vessel. The defendant to do under the circumstances'.<sup>12</sup> It was reasonable, said the County Court Judge, though not 'every trifling delay would justify a refusal to wait'.<sup>13</sup> It was not reasonable, said the Court of Common Pleas and the Court of Appeal, since no ordinary man in the plaintiff's position would have incurred this expenditure on his own account, and at his own cost, had the circumstances been such that the defendant was not responsible.<sup>14</sup>

It follows from this, of course, that if the reasonable man would have incurred such expenditure at his own cost (i.e., when his prompt arrival was necessary) then that is enough for recovery. This proposition we endorse. The remaining authorities, however, are far from settled on this point and introduce perhaps

<sup>12</sup> Supra n.11 at p.324. Alderson B.'s dictum was essentially accurate, agreed James L.J., but the plaintiff must not act 'unreasonably or oppressively as regards the other party, or extravagantly'; ibid., at p.309.

<sup>13</sup> Ibid., at p.296. In view of this remark it is difficult to agree with the Court of Appeal 'that the County Court Judge considered the principle enunciated by Baron Alderson as absolute and applicable to all cases'; ibid., at p.324, per Baggallay J.A. See too James L.J. ibid., at p.309.

<sup>14</sup> Ibid., at p.313, per Mellish .L.J. The same test was applied with the same results to the broadly similar case of Bright v. P & O Navigation Co. (1897) 2 Com. Cas. 106. The plaintiff in Le Blanche v. L. & N.W. Rly Co. had in fact only taken the special train to see whether he could charge the expense of it upon the company; see Baggallay J.A., ibid., at p.324.



the possible further requirement of prior communication to the defendant. In Hinde v. Liddell,<sup>15</sup> for example, the plaintiff ordered goods for resale to a foreign buyer which he planned to ship on a particular vessel. The defendant failed to deliver, and since goods of the contract quality were unavailable on the market, but had to be manufactured to a prior order, the plaintiff bought the nearest, but more costly, equivalent, to enable him to ship the goods on time.

This, said the court, he was entitled to do.<sup>16</sup>

But this was not necessarily to decide that when time is of the essence, that alone might suffice. First, it would

<sup>15</sup>

(1875) L.R. 10 Q.B. 265.

<sup>16</sup>

The plaintiff was entitled 'to get the best substitute he could', said Field J., and to obtain material as close as possible 'in price and quality' to that promised. But, he added: 'If he had derived any benefit from the advance in price I should hesitate before I said he could recover the whole of this expenditure; supra n.15 at p.270. This argument, that the plaintiff must give credit for any gains resulting solely from his substitute performance, and which in effect reduce his initial outlay in substitution, was acted upon in Erie County Natural Gas Co. v. Carroll (1911) A.C. 105 (J.C.), and in British Westinghouse Co. v. Underground Electric Rly of London (1912) A.C. 673 (H/L). However, it was decided in Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. [1970] 1 All E.R. 225 (C/A) that, where a building was destroyed through the fault of contractors and was replaced by a factory of more modern design, no set-off could be allowed for this "betterment". "True it is", said Lord Denning M.R., "they got new for old, but I do not think the wrongdoer can diminish the claim on that account"; ibid., at p.236. This decision was followed in Danske Mobler Ltd v. Sharp & Holmes Ltd. (an unreported New Zealand decision; May 1970).

Nor does anything more definite emerge from Buckmaster  
 probably have been unreasonable to expect the buyer to wait  
 until the goods had been specially manufactured; and second,  
 the plaintiff had in any case stipulated with the defendant  
 for a specific time for delivery, and had told him that the  
 goods were for shipment to foreign parts. Contemplation was  
 not, in the event, set out as essential to the decision, but  
 we cannot assume that it was not so treated. <sup>17</sup>

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Stroms Bruks Aktie Bolag v. Hutchison [1905] A.C. 515  
 (H/L) is similarly indecisive. To enable themselves to  
 fulfil a contract with a Welsh firm for the sale and  
 delivery of wood-pulp by a specified date, the plaintiffs  
 contracted with the defendants for its shipment from Sweden  
 to Cardiff. The defendants failed to provide a vessel and  
 the Welsh firm bought in against the plaintiffs. The  
 plaintiffs, said Lord Davey, could recover the amount paid  
 to the Welsh firm since their allowing the sub-buyers to  
 buy in could be treated as the equivalent of buying in  
 themselves; ibid., at p.529. Assuming for purposes of  
 argument, that buying in was more expensive than chartering  
 an alternative vessel, still we cannot find conclusive  
 evidence that the urgency of the matter would alone have  
 allowed recovery. First, it would appear that a considerable  
 time would have elapsed before another vessel could have  
 been obtained, the Swedish port being ice-bound, and second,  
 the defendants, being carriers, 'must be presumed to have  
 contemplated that the appellants were shipping the goods  
 in performance of a contract limited as to the time of  
 delivery'; ibid., at p.527, per Lord Davey. See too Lord  
 Macnaghten ibid., at p.524.

of this case with Healin v. G.N. Ry Co. In the earlier  
 decision the plaintiff, a tailor, claimed for the loss of  
 appointments with various customers. But Martin B., who was  
 also presiding judge in Buckmaster v. G.N. Ry Co., held that  
 since the defendant had not been told of the purpose of the  
 visit, recovery could not be allowed; supra n.2 at pp.409-10.  
 Profits, of course, were allowed in Buckmaster's case.



Nor does anything more definite emerge from Buckmaster v. G. E. Rly Co.<sup>18</sup> The defendants failing to perform as promised, the plaintiff hired a special train to get him to a morning market before its business closed. No reference is made to contemplation in this briefest of judgments (the plaintiff is said only to be 'entitled' to the expense), and a decision to allow the plaintiff his loss of market (despite his efforts he still arrived late) reveals such a loss as 'the reasonable and natural consequence' of the breach.<sup>19</sup> However, But this absence of reference is not wholly conclusive, since the plaintiff was a season-ticket holder who had been making twice-weekly visits to the market. It is probable then that the defendants knew the purpose of the plaintiff's journey, and if this does not necessarily mean acquaintance with the time-factor, still it is not unfair to suppose that the defendants were alive to this as well.<sup>20</sup>

18

(1870) 23 L.T. 471.

19

Ibid., at p.473, per Martin B.

20

Some evidence that the defendants at least knew that the plaintiff was travelling to market emerges from a comparison of this case with Hamlin v. G.N. Rly Co. In the earlier decision the plaintiff, a tailor, claimed for the loss of appointments with various customers. But Martin B., who was also presiding judge in Buckmaster v. G.E. Rly Co., held that since the defendant had not been told of the purpose of the visit, recovery could not be allowed; supra n.8 at pp.409-10. Profits, of course, were allowed in Buckmaster's case.



Buckmaster v. G. E. Rly Co., therefore, whatever its attraction, must be treated at best as a somewhat superficial authority. Still more difficult to evaluate is a more recent case, Romulus Films, Ltd v. Dempster, Ltd,<sup>21</sup> which seems both to reject and accept the idea that urgency alone is adequate. The defendants in this case had agreed to fly certain film equipment and passengers from an African location to England. The aircraft was delayed but the carriers managed to obtain another to reduce the period of waiting. It could not, however, arrive soon enough for the plaintiffs, who urgently desired the return of their equipment for the immediate recommencement of shooting. Accordingly, they duplicated the necessary items in England. McNair J refused to give compensation although the plaintiffs had acted reasonably; it needs to be shown, he said, that the 'special circumstances' had been communicated to the carriers who had then expressly or impliedly, contracted on the assumption that they would be responsible for all damages arising therefrom. Of this, he said, there was no evidence.<sup>22</sup>

This then is a clear finding that contemplation is essential to liability: it contrasts oddly, however, with an earlier part of the judgment where McNair J. allowed the cost of flying home,

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[1952] 2 Lloyd's Rep. 535.

22

Ibid., at pp.539-40.

23

Supra n.21, at p.539.

in advance of the substitute aircraft, one of the passengers who was urgently wanted in England. There is no indication at all that the defendants knew of this urgency, yet, said the learned judge: 'That seems to me to be a recoverable head of damage'.<sup>23</sup>

The situation, therefore, is confused. Future courts will probably stress the need for some prior notification to the defendant, but we would argue against this. The earlier part of McNair J.'s judgment, as we see it, demonstrates a better view of the law.

#### Some Further Species of Performance Expenditure

Thus far we have discussed only those claims which consist of the actual purchase price of the substitute contract. This we shall hereafter refer to as 'primary' performance expenditure. There are, however, three further situations in which a claim for performance expenditure may be made.

First, it is possible that obtaining a substitute performance may involve the plaintiff in more than the simple purchase price. A traveller, for instance, compelled to wait many hours for alternative transport, might incur the expense of overnight accommodation as well as the cost of his ticket. Second, a less recognisable species of performance expenditure, the plaintiff may spend money trying to 'extract' performance from the defendant,

as when he searches for goods that have gone astray. Third, even more remote from the archetype of performance expenditure, the plaintiff may have certain works or contracts contingent on, but separate from, the defendant's performance and which, in their own performance, have become that much more expensive through the defendant's breach. Since like principles apply, it will be more convenient to take the first and second groups together, and give the third group a separate exposition.

(a) 'Secondary' Performance Expenditure

The link between these first and second groups of expenditure is that they, like primary performance expenditure, derive from a reinstatement of the original bargain. It follows

then, as a matter of simple consistency, that this 'secondary' performance expenditure should likewise furnish a potential measure of recovery. Rly Co. (1875) L.R. 10 Q.B. 111 at p.120.

The number of cases is small, but sufficient to uphold this opening observation. Thus the first example we gave, that of the traveller taking overnight accommodation, was taken from the familiar Hamlin v. G.W. Rly Co.,<sup>24</sup> while the second, that of the man searching for goods that have gone astray, was taken from Hales v. L. & N.W. Rly Co.<sup>25</sup>

<sup>24</sup> (Supra n.8. J. Ex. 20, 22. The trial judge had given the cost of the bed, but, since the hearing before the present court was for an (1863) 4 B. & S. 66. is award was not affected.



In each case the plaintiff's claim succeeded.<sup>26</sup>

The amounts involved have generally been small, and because of this the courts have rarely discussed questions of principle; but at least we can say, rather obviously, that the expenditure must be reasonable, both as an item incurred and as an amount expended. In the oft-cited Hamlin v. G. N. Rly Co., for instance, both Martin and Alderson BB. noted that the plaintiff could have made his destination that night had he taken a post-chaise, the latter observing that in view of this 'it was even doubtful whether the plaintiff could recover for the bed'.<sup>27</sup>

<sup>26</sup>

But as 5/- damages were awarded in Hamlin's case, while the fare paid was 1/4 and the cost of accommodation 2/-, one can sympathise with Blackburn J.'s later remark that: 'I must say I do not know how that amount was arrived at'; Hobbs v. L. & S.W. Rly Co. (1875) L.R. 10 Q.B. 111 at p.120. Other cases where secondary performance expenditure has been recovered are: Cranston v. Marshall (1850) 5 Ex. 395 (cost of accommodation while awaiting ship); Giachetti v. Speeding, Marshall & Co. (1899) 15 T.L.R. 401 (telegrams sent inquiring after delayed goods); Heskell v. Continental Express, Ltd [1950] 1 All E.R. 1033 (small sums spent in endeavour to trace goods). Similar expenditure was also held to be recoverable in Athens-MacDonald Travel Service v. Kazis [1970] S.A.S.R. 264. The appellant travel agents had failed to provide the respondent with a promised 3 month holiday in Cyprus, furnishing him instead with one some 3 weeks shorter. Zelling J. upheld the lower Court's decision to compensate the respondent for his efforts "to get what he had been assured he would get by the [appellant] company", ibid., at p.267.

<sup>27</sup>

(1856) 26 L.J. Ex. 20, 22. The trial judge had given the cost of the bed, but, since the hearing before the present court was for an increase in damages, his award was not affected.

Again, in a rather neat example, Grosvenor Hotel v. Hamilton,<sup>28</sup> the plaintiff was compelled to leave rented premises and sought the cost of obtaining fresh premises - primary performance expenditure - and of moving to, and setting up in, the new premises - secondary performance expenditure. He recovered for both heads of damages but the sum awarded under the second was reduced on appeal. Said Lindley L.J.: 'A person setting up in a new place is apt to spend more than is necessary'.<sup>29</sup>

What is not clear, however, is the exact position of the contemplation formula, although it is not impossible to imagine situations where recovery for secondary performance expenditure might properly be made contingent upon the defendant's knowledge. Thus, a man might purchase an item for which he has a profitable contract of resale, and might thus be put to more expense in 'extracting' performance than would normally and reasonably be expected. In such a case, we would agree, the defendant's knowledge of the special circumstances would be essential to liability.

(footnote continued from p.137)

<sup>28</sup> Woodger v. G.S. Fly Co. [1894] 2 Q.B. 836 (C/A). The plaintiff, a commercial traveller, had sent a parcel of samples by rail, revealing neither its contents nor his status to the defendant. The package was delayed and, as Boatman v. Smith J. observed, 'general damages could include cab-hire, or other reasonable expenses, if the plaintiff had to call several times at the company's office in endeavouring to recover the goods'.

<sup>29</sup> Ibid., at p.119.  
<sup>30</sup> Ibid., at pp.840-1. Another example of unreasonable behaviour is given in Ansett v. Marshall (1853) 22 L.J. Q.B. 118. The plaintiff was wrongly refused a passage on a boat, but the defendant almost immediately discovered his error, and offered a berth on the next boat leaving a few days later. The plaintiff declined and remained until the trial and gave evidence in his own favour. The plaintiff claimed for his expenses while awaiting the trial, but, said Crompton J.: 'He could not recover as damages (footnote continued on p.138) case (where, it would seem, the expense of 'looking after' goods was allowed, as well as the cost of their removal to another market) since it was decided before Hadley v. Baxendale; Woodger v. G.S. Fly Co. supra n.30 at p.321.

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 same. What, of course, we see in this case is the arbitrary  
 expenses, if the plaintiff had to call several times at the  
 use of the contemplation formula to restrict the damages<sup>31</sup>  
 company's office in endeavouring to recover the goods'.<sup>31</sup>

charged against a carrier.  
 It was held, however, that such damages did not include  
 accommodation whilst awaiting their delivery: 'It is  
 difficult', said Bovill C.J., 'to see how any such damages  
 as the plaintiff's hotel expenses could have been reasonably  
 within the contemplation of the parties'.<sup>32</sup> But, as we said  
 in relation to Black v. Baxendale,<sup>33</sup> the difficulty lies in  
 seeing anything 'special' about these expenses; despatching  
 traveller's goods seems nothing beyond an ordinary use of the  
 late in delivering steel plates to the plaintiff, a barge-

(footnote continued from p.137)  
 in this action the expense of more than a few days delay, for  
 you [the defendant] show that you offered him another passage to  
 Australia almost immediately'; ibid., at p.119.

<sup>30</sup> (1867) L.R. 2 C.P. 318.

<sup>31</sup> Ibid., at p.321.

<sup>32</sup> Ibid.

<sup>33</sup> (1847) 1 Ex. 410, discussed in chapter 3. Bovill C.J.  
 doubted the authority of this case (where, it would seem, the  
 expense of 'looking after' goods was allowed, as well as the cost  
 of their removal to another market) since it was decided before  
Hadley v. Baxendale; Woodger v. G.W. Rly Co. supra n.30 at p.321.  
Ibid., per Kennedy J.



railway, and even if it were there seems nothing about this plaintiff's behaviour which necessarily distinguishes it from that of the 'ordinary' consignor who sends 'ordinary' goods. There will, surely, be times when it will be reasonable for him to await delayed goods, just as there will also be times when it will be prudent for a commercial traveller to do the same. What, of course, we see in this case is the arbitrary use of the contemplation formula to restrict the damages charged against a carrier.

(b) 'Contingent' Performance Expenditure

We referred above to a rather different type of performance expenditure which, we said, derived from any works or contracts contingent on, but separate from the defendant's performance, and which, in their own performance, had become that much more expensive through the defendant's breach. One very good example is Watson v. Gray<sup>34</sup> where the defendant was late in delivering steel plates to the plaintiff, a barge-builder. The plaintiff successfully claimed the 'extra cost of building his barges' (which means, we may suppose, the costs involved in employing men and machines for a longer period) since the defendant, who knew the plaintiff's occupation, should reckon it an expense 'which might be reasonably contemplated as resulting from the breach'.<sup>35</sup>

<sup>34</sup> (1900) 16 T.L.R. 308

<sup>35</sup> Ibid., per Kennedy J.

Watson v. Gray is not, however, a typical case, since exists between the parties. For example, regular buyers and most of the authorities deal with claims arising out of what sellers of a particular commodity would know about the nature we may call 'seasonal factors'. Thus, in Henderson v. Meyer<sup>36</sup> incidents of the other's business, such as various seasonal influences, the defendant manufacturer delivered late to the plaintiff, whom he knew to be a timber-importer, cranes for use in his timber yard. The plaintiff recovered as damages the extra labour costs of loading by hand instead of crane (once more an example of primary performance expenditure), but not the additional demurrage on barges kept awaiting unloading: 'the seasonal rise in import duties. The point we would make is that seller as a crane manufacturer', said Caldecote C.J., 'could not be expected to have contemplated such expenses as they depended on the length of the timber-importing season'.<sup>37</sup>

This decision, it might be argued, has since become more doubtful. Reasonable businessmen, Lord Wright has suggested, 'must be taken to understand the practice and exigencies of the other's trade or business'. That, he said, 'need not generally be the subject of special discussion or communication'.<sup>38</sup> But we would argue that this observation, if generally a valid one, obtains only where what we might call a 'community of interest' to the buyer at the port of Hull, from whence, as he knew, they

<sup>36</sup> (1941) 85 Sol. Jo. 166; 46 Com. Cas. 209. Citation will be from the former report.

<sup>37</sup> [Ibid.] 1 K.B. 55; [1950] 2 All E.R. 517.

<sup>38</sup> Monarch S.S. Co. v. Karlshamns Oljefabriker supra n.2 at p. 14.

exists between the parties. For example, regular buyers and sellers of a particular commodity would know about the natural incidents of the other's business, such as various seasonal influences, and would be properly held liable for any related loss despite the absence of express communication. Ardennes (Cargo Owners) v. Ardennes (Owners)<sup>39</sup> might offer some slight confirmation of this in that a shipowner, who was late in delivering goods, chose not to contest his liability for a seasonal rise in import duties. The point we would make is that a shipowner, being intimately linked with the business of export and import, would naturally be aware of such normal fluctuations. But a crane-manufacturer (and Caldecote C.J. was careful to stress the defendant's position as such) could hardly be expected to be aware of the exigencies of the timber-importing business. Accordingly, Henderson v. Meyer is still a valid authority.

Contemplation, then, might seem essential to liability, but the earlier case of Borries v. Hutchinson<sup>40</sup> had suggested another approach. In this case the seller was late in delivering goods to the buyer at the port of Hull from whence, as he knew, they were to be delivered to a sub-buyer 'on the continent': he did not constitute knowledge that he lived in Russia. How odd, then, supra n.40 at p.465, per Willes J. Ibid., at p.465, per Willes J. See, to like effect, Erie C.J. ibid., at p.462 and Keating J. ibid., at p.466.

<sup>39</sup> [1951] 1 K.B. 55; [1950] 2 All E.R. 517.

<sup>40</sup> (1865) 18 C.B. (N.S.) 445.



of freight and insurance as such (because he was unaware that not know, however, that the destination was Russia. By the the final destination was Russia) it is obviously inconsistent time the goods arrived the cost of freight and insurance had to charge with him a deterioration in the goods when it was risen (as was normal at that time of year) and the plaintiff only on the route to Russia, and not on any of the other routes sought compensation for the additional cost incurred. The ex Hull, that there had been such a deterioration (i.e., a movement in rates of freight and insurance). Goods, however, and insurance' as such since it 'was not one which the can and do deteriorate during a period of delay; and if the plaintiff could claim as a matter in respect of which the court had preferred to suggest that the rise in export costs defendant had had notice at the time of the contract'.<sup>41</sup> But, could have operated as a guide to that deterioration, then the the argument continued, 'the value of such an article as this decision would have appeared just as contrived, perhaps, but depends upon the existence of facilities for its transport to logically more acceptable.' It is on the reasoning as given the place for which it is destined', so it must have declined that Borries v. Hutchinson cannot be upheld. in value by the amount of the increase in freight and insurance.<sup>42</sup>

Approached thus, the court concluded, the loss must be recoverable as 'the direct and natural consequence of the defendant's breach of contract'.<sup>43</sup> Of course, we

This decision, however, cannot be sustained as it is put: for if the court declined to charge the defendant with the cost circumstances the purchaser of land is not entitled to the loss

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Supra n.40 at p.462, per Erle C.J. In commenting thus, the Chief Justice specifically agreed with one Brett Q.C. that knowledge that the sub-purchaser resided 'on the continent' did not constitute knowledge that he lived in Russia. How odd, then, later to find Brett M.R. saying that the defendant knew that the destination was Russia, and that court had made their award (see text infra) accordingly: Grebert-Borgnis v. Nugent (1885) 15 Q.B.D. 85, 90-1.

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Supra n.40 at p.465, per Willes J.

43

Ibid., at p.465, per Willes J. See, to like effect, Erle C.J. ibid., at p.462 and Keating J. ibid., at p.466.

of freight and insurance as such (because he was unaware that the final destination was Russia) it is obviously inconsistent to charge with him a deterioration in the goods when it was only on the route to Russia, and not on any of the other routes ex Hull, that there had been such a deterioration (i.e., a movement in rates of freight and insurance).<sup>44</sup> Goods, however, can and do deteriorate during a period of delay; and if the court had preferred to suggest that the rise in export costs could have operated as a guide to that deterioration, then the decision would have appeared just as contrived, perhaps, but logically more acceptable.<sup>45</sup> It is on the reasoning as given that Borries v. Hutchinson cannot be upheld. If, therefore,

## 2. The Recovery of Reliance Expenditure

We argued in chapter one<sup>46</sup> that reliance expenditure could never provide an independent basis of recovery. Of course, we concede the existence of the various authorities which fall under

the rule in Flureau v. Thornhill<sup>47</sup> (where, under certain circumstances the purchaser of land is not entitled to the loss

Flureau v. Thornhill [alternatively known as the rule in Bain v. Fothergill (1875) L.R. 7 H.L. 158, the case wherein Flureau v. Thornhill was endorsed] will concern us in chapter 7.

<sup>44</sup> This emerges from a reading of counsel's arguments; supra n.40. at pp.458-9.

<sup>45</sup> Erle C.J. appeared to take a line similar to this when observing that the claim 'fairly represents the amount of deterioration'; ibid., at p.463. But he also said that because of the breach the goods 'were not so available for the Baltic market as they would have been'; ibid., at p.465. This indicates he was following the line of thought more fully developed by Willes J.

<sup>46</sup> Supra pp10-12.

<sup>47</sup> (1776) 2 Wm. Bl. 1078.

of his bargain, being restricted instead to such reliance expenses as the cost of investigating the title), but this is an exceptional type of situation which need not detain us here.<sup>48</sup> What does require examination is that handful of cases where no such limitation operates, but where there is nonetheless a recoupment of reliance expenditure.

These decisions are not inconsistent with our previous arguments. The reasoning has broadly been this, that if (to take a familiar case) a lessee spends £500 in reliance on a contract to lease a warehouse, it is because he assumed that he would have earned at least enough from the business to be conducted therein to cover his preliminary outlay. If, therefore, he claims for the loss of his business profits, and they cannot be precisely computed, it will be reasonable to 'guesstimate' them as, at the very least, £500.<sup>49</sup> (We hasten to add that Nurse v. Barns<sup>50</sup> gives no indication of having been decided in this way:

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But, since the rule is (broadly) that recovery for loss of bargain is not permitted in the absence of fraud, the rule in Flureau v. Thornhill [alternatively known as the rule in Bain v. Fothergill (1874) L.R. 7 H.L. 158, the case wherein Flureau v. Thornhill was endorsed] will concern us in chapter 7.

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Unlike some American courts, English courts do not insist on the amount of profit being proven with a high degree of certainty: the American approach is dealt with by McCormick, op. cit., chapter 2.

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(1664) T. Raym. 77. See chapter 1 p.9.

(1876) 10 S.A.S.R. 118. I am indebted to Professor Lucke of the University of Adelaide for this reference.

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Ibid., at p.132.



we instance it only to show how in certain circumstances the £500 could have been recovered). Reliance expenditure might, therefore, be recovered not qua reliance expenditure but instead as a surrogate expectation interest.<sup>51</sup>

Consider, first of all, the early Australian decision of Aldwell v. Bunday.<sup>52</sup> Here an advertisement publicised a boat race at which the first prize was to be £150. Acting upon this, the plaintiff procured a boat and incurred some expenditure in preparing for the event. The promised race failed to materialise and a claim was made for the initial outlay. To recover these expenses, said Lord Campbell C.J., not as Stow J. pointed to the acute difficulty in this case of estimating the extent of the plaintiff's loss, viz., the chance of winning £150.<sup>53</sup> There was, he believed, only one method open to him by which the value of that chance could be 'The preliminary labour and expenses', he said, 'although not:  
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The same ex post facto rationalisation can be made of McNab v. McMeckan (1866) Macassey's New Zealand Reports 445 and McRae v. Commonwealth Disposals Csn. (1951) 84 C.L.R. 377. In the former case, the plaintiff drove his sheep to the defendant's boat on which they were to be taken to a sale, the defendant wrongfully declining to accept them on board. In the latter, a tanker was sold which later proved to be non-existent. The plaintiffs were entitled to recoup the expenses of driving the sheep, and of preparing for salvage, respectively. It is suggested that, if these decisions are to be sustained, it is on the ground that the profits each plaintiff would ultimately have earned were best represented by the preliminary outlay.

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(1876) 10 S.A.S.R. 118. I am indebted to Professor Lucke of the University of Adelaide for this reference.

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Ibid., at p.132.

estimated, and that was to have regard to the preliminary expenditure: "a consideration of those expenses", he asserted, "was the only means of estimating the plaintiff's loss".<sup>54</sup>

Still more explicit, perhaps, are the two very important cases of Herring v. Tomlin<sup>55</sup> and Quirk v. Thomas.<sup>56</sup> In the earlier case the defendant declined to go through with a partnership agreement after the plaintiff had expended considerable sums both in preparing for the partnership and in endeavouring to obtain employment for it. The plaintiff could recover these expenses, said Lord Campbell C.J., not as though they 'had all been lost', but as showing 'the value of the contract broken'.<sup>57</sup> The plaintiff, he added, 'was not entitled to all the money he had laid out, but merely to the profits he would have derived'.<sup>58</sup> Erle J. agreed: 'The preliminary labour and expenses', he said, 'although not to be allowed as a charge would show that the partnership

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Supra n.52 at p.134.

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(1854) 23 L.T. (O.S.) 92; 2 W.R. 470. Citation will be from the former report.

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[1916] 1 K.B. 516 (C/A).

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Supra n.55

58

Ibid.

Supra n.56 at p.534. See, too Hills v. Harris [1963] W.A.R. 145; Apel v. Ready (1970) 92 W.N. (N.S.W.) 491.

was of a certain value.<sup>59</sup> guide to the value of the  
 expected reliance upon.<sup>62</sup>  
Quirk v. Thomas confirmed this view. The plaintiff,  
 a woman suing for breach of promise to marry, lodged  
 as an item of claim a profitable business given up in  
 view of her intended marriage. But, said Pickford L.J.,  
 explaining why reliance expenditure was not compensable in  
 its own right: 'The loss of this business did not arise  
 from the breach at all. If the contract had been kept  
 the business would have been equally gone'.<sup>60</sup> That is so,  
 agreed Phillimore L.J., but: 'If it was worth her while to  
 give up this business in order to get the man to marry her,  
 it might be suggested that her loss by reason of his refusal  
 was at least as great'.<sup>61</sup> He took Lord Campbell's view, in  
 other words, that while reliance expenditure did not present  
 an independent basis of recovery, it could still be employed  
 (and a contract of marriage would obviously furnish

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Supra n.55. There is more than just a hint of this  
 argument in Thesiger J.'s judgment in Perestrello v. United  
 Paint Co. The Times, April 15, 1969. The judge refused to  
 allow a claim for expenses incurred in negotiating a contract  
 since such an outlay would have been sustained even if the  
 contract had been fully performed. However, he did say that  
 the outlay could have been recovered had an equation been  
 produced proving that the initial outlay would have been  
 covered by profit deriving from the contract itself.

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Supra n.56 at pp.537-8. Lush J. made the same point at  
 [1915] 1 K.B. 798, 810.

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Supra n.56 at p.534. See too Mills v. Harris [1963] W.A.R.  
 145; Apel v. Ready (1970) 92 W.N. (N.S.W.) 491.



a suitable occasion) as a guide to the value of the the defendant had never contemplated such a way of raising expectancy relied upon.<sup>62</sup> the cash.

In the light of these arguments (which seem not to This, however, raises two points. First, the judgment have been repeated since), it is worthwhile examining the clearly implies that if the sale of shares had been Court of Appeal's decision in Collins v. Howard.<sup>63</sup> In contemplated then the additional cost of re-purchase should this case the plaintiff agreed to fund the commercial have been recovered. But since the plaintiff would have exploitation of the defendant's invention and unbeknown to lost the appreciation on his shares even had the contract him cashed shares worth £1,000 for that purpose. The been performed this view is wrong. Second, since reliance defendant resiled from the deal and the plaintiff bought expenditure is only to be returned as a surrogate expectancy, back his shares, prices having risen, at an increased cost it cannot itself be subject to the contemplation formula of £245: this sum now formed the amount of his claim. The the sums incurred in reliance on a contract are neither more court declined to give him his damages because, it was said, nor less an efficient guide to the value of the expectancy

<sup>62</sup> cause they were, or were not, anticipated.

This case was conducted against the estate of the deceased promisor and at a time, i.e., before the Law Reform (Miscellaneous Provisions) Act, 1934, when general damages, as opposed to special damages, were irrecoverable. In this case therefore, as in the similar case of Riley v. Brown (1929) 98 L.J.K.B. 739 [a flat purchased in anticipation of marriage] no damages could be recovered at all. In a third case, Finlay v. Chirney (1888) 20 Q.B.D. 494 (C/A) [clothes purchased in anticipation of marriage], the expenses were disallowed since they were 'unreasonable'; see e.g., Lord Esher M.R. ibid., at p.501. As far as this indicates that reasonable reliance expenditure is to be compensated as an independent head of damages, (as Bowen and Fry L.JJ appeared to believe, ibid., at p.508), it cannot be accepted. is obviously inconsistent with <sup>63</sup> gain decision. He also recovered a sum representing the infer [1949] 2 All E.R. 324.

<sup>65</sup> 'As to that', Tucker L.J. had said, 'nobody knows what it is', ibid., at p.326.

the defendant had never contemplated such a way of raising of giving (purely nominal damages) would have been to apply the cash.<sup>64</sup>

the principles of Herring v. Tolin and Quirk v. Thomas  
This, however, raises two points. First, the judgment and consider, not the £245 appreciation in the shares, but clearly implies that if the sale of shares had been instead the plaintiff's initial encashment of shares worth £1,000. That he was prepared to invest a part of this have been recovered. But since the plaintiff would have some in the venture is, perhaps, some indication of its value, lost the appreciation on his shares even had the contract and one from which the court should have made some general been performed this view is wrong. Second, since reliance assessment of the plaintiff's likely loss of profit. Such an expenditure is only to be returned as a surrogate expectancy, approach, one imagines, would have resulted in his recovering it cannot itself be subject to the contemplation formula: at least the £245 claimed.

the sums incurred in reliance on a contract are neither more nor less an efficient guide to the value of the expectancy because they were, or were not, anticipated.

The Court of Appeal, however, failed to consider this possible use of reliance expenditure notwithstanding the impossibility of computing the plaintiff's loss of profit.<sup>65</sup> This was a mistake. The proper course to have adopted (instead deprived. That this way form an item of account was recognized

<sup>64</sup> Supra n.63 at p.326, per Tucker L.J. But oddly enough, the plaintiff was allowed the expenses involved in and about re-purchasing the shares: this is obviously inconsistent with the main decision. He also recovered a sum representing the interest on the £1,000.

<sup>65</sup> 'As to that', Tucker L.J. had said, 'nobody knows what it is', ibid., at p.326.

endeavouring to sell the horse to the best advantage,<sup>67</sup> of giving purely nominal damages) would have been to apply the principles of Herring v. Tomlin and Quirk v. Thomas and consider, not the £245 appreciation in the shares, but instead the plaintiff's initial encashment of shares worth £1,000. That he was prepared to invest upwards of this sum in the venture is, perhaps, some indication of its value, and one from which the court should have made some general assessment of the plaintiff's likely loss of profit. Such an approach, one imagines, would have resulted in his recovering at least the £245 claimed.<sup>69</sup>

3. The Recovery of Expenditure on Maintenance, Upkeep and Improvement

Now, quite apart from any question of reliance or performance expenditure, compensation may also be sought for the cost of maintaining or improving goods or property which the plaintiff has either rejected or of which he has been deprived. That this may form an item of account was recognised as long ago as McKenzie v. Hancock.<sup>63</sup> In this case the plaintiff was allowed to recover the upkeep of a horse delivered unsound 'for so long as might reasonably be occupied in Richardson J. *ibid.*, at p. 729. The issue, however, was undecided as the plaintiff's declaration was insufficient.

<sup>63</sup>

(1826) Ry. & Mood. 436.



endeavouring to sell the horse to the best advantage'.<sup>67</sup>  
 This is, however, a straightforward case. The  
 difficulties begin when the goods (or, more usually land)  
 are returned to the vendor in an enhanced condition.  
 Compensation, it has been argued, 'would engage the  
 covenantor to an unlimited extent, depending not on the  
 value of the property conveyed, but on what the covenantee  
 might subsequently think proper to put on it',<sup>68</sup> and title  
 perhaps because of this Dallas C.J. once doubted 'whether in  
 any case a plaintiff can recover for the improvements and  
 buildings he may choose to make and erect upon the lands'.<sup>69</sup>  
 But while it would no doubt be wrong to compel the defendant  
 to make good every item of loss, so also would it be wrong to  
 leave him with an unearned (not to say unjust) enrichment.

described as 'ordinary and natural' than overhauling the item

<sup>67</sup>  
Supra n.66 at p.437, per Littledale J. See to <sup>72</sup>Caswell v. Coare (1809) 1 Taunt. 566; Chesterman v. Lamb (1834) 2 A. & E. 129; Watson v. Denton (1835) 7 Car. & P. 85; Ellis, Clerk v. Chinnock (1835) 7 Car. & P. 169. Mayne suggests, rightly we think, that where the article has been used beneficially there ought to be a set-off against this item of damage; op. cit., p.199. Necessary expenses, the latter not. As regards this

<sup>68</sup>  
 See counsel in Bunny v. Hopkinson (1859) 27 Beav. 565, 567.

<sup>69</sup>  
Lewis v. Campbell (1819) 8 Taunt. 715, 727; see also Richardson J. ibid., at p.729. The issue, however, went undecided as the plaintiff's declaration was insufficient.

<sup>71</sup>  
 Especially ibid., at pp.558 and 562 respectively.

<sup>72</sup>  
 The same decision was reached, on identical facts, in Rex Auto Exchange v. Hoffman (1925) 34 Va. Super 369.

Better, instead, to select the rather obvious via media of compelling the vendor to make good only such expenditure as might be reasonable. <sup>70</sup> This, at any rate, is the position so far reached with improvement by simple repair and overhaul. In Mason v. Burningham,<sup>70</sup> for example, the plaintiff sought the costs of overhauling a typewriter since it appeared that, the machine having been stolen, the defendant had no title to give. In the lower court the judge had refused the claim, worried lest everything which the purchaser might do to an article should be counted against the seller. Singleton and Evershed L.JJ., however, were careful to point out that liability would extend only to such expenditure as was 'ordinary and natural'.<sup>71</sup> And since nothing could more aptly be described as 'ordinary and natural' than overhauling the item purchased, recovery, they said, ought to be allowed.<sup>72</sup>

Some, however, might claim to see a distinction between such improvements and improvements-by-addition, the former being necessary expenses, the latter not. As regards this second category, the argument might run, Dallas C.J. will be

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[1949] 2 K.B. 545 (C/A). p.80, and Windsor v. ... ibid.

71

Especially ibid., at pp.558 and 562 respectively. ibid.

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The same decision was reached, on identical facts, in Rex Auto Exchange v. Hoffman (1925) 84 Pa. Super 369.

right to the extent that reasonableness alone will not suffice, and that first the defendant must specifically contemplate, and hence 'risk', the particular improvement, before liability will attach. Pickhills v. Matthews<sup>73</sup> might be a case in point. Here the cost of fencing property received under a defective title could not be recovered because, the court held, this project had not been contemplated by the defendant at the time the contract was made.<sup>74</sup>

But such a distinction, if intended, cannot be maintained: improvements-by-addition, as much as overhauls and repairs, are among the normal incidents of ownership and should, where reasonable, be such as were 'risked' by the defendant and thus be immediately compensable. Specific contemplation, in short, should be restricted only to such improvements as might be unusual. The authorities, the few that there are, commit themselves on this point neither one way nor the other. In Bunny v. Hopkinson,<sup>75</sup> for instance, a claim was allowed for the cost of

<sup>73</sup>

(1888) 2 S.R. (N.S.W.) 79.

<sup>74</sup>

See Martin C.J. ibid., at p.80, and Windeyer J., ibid., at p.81. Martin C.J. thought the plaintiff might have a remedy if the defendant had recommended him to put up the fence; ibid., at p.81.

<sup>75</sup>

(1859) 27 Beav. 565.

Bunny v. Hopkinson, were each approved by Singleton L.J. in Nason v. Birmingham, supra n.70 at pp. 324-5.



houses erected on land wherefrom the purchaser had been evicted through the seller's lack of title. And in Spedding v. Nevell<sup>76</sup> the expenses of general improvements to property were recovered, this time in an action against an agent for breach of warranty of authority. In each case the expenditure was specifically contemplated:<sup>77</sup> but in neither of them was contemplation laid down as the sine qua non of liability. In such a situation we can still maintain that the law is not too strict. Indeed, in another case, Kelly C.B. once appeared to take the widest of views when he said that the plaintiff, who had been evicted from a leasehold, could collect the cost of a greenhouse simply because 'he had lost the use of it'.<sup>78</sup> If taken literally, this would mean that any claimant could recover any expense no matter how extravagant or unreasonable. But in the circumstances of the case it seems unwise to give the Chief Baron's observation quite such a breadth of meaning: first, because the improvement seems in any case a reasonable one; and second, because the plaintiff needed the greenhouse in his business as a florist, and it is more than likely that the

<sup>76</sup> In addition recover for expenses which were necessarily laid out by him for its attainment'.<sup>79</sup>  
 (1869) L.R. 4 C.P. 212.

<sup>77</sup> As it was in the identical decision in Gibson v. D'Este (1843) 2 Y. & C.C.C. 578 (reversed sub. nom. Wilde v. Gibson (1848) 1 H.L.C. 605 on a point not here relevant) which also concerned various improvements which had been made to property.

<sup>78</sup> the loss of expectancy generally and not just 'loss of bargain'.  
Rolph v. Crouch (1867) L.R. 3 Ex. 44, 49. This case, and Bunny v. Hopkinson, were each approved by Singleton L.J. in Mason v. Burningham, supra n.70 at pp.558-9. following.

This statement tends to beg the question. If the value of the plaintiff's bargain were assessed at its gross value (as the case of land, for example, its current market value, or in the case of a business, the total income expected), the defendant knew of his trade and so contemplated the erection of some such building with reference thereto.

The position therefore, as with our other groups of performance expenditure is fluid. The authorities neither clearly would be wrong, as McGregor said, to compensate the state clearly that contemplation is essential, nor that plaintiff for his expenditure in addition. If, on the other expenditure can be recouped simply because it has been thrown away. In such a situation we can still maintain that the proper view is the one set out before, namely that the vendor should be liable even for such improvements as he did not expressly contemplate, provided only that they are reasonable.

#### 4. Double Compensation - Problems of Computation

A not infrequent source of difficulty lies in the claim which combines elements of both reliance and expectation interests. McGregor has argued that it is wrong to bring them together since the expenses 'represent part of the price that the plaintiff has to incur to secure his bargain. If he recovered for the loss of his bargain, it would be inconsistent that he should in addition recover for expenses which were necessarily laid out by him for its attainment'.<sup>79</sup>

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Op. cit., § 21. McGregor, of course, means by 'loss of bargain' the loss of expectancy generally and not just 'loss of bargain' as we distinguished it from 'loss of profit'; supra chapters 2-4. For ease of exposition, McGregor's terminology is that adopted in the lines immediately following.

'doubt' This statement tends to beg the question. If the value<sup>80</sup>  
 of the plaintiff's bargain were assessed at its gross value  
 (in the case of land, for example, its current market value,  
 or in the case of a business, the total income expected), it  
 clearly would be wrong, as McGregor said, to compensate the  
 plaintiff for his expenditure in addition. If, on the other<sup>81</sup>  
 hand, it were assessed at its net value (i.e., gross value<sup>82</sup>  
 less all necessary expenditure<sup>83</sup>) then there would be no  
 inconsistency of compensation about combining the two heads  
 of damage. Thus, a vendee could not claim the market value<sup>84</sup>  
 of land (less the contract price if unpaid) and his preliminary<sup>80</sup>  
 conveyancing expenses, since this would give him the full<sup>81</sup>  
 benefit of his contract and yet relieve him of some of its<sup>82</sup>  
 necessary obligations. But he could claim his expenses and his<sup>83</sup>  
 loss of bargain provided that this latter were computed by  
 subtracting both the contract price (if unpaid) and the cost of<sup>84</sup>  
 conveyance from the market value. This approach, it will be  
 seen, amounts to allowing the 'normal' measure of damages, i.e.,  
 market price less contract price, and leaving the expense to lie  
 where it falls. The failure to point out how the loss of bargain was<sup>80</sup>  
 calculated has often led to an apparent inconsistency of, - i.e.,  
 Similar cases are: Engel v. Fitch (1869) L.R. 4 Q.B. 679;  
affirming (1868) L.R. 3 Q.B. 314; Bain v. Fothergill (1874) L.R. 7  
 H.L. 158; Day v. Singleton [1899] 2 Ch. 320 (C/A).



'double' - compensation. In the familiar Waters v. Towers,<sup>80</sup> for example, the plaintiff recovered both his business profits together with the wages of men who would have been employed to earn those profits. If such profits were 'gross' the decision is clearly wrong: if, on the other hand, they are 'net', it is equally clearly right.<sup>81</sup> Again, in an impressive number of cases, including Hopkins v. Grazebrook<sup>82</sup> and Robinson v. Harman,<sup>83</sup> the vendee of land apparently received both the normal measure of damages in addition to compensation for his conveyancing expenses.<sup>84</sup> If some

such uncertainty about Balfour's apparently inconsistent

80 (1853) 8 Ex. 401. Fossinol v. British Artid Plastics

81 Ltd. The same confusion surrounds: Hydraulic Engineering Co. v. McHaffie (1878) 4 Q.B.D. 670 (C/A) (loss of resale profit on a machine together with expenses of manufacturing it); The Steam Herring Fleet v. Richards (1901) 17 T.L.R. 731 (business profits awarded together with cost of hiring staff necessary to earn those profits); Molling v. Dean (1902) 18 T.L.R. 216 (loss of resale profit on books sold in the U.S.A. together with the expenses incurred in sending them there); Kleinert v. Abooso Gold Mining Co. (1913) 58 Sol.Jo. 45 (J/C) (business profits awarded together with expenses preparatory to earning those profits). One may note also Saint Line v. Richardson [1940] 2 K.B. 99 where Atkinson J., when asked to state the law for an arbitrator, stated that business profits were recoverable, and referring to the claim for the expenses pertaining to men required to earn those profits, added: 'Expenses thrown away may well be recoverable under the general law'; ibid., at p.105. added is increased by Sargent J.'s decision in Daniel v. Yassall [1917] 2 Ch (1826) 6 B. & C. 31, refer to the earlier cases, but declined make a similar award since the conveyancing expenses would have (1848) 1 Ex. 850. own away even had the contract been performed, 84 id., at p.412. An award was made, therefore, for the 'normal' See Similar cases are: Engel v. Fitch (1869) L.R. 4 Q.B. 659; affirming (1868) L.R. 3 Q.B. 314; Bain v. Fothergill (1874) L.R. 7 H.L. 158; Day v. Singleton [1899] 2 Ch. 320 (C/A).

(perhaps instinctive) deduction for expenditure had been certain future expenses, but not the expenses of advertising, made when assessing the normal measure, these decisions are from the likely total income, Hallett J. recognised that to be acceptable. But if, as seems more likely, the courts had acceded to the claim would normally mean giving the plaintiff simply added the market price less contract price on to the his damages twice over. Nonetheless, he agreed to make the preliminary disbursements (forgetting, perhaps, that under the award because the advertising expense was intended to earn rule in Flureau v. Thornhill<sup>85</sup> such expenditure is protected profits not only during the limited period for which the plaintiff claimed, but was rather an outlay which would be 86 these decisions sanction an award of 'double' compensation.<sup>86</sup> spread out over the whole period of the plaintiff's venture.

Final judgment cannot be made on these cases since the method of computation is unrevealed. However, there is no such unclarity about Hallett J.'s apparently inconsistent judgment in the interesting Foaminol v. British Artid Plastics Ltd.<sup>87</sup> The defendant failed to deliver containers to the plaintiff in which the latter was to market hand-cream. The plaintiff then claimed the profits he would have earned over notwithstanding the machine having a commercial life of ten years, and initial period and compensation for his advertising expenditure. Since these profits were computed by deducting thus:

<sup>85</sup> Supra n. 47. For a brief account of the rule, see supra n. 48. support etc., the plant supplied by the

<sup>86</sup> The likelihood that they were in fact wrongly decided is increased by Sargant J.'s decision in Daniel v. Vassall [1917] 2 Ch. 405. He did not refer to the earlier cases, but declined to make a similar award since the conveyancing expenses would have been equally thrown away even had the contract been performed, ibid., at p. 412. An award was made, therefore, for the 'normal' measure only.

<sup>87</sup> The plaintiff having claimed the profits he would have earned from [1941] 2 All E.R. 393. own to the time of trial, a period of almost exactly three years.

certain future expenses, but not the expenses of advertising, from the likely total income, Hallett J. recognised that to accede to the claim would normally mean giving the plaintiff his damages twice over. Nonetheless, he agreed to make the award because the advertising expense was intended to earn profits not only during the limited period for which the plaintiff claimed, but was rather an outlay which would be spread out over the whole period of the plaintiff's venture.<sup>88</sup>

The answer to this decision lies in Cullinane v. British 'Rema' Manufacturing Co.<sup>89</sup> This case dealt with the purchase of a crusher warranted capable of crushing clay at the rate of six tons per hour, but which turned out to be capable of crushing clay only at the commercially useless rate of two tons per hour. The plaintiff claimed damages, but he did so, notwithstanding the machine having a commercial life of ten years, for a period of three.<sup>90</sup> His statement of claim was formulated thus:

A. The cost of buildings erected and work done to house, support etc., the plant supplied by the

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Supra n.87 at pp.395-6.

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[1953] 2 All E.R. 1257; [1954] 1 Q.B. 292 (C/A). Citation will be from the former report.

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The plaintiff having claimed the profits he would have earned from the date of delivery down to the time of trial, a period of almost exactly three years.



defendant, less residual value:

B. The cost of the plant supplied by the defendant, less residual value:

C. Cost of ancillary and associated plant, less residual value:

D. Interest on above, before deduction of residual values, less interest on the unpaid balance of the purchase price:

E. Loss of profit, calculated by estimating gross receipts and subtracting therefrom probable running costs as well as ten per cent depreciation on the sum of heads A.B. and C.

The official referee accepted that the claim had been properly presented (although he reduced the sums claimed, particularly under head E) with one important exception; he declined to set off against the plaintiff's income any amount for depreciation. But this, said the Court of Appeal, could not be right: it clearly permits double compensation. The official referee, said Jenkins L.J., 'seems to have given the full amount of profit on the footing that the capital expenditure had been incurred and at the same time given the plaintiff the full amount of the loss of capital so as to indemnify him for having incurred it.'<sup>91</sup>

<sup>91</sup> Supra n.89 at p.1270.

meant that the plaintiff was claiming loss of profit only for that period 'and did not propose to claim or to seek treated the three year limitation as meaning not that no profits would have been made after the close of that period, but merely that none were claimed.<sup>92</sup> He accepted the claim off all his expenditure and he restricted to the profit as originally framed, and allowed recovery under the computed by the referee under head E. This is the better view. If the plaintiff takes it upon himself to claim for depreciation. But this is difficult to uphold: a person sued for profits over a limited period surely cannot be asked to make good expenses which were intended to produce profits after that period had closed. Morris L.J. deducted 30 per cent from the total expenditure, but this still has the effect of leaving the defendant liable for seven years' expenditure, the machine with a working-life of three years only. This as it were, whereas profit was claimed against him for only three. Hallett J., therefore, was also wrong in his decision to be confined to his loss of gross income over the three years since he allowed a claim for expenses, at least some of which were intended to realise profits after the close of the period Foaminol case should have been restricted to the amount computed for which claim was made.

The decision which should have been reached in Foaminol v.

British Artid Plastics Ltd was that which was reached by the majority in Cullinane v. British 'Rema' Manufacturing Co. The

three years limitation, argued Evershed M.R. and Jenkins L.J., profits worked out by the official referee showed a crescendo over the three years, this was not consistent with the view that at the end of the third year sales would have ceased altogether;

<sup>92</sup> Supra n.89 at p.1270.

However, one amendment needs to be made to the majority meant that the plaintiff was claiming loss of profit only decision. It was argued that the plaintiff could, at his for that period 'and did not propose to claim or to seek option, claim either his profits (i.e., profits less probable to prove loss of profit beyond that date'.<sup>93</sup> On this running expenses) or the loss of his bargain (i.e., the basis, they decided, the plaintiff must be forced to write difference in value between the machine as it was delivered, off all his expenditure and be restricted to the profit and as it should have been) but that he could either combine computed by the referee under head E. This is the better the two. It is difficult to see why this should be so. An view. If the plaintiff takes it upon himself to claim for award which sought to combine both reliance expenses and the profit to be earned over three years out of a possible profits (as the latter was calculated in *Callinane*) would, of ten (possibly because he doubted the profitability of his course, be incorrect. But a claim for the capital loss on the venture over the remaining seven years, although *Evershed M.R.* machine purchased from the defendant is not, *ex hypothesi* a declined to assume that three years would mark an end to its claim for reliance expenditure, rather a claim for the loss on economic viability),<sup>94</sup> he must be treated as having accredited an item which was the subject matter of the contract. To be the machine with a working-life of three years only. This properly compensated, it is submitted, the plaintiff in the being so, he would have to write off all his expenditure and *Callinane* case should have recovered a sum representing his be confined to his loss of gross income over the three years capital loss on the machine as well as the amount he did receive less likely running costs. Similarly, the plaintiff in the under the head of 'loss of profit'. Foaminol case should have been restricted to the amount computed under the head of 'profit'.

*Supra* n.89 at pp.1262, per *Evershed M.R.*, and *ibid.*, at pp.1264-5, per *Jenkins L.J.*

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*Supra* n.89 at p.1262, per *Evershed M.R.* See, to like effect, *Jenkins L.J.*, *ibid.*, at p.1266. f can 'always claim the difference 94 between the price and the market value of the goods'. However, he ad. He agreed that the venture was 'speculative', but since the truck profits worked out by the official referee showed a crescendo over the three years, this was not consistent with the view that at the end of the third year sales would have ceased altogether; *ibid.*, at p.1263. wrong, since he notes that: 'Perhaps the case decides no issue of principle because the pleadings read as if all the loss was incurred in the three years'; *op cit.*, pp.244-5. It is suggested that in view of this statement the author would probably agree with the measure of damages set out in the text.



However, one amendment needs to be made to the majority decision. It was argued that the plaintiff could, at his option, claim either his profits (i.e., receipts less probable running expenses) or the loss of his bargain (i.e., the difference in value between the machine as it was delivered, and as it should have been) but that he could never combine the two.<sup>95</sup> It is difficult to see why this should be so. An award which sought to combine both reliance expenses and profits (as the latter was calculated in Cullinane) would, of course, be incorrect. But a claim for the capital loss on the machine purchased from the defendant is not, ex hypothesi a claim for reliance expenditure, rather a claim for the loss on an item which was the subject matter of the contract. To be properly compensated, it is submitted, the plaintiff in the Cullinane case should have recovered a sum representing his capital loss on the machine as well as the amount he did receive under the head of 'loss of profit'.<sup>96</sup>

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Supra n.89 at pp.1262, per Evershed M.R., and ibid., at pp.1264-5, per Jenkins L.J.

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Street agrees that in cases like Cullinane v. British 'Rema' Manufacturing Co. the plaintiff can 'always claim the difference between the price and the market value of the goods'. However, he adds that the plaintiff can also recover his loss of profit (struck after an allowance for depreciation) and his various expenditures (other than the purchase price of the machine). But he appears to concede that his criticism of Cullinane (for refusing to allow the expenses) may be wrong, since he notes that: 'Perhaps the case decides no issue of principle because the pleadings read as if all the loss was incurred in the three years'; op cit., pp.244-5. It is suggested that in view of this statement the author would probably agree with the measure of damages set out in the text.

Stable J. had meant by 'profit' the question should be  
 The arguments put forward in the preceding pages  
 submitted to him for re-determination. There were, the  
 (briefly, that claims for expenditure can be combined only  
 High Court continued, two ways in which the net profit could  
 with claims for net profit), may be summarised by an  
 be assessed by the judge: he could either (i) make a  
 examination of the important T.C. Industrial Plant Pty Ltd  
v. Roberts (Q'ld) Pty Ltd.<sup>97</sup> The plaintiff in this case  
 single calculation, where he deducted actual and probable  
 expenditure from likely gross receipts, or he could (ii)  
 bought on hire-purchase an impeller-breaker (a machine used  
 first compensate the plaintiff for his preliminary expenditure,  
 in the crushing of gravel) which failed to perform to its  
 and then give the plaintiff his gross receipts less probable  
 warranty. He thus repudiated the agreement and sought the  
 expenditure but only so far as the resultant sum exceeded the  
 profit he would have earned on a contract with the Common-  
 wealth.<sup>98</sup> ready compensated.<sup>99</sup> Stable J. agreed that this contract would have been

Re-hearing the case, Stable J. said his original  
 a profitable one and made an award as follows: the claimant,  
 intention had been to adopt (i) above, but he had not done so  
 he said, was entitled (i) to recover back those expenses  
 since he refused to write off against the Commonwealth contract  
 incurred while attempting to use the machine on the Common-  
 the entire hire-purchase price: it seemed unreal, he said, to  
 wealth contract, and (ii) (since an award of expenditure would  
 suppose that this machine would have performed its chores  
 only have brought him up the the 'zero line') to a sum  
 efficiently and then, as the last stone was turned, have  
 representing his loss of profit as well.

The High Court agreed that the plaintiff could recover both  
 expenditure and profit, provided only that this latter was  
 no acceptable evidence of what the machine's residual value would  
 have been, so he had approached the matter, as he would again  
 understood to mean net profit. But since it was not clear what  
 approach it, in the second of the ways suggested by the High

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[1964] A.L.R. 1083. Much of the material on this case which  
 is presented in the following pages has been made available by  
 Messrs Thynne & Macarthy of Brisbane, the Registry, Supreme Court,  
 Brisbane, and Mr J.R. Forbes, late of Messrs Tully and Wilson,  
 Brisbane, now Lecturer in Commercial Law at the University of  
 Newcastle (N.S.W.).

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The defendant knew of this contract at the time the hire-  
 purchase agreement was made.

Stable J. had meant by 'profit' the question should be submitted to him for re-determination. There were, the High Court continued, two ways in which the net profit could be assessed by the judge: he could either (i) pursue a single calculation, whereby he deducted actual and probable expenditure from likely gross receipts, or he could (ii) first compensate the plaintiff for his preliminary expenditure, and then give the plaintiff his gross receipts less probable expenditure but only so far as the resultant sum exceeded the amount already compensated.<sup>99</sup>

Re-hearing the case, Stable J. said his original intention had been to adopt (i) above, but he had not done so since he refused to write off against the Commonwealth contract the entire hire-purchase price: it seemed unreal, he said, to suppose that this machine would have performed its chores efficiently and then, as the last stone was turned, have 'disintegrated into worthless smithereens'. However, there was no acceptable evidence of what the machine's residual value would have been, so he had approached the matter, as he would again approach it, in the second of the ways suggested by the High Court. Thus, he allowed the plaintiff to recover his out-of-pocket expenses, and gave him in addition a sum representing his

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<sup>99</sup> Supra n.97 at p.1092, a joint judgment of Kitto, off the Taylor and Windeyer JJ. rejected by a High Court consisting of Barwick C.J., Kitto and Taylor JJ.



expenditure' could be expanded to include various other loss of profit. This second sum was computed by first estimating likely gross income, and subtracting therefrom a) future expenditure,<sup>100</sup> and b) an amount for depreciation of the machine at the rate of 15 per cent per annum. Stable J. then allowed so much of the resultant sum as exceeded the amount given as compensation for preliminary expenditure: he allowed in short, expenditure plus net profit.<sup>101</sup>

the court must do the best it can'.<sup>102</sup> Doing 'the best it can', we suggested, can include looking at reliance

We need say only a few words to finish with. Our main task in this chapter, apart from examining the distinctive problems raised by 'improvement expenditure', has been to bring together the various groups of 'expectation expenditure', i.e., expenditure which is protected because the expectation interest is protected. First, and most obviously, we showed that this included recovery of the costs involved in substituting the defendant's promised performance (the least, one imagines, that could be expected of a legal system which enforces contracts), and that this notion of 'performance

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Included in this 'future expenditure' was a sum representing the adversities that every businessman should expect. Even 'the best laid plans', said Stable J., 'oft gang a-gley'.

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An appeal against the judge's refusal to write off the entire capital cost was rejected by a High Court consisting of Barwick C.J., Kitto and Taylor JJ.

expenditure' could be expanded to include various other costs incurred by the plaintiff as a result of the breach of contract. Second, Chapter 6 we tried to show that this could also include reliance expenditure, provided this was understood to mean not its recovery qua reliance expenditure, but instead as a surrogate expectancy. As Devlin J. once said, where precise evidence is obtainable of the profit lost, 'the court naturally expects to have it [but] where it is not, the court must do the best it can'.<sup>102</sup> Doing 'the best it can', we suggested, can include looking at reliance expenditure. Finally, we examined the relationship between the recovery of expectation expenditure and protection of the expectation interest. Each, as we shall presently see, One last head of damages remains to be discussed, the recovery of losses caused: to this we turn in the following chapter.

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Biggin v. Permanite [1951] 1 K.B. 422, 438. The element of resale in this situation readily explains the normal assessment of the now defendant's liability by the criterion of contemplation. But in the following pages we shall separate

the recovery of damages from the recovery of costs, and argue that, at least in the former case, contemplation of resale ought not to be an essential ingredient of liability.

### Chapter 6

#### RECOVERY FOR LOSSES CAUSED

Damages Fuller and Perdue's example of a loss caused (or 'reliance loss' as they called it) was, as we may recall, that of the farmer who buys a diseased cow which infects the rest of the herd. This, however, represents only one category of loss caused. The other category (and to this we turn first) consists of the damages and costs paid to a third party by the now plaintiff in previous legal proceedings. The clear distinction which exists between these two groups has been bridged by one factor: each, as we shall presently see, has been governed by the decision in Hadley v. Baxendale.

#### 1. Recovery of Damages and Costs

The type of case with which we shall deal in this section is that in which the now plaintiff has bought goods from the now defendant, has resold them, and has then been sued by his sub-buyer because the defendant's breach of contract has involved him in a similar breach of his own sub-contract. The element of resale in this situation readily explains the normal assessment of the now defendant's liability by the criterion of contemplation. But in the following pages we shall separate



the recovery of damages from the recovery of costs, and argue that, at least in the former case, contemplation of resale ought not always to be an essential ingredient of liability.

Damages to what the defendant might have contemplated.

The argument may be illustrated thus: if A sells a coat to B who resells it to C, then any 'defectiveness' in that coat will only be revealed to C, its actual wearer. If C then suffers some injury (there might, for example, be some deleterious chemical in the fabric of the coat), he will claim damages from B. B in turn should be able to claim the sum so paid from A., whether A contemplated resale or not, since the injury suffered by C was such as B would have suffered had there been no resale, and which has not, as an injury, been of itself affected by the resale. A, in other words, should be immediately liable to B for the damages paid to C since they are, in this sense, the 'natural consequences' of his breach. A concrete example of these 'transferred damages' is given in Wells v. Pratt & Haynes [1911] A.C. 394. In this case, corn-seed had been sold to the plaintiff and the matter of damages was not discussed in the judgment.

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(1858) E.B. & E. 84.

of Willes J., however, is one of the very few judges and resold and which, when the crop was raised, turned out who has thus expressly recognized the nature of the crop to be corn of lower than the quality warranted. In the transferred damages. But the extent to which it was a decision itself the plaintiff was allowed to recover the amount paid as damages to the third party, without any different approaches which have appeared by the recovery reference to what the defendant might have contemplated. of damages paid for physical loss.

Later, Willes J. stressed the irrelevance of contemplation, first, there are a number of cases which do in fact noting of Randall v. Raper that it was 'a matter of stress the defendant's contemplation of resale, but which comparative indifference' to the vendor as to whether the effectively concede its lack of relevance. In both vendee or sub-vendee suffered the actual damages: 'they were Kasler & Cohen v. Blaylock and Blain v. Parsonage, equally damages', he observed, 'resulting naturally from his for example, defective goods (in the first case, fur collars, breach of contract'.<sup>2</sup>

<sup>2</sup> line of buyers and sellers, causing injury to the ultimate

Borries v. Hutchinson (1865) 18 C.B. (N.S.) 445, 464. Another good example is Marles v. Trant, McKinnon [1954] 1 Q.B. 29 (C/A) where the facts were the same except that the sub-contract had been performed illegally through the vendee's failure to obey various statutory requirements. Both Singleton and Denning L.JJ. pointed out that the better course for the vendee to have adopted would have been to ignore the sub-contract altogether and claim for the ordinary consequences of the breach: this would have given him compensation for the lower value of the crop and would have also compensated him for the sum paid to the sub-vendee, for this had been computed in an identical fashion; ibid., at paras pp.34 and 38 respectively. In the event the plaintiff's claim to recover the amount paid to his sub-buyer was successful, even though he had made express reference to the resale since (i) the statutory offence was one of mere inadvertence, and (ii) the damages did not result from the omission which constituted the offence. In Wallis & Wells v. Pratt & Haynes [1911] A.C. 394 (H/L) recovery was allowed under circumstances identical to Randall v. Raper but the matter of damages was not discussed in the judgments. The only objection was that the now plaintiff should have proved the extent of his liability in due court proceedings. The Court of Appeal rejected this, holding it enough that the sum was paid as part of a reasonable settlement; [1951] 1 K.B. 422.



of Willes J., however, is one of the very few judges who has thus far expressly recognised the notion of transferred damages. But the extent to which it has gained a tacit acceptance is evident from the two different approaches which have appeared to the recovery of damages paid for physical loss.

First, there are a number of cases which do in fact stress the defendant's contemplation of resale, but which effectively concede its lack of relevance. In both Kasler & Cohen v. Slavouski<sup>3</sup> and Biggin v. Permanite,<sup>4</sup> for example, defective goods (in the first case, fur collars, in the second, roofing adhesive) were sold and resold down a line of buyers and sellers, causing injury to the ultimate consumer. Branson and Devlin JJ., agreeing that the plaintiff might recover the damages he had paid, first pointed to the contemplation of resale, but ultimately declared that as long as the damage at the end of the chain was predictable, then the length of the chain, the number of people involved in it, was irrelevant.<sup>5</sup> This, however, is virtually to echo the sentiments

<sup>3</sup> [1928] 1 K.B. 78.

<sup>4</sup> [1951] 1 K.B. 422.

<sup>5</sup> [1923] 1 K.B. 690.

<sup>8</sup> Supra nn.3 and 4 at pp.85-6, 87 and 432 respectively. Devlin J.'s only objection was that the now plaintiff should have proved the extent of his liability in due court proceedings. The Court of Appeal rejected this, holding it enough that the sum was paid as part of a reasonable settlement; [1951] 1 K.B. 422.



of Willes J., that so long as the damage is itself such as would arise in the ordinary course of events from the breach, then it is a matter of 'comparative indifference' as to who suffers the actual loss; and to recognise that the defendant is liable for the amount of the damages whoever is the actual sufferer. The reference to the expectation of resale, in other words, appears to be nothing more than lip-service paid to the contemplation formula.<sup>6</sup>

Second, transferability seems to gain even clearer recognition in cases such as Pinnock v. Lewis<sup>7</sup> and British Oil and Coke Co. v. Burstall.<sup>8</sup> In each of these decisions poisoned cattle-fodder was sold down a line of buyers and sellers, and in each of them the now defendant was successfully sued for the damages paid by the now plaintiff. Both Roche and Rowlatt JJ. eschewed any reference to contemplation of resale, at p.742. As a general statement of the law this is, of course, correct, but its application in the present case can be criticised.

<sup>6</sup> The notion of transferability would also appear to have been tacitly accepted in Dobell v. Barber & Garrett [1931] 1 K.B. 219 (C/A). Poisoned cattle-fodder was sold down a chain of buyers and sellers, and the plaintiff was held entitled to recover the damages passed back up the line to him. Stress was laid on his having contemplated resale, though it seems clear that he did not anticipate the precise number of resales that took place. This seems to bring the case within Willes J.'s 'comparative indifference' formula, and so to render the contemplation of resale immaterial.

<sup>7</sup> [1923] 1 K.B. 690.

<sup>8</sup> Bostock v. Nicholson is that in the latter the third party stood in the plaintiffs' shoes: and that, at any rate to the (1923) 39 T.L.R. 406.

and found it quite enough for their decisions that the Non-Delivery and Delayed Delivery

fodder was in fact sold as fodder.<sup>9</sup> Clearly they were

In each of these groups of cases, therefore, but concerned with one fact only, that the injuries were especially the latter, we find a tolerable degree of support 'natural' or 'predictable'. More obviously even than for the notion of transferred damages. We are, however, far Branson and Devlin JJ. they were not concerned with the from saying that transferability applies only to defective identity of the actual sufferer.<sup>10</sup>

delivery, rather that it offers the clearest example. Indeed,

<sup>9</sup> Since all that is asked is that C. suffers the damage which B.

Supra nn.7 and 8 at pp.697 and 402 respectively.

<sup>10</sup> would have suffered, there can be no ground for restricting the

Some criticisms might usefully be offered here of Bostock v. Nicholson [1904] 1 K.B. 725. In this case the plaintiffs purchased from the defendants sulphuric acid warranted commercially free from arsenic. They used the acid in the manufacture of brewing sugar and then sold this sugar to brewers who used it in brewing beer. Because the acid was not commercially free of arsenic several drinkers died or became ill, and the brewers successfully claimed from the plaintiffs the compensation they had to pay. [For the brewers' action, see Holden v. Bostock (1902) 50 W.R. 323 (C/A).] The plaintiffs, said Bruce J., had no remedy for the monies thus paid as no liability can be incurred in the case of a 'distinct collateral contract with a third person uncommunicated to the original contractor or wrongdoer'; ibid., at p.742. As a general statement of the law this is, of course, correct, but its application in the present case can be criticised. First, the use of the acid in brewing beer was a natural user and one, therefore, which the defendants, although they were not expressly forewarned of the plaintiffs' intentions, ought to have been expected to 'risk'. Second, Bruce J. apparently conceded this by allowing the plaintiffs to recover the cost of material destroyed when mixed with the poisonous acid in preparing the brewing sugar. This implies that if the plaintiffs had themselves completed the whole process of manufacturing the beer, instead of leaving that to the purchasers from them, Bruce J. would have then allowed the plaintiffs to recover the further natural consequences of the natural user, namely, the claims made against them by those who had drunk the poisonous brew. The only difference between this hypothetical case and Bostock v. Nicholson is that in the latter the third party stood in the plaintiffs' shoes: and that, at any rate to the defendants, should be a matter of 'comparative indifference'.



decision finally on the second rule in Hadley v. Baxendale,  
Non-Delivery and Delayed Delivery

In each of these groups of cases, therefore, but especially the latter, we find a tolerable degree of support for the notion of transferred damages. We are, however, far from saying that transferability applies only to defective delivery, rather that it offers the clearest example. Indeed, since all that is asked is that C. suffers the damage which B. would have suffered, there can be no ground for restricting the operation of transferability to any one particular breach. On the other hand, we would have to concede that its application to the field of non-delivery and delayed delivery is much less backed by 'authority' than it is to defective delivery; some cases, indeed, are distinctly adverse. We may try to re-appraise some of them.

First, we may establish an argument based on Grebert-Borgnis v. Nugent.<sup>11</sup> In this case the defendant sold sheepskins to the plaintiff knowing they were for resale to a French buyer; he failed to make delivery and the plaintiff was adjudged liable in the French court to the sub-vendee in the sum of £28. In the present action the defendant conceded his liability for the vendee's loss of resale profit, and the court, resting its

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(1885) 15 Q.B.D. 85 (C/A).



decision firmly on the second rule in Hadley v. Baxendale, found him liable also for the damages paid: some liability was contemplated to the sub-vendee, it was said, and £28 seemed a not unreasonable sum.<sup>12</sup>

The Court of Appeal's initial hesitancy about awarding the £28 derived from the absence of precise evidence as to how it had been arrived at by the French court. But we would argue in this way; that had it represented the profits to be made from the sheepskins (which seems likely since there was no market in which replacements could be bought)<sup>13</sup> then the plaintiff could have claimed an entitlement to the amount so paid because, on the familiar argument, the third party had merely suffered the damage that he himself would have suffered had there been no resale at all.

In view of this type of argument, it becomes necessary to examine afresh the well-known decision in Borries v. Hutchinson.<sup>14</sup> In this case goods were sold by A. to B. who resold to C. who in turn resold to D. When A. failed to make delivery D. sought and received compensation from C. C. successfully claimed back the amount so paid from B. and he in turn sought to relay the

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See Brett M.R. and Bowen L.J., supra n.11 at pp.92 and 93 respectively.

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See Bowen L.J. ibid., at p.93.

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Supra n.2.

damages back to A. It was found that A. had contemplated one resale (and for this reason had conceded to B. his loss of profit) but not the further sale to D.: hence the claim failed, considerably behind with his performance and the fuse-box,

Now, the report does not say how the damages claimed by D. were made up, but since the goods concerned - caustic soda - were to be used by him in his business as a soap and candle-maker, and could not be replaced in the available market, it seems more than likely that the damages represented a loss of business profits. If this is so, then the effect of the award of transactions in this case was merely to transfer to D. a loss that would otherwise have affected B. On this interpretation, therefore, Borries v. Hutchinson is wrong.<sup>15</sup>

If, then, this first line of 're-appraisal' was based on Grebert-Borgnis v. Nugent, a second might be based on Portman v. Middleton.<sup>16</sup> This was a case where A. agreed with B. to repair

B. not A. has suffered by the delay. But that, to repeat a  
<sup>15</sup> As it is, indeed, on another ground. Since the defendant contemplated one resale then he must also have contemplated a possible liability to the sub-vendee in the event of breach. 'The one', as Lord Dunedin has aptly remarked, 'is the corollary of the other'; Hall v. Pim [1928] All E.R. Rep. 763, 767. The court should, therefore, have taken the amount paid by C. to D. as representing the amount which B. would have had to pay even had there never been a second resale.

<sup>16</sup> Supra n. 16 at p. 326.  
(1858) 4 C.B. (N.S.) 322.

a threshing-machine in time for harvest: he needed a fuse-box to proceed with this overhaul and C. agreed to provide him with one 'in a fortnight'. C. however, was considerably behind with his performance and the fuse-box, when delivered, turned out to be utterly worthless, compelling A. to obtain a fuse-box from other sources.<sup>17</sup> The net effect of this was that A. was late in delivering the machine to B. who brought an action for delay against A., ultimately settling for £20. A., it was held, could not regain this £20 since there was 'no evidence that the defendants were aware of his contract with B. until after the breach'.<sup>18</sup> Our

<sup>19</sup> objection is that had there been only two parties involved A. could have claimed from C. not just the cost of resorting to the market for a fuse-box, but also damages for the necessary delay before the threshing-machine was ready, this time for his own personal use. What has happened in this case is that B. not A. has suffered by the delay. But that, to repeat a familiar phrase, should be to C. a matter of 'comparative

<sup>17</sup> An instance of primary performance expenditure - see chapter 5 pp. 123-134 which the court rightly allowed A. to recover.

<sup>18</sup> Supra n.16 at p.326.



indifference'.<sup>19</sup> is, in short, that over the great majority

Now, if we are able to dispense with contemplation in these two situations (as we were when the claim arose from a defective sale) it is clear that its relevance to the recovery of damages paid is severely limited. Indeed, it would seem only where the breach is one by delay, and where the delay in performing the sub-contract is unavoidably greater than the delay in performing the head contract (and where, therefore, the damages are greater than if there had been no resale) that contemplation of resale might be in point.<sup>20</sup>

*costs. In Hammond v. Bussey,*<sup>21</sup> for example, Fry L.J.

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Transferability could have applied to Portman v. Middleton since the damages paid by the plaintiff were nothing beyond the ordinary damages for delay. If, however, they had been in any way 'special', then the rule in Elbinger v. Armstrong (1874) L.R. 9 Q.B. 473 would have operated so as to prevent any application of the doctrine. In this case the defendant's delay caused the plaintiff to be late in the performance of a sub-contract. Now, although he knew of the sub-contract, the defendant did not know that the plaintiff had agreed to pay stipulated amounts in the event of delay. Accordingly, the defendant was properly held not be liable for the amount paid by way of penalty to the sub-vendee. (However, the plaintiff did recover the damages paid, not of course qua damages paid, but because they represented the damages which might naturally have flowed from the defendant's breach, including therein the plaintiff's probable liability on the sub-contract to which, as the defendant knew, his own contract 'was subsidiary'; ibid., at p.479, per Blackburn J.).

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There appears to be no relevant authority.

<sup>21</sup> (1887) 20 Q.B.D. 79 (Q.A.).

<sup>22</sup> Ibid., at pp.99-100. To the same effect, see Lord Esher N.R. Ibid., at p.90, and Bowen L.J. Ibid., at pp.94-5.

Our conclusion is, in short, that over the great majority of cases, damages paid can be recouped without there being knowledge of the sub-contract.

Costs ignore him and proceed with the defence nonetheless.

Cost, however, stand on a different footing. Since they add to the damages which would have been incurred had there been no resale, the doctrine of transferability cannot apply. But contemplation of resale, essential though it may be, provides the plaintiff only with a starting-point in his claim; it is insufficient by itself to ground an action for costs. In Hammond v. Bussey,<sup>21</sup> for example, Fry L.J. observed that since the defendants knew that there would be a resale, they must then have contemplated a possible action against their vendees in the event of a breach, and: 'That being so, it follows that the costs of a reasonable defence would be in the contemplation of the parties'.<sup>22</sup>

Here then is the obvious addendum that not only must the defendant contemplate resale, but the plaintiff must also act reasonably in defending the action brought against himself.

It is, in other words, the quality of his conduct which is the clinching factor in any claim. Our following discussion

<sup>21</sup> 1 C.B. 402. Here a lessee could recover the costs suffered in resisting an action of ejectment since the present defendant had directed a defence. ibid., at p. 433, per Tindal C.J.

(1887) 20 Q.B.D. 79 (C/A).

<sup>22</sup>

Ibid., at pp. 99-100. To the same effect, see Lord Esher M.R. ibid., at p. 90, and Bowen L.J. ibid., at pp. 94-5.



briefly examines this question of reasonableness and considers it in the light of the options open to the now plaintiff: either to notify the now defendant of the impending action, or to ignore him and proceed with the defence nonetheless.

In this case the plaintiff, who had begun an action against

(a) Recovery where Notice has been given

Since few would wish to commit themselves to the costs of litigation, notice rarely results in express consent to the defence of a threatened action. There is, however, a strong example in the early case of Howes v. Martin.<sup>23</sup> The defendant in this action received the plaintiff's notification and went so far as to ask him to defend, adding that the third party's

claim - on a bill of exchange accepted by the plaintiff on behalf of the defendant - was lacking in substance. The plaintiff did defend, and lost. Said Lord Kenyon C.J.; his various expenses must be recouped as the defendant 'was personally interested and directed the defence to be made. The money must be considered to have been laid out by the plaintiff on his the [defendant's] own account, and to his own use'.<sup>24</sup>

<sup>23</sup>

(1794) 1 Esp.162.

<sup>24</sup>

Ibid., at p.164. See too Williams v. Burrell (1845)

1 C.B. 402. Here a lessor could recover the costs suffered in resisting an action of ejectment since the present defendant had 'directed' a defence: ibid., at p.433, per Tindal C.J.

<sup>25</sup> Supra n.21.



It is similarly unusual, if for less obvious reasons, for notice to result in a withholding of consent. Indeed, there seems to be no case directly in point although Godwin v. Francis<sup>25</sup> does come near this type of situation.<sup>28</sup> In this case the plaintiff, who had begun an action against supposed vendors of land, persisted in it even after the supposed agent, the present defendant, denied on oath that he ever had authority to act. As Montagu Smith J. said: 'The further prosecution of the action then became imprudent, preposterous, and excessive'. Now, asked A.L. Smith L.J., and therefore the costs beyond that time....cannot be recovered in this action'.<sup>26</sup>

The majority of cases, therefore, lie in the middle ground where the now defendant neither agrees to, nor disagrees with, the defence of some previous action. This is not to say, however, that even without committing himself, the defendant cannot virtually direct the plaintiff to pursue some particular course. In Hammond v. Bussey,<sup>27</sup> for example, where coal had been sold and resold, the defendant refused to have anything to do with the action, but stoutly maintained

<sup>25</sup> ibid., at p.422. Lord Halsbury L.C. also thought that this amounted to 'an implied intimation' that the action

<sup>26</sup> supra n.21, at p.421.

<sup>27</sup> (1870) L.R. 5 C.P. 295.

<sup>28</sup> Two cases similar to Hammond v. Bussey and Agius v. O.W.C. ibid., at p.307. With this compare the conduct of the plaintiff in Spedding v. Nevell (1869) L.R. 7 C.P. 212 who, receiving identical information from the alleged agent, promptly dropped his claim against the alleged vendors.

<sup>29</sup> supra n.21. goods were defective), and in each the costs of a

that the defect alleged by the sub-vendee was non-existent. By acting thus, said Bowen L.J., and insisting 'that the coal was according to the contract, the defendant may be said to have driven the plaintiffs to defend the action'.<sup>28</sup> Similarly, in Agius v. G.W.C. Co.,<sup>29</sup> the defendant was told by the plaintiff of a sub-vendee's threatened action but repudiated liability and declined to have anything to do with the defence. He did, however, add that he thought the claim 'preposterous' and 'excessive'. Now, asked A.L. Smith L.J., 'what did this mean?' 'Obviously', he answered, 'it meant that the plaintiff could not give in and pay the amount claimed, or, at any rate, that, if he did, the defendant would not be responsible'.<sup>30</sup> It followed then, in both these cases, that since the defendant had also contemplated resale, the plaintiff could recover the expenses of the previous action.<sup>31</sup>

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Supra n.21 at p.96.

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[1899] 1 Q.B. 413 (C/A).

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Ibid., at p.422. Lord Halsbury L.C. also thought that this amounted to 'an implied intimation' that the action ought to be defended; ibid., at p.421.

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Two cases similar to Hammond v. Bussey and Agius v. G.W.C. Co. are Sutton v. Baillie (1891) 8 T.L.R. 17, and Bennett v. Kreeger (1925) 41 T.L.R. 609. In each case the defendant denied a state of affairs alleged by the third party (in the first case that a right of way existed over land, in the second that goods were defective), and in each the costs of a subsequent defence were recovered.

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(1873) L.R. 8 Q.P. 227.

whichever course is most prudent, whether it be defending,

Of course, these preceding cases are nothing more than particular instances of a reasonable defence and must go by default. In the present case the defendant had to be judged strictly in that light. That it may be unwise even to follow an express consent or direction is shown by Pow v. Davies.<sup>32</sup> In this case the defendant purported to let premises to the plaintiff, believing that he possessed the authority so to do. He counselled the plaintiff to defend the subsequent action for ejectment arguing that the suit would not be persevered with were he to resist it. As Cockburn C.J. very properly observed: 'If the plaintiff acted on the advice of the defendant, I do not think it was a reasonable course'.<sup>33</sup>

To conclude this part of our survey, we might conveniently take note of a case wherein the defendant's response to notice was totally non-committal. One such was Mors-le-Blanch v. Wilson<sup>34</sup> where the defendant was informed of a third party's threatened action yet declined to offer the plaintiff any advice or assistance. In situations like this, said Bovill C.J., where all the facts are laid before the defendant, and he leaves the plaintiff entirely to his own devices, the latter may pursue

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(1861) 1 B. & S. 220.

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Ibid., at pp. 228-9. A further point telling against the plaintiff was that even had the defendant possessed the relevant authority his defence to the ejectment action would still have failed, the agreement for the lease being verbal only. The plaintiff's defence, therefore, was based on a mistaken view of the law.

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(1873) L.R. 8 C.P. 227.



whichever course is most prudent, whether it be defending, compromising, paying money into court or letting judgment go by default.<sup>35</sup> In the present case the defendant had so delayed unloading vessels that the plaintiff, who had himself chartered them, was late in returning them to the owner. Even though his subsequent resistance to the owner's claim was unsuccessful, the court was unanimous in holding that in the circumstances it was a proper course to defend.<sup>36</sup>

(b) Recovery in the Absence of Notice

As we may recall from an earlier chapter, Washington argued that there was little, if any, restraint on the recovery of damages prior to 1854. Among the more interesting rebuttals he had been held liable.

<sup>35</sup> (1843) 5 Kan. 2 8. 405.

<sup>36</sup> Supra n.34 at p.233.

<sup>37</sup> ibid., at p.412. This was a case where the defendant had... See e.g., Grove J. ibid., at p.234. Further cases where it has been held reasonable to defend an action, despite an apparent lack of guidance from the defendant, are: Rolph v. Crouch (1867) L.R. 3 Ex. 44; Sheahan v. Stockman (1922) 22 S.R. (N.S.W.) 415 and Kasler & Cohen v. Slavouski [1928] 1 K.B. 78. The first concerned an alleged right of way over land, the second and third a defect in goods. A further feature of this last case was that an analyst had exonerated the goods - a fur collar - from being in any way defective. As Branson J. v. said, if the action had not then been contested 'one can well imagine what the parties higher up the line would have said'; ibid., at p.88. The one instance of an unreasonable defence after notice is Maxwell v. British Thompson Houston Co. (Blackwell, third parties), [1904] 2 K.B. 342. In this case the plaintiff defended an action and unsuccessfully appealed against the adverse decision. His trial defence was reasonable since the now defendant had actively assisted his defence, but his appeal was not because the defendant, although notified, had this time declined to offer any help or proffer any guidance. Radley v. Baxendale, must be regarded as a dubious one.

of this view are remarks such as that of Lord Tenterden C.J. in Knight v. Hughes:<sup>37</sup> the costs of a previous action, he declared, could not be recovered unless the plaintiff 'was authorised by the defendant to defend';<sup>38</sup> or of Tindal C.J. in Blyth v. Smith:<sup>39</sup> the defendant, he said, would have had 'just ground of complaint' if the plaintiff had defended the previous action without notifying him first.<sup>40</sup>

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(1828) M. & M. 247.

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Ibid. The plaintiff and defendant were co-sureties for a collector of taxes who had become a defaulter. The plaintiff was sued for the relevant amount and was found liable: since he had not been 'authorised' to defend, he could recover from the defendant nothing beyond half the sum for which he had been held liable.

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(1843) 5 Man. & G. 405.

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Ibid., at p.412. This was a case where the defendant had chartered an unseaworthy vessel to the plaintiff, who had, the cargo being damaged in consequence, been sued by those whose goods he carried. The defendant had declined to offer any guidance and the plaintiff's subsequent defence, while unsuccessful, was still held reasonable. For further indications that the recovery of costs was tightly controlled before Hadley v. Baxendale see: Gillett v. Rippon (1829) M. & M. 406; Tindall v. Bell (1834) M. & M. 228; Hodges v. Litchfield (1835) 1 Bing. (N.C.) 492; Pennell v. Woodburn (1835) 7 Car. & F. 117; Walton v. Fothergill (1835) 7 Car. & P. 392; Short v. Kalloway (1839) 11 A. & E. 28; Penley v. Watts (1841) 7 M. & W. 601; Walker v. Hatton (1842) 10 M. & W. 249. The one decision perhaps supporting Washington is Lewis v. Peake (1816) 7 Taunt. 153, where the costs were allowed of defending an action which arose from the sale and resale of a horse. The plaintiff told the defendant of the forthcoming action but he failed to reply. There is then little doubt but that the defence was a reasonable one. However, since a further necessity would be contemplation of resale (evidence of which is not forthcoming from the report) this decision, coming prior to Hadley v. Baxendale, must be regarded as a dubious one.

But these cases are valuable only for their historical testimony. They must not, as far as they indicate that notice is essential, be looked upon as stating the modern law. Notice, as Crompton J. once said, may be a factor in the plaintiff's favour, but it is unnecessary 'in point of law that the party should give notice to the other of the course he intends to pursue'.<sup>41</sup> It is, he concluded, only one factor, 'in the consideration' of what is reasonable.<sup>42</sup> This is undoubtedly correct, although Hughes v. Graeme does little to make good the general lack of evidence. For we find that while the plaintiff did not perhaps forewarn the defendant of his intended action, the latter was at all times aware of his plans and even appeared as a witness in his case. Clearly this situation differs very little from one where notice has first been given. Accordingly, nothing exceptional appears in the plaintiff recouping the costs of a bill of specific performance (brought against the defendant's alleged principal) even though that action was ultimately unsuccessful.<sup>43</sup> But this would seem to be the only type of case in which the costs of an unsuccessful defence have been recovered.

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Hughes v. Graeme (1864) 33 L.J.Q.B. 335, 338.

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Ibid., at p.339.

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An identical case is Randell v. Trimen (1856) 18 C.B. 786.



Elsewhere the absence of notice has generally told against the plaintiff,<sup>44</sup> although the possibility of recovery was left open in the unusual case of Caldbeck v. Boon.<sup>45</sup> The plaintiff and defendant in this case were sheriff and execution creditor respectively: the plaintiff had arrested the wrong man (an agent appointed by the defendant to assist the plaintiff having pointed to the debtor's brother) and had resisted an action for wrongful arrest without notifying the defendant. It was agreed that the defendant, by appointing an agent, had made himself responsible for the wrongful arrest. An action was thus open to the plaintiff who, at first instance, recovered the damages paid and now sought to recover the amount of costs incurred. But for us to reach a decision, said Lawson J., some question ought first to have been put to the jury 'as to whether the course adopted - of defending the action without communicating with B. and taking his directions - was or was not a reasonable one under the circumstances'.<sup>46</sup> The plaintiff, he said, was entitled to have the opinion of a jury, but would be better advised to settle for recovery of the damages paid.<sup>47</sup> This he did.

<sup>44</sup> See e.g., Richardson v. Dunn (1860) 8 C.B. (N.S.) 665, and The Wallsend [1907] P. 302.  
<sup>45</sup> (1873) I.R. 7 O.L. 32.  
<sup>46</sup> Ibid., at p.37.  
<sup>47</sup> Ibid.

Elsewhere the absence of notice has generally been held against the plaintiff,<sup>44</sup> although the possibility of recovery was left open in the unusual case of Caldbeck v. Boon.<sup>45</sup> The plaintiff and defendant in this case were sheriff and execution creditor respectively: the plaintiff had arrested the wrong man (an agent appointed by the defendant to assist the plaintiff having pointed to the debtor's brother) and had resisted an action for wrongful arrest without notifying the defendant. It was agreed that the defendant, by appointing an agent, had made himself responsible for the wrongful arrest. An action was thus open to the plaintiff who, at first instance, recovered the damages paid and now sought to recover the amount of costs incurred. But for us to reach a decision, said Lawson J., some question ought first to have been put to the jury 'as to whether the course adopted - of defending the action without communicating with B. and taking his directions - was or was not a reasonable one under the circumstances'.<sup>46</sup> The plaintiff, he said, was entitled to have the opinion of a jury, but would be better advised to settle for recovery of the damages paid.<sup>47</sup> This he did.

<sup>44</sup> See e.g., Richardson v. Dunn (1860) 8 C.B. (N.S.) 665, and The Wallsend [1907] P. 302.

<sup>45</sup> (1873) I.R. 7 O.L. 32.

<sup>46</sup> Ibid., at p.37.

<sup>47</sup> Ibid.

reasonably: in some cases they should defend, in others  
But while it may be difficult to discover a case where  
perhaps wisely, not. The test is, in taking the stand they  
the costs of an unsuccessful defence have been recovered, there  
did, whether defending or not, did they act reasonably".<sup>50</sup>  
is an example - a strong one - where the costs of a successful

2. Physical Damage to Person. In Britannia Hygienic Laundry Co.

v. Thornycroft<sup>48</sup> the defendant had repaired the plaintiff's  
vehicle defectively; the result being that, when the vehicle  
was being driven, a wheel came off and damaged X's van. X sued  
the now plaintiff who unsuccessfully defended an action at first  
instance, but whose appeal was upheld both in the Divisional  
Court and the Court of Appeal. There is no reference to notice  
in the declaration nor in the judgment of McCardie J. He merely  
stated that the costs were recoverable as 'the probable and  
direct consequences' of the breach of contract.<sup>49</sup>

This case, of course, has more general implications. Since  
we cannot rationally argue that notice is essential for recouping  
the costs of an unsuccessful defence, but is not essential for the  
costs of a successful defence, it follows that Britannia Hygienic  
Laundry Co. v. Thornycroft is an authority for stating that even  
where no notice has been given the costs of any defence are always  
potentially recoverable. As Crisp J. once observed: "When a

claim is made by a sub-purchaser, the plaintiffs have to act  
(1954) 29 Tas.L.R. 102, 103. This was an action for non-delivery  
of apples, the defendant knowing they were for resale. The

<sup>48</sup> The Australian Fruit & Produce Co. Ltd. v. The Fruit & Produce Co. Ltd.  
(1925) 41 T.L.R. 667; reversed on the facts, (1925) 95 L.J.K.B. 237 (C/A).

<sup>49</sup> (1925) 41 T.L.R. 667, 668.



reasonably: in some cases they should defend, in others perhaps wisely, not. The test is, in taking the stand they did, whether defending or not, did they act reasonably".<sup>50</sup>

## 2. Physical Damage to Person or Property

Now, quite apart from the question of damages and costs, there is the problem of physical damage to person or property. As we said earlier, the application of Hadley v. Baxendale to the recovery of damages and costs was a natural one in view of the element of resale. But we should not be surprised if it turns out that Hadley v. Baxendale has likewise been applied to the recovery of physical damage. For not only was there an almost total dearth of authority on this topic prior to 1854, but the judgment also adopted the language of causation - it spoke of natural 'results' and probable 'consequences' - which would allow it to be applied with as much facility to losses caused as to gains prevented. For ease of exposition, we shall trace its development in three categories of physical damage: these are distinguished not so much by the type of loss, but rather the manner of its occurrence.

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The Australian Fruit & Produce Co. Ltd v. Terry Pty Ltd (1934) 29 Tas.L.R. 102, 103. This was an action for non-delivery of apples, the defendant knowing they were for resale. The plaintiff conceded the sub-purchaser's claim for damages, avoiding the costs of litigation. Crisp J. held this to be a reasonable approach and awarded the sum paid, plus profits lost, against the now defendant.

(footnote continued p.190)

However, this 'purely sentimental' injury, as Moller J.

(a) Direct Damage

once aptly called it, must be clearly distinguished from

A breach of contract does not, except in the less common the substantial, if still generally imprecise, 'inconvenience' cases, ever cause a loss in quite as direct a sense as a which a party might suffer directly from the breach. In blow might cause a bruise. Normally there has to be some Hobbs v. L. & S.W. Rly Co. the plaintiff, his wife and additional act or event (even if it is only such a simple one children, bought tickets on the defendant's railway from H. as e.g., eating the poisonous food) before a breach can to H. They boarded the train, but it went to E. where the produce its full disruptive potential. For immediate purposes parties were compelled to leave. In the absence of accommodation we understand only such damages as 'direct' as occur in the or alternative transport the family were compelled to walk the total absence of any such 'catalytic' event.<sup>51</sup>

4 or 5 miles home. For this "real physical inconvenience"<sup>55</sup>

One type of 'injury' which flows directly from every 28 compensation was given.

breach of contract is the anger or disappointment which it

Another illustration is Burton v. Pinkerton.<sup>57</sup> In this occasions to the plaintiff. This, of course, has never been

held compensable. It is far too ephemeral an item ever to rate

seriously as a loss caused. Thus the rule is, as Pollock C.B.

once said, that a man may recover damages for the natural loss,

'but not damages for the disappointment of mind, occasioned by

the breach of contract'.<sup>52</sup>

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The effect of Re Polemis [1921] 3 K.B. 560 (C/A) on such claims, and contract damages generally, would probably have been nil: see McNair, 'This Polemis Business' (1930-32) 4 C.L.R. 125. But this question is now of historical interest only since (i) The Wagon Mound [1961] 2 W.L.R. 126 (J/C) has 'overruled' Re Polemis and supplanted 'directness' by 'foreseeability', and (ii) The Heron II [1967] 3 All E.R. 686 (H/L) has stated that 'contemplation' not 'foreseeability' is the appropriate test in contract.

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Hamlin v. G.N. Rly Co. (1856) 1 H. & N. 408, 411. "As to mere disappointment, regret or other feelings of the mind simpliciter (footnote continued p.190)



However, this 'purely sentimental' injury, as Mellor J. once aptly called it,<sup>53</sup> must be clearly distinguished from the substantial, if still generally imprecise, 'inconvenience' which a party might suffer directly from the breach. In Hobbs v. L. & S.W. Rly Co.<sup>54</sup> the plaintiff, his wife and children, bought tickets on the defendant's railway from W. to H. They boarded the train, but it went to E. where the parties were compelled to leave. In the absence of accommodation or alternative transport the family were compelled to walk the 4 or 5 miles home. For this "real physical inconvenience"<sup>55</sup> £8 compensation was given.<sup>56</sup>

Another illustration is Burton v. Pinkerton.<sup>57</sup> In this (footnote continued from p.189)

The law has not yet progressed so far that I can say.....that damages can be awarded under this head". Athens-MacDonald Travel Service v. Kazis [1970] S.A.S.R. 264, 274, per Zelling J. See chapter 5 n.26. Wright v. Evans [1953] 1 W.L.R. 1424, 1432, per 53

Hobbs v. L. & S.W. Rly Co. (1875) L.R. (10 Q.B. 111, 122.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., at p.122, per Mellor J.

<sup>56</sup> Arguably, the walk home could be described as performance of the contract and the £8 as primary performance expenditure. But while the walk home certainly was a performance of the contract, the (notional) expense involved seems to have been covered by the £2 which the railway co. paid into court. Counsel indicated that this would cover the cost of a conveyance had one been available; ibid., at p.114. The £8, therefore is better treated as compensation for the inconvenience of having to walk home.

<sup>57</sup> (1867) L.R. 2 Ex. 340.



case the plaintiff, serving on board a ship which wrongfully took part in hostilities between Spain and Peru, disembarked contemplated as resulting from the breach of an ordinary commercial contract, but different again, he says, are cases only to find his ship had gone, taking with it the bulk of his which affect the plaintiff's personal, social and family possessions. He could recover neither for his incarceration nor the loss of his goods (for reasons we shall later see) but that even where these more intimate contracts are concerned he could, said Bramwell B., recover 'something under the head of general damage for some of the inconvenience and annoyances is not allowed unless the defendant is forewarned of the he had suffered'.<sup>58</sup>

Furthermore, disappointment or vexation which deteriorates into an actual illness, or at least severe mental distress, the conduct of a divorce suit and was sued, *inter alia*, for the ought also to be compensable since this again represents a loss nervous shock, anxiety state and general breakdown in health of a more specifically concrete disposition. Normally, as caused by this failure to attend to his duties. Said Lord

<sup>58</sup> Denning M.R.: 'Just as in the law of tort, so also in the law of contract'. *Supra* n.57 at p.349. See too *Beckham v. Drake* (1841) 8 M. & W. 846, 855, per Parke B., (1849) 2 H.L.C. 579, 607-8, or per Erle J.; *Griffith v. Evans* [1953] 1 W.L.R. 1424, 1432, per Denning L.J. In *Bailey v. Bullock* [1950] 2 All E.R. 1167 and *Stedman v. Swans' Tours* (1951) 95 S.J. 727 (C/A) damages were given for inconvenience under circumstances which really amounted to giving the normal damages for a defective sale; in the former case the plaintiff received a sum based on inconvenience (*Burton v. Pinkerton* being expressly adopted) where the plaintiff had spent two years residing with in-laws through the defendant solicitor's failure to obtain conveyance of a house. And in the latter, a honeymoon couple were compensated for being given inferior hotel accommodation. In each case the award would appear to represent the difference between what was promised and what was in fact received. An excellent summary of all the cases is to be found in *Athens-MacDonald Travel Service Pty Ltd v. Kazis* *supra* n.52. In this case, the plaintiff recovered \$400 for the "substantial inconvenience" he suffered through the defendant's failure to provide him with the holiday contracted for. Such inconvenience included inability to visit various locations and holiday places.

McGregor has seen, such a degree of distress would not be contemplated as resulting from the breach of an ordinary commercial contract, but different again, he says, are cases which affect the plaintiff's personal, social and family interests'.<sup>59</sup> Lord Denning M.R., however, recently argued that even where these more intimate contracts are concerned mental distress is still a special loss, so that a remedy is not allowed unless the defendant is forewarned of the relevant special circumstances. In the particular case, Cook v. S.,<sup>60</sup> the defendant solicitor acted negligently in the conduct of a divorce suit and was sued, inter alia, for the nervous shock, anxiety state and general breakdown in health caused by this failure to attend to his duties. Said Lord Denning M.R.: 'Just as in the law of tort, so also in the law of contract, damages can be recovered for nervous shock or anxiety state if it is a reasonably foreseeable consequence'.<sup>61</sup>

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Op. cit., §.52. Such damages are often awarded in the U.S.A, he notes, citing McCormick, op. cit., p.145.

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[1967] 1 All E.R. 299, (C/A); affirming as to damages [1966] 1 All E.R. 248.

61

[1966] 1 All E.R. 299, 303. In view of the subsequent decision in The Heron II Lord Denning M.R.'s reference to 'foreseeable' will have to be assumed to mean 'contemplated as not unlikely', or some such similar phrase; see chapter 4 pp. 82-87.

For instance Bradshaw v. L. & Y. Ry Co. (1875) L.R. 10 C.P. 189; Phillips v. L. & S.W. Ry Co. (1879) 5 Q.B.D. 78; (1879) 5 C.P.D. 280.

But here, he said, the defendant knew no more than that the plaintiff was highly strung. Had he known of her disposition to nervous breakdowns then his area of liability would have been enlarged. But as he was not aware of this, the action must fail on its facts.<sup>62</sup>

The difficulty with this case is that the plaintiff was indeed a woman of an unusually sensitive disposition. But it was also one of those cases where, as McGregor said,<sup>63</sup> mental distress would 'ordinarily' flow from the breach. It is suggested, therefore, that the better approach would have been for Lord Denning M.R. to have compensated the plaintiff for the distress which the ordinary, robust person would have suffered from negligence in the conduct of a case which affected "personal, social and family interests". But this apart, the important point to note is that Lord Denning M.R. does agree that mental distress can form a separate head of damage.

A last possible head of direct loss is, of course, actual physical damage to person or property. The failure to carry safely springs most readily to mind,<sup>64</sup> but the decision in

<sup>62</sup> Supra n.60 at p.303.

<sup>63</sup> Supra n.59.

<sup>64</sup> See for instance Bradshaw v. L. & Y. Rly Co. (1875) L.R. 10 C.P. 189; Phillips v. L. & S.W. Rly Co. (1879) 5 Q.B.D. 78; (1879) 5 C.P.D. 280.



(b) Damage from a Natural User  
McMahon v. Field<sup>65</sup> offers, perhaps, a more interesting example. In this case the defendants, who had agreed to provide accommodation for the plaintiff's horses, thrust them from the stables into the cold night air. The ensuing chills were compensable, said Brett L.J., not because they were a 'necessary' consequence of the breach<sup>66</sup> (indeed the horses might have withstood the rigours of their privations)<sup>67</sup> but because they were, said Cotton L.J. 'the natural and probable consequence of the breach'.<sup>68</sup>

<sup>65</sup> (1881) 7 Q.B.D. 591 (C/A).

<sup>66</sup> Ibid., at p.595.

<sup>67</sup> Bramwell L.J. in fact thought the plaintiff had been remiss in not having his horses exercised (thus to avoid a chill) while he sought alternative stabling. He was not, however, prepared to dissent from the opinion of his brethren; ibid., at p.594.

<sup>68</sup> Ibid., at p.597. Before leaving McMahon v. Field a word must be said on the criticisms made therein of a particular aspect of Hobbs v. L. & S.W. Rly Co., supra n.53. The result of the family's walk home in this latter case had resulted in the wife contracting influenza, compensation for which was denied. Such a loss, said Cockburn C.J. was neither an 'immediate and necessary effect of the breach nor in the contemplation of the parties'; ibid., at p.119. But, said Bramwell L.J. in McMahon v. Field 'surely catching a cold is the predictable consequence of having to walk home on a dark night', supra n.65 at p.594. 'If there is a difference in these cases', said Brett L.J., (although he confessed it a barely tenable one), it must be that 'people do get out of a train and walk home at night without catching cold, and it is not nearly so inevitable that a person getting out of a train under circumstances as in Hobbs v. L. & S.W. Rly Co. should catch cold, as that horses turned out, as in this case, should suffer'; ibid., at p.595. But what the later court failed (continued p.195)

(b) Damage arising from a Natural User

As part of his general thesis Washington cited the early decision in Borrodaile v. Brunton.<sup>69</sup> There, he said, where the recipient of a defective anchor-cable was compensated for the resulting loss of his anchor, is outstanding evidence of the liberality of damages prior to Hadley v. Baxendale.<sup>70</sup> There seems, however, little amiss with this decision. The damage arose from a natural user of an anchor-cable, and hardly any other species of loss, in the words of the later case, could be more aptly described as reasonably contemplated, or as a natural and probable consequence. Such loss as occurred would

the Court of Appeal in Jackson v. Watson.<sup>73</sup> Here poisoned food (footnote continued from p.194)

to appreciate is that Hobbs' case differs from McMahon v. Field in that the walk home, unlike the injury to the horses, was a performance of the defendant's agreement (see chapter 5 pp.123-135) and that once the plaintiff had received, or was in the process of receiving, whatever the defendant had promised to give him, at that moment the effect of the defendant's breach was exhausted. Thus nothing which happened during the walk home could affect the measure of damages. Cockburn C.J. was, therefore, quite right to point out in Hobbs' case that had the plaintiff taken a carriage home, and had the carriage crashed, no recovery could have been had; supra n.53 at p.119. Similarly, no additional compensation would have been allowed in McMahon v. Field had the alternative stabling acquired by the plaintiff been burnt down and his animals destroyed: the acquisition of fresh accommodation would have been performance on behalf of the defendant and would have terminated the effect of the breach. But since the injuries not alleged in McMahon v. Field in no way arose from a performance of the contract, both cases, we conclude, were correctly decided.

<sup>69</sup> Imagines, Dallas C.J.'s finding as to the warranty.

<sup>72</sup> (1818) 8 Taunt. 535.

<sup>70</sup> Mullett v. Mason (1866) L.R. 1 Q.P. 559, 561.

<sup>73</sup> Op. cit., p.99.

[1892] 2 K.B. 193.





the loss of his wife's services was said to be justified. This damage, observed Farwell L.J. was a 'reasonable consequence of breach within the contemplation of the parties'.<sup>74</sup>

also (c) Damages arising from an Intervening Act or Event

If, then, the injury does not arise directly or from a natural user, but is affected instead by some act or event interposed between breach and damage, the basic rule is that the defendant cannot be held liable for the loss complained of. In Burton v. Pinkerton,<sup>75</sup> for instance, the plaintiff recovered nothing for his period of detention. 'It is true', said Bramwell B. 'that in one sense the defendant's conduct caused<sup>76</sup> his absence. He was duty bound, said Tucker L.J., to keep the

<sup>74</sup> Supra n.73 at p.204. See as further illustrations: Square v. Model Farm Dairies [1939] 2 K.B. 365 (C/A) (sale of contaminated milk); Wilson v. Rickett Cockerill [1954] 1 Q.B. 598 (C/A) (damage caused through sale of coal containing explosive substance); Knowles v. Nunn (1866) 14 L.T. 592; Mullett v. Mason (1866) L.R. 1 C.P. 559; Smith v. Green (1876) 1 C.P.D. 92; (diseased animals infecting others); Sheahan v. Stockman (1922) 22 S.R. (N.S.W.) 415; Pinnock v. Lewis [1923] 1 K.B. 690; British Oil Co. v. Burstall (1929) 39 T.L.R. 406; Dobell v. Barber [1931] 1 K.B. 219 (C/A) (all concerning sale of poisoned cattle food killing animals); Kasler & Cohen v. Slavouski [1928] 1 K.B. 78 (chemical in clothes affecting health of wearer); Hardwick v. S.A.P.F.A. [1969] 2 A.C. 31; Ashington Piggeries v. Christopher Hill, The Times Feb. 24, 1971.

<sup>75</sup> [1948] 2 K.B. 48 (C/A).

<sup>79</sup> Supra n.57.

<sup>76</sup> Ibid., at p.52. See too London Joint Stock Bank v. Macmillan [1919] A.C. 713. Italicised in the report. The drawer of a cheque who had so written the sum as to allow it to be readily altered was held liable to the bank for the amount of the forged increase. It was his duty, the House of Lords held, to guard against drawing cheques in such a way as to make this possible. In Weld-Blundell v. Stephens [1920] A.C. 956 (H/L), however, the plaintiff, who had (footnote continued p. 199)

the imprisonment and but for that, no doubt, the plaintiff would not have been imprisoned'. But this, he added, is not enough: the breach must not only be the sine qua non it must also be (which here it was not) the causa causans.<sup>77</sup>

Nevertheless, despite the accuracy of this basic rule, there are three situations where the defendant will be held responsible for damage arising from an intervening act. The most straightforward occurs where the intervening act is one which it was the defendant's contractual duty to guard against. This was why the defendant decorator in Stansbie v. Troman<sup>78</sup> was liable for the loss of goods stolen from the house during his absence. He was duty bound, said Tucker L.J., to keep the premises secure lest thieves or dishonest persons gain access thereto. He had failed so to do and must be held responsible for allowing to happen that which he ought to have taken reasonable measures to prevent.<sup>79</sup>

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Supra n.57 at p.350. The same considerations, he said applied to the loss of his clothes. See too Martin B. ibid., at p.350. A similar case is Cobb v. G.W. Rly Co. [1893] 1 Q.B. 459 (C/A). See especially ibid., at p.464, per Bowen L.J.

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[1948] 2 K.B. 48 (C/A).

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Ibid., at p.52. See too London Joint Stock Bank v. Macmillan [1918] A.C. 777 (H/L) where the drawer of a cheque who had so written the sum as to allow it to be readily altered was held liable to the bank for the amount of the forged increase. It was his duty, the House of Lords held, to guard against drawing cheques in such a way as to make this possible. In Weld-Blundell v. Stephens [1920] A.C. 956 (H/L), however, the plaintiff, who had

(footnote continued p. 199)

then he will be liable for the damages flowing therefrom.

A second, perhaps equally apparent, exception arises in this case the plaintiff's crops were damaged by rain where the intervention is the reasonable act of the plaintiff after the defendant was late in delivering a threshing or a third party. One example is Compania Naviera Maropan S.A. v. Bowaters.<sup>80</sup> In this case the defendant charterers nominated Lord Campbell C.J., that was a predictable item of loss. an unsafe part of loading but the master, trusting in the assurance of the defendants' pilot, entered the port with the result that the ship was damaged. There could be no recovery Clefabriker. The outbreak of World War II had meant that had the master acted unreasonably, said Hodson L.J., but here the defendants' ship had been commandeered en route by the Admiralty and diverted from her Swedish destination to Glasgow. his conduct was not to be condemned and so the claim was justified.<sup>81</sup>

The plaintiffs claimed the cost of transhipping her cargo to the agreed port, pleading that had unseaworthiness not delayed the vessel, she would have made her destination before hostilities commenced. The defendants answered that the delay was an intervening act was such as the defendant should have expected 'historically true but causally irrelevant', in the sense that

(footnote continued from p.198)

libelled various people in letters written to the defendant, could not recover the damages paid in a libel action, even though that action had only come about through the defendant's failure to ensure that the letters could not fall into the hands of others. McGregor thinks this reconcilable with Macmillan's case if libel, for 'no very clear reason' is treated as exceptional; op. cit., § p.119. Scrutton L.J., - more forthrightly - thinks them irreconcilable; Re Polemis supra n.51 at p.577.

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[1955] 2 All E.R. 241 (C/A).

81

Ibid., at p.252. See too Wilson v. The Newport Dock Co.

[1866] L.R. 1 Ex. 177.

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(1859) 1 El. & El. 602.



then he will be liable for the damages flowing therefrom. In this case the plaintiff's crops were damaged by rain after the defendant was late in delivering a threshing machine; the English climate being such as it is, said Lord Campbell C.J., that was a predictable item of loss.<sup>83</sup>

However, the landmark case on this facet of the law is generally taken to be Monarch S.S. Co. v. Karlshamns Oljefabriker.<sup>84</sup> The outbreak of World War II had meant that the defendants' ship had been commandeered en route by the Admiralty and diverted from her Swedish destination to Glasgow. The plaintiffs claimed the cost of transshipping her cargo to the agreed port, pleading that had unseaworthiness not delayed the vessel, she would have made her destination before hostilities commenced.<sup>85</sup> The defendants answered that the delay was 'historically true but causally irrelevant',<sup>86</sup> in the sense that the continued journey was really prevented by an act of the British Government. This defence their lordships rejected,

<sup>83</sup>

Supra n.82 at p.614.

<sup>84</sup>

[1949] 1 All E.R. 1; [1949] A.C. 196 (H/L). Citation is from the former report.

<sup>85</sup>

The intervening act thus gave rise to what we have called 'performance damages' (see chapter 5 pp.125-134). But the case is, of course, equally an authority for physical injury; see the cases mentioned in the text, infra p.201.

<sup>86</sup>

Supra n.84 at p.6, per Lord Porter.

Supra n.84 at p.7.

declaring, in a series of not unfamiliar phrases, that when the contract was made the parties contemplated the outbreak of war, and the consequent imposition of Admiralty restrictions as a 'real danger'<sup>87</sup> and as 'matter which commercially ought to be taken into account'.<sup>88</sup>

The essence of the judgment was then that the loss was contemplated, not because the defendants ever considered breaking their contract but because they must have appreciated that delay in performance might be aggravated by an outbreak of war. In this way they deprived the intervening act of its effect as a novus actus interveniens. Moreover, it was on these grounds that their lordships explained two earlier cases. The Wilhelm,<sup>89</sup> it was said, could be justified since the defendants must have realised that delay in sailing would result in the vessel being frozen in: A.P.C.M., Ltd v. Houlder Bros,<sup>90</sup> was also right since the torpedoing of a vessel while travelling overdue was not an event which could have been expected. Where breach is by delay, said Lord Porter, summing it up, it is 'the reasonable anticipation which matters'.<sup>91</sup>

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Supra n.84 at p.20, per Lord du Parq.

88

Ibid., at p.18, per Lord Uthwatt.

89

(1856) 14 L.T. 636.

90

(1917) 86 L.J.K.B. 1495.

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Supra n.84 at p.7.

### A Final Word

in the value of the cow as it was and as it should have been.

It was argued in the opening chapter (and we reminded ourselves of it at the beginning of this chapter) that a separate reliance interest appeared only when the claim consisted of what we subsequently referred to as 'losses never been made.

caused'. We might conveniently close our survey of this

topic by briefly re-examining the relationship which protection of this reliance interest bears to protection of the expectation interest.

It was argued in the Introduction<sup>92</sup> that, in total contrast to reliance expenditure a la Nurse v. Barns, these are reliance losses suffered only because the contract has been broken; so they are in a sense the only contractual losses which might properly be referred to as 'consequential'. This meant, it was pointed out, that there could be no possible 'inconsistency of compensation' about an award which protected both reliance and expectation interests.<sup>93</sup> Indeed, if the two

were not combined this would itself be an inconsistency, though one working in the opposite direction. For instance, it was shown to be inadequate to give the farmer, whose herd had been infected by his unwitting purchase of a diseased cow, only the difference

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Supra p. 12.

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For a discussion of this point in another context see the previous chapter pp. 155-166.



in the value of the cow as it was and as it should have been. It was also shown to be insufficient to compensate him only for the injuries he suffered, as this would merely be to put him in the position he would have been in had the contract never been made.

But these points seem not always to have been appreciated. In Jackson v. Watson,<sup>94</sup> for instance, the plaintiff claimed only for his out-of-pocket loss<sup>95</sup> and nothing beyond for the value of his bargain. This may be understandable (for the small amount involved would make the expectancy easily overlooked) but the fact remains that in this case, and apparently many of those like it,<sup>96</sup> the damages were incomplete. Street, however, points to one such case wherein the proper measure of damages was awarded. This was Andrews v. Hopkinson<sup>97</sup> where the plaintiff was injured when driving a vehicle warranted to

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Supra n.73.

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Including therein a sum representing the loss of his wife's services.

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This certainly seems to be so with those decisions cited supra n.74.

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[1957] 1 Q.B. 229.

be in a certain condition. He recovered compensation (i) for the injuries he sustained, and (ii) for the difference between the value of the car as it was and as it should have been. This, said the author, was the proper approach, since the plaintiff recovered damages 'for both reliance and expectation interests'.<sup>98</sup>

When the rule governing the measure of damages was first authoritatively stated, they contained no reference whatsoever to the question of fault. Indeed, Alderson B. stated, seemingly as an exhaustive proposition, that a contract-breaker should be liable only for such loss as arose "naturally" from the breach of contract, or such as he should reasonably have contemplated.

This failure to take cognizance of fault is surprising, not on ethical grounds alone, but because the Court of Exchequer reached its decision only after expressing a considerable debt to the Code Napoleon. Indeed, Parke B. referred to it arguendo as containing "the sensible rule"; the contract-breaker, he observed, is made liable only for the "damages foreseen"; but when the breach is deliberate or willful,

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Op. cit., p.245.

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Hadley v. Baxendale (1854) 9 Ex. 341, 349.

2

Ibid., at p.346. The relevant part of the Code is liv.iii., tit. iii nos. 349-51.

Chapter 7

THE QUESTION OF FAULT

When the rules governing the recovery of contract damages were first authoritatively stated, they contained no reference whatsoever to the question of fault. Instead, Alderson B. stated, seemingly as an exhaustive proposition, that a contract-breaker should be liable only for such loss as arose "naturally" from the breach of contract, or such as he should reasonably have contemplated.<sup>1</sup>

This failure to take cognizance of fault is surprising, not on ethical grounds alone, but because the Court of Exchequer reached its decision only after expressing a considerable debt to the Code Napoleon. Indeed, Parke B. referred to it arguendo as containing "the sensible rule"; the contract breaker, he observed, is made liable only for the "damages foreseen"; but when the breach is deliberate or wilful, he then becomes liable for all such loss as resulted "directly and immediately" from his non-performance".<sup>2</sup>

1

Hadley v. Baxendale (1854) 9 Ex 341, 354.

2

Ibid., at p.346. The relevant part of the Code is liv.iii, tit; iii ss. 1149 - 51.



ever say to the other: "I will not pay you the damage arising from my breach of contract." But this latter part of the Code's "sensible" formulation was not received into the body of the judgment. The purpose of this chapter is to see how far notions of fault have in fact intruded upon the "blameless" rule in Hadley v. Baxendale.

### 1. Fault on the Part of the Plaintiff

Fault is generally considered as relating only to the party who breaches the agreement. But fault might also concern the "innocent" party in that his conduct subsequent to the breach can augment the loss that he might otherwise have suffered. In this restricted sense then it is trite law to say that the notion of fault has long been a feature of contract damages: for what we know as the "duty to mitigate", or the "doctrine of avoidable consequences", is simply a refusal to allow recovery for any item of damage which the plaintiff ought to have prevented and for which he can be said to be substantially at fault.

But while we may now regard the doctrine of mitigation as part of the corpus juris, its acceptance by the courts passed through some stormy waters. In Smith v. McGuire,<sup>3</sup> for instance, Martin B. doubted whether a party who breaks a contract could

<sup>3</sup>

(1858) 2 H. & N. 554.

ever say to the other: "I will not pay you the damage arising from my breach of contract because you ought to have done something for the purpose of relieving me."<sup>4</sup> And again, in Dunlop v. Higgins,<sup>5</sup> when the defender disclaimed all responsibility for the pursuers' loss of resale profits, because, as he urged, the latter should have bought the contract goods in the market and thus completed the resale, Lord Cottenham asked rhetorically: "Were the pursuers bound to do this?"<sup>6</sup> He thought not, and so dismissed the defence.<sup>7</sup>

Behind these doubts, of course, lurked a natural disinclination to believe that the innocent party should have to burden himself for the benefit of a contract-breaker, and so save him from those damages which were, for all that they were avoidable, still the direct consequence of his breach. However, the natural antipathy to the recovery of avoidable loss by Co. of London [1912] A.C. 673 (H/L) ultimately proved the stronger force<sup>7</sup> (although it did take heed

See e.g. Roper v. Johnson (1873) L.R. 8 C.P. 167; Finlay v. Kirk Top Tong [1928] 2 K.B. 604 (C/A); Yetton v. Eastwoods [1966] 3 All E.R. 353.

<sup>4</sup> Supra n.3 at p.567. This was, however obiter dicta since the point at issue was whether a shipowner, deprived of an agreed cargo, ought (as it was held he must), to give credit for another actually obtained in substitution.

<sup>5</sup> plaintiff of a letter containing a returned bill. He was unable to proc (1848) 1 H.L.C. 381. he alleged, the normal postal deliveries

<sup>6</sup> did not afford time enough to inform the parties to the bill of its dish. Ibid., at p.402. the parties to the bill apparently lived close

<sup>7</sup> to the plaintiff, and a special messenger could have been sent off to This antipathy is well illustrated in an exchange between counsel and Coleridge J. in Speak v. Taylor (1894) 10 T.L.R. 224, 225. noted with mitigation.

(1853) 13 C.B. 353.

<sup>13</sup> See ibid., at p.365. A similar decision is Gainsford v. Carroll (1824) 2 B. & C. 624, where the plaintiff was not allowed to claim the higher price ruling at the date of judgment, because he ought to have resorted to the market at the date of non-delivery.

Gradually, an increasing number of cases took this of these earlier doubts by stressing (a) that the plaintiff approach as settled,<sup>8</sup> and by the relatively early date need do no more to save the defendant than is reasonable,<sup>8</sup> and (b) by placing the onus on the defendant to prove that prevailing English law - stated in general terms that no the plaintiff ought to have mitigated, and not on the man was entitled to any compensation for a loss which he plaintiff to show that he could not have done.)<sup>9</sup> Thus as might have avoided.<sup>10</sup> It was not, however, until British early as Hordern v. Dalton<sup>10</sup> Abbot C.J. laid it down as a Westinghouse Co. v. Underground Electric Rly Co. of London<sup>16</sup> basic rule that: "If you charge anybody with a loss arising that the doctrine of avoidable consequence received the stamp from mistake, you should show that no due diligence could have of high domestic approval. There are, Viscount Haldane<sup>11</sup> been used by you which might have prevented that loss".<sup>11</sup> observed, two basic principles in contract damages: the first And in a neat riposte to Dunlop v. Higgins, Maule J. is this, that the plaintiff is entitled to compensation for any peremptorily dismissed an identical claim in Peterson v. Ayre<sup>12</sup> pecuniary loss which flows naturally from the breach of on the ground that the plaintiff could and ought to have gone contract; but the second, a qualification to the first, is that into the market to purchase the relevant goods.<sup>13</sup> in that loss he shall recover for nothing which the prudent

<sup>8</sup>  
British Westinghouse Co. v. Underground Electric Rly Co. of London [1912] A.C. 673 (H/L).

<sup>9</sup>  
 See e.g. Roper v. Johnson (1873) L.R. 8 C.P. 167; Finlay v. Kwik Hoo Tong [1928] 2 K.B. 604 (C/A); Yetton v. Eastwoods [1966] 3 All E.R. 353.

<sup>10</sup>  
 (1824) 1 Car. & P. 181.

<sup>11</sup>  
Ibid., at p.182. The case concerned the delayed delivery to the plaintiff of a letter containing a returned bill. He was unable to procure payment because, he alleged, the normal postal deliveries did not afford time enough to inform the parties to the bill of its dishonour. But all the parties to the bill apparently lived close to the plaintiff, and a special messenger could have been sent off to give notice of the dishonour which would have saved its loss. The case, was, however, ultimately decided against the plaintiff on grounds unconnected with mitigation.

<sup>12</sup>  
 (1853) 13 C.B. 353.

<sup>13</sup>  
 See ibid., at p.365. A similar decision is Gainsford v. Carroll (1824) 2 B. & C. 624, where the plaintiff was not allowed to claim the higher price ruling at the date of judgment, because he ought to have resorted to the market at the date of non-delivery.



2. Gradually, an increasing number of cases took this approach as settled,<sup>14</sup> and by the relatively early date of 1874 the Indian Contract Act-derived entirely from prevailing English law - stated in general terms that no man was entitled to any compensation for a loss which he might have avoided.<sup>15</sup> It was not, however, until British Westinghouse Co. v. Underground Electric Rly Co. of London<sup>16</sup> that the doctrine of avoidable consequence received the stamp of high domestic approval. There are, Viscount Haldane observed, two basic principles in contract damages: the first is this, that the plaintiff is entitled to compensation for any pecuniary loss which flows naturally from the breach of contract; but the second, a qualification to the first, is that in that loss he shall recover for nothing which the prudent man could, and would, have avoided. The innocent party, his lordship concluded, is duty bound to take "all reasonable steps to mitigate the loss consequent on the breach".<sup>17</sup>

<sup>14</sup> footnote continued from p.209

See e.g. Harries v. Edmonds (1845) 1 C & K 686; Shaw v. Holland (1846) 15 M & W 136; Barrow v. Arnaud (1848) 8 Q.B. 595; Beckham v. Drake (1849) 2 H.L.C. 579; Hochster v. De la Tour (1853) 2 E. & B. 678; Brown v. Muller (1872) L.R. 7 Ex. 319.

<sup>15</sup>

Sec. 73 enacts that "in estimating the loss arising from a breach of contract, the means which existed of remedying the inconvenience must be taken into account." For an examination of the difficulties involved in elucidating the phrase "means which existed", see Pollock and Mulla, Indian Contracts and Specific Relief Acts (8th edit., 1957) p.467.

<sup>16</sup>

(1844) 8 Jur. 875.  
Supra n.8.

<sup>17</sup>

Ibid., at p.689. See similar statements by Lord Wrenbury in (footnote continued on p.210)

## 2. Fault on the Part of the Defendant

We turn now to consider the influence of fault in the area customarily associated with this problem, viz. whether the innocence or wilfulness of the breach has any bearing on the measure of the contract-breaker's liability. It may seem odd, and perhaps a little inconsistent, that while the common law has readily taken note of any fault attaching to the plaintiff, it has made no formal distinction, save in one exceptional situation, between an innocent and a wilful breach of contract. Indeed, in one of the two possible areas wherein such a distinction could be of any relevance, the House of Lords (as we shall presently see) has come out emphatically against such an approach.

### (i) Vindictive or Exemplary Damages

In the early case of Coppin v. Braithwaite<sup>18</sup> the plaintiff proved that before he had reached the agreed destination, he had been turned off the defendant's ferry "in a contemptuous manner".

(footnote continued from p.209)

Jamal v. Moola Dawood [1916] A.C. 175, 179, and Lord Parmoor in Hill v. Showell (1918) 87 L.J.K.B. 1106, 1115. Some of the more well-known cases wherein the doctrine of mitigation has been applied are: Payzu v. Saunders [1919] 2 K.B. 581 (C/A); Finlay v. Kwik Hoo Tong [1929] 1 K.B. 400 (C/A); Hounsditch Warehouse Co. v. Walker [1944] K.B. 879; Heaven & Kesterton v. Etablissements Francois Albiac [1956] 2 Lloyd's Rep. 316; Barnes v. P.L.A. [1957] 1 Lloyd's Rep. 486; Shindler v. Northern Raincoat Co. [1960] 2 All E.R. 239; Yetten v. Eastwood [1966] 3 All E.R. 353; Edwards v. Society of Graphical and Allied Trades [1970] 1 All E.R. 905.

<sup>18</sup>

(1844) 8 Jur. 875.



He lodged, therefore, a claim including a sum to "compensate" him for the manner of his breach. Parke B. accepted the plea: the plaintiff's ejection, he said, was the breach complained of, and the mode of that ejection was part of the evidence; "surely", his argument ran, "it would make a most material difference if the contract were broken because it would be inconvenient to carry him to his journey's end, and if he were turned out under circumstances of aggravation."<sup>19</sup>

This case stands alone. But there is a remarkable observation by Brett L.J. in Smith v. Day.<sup>20</sup> Herein the question devolved on the measure of damages applicable when one party had obtained an injunction to prevent the other from erecting certain buildings and had agreed to cover whatever loss the latter might have sustained. The judge noted that there was no question of the injunction having been obtained maliciously, but if it had "the court, I think, would act by analogy to the rule in the case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages."<sup>21</sup>

19

<sup>19</sup> Supra n.18 at p.877. Gurney B. agreed, while Alderson and Rolfe BB. delivered short concurring judgments.

20

(1882) 21 Ch. D. 421 (C/A).

21

Ibid., at p.428. Emphasis added.



This remarkable observation is not fortified by reference to authority, nor is the topic mentioned by Brett L.J.'s brethren. But he clearly took it as settled law. If this was the case (and it is entirely possible that in an early text-book, Theodore Sedgwick, and Lord Collyer in unreported decisions, and perhaps County Court cases the principle of Coppin v. Braithwaite was being acted upon) it was convincingly repudiated in Addis v. Gramophone Co.<sup>22</sup> In this case the plaintiff demonstrated that he had been wrongfully dismissed from his employment in a "harsh and humiliating way". He claimed compensation therefor. In tort, said Lord Atkinson, the courts are no doubt free to punish a wrongdoer by awarding vindictive or exemplary damages, but in contract the plaintiff can recover nothing beyond the profit he would have received had the contract been kept; to apply the principles of tort to cases of contract, he suggested, could produce nothing but confusion and uncertainty.<sup>23</sup>

22

[1909] A.C. 499 (H/L).

23

Ibid., at pp.494 and 496. He did agree however, that there could be two exceptions: (i) breach of contract of marriage, and (ii) actions against a banker for refusing to pay a customer's cheque when he is still in funds; ibid., at p.495. larger life interest of the persons named. The court refused to allow the plaintiff to be limited to the amount of his prejudice in the advowson, i.e., the value of the defendant's life interest, since the defendant was a wrongdoer and as the jury were not bound to fix the damages at the value of the living to him. Sonder v. Fletcher was not mentioned in the majority speeches.

25

Sedgwick, op cit., (5th edit., 1874) pp.242 - 3 and p.246. Case (footnote continued on p. 214)

permitting vindictive damages in tort but not contract, and

But to argue that exemplary damage cannot be awarded in contract simply because they can in tort seems to be a somewhat arid and inconsistent piece of reasoning. In an early text-book, Theodore Sedgwick, and Lord Collins in his powerful dissenting judgment in the Addis case itself, both observed that once exemplary damages were accepted as valid in tort "for example's sake and to prevent such offences in the future",<sup>24</sup> there could not in principle be any reason why they were not similarly applicable in contract. In each case, the argument ran, the line of compensation would have been overstepped and a wholly new standard introduced; "and if damages were to be allowed in civil actions between individuals from social or governmental considerations, the expediency of the rule in the one case is the same as in the other."<sup>25</sup> It can only be the forms of

action, Sedgwick went on to say, which offer any excuse for

<sup>24</sup>

<sup>26</sup> Supra n.22 at p.498, per Lord Collins quoting and approving Sedgwick, The Measure of Damages (8th edit., 1891) s.351. Lord Collins further cited in his favour Sondes v. Fletcher (1822) 5 B. & Ad. 835, where the plaintiff presented a living to the defendant, the latter agreeing to resign it when either of two named persons should be capable of taking it over. The defendant declined to resign and was held for the value of the larger life interest of the persons named. The court refused to allow the plaintiff to be limited to the amount of his prejudice in the advowson, i.e., the value of the defendant's life interest, since the defendant was a wrongdoer and so the jury were not bound to fix the damages at the value of the living to him. Sondes v. Fletcher was not mentioned in the majority speeches.

<sup>25</sup>

Sedgwick, op cit., (6th edit., 1874) pp.242 - 3 and p.246. One (footnote continued on p. 214)

permitting vindictive damages in tort but not contract, and once they are disposed of (which they were well before Addis v. Gramophone Co.)<sup>26</sup> there will remain no valid objection to allowing exemplary damages for a malicious breach of contract which does not apply to a wilful tort.<sup>27</sup>

Nowadays, of course, the issue is not wholly concluded by the Addis case since the House of Lords is entitled to disregard its past decisions. But Sedgwick and Lord Collins may still be deprived of a belated vindication, since the draft Contract Code of the United Kingdom would seek to endorse Addis v. Gramophone Co. and so provide it with statutory approval.<sup>28</sup>

(ii) Fault and the Recovery of Profit

The restrictions imposed by the Addis case (and potentially by statute) were directed solely at claims exceeding the

(footnote continued from p.213)

imagines that the edition quoted by Lord Collins, supra n.24, contained the same argument; unfortunately no copy is available to the writer.

26

The abolition of the forms of action, commenced by the Uniformity of Process Act, 1832, was completed by the Judicature Act, 1875.

27

Op cit., (6th edit.) pp.242-3.

28

Under the heading: "No award of damages beyond loss", sec. 433 reads: "Damages are not awarded for a breach of contract, however wilful, either as a punishment of the party in breach or as an example to others."



plaintiff's actual monetary loss. What we shall now look into is the question whether, even when he confines himself to his actual loss, the plaintiff can evade whatever restrictions might normally apply (most notably that the defendant must have contemplated the loss) by advancing the defendant's mala fides.

In one situation there is no doubt but that he can - for according to a hallowed rule, a purchaser of land cannot, except where fraud is present, claim for the loss of his bargain where the contract has gone off through the seller's failure to make out a good title. Flureau v. Thornhill<sup>29</sup> itself made no attempt to account for this restrictive doctrine, but Lord Hatherly later explained it as deriving from the difficulties and complications naturally involved in proving a title to English realty. The purchaser will appreciate this, he said, and 'taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title'.<sup>30</sup>

But the reasons for the rule in Flureau v. Thornhill are today no longer convincing,<sup>31</sup> and because of that, as well as for

<sup>29</sup> (1776) 2 Wm. Bl. 1078. See ibid., for Grey C.J.'s proviso as to fraud.

<sup>30</sup> Bain v. Fothergill (1874) L.R. 7 H.L. 158, 210-11. See to the same effect Day v. Singleton [1899] 2 Ch 320, 329 per Lindley L.J.

<sup>31</sup> The draft Code recommends its abolition; sec. 434.

its sharp divergence from established principles, modern courts have attempted to modify the position by expanding the original proviso as to fraud into the more flexible one of bad faith. So successful have they been, says one commentator, that the plaintiff is now assured of getting the value of his bargain even if he can do no more than show that the defendant failed 'to do his best' to obtain a title.<sup>32</sup>

But if beyond Flureau v. Thornhill there is no formal distinction made between a breach of contract committed bona or mala fide, there is nonetheless much to suggest that in the application of the contemplation formula (which of course is never an issue under Flureau v. Thornhill) the courts are considerably influenced by the degree of fault attaching to the defendant. Certainly in the United States, as both Bauer<sup>33</sup> and McCormick<sup>34</sup> have shown, the courts have never shrunk from drawing

<sup>32</sup> McCormick, op. cit., pp. 684 and 686. He cited as examples: Day v. Singleton [1899] 2 Ch. 320 (C/A); Daniel v. Vassall [1917] 2 Ch. 405; Braybrooks v. Whaley [1919] 1 K.B. 435. The same general point is made by McGregor, op. cit., § 446-50.

<sup>33</sup> 'Consequential Damages in Contract' (1932) 80 U.P.L.R. 687. The author has also chronicled an impressive number of cases where the 'rules' of certainty and causation have plainly been tempered, in tort as well as in contract, to meet the wilfulness of the wrong; 'The Degree of Moral Fault as Affecting Liability' (1933) 81 U.P.L.R. 586.

<sup>34</sup> Ibid.  
<sup>38</sup> Op. cit., p. 575.

[1905] A.C. 513 (H/L).  
<sup>39</sup> Ibid., at p. 523.

attention to the wilfulness of the defendant or from deliberately contrasting an innocent with a wilful breach.

English cases reflecting the same approach have generally been scarce but two at least, with the possibilities of a third, demand attention. In one early authority, Mann v. The General Steam Navigation Co.<sup>35</sup> a carrier was held not to be responsible for the profits lost through delay in delivering certain parcels, mainly because he was unaware of their contents.<sup>36</sup> Pollock C.B., however, noted that: 'The case was never put to the jury as a case of fraud or mala fides; it could not be so considered',<sup>37</sup> indicating that had these elements been present then the plaintiff's lack of knowledge, and hence his contemplation of loss, might not have been such an obstacle. Lord McNaughten too made some trenchant observation in Stroms Bruks Aktie Bolag v. Hutchison,<sup>38</sup> first declaring that 'this is not a case like many in the books where a carrier is bound to accept the goods and some unforeseen accident by land or sea has prevented due delivery. It is a case where persons free to contract or not to have deliberately made a bargain and deliberately broken it for their own convenience',<sup>39</sup>

<sup>35</sup> number of cases in which the decision was plainly

(1856) 26 L.T. (O.S.) 247.

<sup>36</sup> Ibid., at p. 527.

<sup>37</sup> Ibid., at p. 211.

<sup>38</sup> [1905] A.C. 515 (H/L).

<sup>39</sup> Ibid., at p. 523.



influenced by the defendant's good or bad faith. In and finally concluding that 'the courts ought not to be Hadley v. Baxendale itself the breach was never a astute in defeating an honest claim in favour of persons deliberate one (damages for the plaintiff naturally who have wilfully disregarded their obligations'.<sup>40</sup> But<sup>43</sup> protested that this could not affect his client's claim) here again, as with Mann's case before, the decision and neither was it in those other famous decisions where ultimately went on impeccably orthodox grounds.

loss of profits were not recovered: British Columbia  
The third possibility arises from a suggestion by Saw Mill Co. v. Nettleship and Borne v. Midland Rly Co.<sup>45</sup>  
Bramwell B. in Gee v. Lancashire & Yorkshire Rly Co.<sup>41</sup>

More than this, just the same correlation holds good on He said that notice of special circumstances given to the the other side of the line. For in Hall v. Plim and The defendant, after the contract has been made, and during its Heron II where profits were recovered the defendant was performance, might well entitle the plaintiff to say to him: deliberately in breach. There is indeed even more to this 'If you, after that notice, persist in breaking the contract, second case, since their lordships expressly overturned an I shall claim the damages which will result from the breach'.<sup>42</sup> earlier case adopting a restricted measure of damages; Since it is difficult to see how such a notice could rationally but would they have done so had the breach been an innocent be given as effective to an innocent contract-breaker, we may one? In the lower court, at any rate, Salmon L.J. was keen assume (as the language justifies us in assuming) that Bramwell to stress the propriety of finding for the plaintiff where, B. had only in mind the party who breaks his contract mala fide. as in this case, the party in breach deliberately chose to Indeed, in Gee v. Lancashire & Yorkshire Rly Co. itself, notice break the contract and run the risk in order to make money.' had been given out-of-time and was held insufficient in circumstances which betray no indications of wilfulness.

(1854) 9 Ex. 341, 345.  
44 Even when we look at what the judges actually do, we find a (1868) L.R. 3 C.P. 499.  
significant number of cases in which the decision was plainly (1873) L.R. 8 C.P. 131; affg. (1872) L.R. 7 C.P. 583.  
The Arpad [1934] P.189 (C/A) also concerned an innocent breach  
40 of contract.  
45 Supra n.38 at p.527.  
41 [1928] All E.R. Rep. 763 (H/L).  
47 (1860) 6 H. & N. 211.  
42 [1967] 3 All E.R. 686 (H/L).  
48 Ibid., at p.218.  
The Parana (1877) 2 P.D. 118 (C/A), itself a case of an innocent breach.  
49 The Heron II [1966] 2 All E.R. 593, 610.

influenced by the defendant's good or bad faith. In

Hadley v. Baxendale itself the breach was never a

deliberate one (counsel for the plaintiff naturally

protested that this could not affect his client's claim)<sup>43</sup>

and neither was it in those other famous decisions where

loss of profits were not recovered: British Columbia

Saw Mill Co. v. Nettleship<sup>44</sup> and Horne v. Midland Rly Co.<sup>45</sup>

More than this, just the same correlation holds good on

the other side of the line. For in Hall v. Pim<sup>46</sup> and The

Heron II<sup>47</sup> where profits were recovered the defendant was

deliberately in breach. There is indeed even more to this

second case, since their lordships expressly overturned an

earlier case adopting a restricted measure of damages;<sup>48</sup>

but would they have done so had the breach been an innocent

one? In the lower court, at any rate, Salmon L.J. was keen

to stress the propriety of finding for the plaintiff 'where,

as in this case, the party in breach deliberately chose to

break the contract and run the risk in order to make money.'<sup>49</sup>

<sup>43</sup> See Donat, Loix Civiles (1705) book (iii) tit 5, sec.

(ii) p. (1854) 9 Ex. 341, 345.

<sup>44</sup> (1868) L.R. 3 C.P. 499.

<sup>45</sup> (1873) L.R. 8 C.P. 131; affg. (1872) L.R. 7 C.P. 583.

The Arpad [1934] P.189 (C/A) also concerned an innocent breach of contract.

<sup>46</sup> [1928] All E.R. Rep. 763 (H/L).

<sup>47</sup> [1967] 3 All E.R. 686 (H/L).

<sup>48</sup> The Parana (1877) 2 P.D. 118 (C/A), itself a case of an innocent breach.

<sup>49</sup> The Heron II [1966] 2 All E.R. 593, 610.

There is then considerable evidence to suggest that in determining the measure of damages the courts are keenly influenced by the degree of fault attaching to the defendant. And in principle there is no good reason why this should not be so: the contemplation formula, after all, was first designed as a way of securing a 'just decision',<sup>50</sup> but what is a 'just decision' will naturally vary with the circumstances, including good or bad faith in the defendant. If then our courts gave formal recognition to what appears to be their actual practice, and stated as law that the man who deliberately breaks faith should be held to the full amount of consequential loss regardless of what he contemplated, we shall then, as McCormick has said 'have completed the process, begun piecemeal in Hadley v. Baxendale, of borrowing from the French Civil Code its theory of damages in contract'.<sup>51</sup>

<sup>50</sup> See Domat, Loix Civiles (1705) book (iii) tit 5, sec. (ii) para 2.

<sup>51</sup> McCormick, C.T. Op. cit., p.581.

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