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## **HADLEY V. BAXENDALE: STILL CRAZY AFTER ALL THESE YEARS?**

### **Panelists**

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*Allan C. Hutchinson*§  
*Roy Ryden Anderson*\*\*  
*Florian Faust*↑↑

### **Edited by**

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*The following discussion about Hadley v. Baxendale<sup>1</sup> took place on June 8, 2004, at the Conference on “The Common Law of Contracts as a World Force in Two Ages of Revolution,” held at the Oxstalls Campus of the University of Gloucestershire, in Gloucester, England.<sup>2</sup> The Conference marked the 150th anniversary of Hadley. The following discussion was intended to be a free-ranging exploration of Hadley, its rule, its role in legal pedagogy, and its likely future. Participants at the Conference were invited to participate in the discussion.*

**JOE SPURLOCK:** This Conference has been quite an eye-opener for me. Most of my life, as a practicing lawyer, politician, and judge, I expected academics and scholars to live in those ivory towers we all hear about. Over the last fifteen years, as a contracts professor, I have learned that this is not true. We don’t always live in ivory towers, we sometimes live in hovels, just like everybody else. But to a certain extent scholars are much like judges. You sit in your cloisters or cells, and you do your research and writing, and then it is only on occasions like this that you get a chance to get together and really share ideas.

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1. 156 Eng. Rep. 145 (Ex. 1854).

2. The Conference was jointly sponsored by the Texas Wesleyan University School of Law, the Faculty of Law of the University of Gloucestershire, and the Central Gloucester Initiative.

The only formal speaker we are going to have is Dr. Florian Faust, who is with us from Germany. The rule of *Hadley v. Baxendale* is found in virtually all common law countries and is, in a somewhat different form, found in the law of many other countries through the influence of Pothier and the French Civil Code.<sup>3</sup> But Dr. Faust comes to us from a land without *Hadley v. Baxendale*, or as I said to him, the “island of Germany” within the European Union, and is perhaps in contrast to both the civil and common law worlds. I asked him to tell us what would a world without *Hadley* be like?

FLORIAN FAUST: I think it would be a happy world. First let me come back to the “island”—I do not think that is quite correct. Austria and Switzerland are also part of the island. But even the French are not so far from it as we may think.

We have heard that the rule of *Hadley v. Baxendale* comes from Pothier,<sup>4</sup> and Article 1150 of the French Civil Code,<sup>5</sup> and the French are, of course, very proud of it. If you read the standard French dissertation on the foreseeability rule, by Isabelle Souleau,<sup>6</sup> you get the impression that all countries which don’t have this rule are somewhat dubious, but if you actually look at the role the rule plays in French legal practice, it is very small. The French literature even says that courts have classified actions as tortious in order to avoid the foreseeability rule,<sup>7</sup> because they don’t like it. My point is that obviously it is in the French code, but it is not considered as something very important. By the way, an interesting point is that you find, in French standard contract literature, a claim that the British have given up that rule. I traced it back. The notion comes from a dissertation where the writer mixed up another case<sup>8</sup> with contract damages.<sup>9</sup> From this dissertation, it got into two other books,<sup>10</sup> which cited to the first one, and from them it got into one of the standard contracts textbooks without any sources being given<sup>11</sup>—and there it has been now for many years, and they say, “Well, the British have given up that.”

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3. Joseph M. Perillo, *Robert J. Pothier’s Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267 (2005).

4. *Id.* at 272.

5. FRENCH C. CIV. art. 1150.

6. Souleau, Isabelle, *La prévisibilité du dommage contractuel*, dissertation Université Paris II, 1979, xeroxed.

7. Mazeaud, Henri/Mazeaud, Léon/Mazeaud, Jean/Chabas, François, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, vol. 3/1, 6th ed. Paris 1978, no. 2391; Roujou de Boubée, Marie-Eve, *Essai sur la notion de réparation*, Paris 1974, p. 309.

8. *Weld-Blundell v. Stephens*, [1920] A.C. 956 (H.L.).

9. *Roujou de Boubée* (supra n. 13), p. 309–10.

10. Chartier, Yves, *La réparation du préjudice dans la responsabilité civile*, Paris 1983, no. 91 n. 719; Souleau (supra n. 12), p. 266 n. 1.

11. Malaurie, Philippe/Aynès, Laurent, *Cours de droit civil*, vol. 6: Les obligations, 5th ed. Paris 1994, no. 839.

The next point to clarify is that the Germans *do* have the foreseeability rule with regard to international contracts. The rule, as part of the CISG,<sup>12</sup> and before of the Hague Convention,<sup>13</sup> has been in force in Germany for more than 30 years. The law on international commercial contracts of the former German Democratic Republic contained the foreseeability rule as well.<sup>14</sup>

I would like to talk a little bit about how it got into the CISG, because I think that is rather interesting. The origins of the CISG go back to the 1920s, and it was an idea of Ernst Rabel, a famous German lawyer. When they started thinking about how to make this international sales law, it was clear from the outset that the foreseeability rule was going to be incorporated. It was especially Ernst Rabel and the other German lawyers who wanted to have that rule included. I think that is partly because of the idea that the grass is always greener on the other side of the fence. The Germans were proud of knowing this English rule, and they wanted to keep it, and of course the English and the French did not disagree. So it was clear from the outset, from 1930, that this rule was going to be part of the international sales law. Whether or not it is a sensible rule was never considered until the late 1950s, when the draft of the Hague Convention was sent out to the different national governments for comments. The Portuguese government wrote back: "Let's cancel that rule out, it does not make any sense." So people suddenly started to think, is it a good rule or not? And it seems that there were, at this time, at least some serious doubts. But everybody said: "Well, now it's too late to think about that. If we cut it out now, we will have to start all over again. So let's just close our eyes and go our way."<sup>15</sup> Before the adoption of CISG, it was not even discussed whether the rule made sense.

However, the issue *was* thoroughly discussed when the German codes in the 19th century were drafted, not with regard to the German Civil Code but to the commercial code. At that time, both lawyers and merchants who drafted the commercial code opposed this rule very strongly. Perhaps that fits the fact that, as we heard today, at the special jury in the trial of the *Hadley v. Baxendale* case, the merchants awarded £25 of damages. In Germany the opinion of the merchants was that there are not only the Baxendales of this world, but there are also the Hadleys. The question is whether this loss is to be borne by the Hadleys or by the Baxendales? So we have one party at fault

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12. The United Nations Convention on Contracts for the International Sale of Goods, Art. 74 cl. 2.

13. Uniform Law on the International Sale of Goods, Art. 82, 86 (1964).

14. Gesetz über internationale Wirtschaftsverträge (Gesetzblatt der Deutschen demokratischen Republik 1976 I, p. 61), § 297.

15. See *Faust, Florian*, Die Vorhersehbarkeit des Schadens gemäß Art. 74 S. 2 UN-Kaufrecht (CISG), Tübingen 1996, p. 61-62.

(Baxendale), and one innocent party (the Hadleys), and it was common opinion that the innocent party should be made whole. That was the first reason. The second reason, in the 19th century, was that it is not always possible to give notice. There may be cases where the future plaintiff himself does not know of the possible loss, and this should not bar recovery. Also many merchants considered it inappropriate to have to reveal their own business plans and dealings to the other party just in order to get full recovery, so they should be permitted to keep some things secret. The last reason for rejecting the rule was that damages should not be calculable in advance, because that would encourage people to break contracts intentionally, and that is something bad.<sup>16</sup>

I think the basis of all of it is perhaps a fundamentally different notion of what a contract is. For a German, the idea of efficient breach is something extremely dubious. For us, contracts are there to keep them, to perform them, and not to decide whether to perform them or to pay damages. Therefore, our standard remedy is specific performance, not damages. So damages really are the last resort, not the first one.

Even more important, we have no strict liability in contract law. So in order to have to pay damages, the defendant must be at fault. In fact, the fault principle and the principle of full recovery are regarded as two sides of the same coin. When in the 1980s people considered a revision of the German Civil Code, one eminent law professor, Ulrich Huber, proposed the foreseeability rule, but explicitly so because he wanted to introduce strict liability in contract law.<sup>17</sup> Ultimately, strict liability was not introduced, and therefore, foreseeability was not introduced either.

The priority of specific performance is nothing specific to German law. If you look at the new EC consumer sales directive,<sup>18</sup> it is more or less the same thing: if the goods are defective, the primary remedy is specific performance. So you have a right to get another TV set without defect, or to have the defective TV set repaired. Only if the seller does not repair or replace the defective goods, you can cancel the contract or get a price deduction. But the whole directive does not say a word about damages, because obviously they are not consid-

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16. *Jakobs, Horst Heinrich/Schubert, Werner*, Die Beratung des Bürgerlichen Gesetzbuchs in systematischer Zusammenstellung der unveröffentlichten Quellen – Recht der Schuldverhältnisse I, Berlin, New York 1978, p. 978 ff.

17. *Huber, Ulrich*: Leistungsstörungen – Empfiehlt sich die Einführung eines Leistungsstörungsrechts nach dem Vorbild des Einheitlichen Kaufgesetzes? Welche Änderungen im Gesetzestext und welche praktischen Auswirkungen im Schuldrecht würden sich dabei ergeben?, in: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, hrsg. vom Bundesminister der Justiz, vol. 1, Köln 1981, p. 647 (729).

18. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Official Journal L 171 of 07/07/1999, p. 12–16.

ered as a vital remedy. So the different national states are free whether or not to provide a damage award.

I think that is the most important ideological basis for the rejection of the foreseeability rule. We think of a contract as something which has to be performed, and if it is not performed, you have to grant full compensation.

In the 19th century Germans considered a sort of substitute rule for the foreseeability rule, which finally made its way into the code, but it is, as a practical matter, not very important. That relates to something we talked about yesterday; the mitigation principle.<sup>19</sup> In fact, if we wanted not to grant full compensation, we would do it under the mitigation principle, and our code explicitly says that the defendant is required to give prior notice to the other party if he risks incurring especially high damages,<sup>20</sup> so to make the other party aware that he or she has to be very careful in performing the contract.

If we look at this kind of rule and compare it with the foreseeability rule, I think it has several advantages. First, you can use it for contract and tort at the same time. Second, the risk of damage which is unforeseeable to both parties is borne by the defendant, not by the plaintiff. Third, because it is a question of mitigation, you have only to give notice if there is a reasonable probability that this notice will alter the other party's behavior. So you do not have to give notice merely to get full compensation afterwards in cases like standard transactions, where it is completely clear that this notice won't have any effect on the level of care the other party observes. Fourth, the notice need not be given at the time the contract is made but only at the time before the breach or the tort. So the other party always has to adjust his or her behavior to his or her present state of knowledge and not to the state of knowledge perhaps of three months ago when the contract was made. So I think that this in fact is the better rule, although it has not been put very much in operation.

To conclude, I would like to make one remark which perhaps also explains why Germany does not have the foreseeability rule. I hope you will forgive me the remark, but something which strikes me about this Conference, as a German lawyer, is that we have heard I think about eighteen talks about and around *Hadley v. Baxendale*, but none of those talks has dealt with the application of the rule. Nobody has talked about what the foreseeability rule actually says. When is a certain kind of damage foreseeable? What has to be foreseeable, the extent of the damage, the amount, or the kind of damage? What is the level of probability required to make any kind of damage foreseeable?

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19. David Campbell, *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 TEX. WESLEYAN L. REV. 455 (2005).

20. BGB (German Civil Code) § 254 par. 2 cl. 1.

I have a suspicion that in fact this is considered one of the biggest advantages of this rule in common law: nobody knows what the law actually says and therefore, you can do anything you want with it. As Robert Dunn said in his book on the recovery of damages for lost profits, the rule is merely a “makeweight to a decision based on adequate independent grounds.”<sup>21</sup> So I have the impression that the courts can require any kind of probability they want, and if that does not help, they pull the “tacit agreement” test out of the hat and say: “There is a tacit agreement required, and therefore we want to deny that recovery.”

That would be an idea very repugnant to a German lawyer, because it means giving the judges lots of discretion. (Of course our judges have some discretion too, but that is something you must not talk about in public.) We have the idea that predictability is of very high value, and that judges are merely the mouth of the law, certainly not an individual person who brings in his or her own conceptions of how the world should be. We don’t even know the names of our Supreme Court judges; I think ninety percent of the law students could not name a single Supreme Court judge in Germany. Therefore, we are looking for a rule which gives certainty, and that is certainly not the foreseeability rule.

Also, from an economic viewpoint, I think a rule which gives certainty would be much better. As Ayres and Gertner put it, contract law operates as penalty default rules which simply make the parties contract around and find the rule which is best for their contract.<sup>22</sup> As such a penalty default rule, one should choose a clear rule with which everybody knows where he or she stands, rather than a rule the meaning of which you will only know once the court has decided.

I am sorry for criticizing heavily the common law, but I guess that is partly what I am here for.

SPURLOCK: Before we respond, let me clear up something for Florian. He says that in Germany they view judges as the mouth of the law. As we know here, in our common law system judges are considered to be the *oracles* of the law; that is, those people in which all wisdom resides, and therefore, much like the Oracle of Delphi we give you cryptic pronouncements that we expect you somehow to make sense of. Allan?

ALLAN HUTCHINSON: Yogi Berra had a lot of wisdom to say about the law, and one of his reputed lines was: “Prediction is very difficult, especially about the future.”<sup>23</sup> [Laughter] This strikes me as

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21. 1 ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS § 1.19 (4th ed. 1992).

22. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

23. Oddly enough, this line has been attributed both to Berra, an American baseball player famous for his curious locations, see CHRISTOPHER WILLS, YELLOW FE-

saying a lot about law. But as my first line went down well, I will give another, which somehow connects with what Florian said. There was a popular commentator in England, who was asked to explain what football is, or what soccer is. He gave a rather elaborate explanation, but it ended like this: “Football is a simple game where twenty-two players play against each other and in the end Germany wins.”<sup>24</sup> [Laughter]

That is one English joke about Germany I am comfortable telling. It is a story where Germany comes out ahead, and Florian thinks that would be the same with the German legal system. I know nothing about Germany, so I speak with no authority on these matters. But I would like to make a couple of comments about what Florian said.

The first is how different really is German law to Anglo-American law in this sense? It is very dangerous, I think, to look at an isolated rule and say: “Well, we don’t have that rule. Therefore, our system works differently.” It seems to me that one needs to look at the whole of the system. One would need to know more about it. Some of these things have been mentioned. Florian says: “Well, we don’t have strict liability, we have fault.” But he also says that there is a lot in there that starts to counterweight that. There is the principle of mitigation. There is causation—we might want to look at German causation rules about how one connects events, whether one can claim this or that kind of particular damages that result from the contract. I think that before we can make that assessment of whether German law is truly different in the *Hadley v. Baxendale* situation, we would have to look at the whole system. That is point number one.

The second point is that if we really wanted to know whether German law was different, we could not just stop by looking at the books. We have a habit of saying “if you look at the books of English law it is this way, if you look at the books of German law it is this way.” But what we have to look at is what are the *damages* actually given out across the board by German courts as compared to American or English courts.

I have no answer to that. But I don’t think it will be much different at the end of the day, when we assess what is actually going on. It may

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VER, BLACK GODDESS: THE COEVOLUTION OF PEOPLE AND PLAGUES 245 (Addison-Wesley 1996) (quoting Yogi Berra) (“Predicting things is hard, especially about the future”), and to the Nobel-winning physicist Niels Bohr, see BARRY B. HUGHES, INTERNATIONAL FUTURES: CHOICES IN THE FACE OF UNCERTAINTY 7 (3d ed. 1999). Berra is also credited with slightly different versions. See, e.g., DAVID BRIN, PH.D., THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? 263 (1998) (“I never make predictions, especially about the future.”); Robert Perloff, *Playing the Hand That’s Dealt You: My Life and Times (So Far) as a Psychologist*, in ACADEMIC PATHS: CAREER DECISIONS AND EXPERIENCES OF PSYCHOLOGISTS 121, 134 (Peter A. Keller ed., 1994) (“Don’t make predictions, especially about the future.”).

24. There are various, slightly different versions of this quotation. All attributed to former England striker Gary Lineker, usually with respect to the 1996 World Cup.



well be different, but not *significantly* different across the board. It seems to me to do this kind of comparative work, which I think is vitally important, we need to do more—dare I say—empirical studies about this kind of material. But these will need to be real empirical studies about what actually happens in the courts. So one needs to look at that.

And one question that Florian flagged—which presumably we could turn around on German law—is not so much what does *Hadley v. Baxendale* say, but what does *Hadley v. Baxendale* demand? At this point it is very difficult to say what it demands. To my mind that is why it has been around for 150 years. It can be used by different people for different things.

I said, when I presented the other day,<sup>25</sup> that *Hadley v. Baxendale* is number two in the English common law hit parade, and number one is *Donoghue v. Stevenson*.<sup>26</sup> *Donoghue v. Stevenson* is a wonderful case. It says basically nothing about the duty of care relationship.<sup>27</sup> That is part of its appeal; the fact we can't nail down what it says, and it does give rise to lots of different decisions.

Another point, relating to one of the questions Joe asked, and still asks,<sup>28</sup> is what might have happened if there had been no *Hadley v. Baxendale*. I have been reading a book about a genre of history called “the might have been”—it's probably got another title<sup>29</sup>—but the

25. Allan C. Hutchinson, *Work-In-Progress: Evolution and Common Law*, 11 TEX. WESLEYAN L. REV. 253 (2005).

26. [1932] A.C. 562 (H.L.) (involving personal injuries to customer who found remains of a snail in a soft drink). Professor Hutchinson, a noted torts scholar, may be perhaps carried away into hyperbole by his enthusiasm, at least so far as the United States is concerned. A quick check of LEXIS shows that *Donoghue* has been mentioned 138 times in the general law review database, while *Hadley* is mentioned 548 times. In the courts, *Hadley*'s dominance is even greater; *Donoghue* has been cited in twenty-six opinions, compared to 1,506 for *Hadley*. Plus, *Hadley* is the only important common law case to give its name to a porn movie actor. See BEHIND THE GREEN DOOR (Mitchell Bros. 1972) (co-starring Hadley V. Baxendale). There are also reportedly seventeen people in the United States named “Hadley V. Baxendale.” See E-mail from Jim Gordon to AALS Contracts Listserve (Nov. 21, 2003) (on file with the Texas Wesleyan Law Review). There does not seem to be anyone named *Donoghue V. Stevenson*.

27. Lord Atkin's famous language is as follows:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

*Donoghue*, [1932] A.C. at 580. According to the late Dean Prosser, “As a formula this is so vague as to have little meaning, and as a guide to decision it has had no value at all.” WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 326 (4th ed. 1971).

28. Perillo, *supra* note 3, at 267-90.

29. This is sometimes called “Alternative History.”

question is “what if this had not happened”? What would things be like? I have not read all the book yet. One of its examples is, what if Margaret Thatcher had been killed by the bomb in Brighton in the late Seventies? What would have been different? What if Hitler had been killed as a child—had stepped off the curb one day and was killed in a road accident. Would history be different?

Well, this is a similar kind of question. What would have happened if the shaft had not broken? If there had been a different group of people on the jury.

My response is that I can't believe that everything turned on those particular events. I understand the idea of the butterfly effect in chaos theory: if you just change the flapping of a butterfly's wing, everything will change throughout the world. But I have difficulty with that. If there had not been *Hadley v. Baxendale*, there would have been something else. Even the most formalistic lawyer has to believe that material forces have *some* impact upon the kind of laws we get. It can't just be happenstance that this case came along, and but for this case the rule would have been something different. My view is that if it had not been *Hadley v. Baxendale*, it would have been another case. The facts or the language might have been slightly different. Even the result in the case might have been different. But we would have ended up in much the same place that we are now. We have to be careful about isolating these decisions. If you realize that *Hadley v. Baxendale* rule is pretty vague, anyway, another rule may not have led to that many different results.

Finally, the big question to which this speaks is the relationship between law and society. How do we try and understand the relationship between the *laws* we have and the *society* of which we are a part? We get easily trapped in our little boxes, whether as German lawyers or English lawyers, into believing that things had to be the way they are. This seems to me rather silly. First, it is even hard to think about law and society as separate in order to even ask the question, “How does one influence the other?” It's hard to imagine what our society would look like if you pulled law out—it's like talking about a body without a skeleton.

To move from the ridiculous to the sublime, we spent this afternoon doing what all lawyers do so well, and which I can do with the best of them, when we were slicing and dicing the *Gateway* case.<sup>30</sup> I want to go to the other extreme and ask how we answer the question: “Do certain substantive material and social conditions demand certain particular legal forms?” That is a very big and abstract question. It seems to me that this kind of discussion can lead to that. We have a belief, I think, that certain material conditions give rise to and demand

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30. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). See also *Relational Contracting in The Digital Age* 11 TEX. WESLEYAN L. REV. 675 (2005).

certain legal forms. But if one looks at Germany, England, and the U.S., it is hard to imagine that having or not having *Hadley v. Baxendale* would have a big effect on the kind of economic or commercial world in which we live.

As lawyers, we seem to think that certain legal forms are important, that they are demanded by the economic realities. When I listen to the kind of presentation that Florian makes, I am persuaded that we need to break away from that kind of thinking. One, we are not really that important as lawyers. Two, contract law is only a kind of default regime which people can negotiate around as much as they want. Three, even if we switch the rules around, things will tend to come out in a similar way because there are larger forces at work.

Now, this does not apply to everything. There is a big argument in Anglo-American law about whether the corporate form was necessary to advance the capitalist agenda, particularly at the end of the nineteenth century. Some people argue that the capitalist economic revolution could not have occurred without the corporate form. I sometimes think that. But I often think that it would have happened some way or another. I can't believe that not having the corporate form would have brought an end to the capitalist advance.

That makes me think there is no necessary connection between the society we have and the laws we have. There are obviously some general connections about contracts and the like, but the particular details of laws we have are not as significant as we, as lawyers, like to think they are. This should chastise us to some extent, that when we do start arguing about *Gateway* and other such cases—and I am part of that, though I don't really do contract law—sometimes we should think that is an indulgence on our part about details. We should step back and think about the bigger picture, because that is going to have much more of an effect than how exactly we decide particular cases.

SPURLOCK: Roy?

ROY ANDERSON: I certainly agree with Allan that given the time and circumstances, *Hadley v. Baxendale*, or some case like it, was inevitable. *Hadley v. Baxendale* was primarily about controlling jury discretion, and as Florian talked with us it occurred to me that he may well be pulling our leg a bit and having some fun. I would love to be a fly on the wall, maybe on the plane home, when the light comes along and he says: "I'll be damned. I think it really is *that*." What "that" is, is coming up with a device for controlling unbridled *jury* discretion and making damage awards, which is not a problem in Germany.

We had a very good question on the panel that I moderated yesterday, which was what should the jury charge in *Hadley* have been. That led us into various permutations of knowledge and refining that and playing that, much like the British courts did when they started deciding what *Hadley v. Baxendale* meant. They came up with the

*Victoria Laundry* case,<sup>31</sup> and we got standards like “very likely” and “not likely” and all that.<sup>32</sup> All of it being gibberish. I think Baron Alderson, if you got an extra pint or two in for him, would have said the proper instruction is, “Go back and do it again and I will tell you when you have it right.”<sup>33</sup>

That is the problem I have with *Hadley v. Baxendale*. We focus very much on its limiting principle, the foreseeability standard. But I was telling my new friend Andrew Tettenborn, before he took off, that I thought he was really into something yesterday.<sup>34</sup> We were a little hard on him at his presentation, but he was a little hard on us, too. I think he was extrapolating a lot, but *Hadley v. Baxendale* would be a beautiful principle if you want to reform tort law, which we need to do in the U.S. I would like to inject that case into tort law, and I think it would produce a lot more sensible results than we are currently getting.

Having said that, I think it is a wimpy standard for a whole lot of contracts. Certainly if you do U.C.C.<sup>35</sup> work in contracts for the sale of goods, *Hadley v. Baxendale* is not even a speed bump on the way to recovering remote damages. The reason is that where a standard commercial party deals with another commercial party, selling commercial goods, he has got all the reason to know that if he breaches, there is going to be some economic loss. Assuming you can get around the standard consequential damages disclaimer—which ain’t that hard, particularly if you have a wilful breach or a seller that will not honor the agreed remedy—we are told by most of the courts that the *quantum* of that loss is absolutely irrelevant, and therefore, the breacher is liable for the sun, the moon, and the stars. The only thing standing in the way of that is not a legal principle, it is the judge.

I learned this from a couple of trials I was involved in. Honestly, the only reason I am not retired on that small island in the Caribbean that I want to buy, is that in both cases the trial judge would not give us a jury instruction on foreseeability. I have forgotten now how many trillion dollars we were after—the value of the business—but I promise you there was plenty of causation. Mitigation was absolutely impossible. There it was—we had it made. And the only thing standing between us and that money was the judge. Did I mention that we lost?

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31. *Victoria Laundry (Windsor), Ltd. v. Newman Indus., Ltd.*, [1949] 1 All E.R. 997 (K.B.).

32. *Id.* at 1004 (“[T]he true criterion is surely not what was bound ‘necessarily’ to result, but what was likely or liable to do so . . . .”).

33. *But see* Franklin G. Snyder, *Baron Alderson and His Times*, (forthcoming) (Alderson repeatedly denied that judges had discretion to make law, and this was firmly rooted in his Anglican theology).

34. Andrew Tettenborn, *Hadley v. Baxendale: Contract Doctrine or Compensation Rule?*, 11 TEX. WESLEYAN L. REV. 505 (2005).

35. UNIF. COMMERCIAL CODE (Article 2 of the code covers sales of goods.).

When I go back to the ivory tower though, I know I just ran into a pretty good trial judge. He says, “Anderson, I am just not going to give you a jury instruction on that.”

“Why not?” I ask. “I am entitled to it.”

“I just don’t think it was foreseeable.”

And of course when that happens you get up off your knees and you fly around his office and bounce off the ceiling and say, “How can you say that? I’ve given you thirty-eight cases saying this and that! Your Honor, you can’t do that!”

“Tell you what,” you say, “Give me the jury instruction and I am sure the jury is going to say you’re right, and throw us out, and if it doesn’t—”

But he’s not going to let you do that. “I just don’t think it’s foreseeable.”

I guess my over arching point is that, as I have said from the beginning, I don’t understand *Hadley v. Baxendale*, and I don’t think you do either. And if you disagree with me, I’ll just say that you’re not old enough to know better. *Hadley v. Baxendale* is trial court law, and I can read Gilmore and Farnsworth and Perillo and appellate cases until I am cross-eyed, and I am not going to learn anything more about *Hadley v. Baxendale* than I did going in. I think what you learn is that, in my experience, the way it works is that it does give—and this is something this guy next to me<sup>36</sup> hates like hell—the trial judge an enormous amount of discretion.

The Restatement (Second) concedes that. It says we are requiring judges at the trial, at appellate level, to absolutely warp a revered principle and deny recovery on the basis of foreseeability that would leave your mouth aghast.<sup>37</sup> How can the judge absolutely say that when what he is saying is that a recovery of that magnitude would be absolutely unfair? You have not given me any proper policing in principles, including *Hadley v. Baxendale*. All Farnsworth<sup>38</sup> says is how about this disproportionate compensation theory that says if the quantum of loss sought so greatly exceeds the amount of consideration under the contract received by the breaching party, then the trial judge can do directly what we all know he has been doing indirectly under our system for a long, long time, and that is limit the damage recovery as justice would require.

SPURLOCK: Your turn, Joe.

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36. Florian Faust.

37. See RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981) (“A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.”).

38. E. Allen Farnsworth was the reporter for the Restatement (Second) of Contracts.

JOSEPH PERILLO: I will make comment on some of what I heard. Allan has said that if *Hadley v. Baxendale* had not been decided, another case would have somehow come up with a similar rule. It has been proved actually by an article that Florian wrote on *Hadley v. Baxendale*.<sup>39</sup> It's a point that Danzig makes in a sentence or two,<sup>40</sup> but Florian makes the whole subject of the article: that plaintiff's counsel expressly agreed that he would abandon the count in assumption—*and this was a negligence case*—for an action on the case. It was a tort case, yet Baron Alderson, egged on by Baron Parke (particularly judging by the oral arguments as reported in the case) wanted to put a limitation on damages in contract cases. The rug was pulled out from under him, but he ignored it, and he gave a rule for contract damages.

So I think that kind of supports Allan's point. However, let me argue with one of Florian's points. He asks why should the innocent plaintiff suffer the loss, why the aggrieved party instead of the defendant, whether foreseeable or not? I don't know the answer, other than it is obviously deeply felt in our business people. How do I prove that? In almost any contract between business entities of fairly equal strength, there is an exclusion of consequential damages, which shows the attitude of the business community.

My final point, relates to the question raised by Roy Anderson and Florian: "Is this rule so unpredictable as to be meaningless?" Well, in teaching and writing about consequential damages, I find the cases fairly predictable. That, of course, is based not on what the trial judge has heard, or what the jury has heard, but upon what the appellate court states are the facts of the case. It may be that by the time it reaches that point, the trial judge and the appellate judges have already ignored *Hadley v. Baxendale* and Roy's pleas, and so the appellate report may not reflect reality. But to the extent you accept the facts as reported in cases, I find that theory has very predictable results. Of course, like any flexible rule, whether foreseeability or reasonableness, you have a vast grey area at the margins. But at the central parts of the cases I really do not think that it is any more uncertain than most rules of contract law that deal with such things as substantial performance, reasonable time, and so on.

ANDERSON: One very quick reply because I agree emphatically with Joseph, that the cases are no-brainers. They are verdict-predictable. Certainly the U.C.C. cases I was talking about—it is difficult to find a U.C.C. case that denies recovery of remote consequential damages on the basis of foreseeability. That makes it very predictable. What I was talking about were the difficult cases, the ones that come

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39. See Florian Faust, *Hadley v. Baxendale—An Understandable Miscarriage of Justice*, 15 J. LEGAL HIST. 41 (1994).

40. See Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 269 (1975).

along every so often. The ones that primarily bother me are these disproportionate compensation cases, where, like I say, foreseeability in U.C.C. law is just not much of a speed bump. Rare is the case that denies recovery on that basis.

FAUST: I would like to make a couple of points to the other members of the panel, first of all to Allan Hutchinson. First, I would not claim that German and English law are different because English law has the *Hadley v. Baxendale* rule and German law does not. That has no meaning whatever as to the relative likeness of two legal systems. You cannot say because theft is punished in China and in Germany, Chinese and German law are the same.

But to make a statement about the likeness of different legal systems, I think you do not have to look at the *results* of certain cases, but at the *way of thinking about law*, starting with the code, or whatever. That is something we cannot do here today. Second, I agree that you do not have to look only at the law in the books but also at the law in practice. I have never been a practicing lawyer in Germany because our university system is very different, but I have never heard of a German case where people included a clause into their contract which conformed to the *Hadley v. Baxendale* rule. What people might do in Germany is to exclude recovery for negligence, except for gross negligence. They might fix the maximum amount of damages (“not more than 1,000 Euros”). I think that the closest to *Hadley v. Baxendale* we might come is that they would exclude damages for lost profits—not for consequential damages, but for lost profits.

To Roy, thank you very much for talking about the jury, because that is something I forgot. Of course German law never had the problem of restricting the jury’s discretion because we do not have a jury in civil cases. That may well have been one of the reasons why our law took a different path. You also mentioned the Restatement clause that gives the judge discretion to reduce disproportionate damage awards.<sup>41</sup>

ANDERSON: That is not a law.

FAUST: Yes, but I think that would be a much better way to do it than to disguise it under the foreseeability rule, because it would force the judge to say explicitly why he denies recovery, and not simply to say that was “not foreseeable.”

ANDERSON: I agree that the disproportionate compensation principle has a lot of wisdom. When they were revising Article 2, it was in two or three of the drafts; it was taken almost verbatim from the Restatement (Second). Who killed it were the plaintiff’s lawyers. I am not sure they did themselves a service there, but they threw up all kinds of smoke. They wanted to know, procedurally, whether it would be some kind of remittitur. Or, if not, what exactly it would be. Who

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41. See RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981).

would have the burden of proof? At what point in the trial did you bring in this issue for mitigation? Finally I remember Dick<sup>42</sup> saying this is not worth fighting over.

In fact, only two or three courts in our country have expressly followed that proposition over the last twenty or so years since we have had that Restatement section.

SPURLOCK: We have a question from the audience.

ROGER HALSON:<sup>43</sup> Could I make a quick observation? Allan, I have waited a long time for this—Allan taught me as an undergraduate twenty-five years ago, so it has been a long time. Allan's response to Florian was, I think, very well met. You, Florian, said, in effect, "I realize in a comparative exercise of this kind, we have to look at the whole." And I think you pointed out that, in particular, there may be a greater remedy available that is partly compensated for by a higher threshold of liability, because liability must be fault-based. I think you also said—and I would appreciate you saying a bit more about this—that the principle of causation in German law must do rather more work than perhaps it does in the common law.

My final observation is that we talked a lot at different points, both today and previously, about whether we have jumped from contract to tort. Andrew yesterday made a plea for an equivalent elegant formalism of the same standard of remoteness between the two.<sup>44</sup> But when we move to this comparative exercise, we have to remember that the boundaries of contract and tort are frequently differently drawn in different jurisdictions, especially when we are thinking of third-party claims. So in this comparative exercise the picture has to be expanded to see where the boundaries are differently drawn.

FAUST: I think that you may expect too much of the German principle of causation, because it does not really have a restrictive effect. The basis for causation in German law is the *condicio sine qua non*. In England this is the "but for" test. Would this result have occurred but for that act? We start with that. This is then somewhat restricted by the principle of adequate causation. It has nothing to do with foreseeability by a specific person, but rather with probability. The test is whether, taking all the knowledge available, the action of the defendant made the result more probable.

We talk about it in cases like this: Suppose I injure Allan. He goes into hospital. He contracts an infectious disease in hospital and has to be transferred to another hospital, and there a fire breaks out and he is seriously injured. Is that still caused by my injuring him? So you see, causation is not really something which restricts liability very much.

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42. Richard E. Speidel, Reporter on Revised Article 2 from 1991 to 1999.

43. Professor of Law, Leeds University School of Law, England.

44. Tettenborn, *supra* note 40, at 516-21.



Another principle that is put into operation sometimes is the question whether the duty I did not obey has the *purpose* of preventing this kind of damage. That is an important point in many tort cases. To give you an example of that: Suppose I drive with my car at seventy miles per hour in a city where I am allowed to drive fifty miles per hour. When I have left the city center I am allowed to drive seventy. I am now driving perfectly at seventy miles per hour, but a child suddenly leaps out and I hit it. I was obeying the speed limit when I hit the child, but if I had obeyed the speed limit ten minutes earlier, I would not have been at that spot at that moment. Am I liable for the injuries to that child? We say no, the purpose of the speed limit is not to make me arrive later at a different point. Certainly we would not put this principle into operation in the case of lost profits, or in the *Hadley v. Baxendale* type of cases.

Your second question was about the contract/tort boundary. In Germany I think contract law is much more important than in England or in the U.S. We treat many actions as contractual which you would consider tortious. For instance, if I enter a shop and fall down because there is a banana peel on the floor and I am injured, in Germany this would be considered a tort but also a breach of contract. The reason for that does not have anything to do with the size of damage awards; in fact, until two years ago you could not recover damages for pain and suffering in contract law. The reason rather is the different kind of liability that attaches through employees. Only in contract law you are always liable for an employee's fault, not in tort law. That is why German law puts many actions under contract law which perhaps would be better placed under tort law, and certainly are placed under tort law in different jurisdictions.

SPURLOCK: Yes, Frank?

FRANKLIN G. SNYDER: I have a question raised by what Allan and Joe said. I heard something that I could interpret one of two different ways. One is we were going to get the *Hadley v. Baxendale* principle itself at some point, regardless of the facts of the particular case that came along. I have a problem with that as a thesis, because other places (as Florian says) have come up with other sorts of rules. The second thing you might be saying, which I would agree with, is that if the *Hadley v. Baxendale* rule had been otherwise, had it been that there was never liability for consequential damages, society would have adapted it much the same way, so instead of having a world where basically all written contracts exclude consequential damages, we would be in a world in which a small minority of contracts provided for consequential damages, and we would be practically in the same place. Is that what you are saying?

HUTCHINSON: *Hadley v. Baxendale* is an English case, so why did Americans adopt it? Presumably it was a choice: because they wanted it. They did not follow it because they felt the need to follow *Hadley*

*v. Baxendale*. They liked it. If they hadn't liked it, they could have waited for another case to come up, or simply said: "We will make some other rule." They were not driven to follow *Hadley v. Baxendale*. If it had not been there, what would courts do? They would just design it for themselves.

FAUST: Which they did in *Blanchard v. Ely*,<sup>45</sup> in New York, where the court took the rule from Pothier via Sedgwick before *Hadley* was decided.

HUTCHINSON: I find it difficult to imagine that we have kept this up for 150 years for any reason except that we liked the rule. If it had not been *Hadley v. Baxendale*, somebody would have designed it somewhere else. If *Hadley v. Baxendale* had gone the other way, it would have just been ignored as another case.

I mean, there are so many cases out there that we could follow, but we don't. Why? Because we do not like them. I don't find a sense of inevitability about these cases. It might have been slightly different, not exactly the same, but we would have got to the same place. Suppose, for example, Hitler gets killed when he is a six year old. What does this mean? Nothing. Surely there would have been some historical differences, but would there not have been a Second World War? I find it hard to believe that one change can completely obliterate history in that way. Maybe people think there would not have been a Second World War.

SPURLOCK: Joe?

PERILLO: Can I follow that up? Before *Hadley v. Baxendale*, as Florian mentioned, the Court of Appeal, in *Blanchard v. Ely*, applied Pothier's rule, but, as a court twenty years later said, they got it wrong in application.<sup>46</sup> One court said no consequential damages ever. Other courts used words like "remote" and "proximate." They were struggling for some formula to restrict damages. Then *Hadley v. Baxendale* came along, and the French Civil Court had Pothier, and suddenly the light bulb went on all over the common law world. Here, they said, now we have got an intelligent test.

SNYDER: It seems to me a rather peculiar default rule that virtually everybody who thinks about it tries to get around. It seems to me we could easily have adopted a somewhat different rule.

HUTCHINSON: There is a thing called path dependency in evolution. The classic example is the typewriter: the way the keys are formulated. If we started again, it is not clear to me we would be coming with QWERTY, as it's called. We have now got it and we still use it,

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45. 21 Wend. 342 (N.Y. Sup. Ct. 1839). "In general, the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it; and not such as may have been accidentally occasioned thereby in respect to his own affairs." *Id.* at 347-48 (citation omitted).

46. *Griffin v. Colver*, 16 N.Y. 489 (1858).

how many years after the fact? It's got to be at least a hundred. Why do we do that? Well, it serves our purposes. Everybody is trained in it, so we might as well keep it. It's not perfect, but once you're using it, and it fits your purpose, it's too much trouble to change it. So we stay with it.

SPURLOCK: John, you have a point?

JOHN A. KIDWELL:<sup>47</sup> There is a sense in which *Hadley v. Baxendale* may or may not be an *important* case. It is certainly a *famous* case, but its fame could be unrelated to its importance. For example, *Hamer v. Sidway*<sup>48</sup> is a famous case because it is in the contracts books, and students are used to it. If you write a contracts book, you are under a lot of pressure to put it in by the people who are in the publishing companies saying: "We notice you have left that case out. Some people may not buy the book because you have left it out. Can't you put it in? It's not that long. People like to teach it."

I am never sure whether *Hadley v. Baxendale* is important or just famous. Maybe it's both. If I were doing a contracts book, I am going to put it in, which means my students will all study it, partly for the same reason the QWERTY keyboard is so popular. It has a compatibility factor about it. People who teach contracts prefer casebooks compatible with the skills they have already invested in. They already have notes on *Hadley v. Baxendale*. They want a few new cases in the books, but not too many.

ANDERSON: Famous *is* important. For years I would suggest to my contracts class that this innocuous fact situation produced the most famous case in contract law. Finally one of my students decided to challenge that claim. He ran a survey of the entire first year class at the end of the school year, and *Hadley v. Baxendale* did not win. Armed with that, he then went to the second year class and ran a survey, and, again, *Hadley v. Baxendale* did not win. He did the same thing with the third year class. Guess which contracts case wins hands down, at least in my part of the world? The most famous was *Hawkins v. McGee*.<sup>49</sup> I wish Scott Turow had started that book<sup>50</sup> with some other case, but he started with that.<sup>51</sup>

One point Allan raised. I am with you all the way, until you say since we adopted it we must have liked it. We sure did not necessarily like it. Back then we had this fetish for all things British, and we adopted British cases left and right whether we liked them or not. We

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47. Kathleen M. & George I. Haight Professor of Law and Associate Dean for Academic Affairs, University of Wisconsin Law School, Madison, Wisconsin.

48. 124 N.Y. 538 (1891).

49. 146 A. 641 (N.H. 1929).

50. SCOTT TUROW, ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL (1977).

51. *Id.* It was the first case in JOHN JAY OSBORN, JR. THE PAPER CHASE 6 (1971), and the subsequent film THE PAPER CHASE (20th Century-Fox 1973).

<https://scholarship.law.tamu.edu/txwes-lr/vol11/iss2/24>

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did that for a long time. *Foakes v. Beer*<sup>52</sup> is the most famous example. We didn't like it then and we don't like it now, and we've still got the darn thing. Fortunately, we got over that Britain fetish before the British created these damn roundabouts. [Laughter]

SPURLOCK: On that note, let us conclude. I want to make one small remark from listening to what we have been discussing. Teaching contracts for fifteen years, and looking at how contracts are moving in the real world, we are moving to the idea that adhesion contracts are the norm. As I stand here, I have a ballpoint pen made in Italy, a fountain pen made in England, a coat made in Italy, an American briefcase. All of these are international transactions that we are doing, and all of them are on standard form contracts. I use the word "adhesion" in that sense. We are perhaps moving into a world where we are no longer going to be talking about contracts being a consensual relation. If we are going to be doing without negotiated consent in contracts, will we be moving out of the area of consensual relationships and into something different—like torts—where duties are imposed instead of being assumed?

The question, then, for the next seminar: "Will there still be a place for *Hadley v. Baxendale* in that new world?" I don't know, but I thank you all here for your participation.

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52. [1884] 9 App. Cas. 605 (H.L.).