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# FORESEEABILITY AND DAMAGES

# OF MACK TRUCKS, ROAD BUGS, GILMORE AND DANZIG: HAPPY BIRTHDAY *HADLEY V. BAXENDALE*

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It is testimony to the status of the great case of *Hadley v. Baxendale*[1] that even after 150 years helpful discussion and learning can result from a two-day conference of experienced contracts teachers with the case itself as the centerpiece. As the renderings in the pages of this volume attest, such indeed resulted from a merry gathering in Gloucester, England in June 2004.[2] The occasion also incidentally marked the 30th anniversary of Grant Gilmore's extraordinary little book, *The Death of Contract*,[3] which, in the author's succinct prose, has much to say about the impact of *Hadley*. Gilmore's book was followed a year later by Richard Danzig's equally remarkable and influential article, *Hadley v. Baxendale: A Study in the Industrialization of the Law*,[4] which was subsequently published in his seminal book, *The Capability Problem in Contract Law*.[5]

Over the past quarter century, the Gilmore and Danzig treatises have largely framed the scholarly discussion of *Hadley*. As has been widely quoted, Gilmore regarded the case as "a fixed star in the jurisprudential firmament."[6] He was, however, puzzled as to "why such an essentially uninteresting case, decided in a mediocre opinion by a judge otherwise unknown to fame, should have immediately become celebrated on both sides of the Atlantic."[7] He called the dilemma

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

2. The Common Law of Contracts as a World Force in Two Ages of Revolution, Celebrating the 150th Anniversary of *Hadley v. Baxendale* in Gloucester, England (June 7-8, 2004), *at* http://www.hadleyconference.com (last visited Jan. 26, 2005).

3. GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K. L. Collins ed., 1995).

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

5. RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 68–107 (1978).

6. GILMORE, *supra* note 3, at 92.

7. *Id.* at 54.

"one of the mysteries of legal history."[8] Danzig shortly thereafter did much to unravel the mystery by providing extraordinary research into the historical context and political context that championed the foreseeability rule in *Hadley* and its placing a limitation on recoveries of remote damages[9] for breach of contract, the so-called "negative aspect" of the court's holding. Danzig also exposed how greatly the practical application of the *Hadley* doctrine had changed over time and concluded his analysis by chastising "the tendency to regard some rules of law as 'fixed stars' in our legal system."[10] This veiled reference to Gilmore was probably unfair if Danzig was seriously suggesting that by "fixed" Gilmore meant "unchanged." Gilmore certainly regarded *Hadley* as a seminal contracts case, and rightly so, as well as a source of some very important "conventional rules"[11] of classical contract law, a body of law which, as his book's title suggests, had passed away or at least was suffering a quiet, lingering death. So I doubt that Gilmore would have argued with Danzig's assertion that *Hadley*'s rules, as must happen with all legal doctrine, had by the 1970s undergone dramatic "law change."[12] And certainly Danzig would not have challenged Gilmore's assertion that the great case remained then, as now, a fundamental touchstone in the case law and in law school contracts classes, a "fixed star" as Gilmore did say. Indeed, Danzig lamented regarding the case's foreseeability principle:

> I do not think anyone can explain why we should now accord the mid-nineteenth century rule such curricular prominence, much less how it functions, and still less how it ought to function, in the modern world. Yet it retains its place because it seems as though it has always held this place.[13]

Gilmore perhaps got a chuckle from the lament, because he was fond of telling his students that it takes at least a lifetime both to accept that we really do not understand how *Hadley v. Baxendale* does function and to rest comfortably with the knowledge that we were never really intended to. I have always assumed that what Gilmore meant was that *Hadley's* requirements of foreseeability and communication were highly manipulable, and therefore, ideally suited to accomplish Baron Alderson's primary goal of providing the courts, both trial and

8. *Id.*

9. In this Article, the phrases "remote damages" and "special damages" are used to describe those that fall under the so-called "second rule" of *Hadley v. Baxendale*, referring to damages that arise from special circumstances of the plaintiff rather than damages that arise naturally from the breach. The phrase "consequential damages," which in current terminology is a type of "special damages," did not come into general usage until well into the 20th Century. *See generally* Roy Ryden Anderson, *In Support of Consequential Damages for Sellers*, 11 J.L. & COM. 123 (1992) (arguing that sellers should have the right to recover consequential damages).

10. DANZIG, *supra* note 5, at 105.

11. GILMORE, *supra* note 3, at 59.

12. DANZIG, *supra* note 5, at 105.

13. *Id.*

appellate, with a workable standard for limiting jury discretion in determining the amount of recoverable damages.

Unarguably, setting such a standard was a primary goal of the court in *Hadley*, and indeed that intent is rather apparent from Alderson's opinion in the case. Both Gilmore and Danzig give the point strong emphasis.[14] The devilishly effective vehicle chosen by the court for accomplishing the goal was to set a mercurial, objective standard for the recovery of remote damages that, in essence, meant whatever the reviewing judge might decide that it meant. Whether the standard was articulated as "foreseeability," "communication," or in Baron Alderson's words, "contemplation" of the parties,[15] the standard was essentially met only when a good judge decided that it had been because, as Gilmore observed, the standard over time "has meant all things to all men."[16] Indeed, well over a hundred years later, in the well-known case *The Heron II*,[17] members of the House of Lords quibbled mightily over various synonymic phrases, such as "on the cards," "quite likely," "liable to result," "real danger," and "serious possibility," that were suggested in an apparent attempt to add precision to the *Hadley* foreseeability standard.[18] It is curious that the lords would seriously endeavor after some 115 years of service by *Hadley*'s "fixed star" to emasculate its mercurial standard by attempting to lend precision to it. The Lords, of course, may well have had the contrary intent of emphasizing the standard's manipulability because arguably the phrases under discussion were very much as amorphous as the standard they sought to define. Regardless, as discussed below, by the latter half of the 20th Century the foreseeability principle had become so encrusted with both statutory and case law that expanded the availability of consequential and special damages for

14. *See id.* at 91–95; GILMORE, *supra* note 3, at 54–59, 92–93. Danzig described *Hadley*'s primary impact with the following trenchant observations:

> Thus, the judicial advantages of *Hadley v. Baxendale* can be summarized: after the opinion the outcome of a claim for damages for breach of contract could be more readily predicted (and would therefore be less often litigated) than before; when litigated the more appropriate court could more often be chosen; the costs and biases of a jury could more often be avoided; and County Court judges and juries alike could be more readily confined in the exercise of their discretion. Clearly the rule invented in the case offered substantial rewards to the judges who promulgated it and in later years reaffirmed it.

DANZIG, *supra* note 5, at 95 (emphasis added).

15. Baron Alderson did not use the word "foreseeability" in his opinion in *Hadley v. Baxendale*. He spoke instead of the "contemplation" of the parties at the time of the making of the contract. It is thus ironic that the one word for which the case is most famous appears nowhere in it. *See infra* note 29.

16. GILMORE, *supra* note 3, at 56.

17. Koufos v. C. Czarnikow, Ltd., (1967) 3 All E.R. 686 (H.L.) (commonly referred to as The Heron II) [hereinafter The Heron II].

18. As Gilmore points out, Lord Reid apparently settled ultimately on "not unlikely" as the meaning of *Hadley*'s contemplation or foreseeability standard. GILMORE, *supra* note 3, at 93.

breach of contract that the "foreseeability" principle had become a mere shadow of its former self.

## IN THE BEGINNING

In the beginning, however, the foreseeability principle apparently had real teeth. Gilmore reports that the courts in both England and America used it liberally to restrict jury damage awards by limiting and denying recoveries of remote damages for breach of contract.[19] He subscribes this aggressive use of the "negative" aspect of the holding in *Hadley* as the consequence of a strong opposition among both courts and scholars to the affirmative aspect of the holding—Baron Alderson's extraordinary, for the time, assertion that "subject to the limitation of forseeability . . . lost profits and other consequential damages caused by breach of a contractual duty were recoverable."[20] Gilmore, however, probably made too much of the pervasiveness of this perception because, although the court's decision may have been the first to do so candidly, other English courts had previously affirmed jury awards for such damages,[21] and treatise writers had previously opined that foreseeable remote losses were recoverable for breach of contract.[22] Indeed, a jaundiced view of *Hadley* might regard

19. *See id.* at 58.

20. *Id.*

21. In their argument for Mr. Hadley, lawyers Keating and Dowdeswell cited to several such cases. Hadley v. Baxendale, Eng. Rep. 145, 147–48 (Ex. 1854). The best known of the lot is *Nurse v. Barnes*, 83 Eng. Rep. 43 (K.B. 1663) (upholding an award of 500 English pounds for loss of stock that had been "laid in" for purposes of a commercial lease, although the plaintiff had paid the defendant only 10 English pounds as consideration for the lease). In current vernacular the award of 500 pounds would be labeled either "consequential damages" or "reliance damages" depending on how the stock "laid in" was valued. *See also* Black v. Baxendale, 154 Eng. Rep. 174, 174–75 (Ex. 1847) (deciding that the plaintiff was allowed to recover damages for wasted time and removal cost for the defendant's delay in delivery of haycloths). Ironically, the case, which was decided just seven years previously, was not referred to in *Hadley*, although the case was decided by two (Barons Alderson and Parke) of the three judges who rendered *Hadley v. Baxendale*, and the defendant in *Black* was represented by *Hadley's* third judge (Baron Martin). As Danzig reports, Martin had argued that the jury's verdict was improper because the defendant "'had no notice for what purpose the goods were sent.'" DANZIG, *supra* note 5, at 82. In reply, Baron Parke said: "'It was a question for the jury whether [the expenses] . . . were reasonable.'" *Id.* And Baron Alderson opined: "'Whether these expenses were reasonable was entirely a question for the jury.'" *Id.*

22. As Danzig reports:

> In a lecture given at the Seldon Society while this article was in draft, Professor A.W.B. Simpson of the University of Kent pointed out that both Pothier's treatise on the French Civil Code (translated into English in 1806) and Sedgwick's American treatise in its first and second editions of 1847 and 1852 argued for rules of contract liability essentially like that adopted by the Court in *Hadley v. Baxendale* . . . . [I]nnovation in the law in the nineteenth century was largely prompted by the quiet absorption of the observations of treatise writers, particularly treatise writers influenced by the civil law, into the decisions of English common law judges.

it as no more than a simple parroting of the works of Pothier, Sedgwick, and other highly regarded contract scholars of the time.[23]

At our Gloucester conference this past June, a very good question was raised as to whether the holding in *Hadley*, or one very similar to it, was inevitable. The consensus was affirmative. Another "fixed star," fashioned similarly but perhaps with a fact situation that Gilmore would have found more interesting, would undoubtedly have risen to light the jurisprudential firmament. As Danzig convincingly maintained what seems not so long ago, *Hadley* was a necessary product of its time, "a judicial invention in an age of industrial invention."[24] A limiting principle for unreasonably large damage awards was necessary to protect industry and to further rapid commercial development. And, as asserted above, the manipulable standard chosen was ideal. The obvious alternative, of course, was to adopt a rule of contract law denying altogether the possibility for the recovery of anything but direct damages. Whether that would have made for a better world, then or now, is debatable. What is not debatable is that to adopt such a rule would have been iconoclastic, would have contravened established order, and would have required Baron Alderson's Court of Exchequer to overrule prior case law. But that would have been an unseemly, perhaps unthinkable, alternative for an intermediate appellate judge "otherwise unknown to fame."[25]

So *Hadley* undoubtedly had both its negative and affirmative aspects, both of which have withstood the test of time. By the early part of the 20th Century, any sustained negative reaction to the affirmative aspect of the court's holding[26] had apparently been compromised by a

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DANZIG, *supra* note 5, at 82 (emphasis added).

23. Danzig futher reports that Professor Simpson noted that, during argument in *Hadley v. Baxendale*, Baron Parke had remarked: "'[T]he sensible rule appears to be that which has been laid down in France . . . and which is . . . translated by Sedgwick.'" *Id.*

24. *Id.* at 77.

25. GILMORE, *supra* note 3, at 54.

26. Gilmore reports that through the remainder of the 19th Century *Hadley*'s affirmative aspect that allowed the recovery of consequential damages for breach of contract came under sustained attack from commentators and from courts through manipulation of the foreseeability requirement "with great sophistication, in favor of defendants and against plaintiffs seeking large damage awards." *Id.* at 58. Gilmore, unfortunately, refers us to no cases supporting this assessment but only to Holmes's development of the "assumption of risk" or "tacit agreement" test for foreseeability. *Id.* at 51–53. According to Holmes, the defendant would not be liable for remote damages unless the circumstances at the time of the making of the contract were such that he could be said to have agreed, expressly or tacitly, to have assumed their risk. *See* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903); OLIVER WENDELL HOLMES, THE COMMON LAW 236–37 (Mark DeWolfe Howe ed., 1963). Holmes's test never gained a wide following among commentators or the courts, and it is probably extinct today. The Uniform Commercial Code expressly rejects it: "The 'tacit agreement' test for the recovery of consequential damages is rejected." U.C.C. § 2-715 cmt. 2 (2004).

synthesis which was described by Fuller and Perdue in their classic 1936 article as follows. The case of *Hadley v. Baxendale*:

> may be said to stand for two propositions: (1) that it is not always wise to make the defaulting promisor pay for all the damage which follows as a consequence of his breach, and (2) that specifically the proper test for determining whether particular items of damage should be compensable is to inquire whether they should have been foreseen by the promisor at the time of the contract. The first aspect of the case is much more important than the second.[27]

Implicit in this synthesis, of course, is the affirmative aspect of *Hadley* that full compensation did require the defaulting promisor to pay for remote losses, such as consequential damages, subject to the foreseeability limitation. Thus, in the United States, *Hadley v. Baxendale,* in both of its aspects, had gained a stature worthy of a "fixed star."

### In England

*Hadley* was accorded similar treatment in England. In the well-known case of *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*,[28] the King's Bench undertook an extensive analysis of *Hadley v. Baxendale*, one which mirrored, but expanded upon, the observations of Fuller and Perdue stated above. The court's analysis has been widely cited both in England and in the United States. The court began by affirming that the basic principle of contract damages is to protect the expectation interest of the aggrieved party, but opined that a full implementation of the principle would be "too harsh." The breaching party, therefore, would be responsible only for losses that were foreseeable at the time of the making of the contract. The court then reaffirmed *Hadley*'s bifurcation of expectation damages into the two categories of direct damages: those that arose in the "ordinary course" and of special or indirect damages, those that did not so arise but were attributable to "special circumstances" of the claimant. Although both types required foreseeability, the requirement was imputed to the promisor as a matter of law for direct damages regardless of his actual knowledge. With respect to indirect or special damages, however, the promisor would not be held liable for them unless the relevant special circumstances from which they ensued had been made known to him at the time of the contract.

So far, so good. Both in this country and in England, the basic structure for expectation damages that distinguished the two separate categories of general and special was well established. This distinction, of course, stemmed directly from Baron Alderson's analysis in *Hadley*. Further, the foreseeability limitation was understood to ex-

27. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 Yale L.J. 52, 84 (1937).
28. (1949) 1 All E.R. 997 (C.A.).

tend as a practical matter only to special damages, just as Baron Alderson had said. Thus, nothing to this point in the court's analysis in *Victoria Laundry*, nor in the observations above of Fuller and Perdue, represented anything new, but simply was perhaps a refined regurgitation of the principles articulated long before in *Hadley*.

The court in *Victoria Laundry*, however, then went further by attempting to give definition to the meaning of "foreseeability," a word, incidentally, that Alderson used nowhere in his opinion.[29] In determining whether the foreseeability requirement had been met under the "second rule" of *Hadley*, Judge Asquith said that the breaching party need not have foreseen that the loss would "necessarily result," but that: "It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was *liable to result*."[30]

Had Asquith stopped here, we could rest comfortably with the conclusion that the foreseeability requirement mandated that the breaching party should have reasonably anticipated that the loss was "liable to result," a phrase he used on three occasions within five sentences of a lengthy opinion. In a classic example of judicial "soft shoe," however, Asquith then sought to explain precisely what he meant by "liable to result," suggesting various synonymic phrases such as "likely to," "a real danger," and "a serious possibility," before concluding that: "Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy."[31] Regardless of what his actual intent may have been, the good judge thereby emphatically emphasized the mercurial and amorphous meaning of "foreseeability" and achieved something approaching appellate judge nirvana by providing enough confusing fodder to befuddle trial judges and trial lawyers to distraction and to arm academics with enough material for a dozen law review articles.

It would perhaps be easy to dismiss Judge Asquith's various diversions as merely attributable to an irrelevant, momentary lapse in decorum had not the House of Lords, as noted above, taken up the gauntlet two decades later in *The Heron II*. Each of Asquith's suggested meanings for foreseeability was addressed in various opinions of several of the lords, at times with vehement disagreement as to one

29. "Foreseeability," for which *Hadley v. Baxendale* is so widely known, ironically appears nowhere in the court's opinion. It was the term used by the treatise writers of the time, such as Pothier. *See supra* notes 22–23. The term was later grafted onto *Hadley*'s holding by courts and commentators. The terms used by Baron Alderson in *Hadley* to limit damages were those not within "contemplation" of the parties or as to which the special circumstances from which they ensued had not been "communicated." Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (Ex. 1854). In oral argument to the court in *Hadley*, the lawyers for Pickford did assert that damages should not be recoverable if they were not within "human foresight." *Id.* at 150.

30. *Victoria Laundry*, (1949) 1 All E.R. at 1003 (emphasis added).

31. *Id.*

or more, but with favorable treatments of another or others. Ultimately Lord Reid, in his opinion for the court, settled on "not unlikely" to result, a phrase that Gilmore, correctly I think, reads as highly permissive: "And 'not unlikely' was all that was required to cast the ship owner in damages under the twentieth century reading of the *Hadley* formula."[32] Whether the court thereby intended a change in substance from Asquith's selection of "liable to result" is unknown. Nothing in Lord Reid's opinion in *The Heron II* suggests as much, and dictionaries of standard English usage treat "liable" and "likely" as synonymous terms for measuring probability.[33] Each indicates that occurrence of the event is better than fifty percent, perhaps much better. But use of the negative, at least colloquially, conveys a much different impression. "Not unlikely" does not convey the same as "likely," regardless of whether it technically should. I would think that any trial lawyer charged with drafting a jury instruction seeking a damage recovery would much prefer to have the matter stated negatively than positively: "Jury, do you find by a preponderance of the evidence that the damages sought by the plaintiff were not unlikely to occur?"; as opposed to: "Jury, do you find . . . that the damages . . . were likely to occur?". But this perhaps makes too much of nuance. Regardless, by the late 1960s the courts in England, at least for commercial cases, clearly had developed a relaxed standard for foreseeability, one that in most cases could easily be met by plaintiffs seeking damages for remote losses.[34]

The judges in this country, however, have never demonstrated an inclination similar to that of their English brethren to define "foreseeability" precisely or to set definite parameters for the foreseeability requirement. In part, this is probably because to do so in any helpful manner would undermine the requirement's serviceability as an effective control over excessive jury damage awards. In this regard, the less said about standards the better. In great measure, however, the reason is undoubtedly attributable to the Uniform Commercial Code's provision for foreseeability in Section 2-715.[35] In significant contrast to the English focus, the UCC provision regarding foresee-

32. GILMORE, *supra* note 3, at 93.

33. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1107 (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed. 1987). The usage remarks regarding liable state: "LIABLE is often interchangeable with LIKELY in constructions with a following infinitive where the sense is that of probability." *Id.*

34. *See infra* pp. 442–43 (reiterating England's development of a more relaxed foreseeability standard and developing the suggestion that the current application of the foreseeability requirement in England and the United States is virtually identical).

35. It was Danzig's opinion as early as the mid-1970s that the Code's relaxed foreseeability standard had influenced the law with the courts in both this country and England for all kinds of contracts: "It is now almost universally recognized that, in the words of the Uniform Commercial Code, if at the time of the making of the contract the seller has 'reason to know' of possible consequential damages, that is enough to make him liable for recovery of those damages." DANZIG, *supra* note 5, at 100.

ability for a buyer's recovery of consequential damages requires only that the seller at the time of the contract have had "reason to know" of the buyer's "general or particular requirements" for the seller's performance.[36] This standard takes a significantly different perspective from that in England because it focuses entirely on the seller's knowledge of the buyer's anticipated use for the seller's performance rather than, as in England, on the probability of the occurrence of the alleged damages. Thus, in applying UCC foreseeability, if the seller has reason to know that the buyer's intended use or requirement for the seller's performance was to accomplish a commercial purpose, the seller then becomes liable for provable consequential damages of whatever particular nature and regardless of their practical probability whenever his breach has frustrated that commercial purpose. The commentary to UCC Section 2-715 reinforces this notion: "In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know . . . ."[37] Where the buyer's commercial purpose is other than resale, the courts have had no difficulty extending this reasoning. Thus:

> Where a seller provides goods to a manufacturing enterprise with knowledge that they are to be used in the manufacturing process, it is reasonable to assume that he should know that defective goods will cause a disruption of production, and loss of profits is a natural consequence of such disruption. Hence loss of profits should be recoverable under those circumstances.[38]

As Professors Farnsworth and Perillo point out in their respective treatises, there are pre-Code cases holding that, for liability for consequential damages to attach, the seller must have been able to foresee both the buyer's purpose in purchasing the goods and that the buyer would have no available substitute for the goods in the event of the seller's breach. Cases also held similarly regarding a lender's breach of a contract to lend money.[39] This rule requiring forseeability by the breaching party of the aggrieved party's lack of mitigation alternatives is of doubtful standing today. Indeed, the most recent case cited for the proposition by either Professor Farnsworth or Professor Perillo is dated 1939.[40] I know of no more recent relevant case.

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36. "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . ." U.C.C. § 2-715(2)(a) (2004).

37. *Id.* at § 2-715 cmt. 6.

38. Lewis v. Mobile Oil Corp., 438 F.2d 500, 510–11 (8th Cir. 1971); *see also* Simeone v. First Bank Nat'l Ass'n, 73 F.3d 184, 188–89 (8th Cir. 1996) (explaining that the seller need only have reason to foresee particular requirements of the buyer).

39. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 597 (5th ed. 2003); E. ALLAN FARNSWORTH, CONTRACTS 797–98 (4th ed. 2004).

40. Marcus & Co. v. K.L.G. Baking Co., 3 A.2d 627, 632 (N.J. 1939) (deciding that buyer's recovery of consequential damages for lost resale profits was denied where

Regardless of the current viability of the rule, Professor Perillo suggests that Section 2-715 rejects it: "Under the UCC it would seem not to be necessary that the seller have reason to know at the time of contracting that no substitute will be available to the buyer."[41] Professor Farnsworth apparently takes the contrary view: "Even if the borrower of money, buyer of goods, or other recipient can surmount the barrier of showing that the inability to cover was foreseeable, the recipient must then show that loss of profits on collateral transactions was also foreseeable in order to recover for that loss."[42] Professor Perillo's conclusion reflects the literal reading of UCC Section 2-715's foreseeability provision, and no case applying the provision has read it differently.

Perhaps what remains of the old rule is reflected by a handful of Code cases that places the burden on the buyer of proving that he could not have mitigated his alleged consequential damages. These cases contravene the well-established common law rule that the burden of proof regarding mitigation is on the breaching party. They do, however, represent a literal reading of UCC Section 2-715, which defines consequential damages, in part, as those "which could not reasonably be prevented by cover or otherwise." The inability to mitigate thus literally becomes part of the buyer's basic burden of proving his consequential damages. The significant majority of Code cases, however, eschews this reading and applies the customary rule that the burden of pleading and proving the aggrieved party's failure reasonably to mitigate damages rests on the defendant.[43]

The equity in requiring that the buyer bear the burden of proof on the mitigation issue is the same as with the old foreseeability rule that required a showing that the seller should have foreseen that the buyer would not be able to obtain substitute goods; that is, that the seller is otherwise entitled to assume that cover opportunities would be readily available to the buyer in the event of breach. It is uncommon in today's markets for substitute goods not to be readily available. Perhaps for this reason, some courts take a middle ground regarding the burden of proof of mitigation by placing the burden on the aggrieved buyer to show that he could not reasonably cover, and on the breaching seller to show the reasonable availability of all other types of mitigation opportunities.[44]

For UCC cases, therefore, the foreseeability requirement has become but a toothless tiger for guarding the gates against large damage

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evidence did not show that seller knew at the time of the contract that goods of the kind would not have been procurable elsewhere by the buyer).

41. PERILLO, *supra* note 39, at 597.

42. FARNSWORTH, *supra* note 39, at 797–98.

43. 2 ROY RYDEN ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 11:22 (2d ed. 2003) (discussing cases on both sides of the issue).

44. *See* Nat'l Farmers Org., Inc. v. McCook Feed & Supply Co., 243 N.W.2d 335, 340 (Neb. 1976).

recoveries for remote losses. In recognition of the foreseeability principle's practical limitations, the commentary to UCC Section 2-715 notes that any recovery of consequential damages is subject to the requirement "that the buyer attempt to minimize his damages in good faith"[45] and suggests that: "Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy."[46] In other words, the seller should not in most cases rely on protection from liability for remote losses on their lack of foreseeability but should either contemplate contracting for an agreed exculpatory clause in the sales contract or, alternatively, hope that the buyer is reasonably able to mitigate any loss that ensues from the seller's breach.

Although the UCC's foreseeability standard governs only transactions in goods, the familiarity incurred in applying it over four decades has undoubtedly affected the courts' application of the foreseeability principle to other types of commercial cases. Indeed, the Code's rationale regarding goods cases is equally applicable to any sort of commercial transaction. If the seller of services, of land, or of intangible or other property not governed by UCC Article 2 has reason to know that the purchase is for a commercial purpose, liability should attach for a breach that frustrates that purpose regardless of the particular nature of the ensuing damages. It would make little sense for the courts to apply one foreseeability rule for goods contracts and an entirely separate one for all other commercial contracts. It is understandable, therefore, that in this country non-Code foreseeability cases read just like the Code ones.

An excellent case on point is the well-known decision of the Fifth Circuit in *Hector Martinez & Co. v. Southern Pacific Transportation Co.*[47] The facts were not unlike those in *Hadley.* The shipper sued a railroad carrier to recover consequential damages for the rental value of a commercial dragline for the period of the carrier's unreasonable delay in the delivery of component parts of the dragline. The trial court dismissed the shipper's claim, citing *Hadley v. Baxendale.* On appeal, the Fifth Circuit reversed, rejecting any "unwarranted extension of *Hadley*" and "arbitrary and inflexible definitions of foreseeability."[48] The court concluded that the case before it was readily distinguishable from *Hadley* because, unlike the mill shaft in *Hadley*, the dragline at issue had an independent commercial use value.[49]

45. U.C.C. § 2-715 cmt. 2 (2004).
46. *Id.* § 2-715 cmt. 3.
47. 606 F.2d 106 (5th Cir. 1979).
48. *Id.* at 109.
49. *Id.* The court's distinction is arguable because the shipper was guilty of delayed delivery of only essential components of the dragline just as the shipper in *Hadley* had been guilty of delayed delivery of an essential component of an operating mill. On the other hand, the shipper in *Hector Martinez & Co.* had undertaken to deliver the complete dragline, but one of the five boxcars necessary to carry it was

The shipper had argued that it had been given no specific information of the shipper's intent regarding the dragline, because "it was as foreseeable that the goods were to be sold as that they were to be used." The court rejected this argument out of hand, stating that foreseeability does not require that the breaching party foresee the actual harm suffered or that the harm "was the *most* foreseeable of possible harms."[50] It should have been obvious to the carrier that the dragline had a commercial purpose and that any delay might frustrate that purpose by depriving the shipper of the use value of the dragline. As it happened, the shipper may have anticipated renting rather than selling the dragline, and the carrier should thus be liable for a reasonable measurement of that loss. In sum, just as with UCC cases, all that the promisor need have foreseen at the time of the contract was that the promisee's "general or particular requirements" for the promised performance were commercial in nature. Responsibility then attached for any reasonable commercial loss, regardless of its particular nature, that ensued as a result of the promisor's breach.[51]

In England, despite the courts' ostensible focus on the probability of harm rather than on whether the promisor should have known of the promisee's requirements, the foreseeability cases reason identically to their American counterparts. The courts' analyses in the seminal cases of *Victoria Laundry* and *The Heron II* provide good

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delayed. The court also gave a flawed interpretation of the two rules in *Hadley* by concluding "that general damages are awarded only if injury were foreseeable to a reasonable man and that special damages are awarded only if actual notice were given [to the defendant] of the possibility of injury." *Id.* The court's requirement of "actual notice" of the circumstances pertaining to special damages probably explains the court's apparent conclusion that the rental value damages were general rather than special. *See* discussion *supra* note 36.

50. *Hector Martinez & Co.*, 606 F.2d at 110.

51. The court was apparently of the opinion that the recovery for the rental value of the dragline was for general rather than special damages. The recovery would then be governed by the first rather than the second rule of *Hadley*. The proper designation of rental value damages in delayed shipment cases is arguable. Rental value measures the damages from the loss of use of the goods shipped during the period of delay, and "loss of use" is a basic type of consequential damages. *See* ANDERSON, *supra* note 43, at § 11:3 ("[A] serviceable general definition of economic consequential damages is those naturally arising from the loss of the contemplated use of the contracted goods."). Where the goods are intended to be rented out at destination, their rental value in essence measures the profits lost during the delay period and, therefore, represents special damages. In *Hector Martinez & Co.*, however, the shipper planned to use the dragline itself on land for which it was paying royalties. No direct profits would have directly resulted from that use and, in fact, the damages were awarded primarily as a rough estimate of damages to prevent the shipper from breaching "its contractual duties with impunity." *Hector Martinez & Co.*, 606 F.2d at 110 n.8. Other courts have adopted the same rationale on similar facts. *Id.* It should make no difference, however, whether this type of rental value recovery is regarded as general or special damages. If general, the courts regard foreseeability of the loss to be imputed to the breaching party as a matter of law. If special, the courts should conclude that the damages were foreseeable as a matter of course from the apparent commercial purpose for the goods shipped.

examples.[52] *Victoria Laundry* involved a claim by a buyer of a commercial boiler to be used in its laundry and dyeing business for the profits lost from not having use of the boiler during the period the seller had wrongfully delayed delivery. The trial court had rejected the buyer's claim under the principle of *Hadley v. Baxendale.* On appeal, the King's Bench reversed, holding that it should have been obvious to the seller at the time of the contract that the buyer had a commercial purpose for the boiler and that the seller thus should be held liable for reasonable lost profits from loss of use of the boiler during the period of delay. The court said that the sellers:

> knew that they were supplying the boiler to a company carrying on the business of laundrymen and dyers, for use in that business. The obvious use of a boiler, in such a business, is surely to boil water for the purpose of washing or dyeing. A laundry might conceivably buy a boiler for some other purpose; for instance, to work radiators or warm bath water for the comfort of its employees or directors, or to use for research, or to exhibit in a museum. All these purposes are possible, but the first is the obvious purpose, which, in the case of a laundry, leaps to the average eye. If the purpose then be to wash or dye, why does the company want to wash or dye, unless for purposes of business advantage, in which we, for the purpose of the rest of this judgment, include maintenance or increase of profit, or reduction of loss?[53]

Clearly, the case would have been reasoned and decided no differently had the court applied the Uniform Commercial Code.[54]

In *The Heron II*, the shipper sued a carrier for consequential damages for an unreasonable delay in delivery of a load of sugar under a charter contract. The shipper planned to sell the sugar at destination and sought damages for profits lost because of a decline in the sugar

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52. Indeed, Professor Gilmore predicted as much some 30 years ago: "In this country, we have not, as yet, had our *Heron II;* the case arising, there is no reason to believe that Anglo-American unity would be impaired." GILMORE, *supra* note 3, at 93.

53. Victoria Laundry (Windsor), Ltd. v. Newman Indus., Ltd., (1949) 1 All E.R. 997, 1003 (C.A.).

54. As part of their consequential damage claim, the plaintiffs alleged that the demand for laundry services at the time was extraordinarily strong and sought profits from particularly lucrative dyeing contracts that they allegedly would have had with the Ministry of Supply. In denying this recovery, the court said that the plaintiffs had failed to meet the requirement of showing that the defendants had known, at the time of the contract, of the prospect and the terms of the alleged lucrative deals.

There is a division in "Anglo-American unity" regarding the necessity of foreseeability of the magnitude of the defendant's loss. The courts in this country have been reluctant to infer the requirement. In the words of one court: "It is not necessary that the *specific* injury or *amount* of harm be foreseen, but only that a reasonable person in [the seller's] position would foresee that in the usual course of events, damages would follow from its breach." Barnard v. Compugraphic Corp., 667 P.2d 117, 120 (Wash. Ct. App. 1983); *see also* Sun Maid Raisin Growers of Cal. v. Victor Packing Co., 194 Cal. Rptr. 612, 614–15 (Cal. Ct. App. 1983). For a collection and discussion of the U.C.C. cases, see ANDERSON, *supra* note 43, § 11:12.

market during the period of delay. The carrier argued that the loss was not foreseeable at the time of the contract and that its sole responsibility was for interest on the value of the sugar during the nine-day delay period. The House of Lords unanimously rejected this argument and awarded the shipper damages for the loss of profits. Regarding foreseeability, Lord Reid observed that, while the carrier "did not know what the charterers intended to do with the sugar,"[55] he must have known that their purpose was commercial and that there was a market for sugar at the place of destination. Therefore:

> if he had thought about the matter, he must have realized that at least it was not unlikely that the sugar would be sold in the market at market price on arrival. And he must have known that in any ordinary market prices are apt to fluctuate day to day . . . .[56]

Like the court in *Victoria Laundry* and just as with the courts in this country, the House of Lords thus concluded that, where the promisors had reason to know of the promisees' commercial purpose, they should be held responsible for reasonable consequential damages attributable to the promisors' frustration of that purpose regardless of the specific nature of the damages.

We are thus left today with a much different perspective of the great case of *Hadley v. Baxendale* than the one Gilmore and Danzig described for the latter half of the 19th Century. The old lead horse shows her age, bent and wrinkled by the weight of 150 years of statutory and case law development. But, in her affirmative aspect, she still stands proudly for having distinguished for the law of contract the basic components for a damage recovery based on the aggrieved party's lost expectation.[57] That essential contribution remains today basically unchanged and merits old *Hadley* the deserved appellation of a "fixed star," at least in the law of contract.[58]

Undoubtedly, the case's other important aspect, the negative one, has undergone substantial change over the many years—a gradual but ever increasingly permissive one—so that today the foreseeability principle, both in England and in the United States, is rarely an effective bar to the recovery of remote damages in commercial contract cases. The old case is no longer doing much of a job in these situations, and the application of its principles has become predictable and boring. Could it be then that Gilmore was wrong and Danzig right

55. The Heron II, (1967) 3 All E.R. 686, 689 (H.L.).

56. *Id.*

57. Expectation damages, defined as the amount which will place the aggrieved party, as best money can do, in the position he or she would have occupied had the contract been performed, has of course become the primary remedial goal of the common law of contract in England and in this country. It is also primary in the Uniform Commercial Code. *See* U.C.C. § 1-305 (2004).

58. GILMORE, *supra* note 3, at 92. Gilmore also notes that: "Since 1854 the starting point for all discussion of contract damage theory has been *Hadley v. Baxendale* . . . ." *Id.* at 54.

that the old case no longer deserves a prominent place in the contract curriculum? I think not, and I also think a lot of trial lawyers and judges would agree with me. It's not old *Hadley* that has become predictable and boring, nor the law of contract itself, but rather contracts themselves. As Danzig points out in arguing against the case's current relevance, we now live in an age of mass-produced, standardized commercial transactions that the foreseeability principle was not designed to accommodate.[59] These transactions quickly develop an essential sameness that inculcates foreseeability. As we have seen, when the purpose of the contract is commercial, foreseeability of commercial consequential loss follows virtually as a matter of course. Further, even when an interesting issue of foreseeability of remote damages might arise, the issue will almost always be smothered by a standardized contract provision excluding liability for special, consequential, or other remote damages. I do not believe that I have ever seen a standardized form contract governing a transaction of any importance that did have a consequential damage excluder of some sort, a type of risk allocator that the courts are loathe to disturb for contracts between commercial parties, and most negotiated contracts include them as well.

Why then do we give *Hadley v. Baxendale* prominent treatment in the law school curriculum? In part, it is simply because *Hadley* is a landmark case and a historical watershed of contract law. Any educated lawyer should know of *Hadley*'s place, such as it might currently be, in the "jurisprudential firmament." And, as a practical matter, we apparently do not overemphasize the case's importance. A brief perusal of several contracts casebooks will demonstrate that, on the average, no more than ten or so pages are devoted to the subject of foreseeability as it pertains to contract damages. Little is addressed other than the seminal cases, most of which have been included in the discussion above. No one should seriously suggest that the contract curriculum should be weighted according to the practical utility of

59. DANZIG, *supra* note 5, at 101–03. Danzig opined that the suggested amendment to *Hadley* that often appears in the "law and economics" literature might be the only thing that would give the foreseeability rule some relevance to modern transactions: "A more sophisticated rationale for the rule in this context might focus on its effect on a seller not at the time of his entering a contract, but rather at the time of his deciding whether to voluntarily breach or to risk breaching." *Id.* at 103. I have always found this suggested "law change" to fall somewhere between dubious and humorous depending on the seller's situation at the time he is considering breach. The new focus for foreseeability would, of course, have no effect on sellers who have decided to breach no matter what, and there are plenty of those around, nor on sellers who simply cannot perform as required by the contract. As to the remainder of the situations, ones where the seller has a breach choice, one can just imagine the slapstick machinations of the potentially aggrieved party as he shovels every piece of information—relevant or not, true or not—in a last ditch effort either to dissuade the potential breacher or to ensure that, if he does indeed breach, he has been given more than enough information to guarantee the aggrieved party's recovery of every cent the law might allow.

particular doctrine. If this were the case, the law of offer and acceptance, of excuse and mistake, of third party beneficiaries and the like, might not be addressed at all, and the core contracts course would focus almost entirely on contract interpretation, on performance obligations, and on breach and its consequences. These latter matters, of course, would then not be understandable because they would be presented entirely out of context. Similarly, it would be absurd to require students to learn contract remedies and the compensation principle without being made aware of the foreseeability limitation. In any survey or core law school course, basic doctrine more often than not is learned in order to grasp the conceptual building blocks that are necessary to provide the context for an understanding of the more advanced and practically relevant issues.

By none of this, however, do I mean to concede that *Hadley*'s foreseeability principle has lost its practical utility. Implementation of the principle has simply long since moved from the appellate courts to its proper home at the trial court level, where it continues to function, as intended all along, as a control over jury discretion in awarding damages for breach of contract. The foreseeability principle of *Hadley v. Baxendale* was always intended primarily to be trial court law. A good parallel is contract's parol evidence rule, a rule that clearly has great practical utility. The rule is undoubtedly applied by trial courts across this country literally thousands of times each passing year, often with tremendous practical consequence for the parties litigant. Yet only a miniscule percentage of these rulings is ever contested at the appellate level. And, when parol evidence cases are appealed, resolution of their issues is largely by a rote application of familiar principles which rarely provides cutting-edge fodder for the law school classroom.

The parol evidence rule is pretty good law. So is *Hadley*'s foreseeability principle and, in this corner at least, the foreseeability principle is the much better law. Both laws, incidentally, have been crafted primarily as controls on jury discretion. Also, just as with the parol evidence rule, the foreseeability principle primarily operates, albeit undoubtedly less often, at the trial court level. Trial judges face far fewer foreseeability decisions than parol evidence ones. But this is a tribute to the effectiveness of the foreseeability principle in channeling lawyers' conduct. Good trial lawyers will rarely make wild claims for remote contract damages that were clearly beyond the pale of the contracting parties' contemplation, because to do so would seriously undermine their creditability with the trial court and would simply not be worth the effort. A good rule of law should never be criticized for its effectiveness in resolving issues without contest. We, of course, never get to see *Hadley* do its job in these situations.

More than occasionally, I am sure, there are lawyers who either did not get the message in their first year of law school or are motivated

by uncautious optimism to make outrageous claims for remote damages. These, then, present easy decisions for a trial judge, who either by pre-trial ruling or by jury instruction, on grounds of foreseeability, will summarily preclude the claim from reaching the jury. I suspect that relatively few of these decisions ever get appealed. And when they do, they then become easy decisions for affirmance. But here, once again, we, the unwashed masses off the firing line, do not get to see old *Hadley* doing her job.

This takes us full circle and back to the basic point emphasized above. The significant majority of foreseeability cases today have become readily predictable at both ends of the spectrum. They are easy cases because either the damages sought were readily foreseeable, or should have been, by the breaching party or, at the other end, they were clearly beyond the reasonable contemplation of the breaching party at the time of the contract. That does leave us, however, at least conceptually, with a narrow middle spectrum of cases in which the foreseeability of the alleged loss is unclear either way. These are the hard cases that go to the jury for a fact finding, one which should not be disturbed either by the trial judge or on appeal.

Was *Hadley* at its time a hard case if we ignore the famous headnote to the case and assume that the fact that the mill was shut down for want of the shaft was not communicated to the defendant at the time of the contract?[60] All would then depend on what Pickfords' agent, Mr. Baxendale, should have known as a matter of course from the nature of the transaction. It has always struck me as surprising that the facts in this regard were apparently never developed by trial counsel on either side of the case and, even more so, that Baron Alderson was willing to conclude as a matter of judicial notice or other similar clairvoyance that Baxendale should not have reasonably understood the desperate circumstances at Hadley's mill. The shaft at issue, after all, was not run-of-the-mill, so to speak. Danzig reports its nature as follows:

> It was a complicated piece of machinery, manufactured by a specialized company on the other side of England. But it was neither a standardized nor a mass-produced machine. It was handcrafted.

60. Whether the defendants actually had knowledge of Hadley's dire circumstances was obviously a key fact in the case. Most have assumed, in light of Baron Alderson's unequivocal assertion that the defendants did not have the knowledge, that the contrary assertion in the headnote was simply wrong. Danzig suggests, however, that notice may have indeed been given to Baxendale but under the then current law of agency, notice merely to Baxendale was not effective to bind Pickfords' Moving Company. Pickfords' lawyers had indeed made this argument, and Danzig speculates that Baron Alderson's statement regarding Pickfords' lack of knowledge was correct according to the admissible evidence. Hence, both the headnote and Alderson were correct—the headnote reflecting reality; Alderson reflecting the virtual reality woven by evidentiary rules of law. *See id.* at 86–87.

> Thus, the transaction in Hadley v. Baxendale: the old shaft has to be brought to eastern England as the "model" for the new one.[61]

If these facts regarding the nature of the shaft should have been readily apparent to an even uninitiated (in the running of mills) Mr. Baxendale, then arguably *Hadley v. Baxendale* was wrongly decided on the very rules it is credited with establishing for the law of contract. *Hadley* then becomes a hard case and one, at the very least, as to which reasonable minds could differ.

I have no idea how often the difficult foreseeability situations present themselves. When they do appear in the reported cases, they usually result in the court upholding the jury's decision without much analysis. In identifying them, of course, much depends on the individual's perception of "difficult." A good example of one such case, at least to me, is the West Virginia Supreme Court's decision in *City National Bank of Charleston v. Wells*.[62] In *Wells*, the court affirmed a jury verdict in favor of a truck buyer for consequential damages for an impaired credit rating that resulted from the buyer's discontinuing finance payments on the truck to a third party.[63] The truck had been purchased by the buyer for use in his business, but the truck was defective and could not be used for its intended purpose.[64] After the buyer had discontinued making the finance payments, he was denied financing on a loan to purchase earth-moving equipment, thereby allegedly causing a business disruption and an accompanying loss of profits.[65] In upholding the jury's verdict for the buyer, the court held that it was reasonable for the defendant truck seller to foresee at the time of the contract that the buyer would "justifiably" refuse to make further payments on the truck when it proved to be substantially defective and that the refusal would, in turn, result in an impairment of the buyer's credit and a disruption of his business.[66] The court's decision is certainly questionable, and the courts have divided on the issue in applying very similar facts.[67]

A special category of foreseeability cases is worthy of mention. It has long been an open secret that the courts on occasion have used (or misused) foreseeability as a malleable standard to limit or deny recoveries of remote damages in situations where the recovery would be patently unfair. The recurring situation is one in which the damage

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61. *Id.* at 84.
62. 384 S.E.2d 374 (W. Va. 1989).
63. *Id.* at 389.
64. *Id.* at 378–79.
65. *Id.* at 383.
66. *Id.* at 384.
67. *Compare* Acme Pump Co. v. Nat'l Cash Register Co., 337 A.2d 672, 676–77 (Conn. C.P. 1974), *with* Chaney v. Gen. Motors Acceptance Corp., 349 So. 2d 519, 521–22 (Miss. 1977) (rejecting the rationale in *Acme Pump* and concluding that any impaired credit rating suffered by the buyer was caused by the buyer's failure to make payments and not by the seller's breach of warranty).

recovery would otherwise be significantly disproportionate to the contract consideration received by the breaching defendant. As the facts develop in these kinds of cases, the normal safeguards against extraordinary liability, such as mitigation, certainty, an agreed damage excluder, and even a proper application of the foreseeability principle, cannot be applied to bar the recovery. The courts then resort to an overly narrow interpretation of the foreseeability requirement as a disguised surrogate for a fairness principle that is otherwise lacking in the law of contract remedies. The cases themselves thus present a warped view of the true meaning of foreseeability and stand as shaky precedent that threatens to facilitate incorrect results in subsequent cases in which an overly stringent application of foreseeability is not justified.[68]

The more recent cases, of course, are often not easy to identify because much depends, not only on the factual nuances of the particular case, but also on individual perceptions of foreseeability. For example, although the disparity between the consideration paid and the consequential damages alleged in the case was not especially compelling, I have always thought that *Gerwin v. Southeastern California Ass'n of Seventh Day Adventists*[69] was probably such a case. The plaintiff had bought at auction, through an agent who did not divulge the plaintiff's identity, a quantity of commercial restaurant and bar equipment.[70] When the defendant refused to deliver, the plaintiff sued. The trial court awarded $15,000 as general damages and $20,000 as consequential damages for loss of profits from the restaurant and bar for which the equipment was purchased.[71] The contract of sale apparently did not include a damage disclaimer, and the defendant seller had apparently made no effort at trial to show that the plaintiff could have mitigated or avoided the alleged consequential damages by cover or otherwise.[72] Nevertheless, the court reversed and amended the trial court judgment to deny any recovery for consequential damages.[73] The court concluded, *inter alia*, that the defendant could not have foreseen at the time of the contract the general or particular requirements of the plaintiff because the buyer was an undisclosed principal and the defendant, thus, did not know with whom he was

68. The early cases commonly involved telegraph companies, which were protected by the courts from liability for extraordinary losses for deals gone bad or other catastrophe caused by a negligent misdirection or misstatement of a critical telegram message or a failure to send it altogether. *See, e.g.*, Kerr S.S. Co. v. Radio Corp. of Am., 157 N.E. 140 (N.Y. 1927) (noting negligent failure to transmit telegram); Newsome v. W. Union Tel. Co., 69 S.E. 10 (N.C. 1910) (committing an error in transmitting a message ordering whiskey for sender's employees, who refused to work without sustenance).

69. 92 Cal. Rptr. 111 (Cal. Ct. App. 1971).

70. *Id.* at 113.

71. *Id.* at 116.

72. *Id.* at 117–18.

73. *Id.* at 120.

dealing.[74] Viewed dispassionately, of course, the court's conclusion in this regard is patently absurd and contravenes the wealth of established case law discussed above, holding that all the seller need have reason to know is that the goods were purchased for a commercial purpose. The seller then becomes liable for all reasonable consequential damages that reasonably flow from a frustration of that purpose. In *Gerwin*, given the nature and the quantity of the goods purchased, the seller undoubtedly had reason to know that the buyer, whoever he may have been, was purchasing for a commercial purpose. It thus seems likely that the court had other reasons, not made apparent in the reported decision that compelled a conclusion that a sizeable recovery of remote damages would be unfair.[75]

A clear example of the disproportionate compensation situation is presented by *Lamkins v. International Harvester Co.*[76] The court framed the issue succinctly as follows:

> The question presented by this appeal is whether in view of the special facts and circumstances connected with the sale of a tractor, the seller thereof *could* be held liable for special damages resulting from the loss of crops, occasioned by inability to cultivate the same because the tractor could not be used at night, the seller having failed to furnish starter and lighting equipment for the tractor within the time contemplated by contract.[77]

The case was before the court on the trial court's dismissal of the buyer's claim for special damages.[78] The dismissal was rendered after presentation of evidence that showed that the buyer had refused delivery of the tractor without the starter and lighting equipment, that the buyer had told the seller that he needed the equipment to get his crop harvested in time, and that the buyer ultimately took delivery only upon the seller's firm assurance that the equipment would be installed within three weeks.[79] When the seller failed to deliver within three weeks, the buyer refused to continue payments on the tractor, and the seller sued.[80] Although the lighting equipment was installed after suit, the buyer counterclaimed for $450 in crop loss resulting from the 45 days he had been deprived use of the tractor at night.[81] In affirming the trial court's dismissal, the court said that the rule of law

74. *Id.* at 118.

75. For example, the court could reasonably have concluded that the informal nature of the auction did not lend itself to negotiation of important tangential matters, such as liability for remote damages that normally would be expected in similar sales in more traditional settings. Or the court may have felt frustrated by the defendant's failure to plead the mitigation issue and put off by the plaintiff's failure to show that reasonable cover opportunities or other methods of loss avoidance were unavailable.

76. 182 S.W.2d 203 (Ark. 1944).

77. *Id.* at 203 (emphasis added).

78. *Id.* at 204.

79. *Id.*

80. *Id.*

81. *Id.*

pertaining to the recovery of special damages for breach of contract was governed by *"the English case of Hadley v. Baxley."*[82] Regarding the foreseeability issue, the court readily conceded that the evidence was sufficient to show that the seller had notice of the buyer's special circumstances, but held that liability of the seller could not attach unless the seller, in addition, had expressly or tacitly agreed to accept liability for any special damages arising from those circumstances. The court said:

> [W]here the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability . . . . [T]here must not only be knowledge of the special circumstances, but . . . "the party sought to be charged . . .must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it". . . that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in the event of default on his part.[83]

The court concluded that "there is nothing in the testimony showing circumstances . . . calculated to bring home to the dealer knowledge that appellant expected him to assume liability for a crop loss, which might amount to several hundreds of dollars, if he should fail to deliver a $20 lighting accessory."[84] Unlike cases typical of this genre, the court thus candidly conceded that, for the normal case, the foreseeability requirement had been met, but then applied the exceptionally restrictive tacit agreement test to avoid imposing liability on the defendant for damages significantly disproportionate to the consideration received for its performance.

The unusual candor of the court in *Lamkins* is perhaps the reason it was chosen for enshrinement in the current Restatement of Contracts as an illustration of a suggested principle for dealing with the disproportionate consideration situation without an accompanying mangling of the foreseeability principle.[85] Restatement (Second) Section 351(3) provides, "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."[86]

This extraordinary provision, although it has no common law analog, seeks to provide a fairness principle which, as noted above, is oth-

82. *Id.* at 205.
83. *Id.* (quoting Hooks Smelting Co. v. Planters' Compress Co., 79 S.W. 1052, 1056 (Ark. 1904)).
84. *Id.* at 206.
85. *See* RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. f, illus. 18 (1981).
86. *Id.* at § 351(3).

erwise missing from the law of contract and to allow the courts to deal with a difficult damage situation directly rather than by a covert misapplication of recognized contract principles. Thus, the commentary to the provision acknowledges that, "Sometimes these limits are covertly imposed, by means of an especially demanding requirement of foreseeability or of certainty. The rule stated in this Section recognizes that what is done in such cases is the imposition of a limitation in the interests of justice."[87]

The Restatement's disproportionate compensation principle has not, as yet, received much recognition by the courts.[88] In part this is probably because, when comparatively inexpensive goods cause extraordinary consequential damages, the seller's liability for them is

87. *Id.* at § 351 cmt. f.

88. *See* Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 743 F. Supp. 250, 257–58 (S.D.N.Y. 1990) (concluding that a shipper would not be permitted to recover $2.4 million in compensatory damages for alleged breach of contract to provide services for $150 because the disparity between damages and contract price, coupled with informal dealings between the parties, in which contract was reached in phone call without mention of liability, indicate parties did not attempt to allocate risks) (citing RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. f (1981)); Perini Corp. v. Greate Bay Hotel & Casino, Inc., 610 A.2d 364, 381–82 (N.J. 1992). The New Jersey Supreme Court rejected defendant's disproportionate compensation argument where contract was negotiated between sophisticated commercial parties, defendant was aware of the "high stakes" involved, and defendant might have bargained for a limitation of liability clause. *Id.* at 382. The opinion states: "Few cases have mentioned [Restatement (2d) Section] 351(3) in dicta; fewer still have relied on that section in limiting damages." *Id.* at 381.

During the recently completed process of revising Article 2 of the Uniform Commercial Code, a provision virtually identical to that of Restatement Section 351(3) was given serious consideration and was included in several of the revision drafts. The provision, however, received strong criticism and was ultimately discarded. *See* Roy Ryden Anderson & Linda J. Rusch, *Perspectives on the Revision of UCC Article 2, Part 7: Remedies,* 1995 COM. L. ANNUAL 207, 225. The article summarizes the criticism of the proposed provision as follows:

> The "disproportionate compensation" standard would thus be viable only after the court is convinced that the standards of foreseeability, certainty, mitigation and the exclusion of consequential damage liability are operating insufficiently to allocate fairly the risk of consequential loss. If these standards are drafted with requisite care and wisdom, there may be no range of cases to which the "disproportionate compensation" principle should properly apply. In addition, the concept of "disproportionate compensation" being used to allow explicit ad hoc decisions by courts without guiding principles seems to be a step backward from the goal of codification.

*Id.*

The justification for the provision was described as follows:

> Those speaking in favor of the principle pointed to the previously discussed notion of varying standards with respect to different types of consequential loss and to the wisdom of allowing courts broad discretion in allocating risks for such loss. It may well be that the standards in Section 2-715 cannot be drafted so as to provide enough flexibility to ensure fair results in all cases, and the "disproportionate compensation" principle would allow the courts that flexibility without their having to engage in covert manipulation of Section 2-715's standards.

*Id.* at 225–26.

protected by a warranty disclaimer or damages excluder in the contract for sale and, when such goods cause catastrophic consequential damages in the form of personal injury or property damage, the plaintiff seeks redress in a products liability action in tort rather than in contract for breach of warranty.[89] Regardless, until the Restatement provision receives a broader recognition, we can continue to anticipate that the courts will, on occasion, rely on a truncated application of the foreseeability principle to limit recoveries of consequential damages in extraordinary cases where injustice would otherwise result.

Although I concede limited practical experience as a trial lawyer, I have seen enough over the years to conclude that these kinds of situations arise much more often at the trial level, where they are firmly and judiciously handled by able trial judges without subsequent appeal. Typically, for whatever reason, the good judge has determined through the course of trial that a recovery of the consequential damages asserted and, as the trial progresses, more than adequately proved would be unreasonable. The disproportionate compensation situation may or may not be involved at all. More typically, the situation is one in which defendant's counsel has not done a very good job of handling his case. Or the trial judge may perceive that the jury is either unduly impressed with plaintiff's counsel or, conversely, that it has, reasonably or unreasonably, taken a keen dislike for defendant's counsel. Or it may not be the darn lawyers at all, but rather the darn accountants, who have, in the court's opinion, bedazzled the jury with extraordinarily fanciful opinions beyond the pale of sound logic. Through the course of the trial—and feeling better and better with each passing day—plaintiff's counsel, however, has put on one heck of a case: her expert witnesses have persuasively asserted both the fact and the amount of the lost profits alleged; she has effectively countered at every turn assertions by the defendant that the damages could have been reasonably mitigated or avoided; and she has easily shown that the defendant had reason to know that the purpose of the defendant in engaging in the contract was to fulfill a commercial purpose. In short, the trial for the plaintiff has gone just swimmingly. In these cases, both lawyers, but particularly the plaintiff's, face the probability of learning a lot more about *Hadley v. Baxendale* than they ever did in law school. I have thus suggested elsewhere that lawyers often learn the fine points of their foreseeability law in the way that road bugs learn about Mack trucks when an incredulous trial judge summarily

89. *See, e.g.*, Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 310, 312–13 (Tex. 1978) (concluding that plaintiff's breach of warranty action barred by warranty disclaimer in contract of sale and concluding that plaintiff's tort action for strict liability barred by "economic loss" rule where only property damages alleged were for damage to the purchased aircraft in a case where a defective engine part caused plane crash).

bars consideration by the jury of the cornerstone of the client's damage case with the disingenuous assertion that the damages were not foreseeable.[90]

There is, then, plenty to justify the appellation "fixed star" for the great case of *Hadley v. Baxendale* other than just its historical importance for having established the basic structure for lost expectation damages for breach of contract. Although in its practical application the stringency of the foreseeability principle has declined steadily over the years as contracting has become more standardized and uniform, it still mightily serves the law of contract in discouraging outrageous claims for remote damages, in providing trial courts with a basis for summarily dismissing such claims when they are made, in providing a flexible guideline in instructing juries charged with deciding hard contract damage cases, and even in acting as a misused surrogate to achieve equitable results when the customary safeguards against excessive damage recoveries have failed. So "Happy 150th Birthday" old *Hadley*, and here is wishing you many, many more. Although you may not be what you used to be, or even what many thought you were, none of the rest of us is either, in either case.

90. ANDERSON, *supra* note 43, § 11:9.