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Marsha Huie

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HADLEY'S LIABILITY-LIMITING AND COMMERCE-ENHANCING PRINCIPLES APPLIED IN THE BRITISH COMMONWEALTH AND THE U.S.A

Marsha Huie†

† Professor of Law, The University of Tulsa College of Law. I am grateful to Klint A. Cowan for his research assistance, and to Martin H. Belsky for encouraging my work during his deanship at The University of Tulsa College of Law.

I. INTRODUCTION

The venerable decision, of which we here celebrate the sesquicentennial, can be broadly read as necessary to aid nascent industry trying to prosper in the middle years of the Industrial Revolution. Professor Grant Gilmore's prediction of the impending death of contracts including consequential damages[1] was premature in Anglo-American jurisprudence. Just as Sir Henry Maine noted the movement in the ancient regime from status (slave, freeman, seignior, serf) to contract, as inferior types like married women and the baseborn acquired, at a glacial pace, the right to contract independently;[2] the 20th century marked movement from contract to codification of legal and equitable principles. Witness as codification the British Sale of Goods Act 1893, as subsequently expanded, and the U.S. Uniform Commercial Code. Once a contract for the sale of goods exists, unless the parties have agreed otherwise, statutes step in to codify the rules of *Hadley v. Baxendale*,[3] which sets limits on "consequential" or "special" damages.

Assuming that the *ratio decidendi* (American *rationale*) of the revered British case of *Hadley v. Baxendale* is to limit business liability, it is worth considering, first, the impact of a particular legal regime's liability-limiting rules on a multinational company's decision of where to locate a particular firm. Does the firm go where the costs of litigation are relatively smaller and, if so, what relationship exists between lowered costs of litigation and liability-limiting rules such as *Hadley v. Baxendale*? Second, it is worth considering whether a particular regime's view on data privacy is based upon intent to limit business' liability, or whether the regime values personal privacy more than business' right to collect and disseminate data that might be considered property of the human data subject? Because the rationale of *Hadley v. Baxendale* may apply to both the business-location decision and a legal regime's view on data privacy in E-commerce, this paper examines a possible nexus between *Hadley v. Baxendale* itself and: (a) the business-location decision; and (b) the protection or disregard of data privacy.

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1. GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K. L. Collins ed., 2d ed. 1995).

2. *See* HENRY SUMNER MAINE, ANCIENT LAW 32–33, 168–70 (Transaction Publishers, 2002) (1866). Sir Henry James Sumner Maine, 1822–1888, master of Trinity Hall College, Cambridge University. His works include: INTERNATIONAL LAW (London, John Murray 1887); LECTURES ON THE EARLY HISTORY OF INSTITUTIONS (London, John Murray 1875); VILLAGE-COMMUNITIES IN THE EAST AND WEST (London, John Murray 1871); and ANCIENT LAW (London, John Murray 1861).

3. 156 Eng. Rep. 145 (Ex. 1854).

The conceit of this piece is that society stands roughly at the same place regarding international commerce, including, particularly, E-commerce and related data-privacy issues, in the year 2004, as the common-law world stood regarding burgeoning industry in the Industrial Revolution when the British court rendered the fateful decision in *Hadley v. Baxendale*. The point is that *Hadley v. Baxendale*'s limitation of damages to foreseeable damages allowed the rapid growth of commerce in the middle years of the industrial revolution, while the emergence of an international data privacy commitment will allow for the growth of E-commerce in the digital age, at least in the long term, by ultimately fostering buyer confidence in the integrity of internet sales of goods and services. Likewise, the mercantile concern with limitation of litigation costs in a global market will ensure the continued relevance and applicability of the rationale of *Hadley v. Baxendale*.

II. *HADLEY V. BAXENDALE*

A. *Reception of* Hadley*'s Case in the U.S.*

U.S. state courts quickly accepted from England the rationale of *Hadley v. Baxendale* as a principle of law. Less than a century earlier, at the end of the colonial period in the late 18th century, the new states in America had enacted reception statutes adopting the principles of common law and equity of England, without controversy and without aversion to being guided by foreign law.[4] Ironically, now in the 21st century, it is notable when the U.S. Supreme Court makes a simple reference to "international law."[5] During the 2003 term, Justice Kennedy's reference[6] sparked a flurry of scholarly commentary, as did Justice O'Connor's and Justice Breyer's extra-judicial statements before the American Society of International Law in 2002 and

4. *See generally* ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY (Univ. of Pa. Press 1992) (1989); RAYMOND J. MICHALOWSKI, ORDER, LAW, AND CRIME: AN INTRODUCTION TO CRIMINOLOGY (1985). For an interesting work on English law carried to the colonies by the King's subjects, see 1 GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS, ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, CHIEFLY CONCERNING THE COLONIES, FISHERIES, AND COMMERCE, OF GREAT BRITAIN 194–229 (Gregg Int'l Publishers Ltd. 1971) (1814).

5. *See* Janet Koven Levit, *Going Public with Transnational Law: The 2002-2003 Supreme Court Term*, 39 TULSA L. REV. 155, 155 (2003) ("The Court's international and foreign law citations were not, in and of themselves, revolutionary or 'breakthrough.' It was the Court's decision to use such citations in the highest profile, potentially most controversial cases . . . ."). Professor Janet Levit notes Chief Justice Rehnquist's reasoning why a mature U.S. should now look to foreign law. *Id.* at 163 n.45 (citing William H. Rehnquist, *Constitutional Courts—Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993)).

6. See Justice Kennedy in Lawrence v. Texas, 123 S. Ct. 2472, 2478, 2482–83 (2003); Grutter v. Bolinger, 123 S. Ct. 2325, 2370–74 (2003) (Kennedy, J., dissenting); *see also* Levit, *supra* note 5, at 158–59.

2003, respectively, that the Court would probably be paying more heed to international law henceforward.[7] Could, one wondered, the Court possibly recognize that all of Europe would condemn U.S. recalcitrance to declare imposition of the death penalty "cruel and unusual" punishment?[8] Now, too, the U.S. government has repeatedly shown hostility to European notions of data privacy. And what role, if any, do liability-limiting rules, such as in *Hadley*, play in a multinational firm's decision to locate an operation in a particular jurisdiction?

B. *Role of the Law in Limiting Liability of Business Ventures*

The *Hadley v. Baxendale* case has played an important role in limiting liability of business ventures. It set no new law for England regarding the general measure of damages for a contract of drayage; presumably, the general measure would be the cost of the carriage, that is, the contract price. Rather, the case cuts off liability for consequential (special) damages at the point past which those harms exceed consequences either subjectively foreseen or objectively foreseeable, depending upon one's reading of the case, by the contracting parties at the time of the contracting. Stated another way, *Hadley v. Baxendale* does not cut off the business defendants' potential liability for the general measure of damages (those resulting in almost every breach of a drayage contract) but sets limits for more attenuated damages. For every new lawyer it quickly becomes axiomatic that the *Hadley v. Baxendale* case limits the breaching party's "special damages" consequent to the breach (the shutdown of the old mill): the British court instructs that reasonable and foreseeable limitations must truncate business liability for those more unusual damages, unforeseen or unforeseeable.

Regarding consequential damages, *Hadley v. Baxendale* is the functional equivalent of *Palsgraf v. Long Island R.R. Co.*,[9] which also refuses to trace actual fault (cause-in-fact) back to Adam and Eve, cutting off tort liability past the point at which "proximate cause" (causation not in fact but in law) is determined to lie. *Palsgraf v. Long Island R.R.* ends the defendant's liability for delict at that point past which the injured party's damage was unforeseeable-in-law, that is, past the point of being "proximately caused" (not merely caused-in-fact) by the tort. Each of these two complementary cases, *Hadley v. Baxendale* and *Palsgraf v. Long Island R.R.*, disallow the injured party from tracing fault all the way back to Adam's fall and adding Eve as

7. Levit, *supra* note 5, 164 n.46.

8. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, 230 [hereinafter ECHR] ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

9. 162 N.E. 99 (N.Y. 1928).

party defendant—the two parties really in-fact to blame for all our woes.

III. JUDAH P. BENJAMIN, BRITISH SALE OF GOODS ACT (SOGA) & RELEVANT CASE LAW

Anglo-American jurisprudence owes thanks to Judah P. Benjamin for its law of sales.[10] Having been a senator from Louisiana, but born in South Carolina, and then becoming the secretary of various cabinets for the unsuccessful Confederate States of America, Mr. Benjamin escaped to England after claiming British citizenship as an accident of birth (in 1811 in the Virgin Islands, West Indies). Remarkably, he became a prominent London barrister, even getting silk as a King's Counsel. In 1868, he authored what is still today entitled *Benjamin on Sales*.[11] The Author mentions the debt Anglo-Americans owe Judah P. Benjamin because Professor Joseph Perillo discussed in this symposium the French influence on British contract law exerted by Pothier,[12] often cited by British courts. The British Sale of Goods Act was enacted in 1893; and the Uniform Commercial Code, its American counterpart, in 1952. Study of the British law of sales therefore demands familiarity with *Benjamin on Sales*.

A. *The British SOGA Itself*

According to British case-law, the British Sale of Goods Act (SOGA) intends to codify *Hadley v. Baxendale*.[13] The rule of common law in England regarding the expectation measure of (general) damages is that where a party sustains a loss by reason of a breach of contract, the injured party is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.[14] As mimicked by U.S. law, in England expectation dam-

10. *See* JUDAH P. BENJAMIN, TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY (London, H. Sweet 1868). Although Louis Brandeis was the first Jewish justice on the US Supreme Court, Judah P. Benjamin had earlier declined the office in 1853 so he could become a senator from Louisiana. He served as Attorney General, Secretary of War, and Secretary of State for the ill-fated Confederacy and was often called its "brain" (as well as "Judas Iscariot"). Having been a successful barrister in New Orleans, he began anew as a barrister in London. Judah P. Benjamin died in 1884 and was interred in Paris, where his wife lived. The Author acquired her interest in Judah P. Benjamin from Professor H. Newcomb Morse.

11. BENJAMIN'S SALE OF GOODS (A.G. Guest et al. eds., 6th ed. 2003).

12. *See generally* M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS [TRAITÉ DES OBLIGATIONS] (William David Evans trans., The Lawbook Exchange, Ltd. 2000) (1806). Other works by Pothier are: DU CONTRAT DE NANTISSEMENT (1767); DES CONTRATS DE PRÊT DE CONSOMPTION (1766); DU CONTRAT DE DEPÔT ET DE MANDAT (1766); DU CONTRAT DE SOCIÉTÉ (1765); DU CONTRAT DE BAIL [BAILMENT] (1764); and DU CONTRAT DE VENTE [SALE CONTRACTS] (1762).

13. See in particular the House of Lords' decision in The Heron II. Koufos v. Czarnikow, Ltd., (1967) 3 All E.R. 686 (H.L.).

14. *See* Sale of Goods Act, 1979, c. 54, §§ 49–54 (Eng.) [hereinafter British SOGA].

ages are compensation damages.[15] Restitutionary damages, however, are only rarely awarded in England, shockingly less often than in the U.S. regime.[16] In England, the late lamented Oxford don, Peter Birks, adjudged that restitution damages require the defendant to pay more than the amount which compensates the plaintiff in cases in which the defendant has profited more from the breach than the plaintiff has lost; and that the courts avoid this measure so as not to discourage efficient breach of contract.[17]

> The rule of Hadley v. Baxendale concisely stated as British domestic law is this: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive . . . [are] such as may fairly and reasonably be considered, either arising naturally — *i.e.*, according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."[18]

Many cases decided at the highest level of court characterize the British SOGA provisions as "codification" of the rule in *Hadley v. Baxendale*.[19]

The relevant British case-law employing the British SOGA is legion. Specifically, the British SOGA cases must follow sections 50, 51, and 53, which codify *Hadley v. Baxendale*.[20] For example, a case regarding lost profits as an item of consequential damages is *R. & H. Hall, Ltd. v. W. H. Pim, Junior, & Co.*[21] The House of Lords considered the proper measure of damages in a case of failure to deliver goods when the seller knows that the buyer will resell the goods because the contract so states. The law lords would not apply section 54(3) of the British SOGA to award the usual expectation measure of damages (the difference between the contract price and the market price at the time when the seller was to have made delivery of the

15. British SOGA, Section 54 regards the availability of interest in the U.K. for breach of a sale contract. *See id.* § 54.

16. For more information on restitutionary causes of action in England, see generally PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION (1985) (discussing restitutionary causes of action in England), and ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION (2d ed. 1978).

17. *See* BIRKS, *supra* note 16, at 9–27.

18. JUDAH P. BENJAMIN, TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY 1098 (Walter Charles Alan Ker ed., 6th ed. 1920) (citing *Hadley v. Baxendale*, 9 Ex. 341, 354–55) (providing an exegesis of the British SOGA). *See generally* BENJAMIN'S SALE OF GOODS, *supra* note 11.

19. See Koufos v. Czarnikow, Ltd., (1967) 3 All E.R. 686 (H.L.). The Buyer's and Seller's Remedies as to the measure of damages for breach of contract for sale of goods is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's or seller's breach of contract or warranty. *See* British SOGA, *supra* note 14, §§ 50(2), 51(2), 53(2).

20. *See* British SOGA, *supra* note 14, §§ 50(2), 51(2), 53(2).

21. 30 Lloyd's List L. Rep. 159 (H.L. 1928).

goods) in a case in which the buyer has lost the profits he expected and in which merely awarding the contract market-price differential would not fully compensate the buyer for losses regarding the expected resale. In such a case, the court said, the buyer might not only lose expected profits from foreseen resale of the goods but also become liable to the third-party buyer.

B. *Selected Recent, Relevant British-Commonwealth Cases*

1. Damages for Loss of the Plaintiff Buyer's Peace of Mind That Disrupts the "Fruit of the Contract"

Some recent cases in the British Commonwealth regarding *Hadley v. Baxendale* illustrate the health and well-being of contracting in business relationships, in contradistinction to Promissory Estoppel and other doctrines that Professor Gilmore prophesied would cut up contract at its roots. One sales case from British Columbia discusses whether a plaintiff proving a breach of warranty might receive damages for mental distress. In *Wharton v. Harris Chevrolet Ltd.*,[22] the Court of Appeal of British Columbia created an exception for the buyer concerning "peace of mind" or, alternatively, an "inconvenience or discomfort to the sensory experience" of the plaintiff buyer. The subject matter of the contract was a good (a vehicle that included a sound system) which was merchantable but nevertheless breached the implied warranty of fitness for a particular purpose (the buyer wanted a particular vehicular sound system to be as the seller had warranted it). The court made an exception to the general rule that damages for breach of contract do not include damages for distress, frustration, anxiety, displeasure, vexation, tension, or aggravation. This "peace of mind" exception may apply when an important component of the contract is "to give pleasure, relaxation, or peace of mind." Here, the buyer failed to receive from the seller the "fruit of the contract." Assuming causation, if the case does not present a "peace of mind" exception, the plaintiff might be able to recover damages for inconvenience and discomfort that are both (1) directly related to the mental suffering and (2) not mere disappointment but more: a "sensory experience."

2. The "Losing Contract" for the Plaintiff in Breach

Contracts purists would say that Anglo-American contract law has come too far in allowing recovery on the contract to a plaintiff who has only partially performed the contract. Another Commonwealth sale-contract case extending *Hadley v. Baxendale* is *Bowlay Logging Ltd. v. Domtar Ltd.*[23] When both parties are in breach of the contract

22. [2002] 97 B.C.L.R.3d 307 (C.A.)

23. [1978] 87 D.L.R.3d 325 (B.C.S.C.), *appeal dismissed*, [1982] 37 B.C.L.R. 195 (C.A.). The provincial trial court is the British Columbia Supreme Court; the highest

of sale, even a plaintiff, who is himself in breach, may recover compensation for the plaintiff's partial performance.[24] The plaintiff, however, may be awarded only nominal damages for the defendant's breach if the plaintiff would have incurred more loss through the plaintiff's own inefficiency than the amount of expenses the plaintiff claims.

The *Bowlay Logging* case presents the issue of a plaintiff's recovery in what would have been, for the injured party, a "losing contract." The defendant pole manufacturer materially breached the contract by failing to supply sufficient logging trucks to haul logs from a timber lot. The plaintiff logging company could not claim damages for lost profits because it was losing money on the contract; the plaintiff therefore, claimed damages for expenditures made in reliance on the contract. The court did not agree with the plaintiff's argument that the court should estop the defendant in breach from requesting an offset for operational losses from the plaintiff's expenditures.

The court held that, when the defendant can prove with some certainty the losses the plaintiff would have incurred had the contract been fully performed, the defendant is entitled to offset such losses from expenditures the plaintiff has made in reliance on the contract. To hold otherwise, the *Bowlay Logging* court thought, would *encourage inefficient business enterprises* (the losing plaintiff) essentially to be insured by the breaching party for all expenses made pursuant to a contract. The court placed the onus of proof on the defendant, who in *Bowlay Logging* proved the operational losses would have exceeded the expenditures made in reliance on the contract, so that the "losing-contract plaintiff," Bowlay, was entitled only to nominal damages.

In a transatlantic vein, the *Bowlay Logging* case does not cite *Hadley v. Baxendale* directly, but does discuss at length *United States v. Behan*,[25] a U.S. Supreme Court decision from 1884, estopping the defendant in breach from arguing that the plaintiff was operating at a loss; the British court cites Judge Learned Hand's rejection of this position from 1949 in *L. Albert & Son v. Armstrong Rubber Co.*[26] In the

provincial court is the B.C. Court of Appeals (C.A.). In matters of federal law, the Supreme Court of Canada is the final arbiter.

24. *See id.* (discussing this rule in British Columbia). In the U.S., judicial encouragement of "efficient breach" of contract remains highly controversial.

25. 110 U.S. 338 (1884).

26. *See* 178 F.2d 182, 189 (2d Cir. 1949). Antitrust scholars best know Judge Learned Hand for having sat in lieu of the U.S. Supreme Court in *United States v. Aluminum Company of America (ALCOA)*, because no high court member was disinterested enough in *ALCOA* to sit on that superior bench. The British best know Learned Hand for the outcry raised in Europe by his astonishingly broad extraterritorial language in *ALCOA*, in which Learned Hand asserted an extreme Territorial Effects Doctrine, assuming (extraterritorial) jurisdiction for the U.S. over any act which the U.S. "reprehends." *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

latter case Judge Learned Hand held that in a claim for expenses in partial performance, the defendant is entitled to deduct whatever he could prove the plaintiff would have lost had the contract had been fully performed.

3. When the Defendant Seller is in Total Breach of Contract

Ford Motor Company of Canada Ltd. v. Haley[27] is a decision of the Supreme Court of Canada, the nation's highest federal court. *In casu* the defendant seller's breach of warranty was total in that the goods completely failed to perform as the seller had warranted. In the case of total failure, the court shifted the burden to the seller to show a residual value in the goods, and if the seller could not do so the buyer should receive restitution of the total purchase price.

4. Loss of Use of Buyer's Money as an Item of Consequential Damages: Canada

Another Canadian case, this one from Alberta, *Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd.*,[28] concerns whether to award, as an item of *consequential* damages for the seller's breach of warranty, the loss of use of the buyer's money stemming from the buyer's other consequential damages. The seller's breach of warranty in the sale of certain goods resulted in the buyer's consequential damage of having to replace certain panels (other goods). The court awarded the buyer the purchase price diminished by the residual value of the panels in the buyer's hands. And because the buyer had to incur expense (to replace the panels) earlier than the buyer would have had to *but for* the seller's breach of warranty, the buyer was to receive compensation for the loss of use of the buyer's money (expense of replacing) for the period during which the panels should have performed properly. As consequential damages, lost profits include loss of sales owing to crop failure and loss of use of the money which the buyer had to spend in replacing the defective panels. Of course, the injured party must heed the Doctrine of Avoidability and seek to mitigate damages. Accordingly, the buyer will recover no more lost profits than those sustained before the buyer's duty to mitigate arose.[29]

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27. [1967] S.C.R. 437 (Can.).

28. [1972] 27 D.L.R.3d 434 (Alta. C.A.), *aff'd*, [1973] 33 D.L.R.3d 384 (Can.)

29. For a recent non-sales case from Canada, see *Bank of Am. Can. v. Mut. Trust Co.*, [2002] S.C.R. 601. This case adopts the expectation measure of damages as expressed in *Hadley v. Baxendale* and goes on to discuss when simple interest, and the more conceptually complicated compound interest, are to be awarded as items of consequential damages. This important case further attenuates *Hadley*'s rule as to consequential damages. *See id.*

5. Loss of Use of Buyer's Money as an Item of Consequential Damages: Australia

Moreover, the highest court of appeal in Australia addressed the issue of loss of use of money as consequential damages in *Hungerfords v. Walker.*[30] As an aid, the Australian court analyzed pertinent British case law consistent with British usage. According to legal commentator, Mr. James Vaux:

> The distinction between a claim for interest, as distinct from a claim for damages or a debt, has never sat easily in the English courts. It can challenge one of the fundamental principles upon which a court will often make an award: *restitutio in integrum*, the restoration of a party to its former position.
>
> . . . Although the decision has no immediate bearing in the English courts, the commercial sense of the [Australian] judgment dictates that it will soon be felt in the UK.[31]

At common-law without a statute, interest cannot be awarded as compensation for late payment of damages. The Australian Full Court awarded damages and loss of use of the money.[32] But compound interest was at issue and no provision in Australian law allowed adding interest to unpaid interest. The High Court of Australia reversed the Full Court using the rule of *Hadley v. Baxendale* to distinguish interest from the general rule of damages.[33]

The High Court of Australia described the first limb of *Hadley v. Baxendale* as the fundamental rule of damages and stated that a plaintiff is entitled to recover when the "damage sustained was reasonably foreseeable as liable to result from the relevant breach of contract."[34] The loss of use of money was, the Court went on, "something more than the late payment of damages. They are pecuniary losses suffered by the plaintiff as a result of the defendant's wrong and therefore, constitute an integral element of the loss for which he is entitled to be compensated by an award of damages."[35] And then the High Court collapsed the two into one, holding it "would prefer to put it on the footing that it [loss of use] is a foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defen-

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30. (1989) 171 C.L.R. 125.

31. James Vaux, *The Interesting Problem of Damages for Loss of Use of Money*, FIN. TIMES (London), May 4, 1989, at 15.

32. Walker v. Hungerfords (1987) 49 S.A.S.R. 93.

33. Vaux, *supra* note 31.

> [L]oss due to the late payment of a debt or damages might be recoverable in accordance with *Hadley v. Baxendale*, though English courts felt constrained by precedent, statute, and the actual remoteness of such damage from the breach of contract or the tort to award the loss as part of a damages claim.

Id.

34. *Hungerfords,* 171 C.L.R. at 142.

35. *Id.* at 144.

dant's breach of contract or tort."[36] According to Mr. Vaux, the Court essentially awarded compound interest with diminution, and to do so distinguished between damages for late payment of a compensatory award, and those for loss of use.[37]

6. Devaluation Loss from Change in Money-Exchange Rate Consequent to Late Payment in a Contract of Affreightment (England)

In England itself, the Court of Appeal addressed the issue of whether damages are payable under the *Hadley v. Baxendale* line of case law for devaluation loss from the change in the exchange rate which the ship owner had sustained as a consequence of the late payment of demurrage. The late payment, a breach of the charter party/contract, clearly in fact caused a loss attributable to the relevant money-exchange rates. In *Lips Maritime Corporation v. President of India*,[38] Neill, Nicholls, and Sir Cumming Bruce, LL.J., allowed ship owners Lips Maritime Corporation to appeal and recognized a claim for damages for loss "caused by late payment [of demurrage] under a contract [charter party] if owing to special circumstances known to the contracting parties it must have been within their contemplation that delay would result in loss, irrespective of whether the special knowledge was exclusive to them."[39]

The charterers of the ship "The President of India" had paid the demurrage late. The contract (charter party) called for payment to be stated in U.S. dollars (as per Greek ship owners' practice) but to be paid in British pounds sterling using the average exchange rate on the day written on the bill of lading. By the delayed time the ship's cargo was discharged the exchange rate had worked to the disadvantage of the ship owner. The precedent of *London, Chatham and Dover Railway v. South Eastern Railway*[40] disallowed recovery for late payment of a debt owed unless a controlling statute or a contractual clause authorized this item of special damage. The court, though, said special damages for late payment should be allowed in certain exceptional cases:

> The difference between general damages and special damages in this connection, is the difference between damages recoverable under the first part of the rule in *Hadley v Baxendale* [ ], ie [sic] damages foreseeable as flowing naturally and probably from the breach of contract in the ordinary course of events: and damages

36. *Id.* at 149.
37. Vaux, *supra* note 31, at 15.
38. President of India v. Lips Mar. Corp., [1987] 1 All E.R. 957, 957–58 (C.A. 1986); *see* Rachel Davies, *Damages Payable for Devaluation Loss*, FIN. TIMES (London), Nov. 4, 1986, at 18.
39. *See Lips Mar. Corp.*, [1987] 1 All E.R. at 967–68.
40. [1893] A.C. 429 (H.L.).

> recoverable under the second branch of that rule ie [sic] damages foreseeable in the particular circumstances of the case because of special matters known to both parties at the time of making the contract.[41]

Thus was the rule of *Hadley v. Baxendale* further stretched. Should the charterer of the ship have known he would sustain loss from late payment of the demurrage in pounds sterling? The Court reasoned that damages might just as well be allowed for late payment of demurrage (a debt, but without precedent) as for situations involving late delivery of a chattel (as in *Hadley v. Baxendale*).

Thus has the British and Commonwealth case law expanded *Hadley v. Baxendale*. And thus have some courts even conflated the old case's two rules.

IV. THE ROLE OF THE RATIONALE OF *HADLEY V. BAXENDALE* IN GLOBALIZED BUSINESS: SITE-LOCATION; AND PRIVACY IN E-COMMERCE

Two questions now arise. First, what role if any does the very same rationale of *Hadley*'s case play as a factor in the business choice of where to locate? Second, what kinds of similar liability-limiting rules lie ahead for enhancing E-commerce including, particularly, the issue of personal privacy? Both, to some extent, depend upon the extent of globalization of business. Europe is becoming one vast customs union and free-trade area. Elsewhere, globalization of world trading systems is occurring in part through similar regional trading blocs created for regional integration. Consider this catalogue of examples: for Europe, the E.U. comprises of twenty-five nations as of the spring of 2004 (mushrooming from 15 to 25 and now embracing most of the former COMECON countries); for the Americas, regionalism has spawned the Andean Community, the Southern Common Market Treaty, the NAFTA, and the MERCOSUR, with MERCOSUR establishing its own bilateral trading pact with the E.U. as of May 2004; for the Caribbean Community and Common Market (CARICOM); the Central American Free Trade Agreement (CAFT); and the Free

41. *Lips Mar. Corp.*, [1987] 1 All E.R. at 961 (finding the controlling precedent of *London, Chatham & Dover Ry. v. S.E. Ry. Co.*, [1893] A.C. 429 (H.L.), inapplicable to claims for special damages and restricted to claims for interest on general damages). And so, the *Lips Mar. Corp.* court got around the *London, Chatham & Dover Ry. Co.* precedent. *See* Davies, *supra* note 38, at 18:

> The question in each case [including *London, Chatham and Dover Railway*] was to determine what loss was reasonably within the contemplation of the parties when the contract was made.
>
> For that purpose the court was entitled to take account of the terms of the contract and the surrounding circumstances, and to draw inferences.

Id.

Trade Area of the Americas (FTAA).[42] For Europe, will there be a new constitution achieved for the E.U.; will Norway join; will the U.K. adopt the Euro and abandon the pound sterling, becoming a full-fledged partner in the E.U.? France, Germany, and England have caused consternation of late by holding exclusive meetings about the future of the community.

A. *Site-Location in International Commerce*

Business decisions to locate internationally are extremely complex to make. What are the factors businesses consider in locating in another country? These are the basic factors companies have to consider: labor costs, natural resource availability, utility availability and cost, transportation costs, capital flow restrictions, and taxes.

In addition to these important factors, local liability-limiting rules may also enter the calculus for choice among sites. It is likely that economists for the multinational company will perform a technical cost-benefit analysis on the variable costs associated with litigation. Such a study should isolate the costs to a multinational corporation of setting policies to protect the corporations from the most litigious area in which they sell their product, goods, or services. Where, for example, are consequential damages sharply limited as in *Hadley v. Baxendale*?[43] The company will set up subsidiaries to sell in those high-risk areas so that the firm there has fewer assets subject to seizure in satisfaction of any litigation assessment, in the hope that circumstances will not cause the court to pierce the corporate veil as in the infamous *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in December, 1984*[44] case of the 1980s. The firm might even aim to hire the best local attorneys, probably keeping them on retainer, so as to create a conflict of interest in the event of litigation against the local subsidiary. Depending upon the nature of the product sold, the company manufacturing the products will want to include additional warning labels and clauses trying to exclude or at least limit liability for consequential damages. The Uniform Commercial Code in the

42. *See, e.g.*, Peter Quinter, *NAFTA, Chile and the Proposed Free Trade Area of the Americas (FTAA)*, EXPERT OBSERVER (December 1995), *available at* http://www.becker-poliakoff.com/publications/article_archive/nafta_chile_trade.htm (last visited Feb. 17, 2005) (on file with the Texas Wesleyan Law Review).

43. One might also ask which countries encourage the "efficient breach" of contract, and what moral climate generates judicial encouragement of promise-breaking, including encouragement of the British (and U.S.) Doctrine of Consideration which would hold unenforceable those promises made without *consideration*. The British Doctrine of Consideration, which demands a bargained-for-exchange not a mere gratuitous promise, is explicable only as an accident of legal history evolving from the old Norman-Anglo forms of action and their gradual demise. Although the U.S. blindly adopted the requirement of consideration in contract law, the Continent did not. Nor strangely enough did Scotland, where the Anglo-Norman forms of action failed to penetrate and the Roman law of obligations held sway.

44. 634 F. Supp. 842 (S.D.N.Y. 1986).

U.S., for example, sets certain statutory limitations on the limitation of liability for special damages.[45]

Perhaps, surprisingly to lawyers, the cost of litigation seems to play a minor role in this decision. Of eleven industrialized countries surveyed in early 2004, Canada and Austria ranked as the number one and two least costly; Britain the third least costly; Italy, the fourth; France, fifth; Luxembourg, sixth; the U.S., the seventh least costly; Iceland, eighth; the Netherlands, ninth; Germany, tenth; and Japan, the eleventh least costly.[46] Factors which business deemed to be of most significance were not cost of litigation, but cost of labor, taxes, utilities, and transportation.[47]

It may be that contractual protections such as risk-shifting clauses, disclaimers of consequential damages, and waivers of subrogation provide adequate safety to business. Incorporation of these and other litigation alternatives into the contracts of local subsidiaries may allow for international business to neglect consideration of local litigation costs.[48]

Two questions need further empirical research. One, are the least costly places those in which there is less litigation (does a direct relationship exist)? Two, are the least costly places those in which there is more litigation (does an inverse relationship exist)?

B. *Fostering E-commerce, Including Data Privacy On-line and Off-line*

The bedrock rationale of *Hadley v. Baxendale* (limiting business liability so as to foster commerce and industry) may or may not be logically extrapolated to the issue of privacy for personal data. But

45. *See* U.C.C. §§ 2-718, 2-719 (1994) (regarding contracts for the sale of goods). The exclusion or limitation of consequential damages cannot deprive the plaintiff buyer of the essentials of a remedy. *See id.* at § 2-719(2). Nor can the section 2-719 limitation of remedy result in an unconscionable fashion to the aggrieved buyer of goods. *See id.* at § 2-719(3). And the limitation or exclusion of consequential damages for personal injury from consumer goods is prima facie unconscionable. *See id.*

46. Amy Chozick, *Study Finds Lowest Costs in Canada, Australia*, WALL ST. J., Feb. 19, 2004, at A11.

47. *See* KPMG, *The CEO's Guide to International Business Costs*, *available at* http://www.competitivealternatives.com/report/viewer.asp?id=ch1 (last visited Feb. 17, 2005) (on file with the Texas Wesleyan Law Review). The comprehensive list of factors important to costs of locating business in a particular country or city or region included: labor costs; utility costs; salaries and wages; electricity; natural gas, statutory plans, telecommunications; government pension plans, public medical plans, depreciation charges, unemployment insurance; financing costs (interest); employer sponsored benefits; paid time not worked; taxes; property; industrial construction income taxes; office leasing; sundry local taxes; and air, sea and road freight. *Id.*

48. *See, e.g.*, Brit T. Brown, *Common Sense Tips for Avoiding Litigation*, *available at* http://library.lp.findlaw.com/articles/file/00093/009448/title/Subject/topic/Alternative%20Dispute%20Resolution%20(ADR)_Mediation/filename/alternativedisputeresolution(adr)_1_52 (last visited Feb. 17, 2005) (on file with the Texas Wesleyan Law Review).

insofar as consumer confidence in personal privacy on the Internet is concerned, it seems more likely that safeguarding buyer privacy would foster internet purchasing.[49] It is argued here that the U.S. law should achieve *"propertization"* of personal data, with the title thereto inuring to the data subject and not to third-party sellers or resellers. That is, the particular individual should own the personally identified or personally identifiable data that are referable to the data subject. Consumers will in the long run be more inclined to purchase online if they are assured of privacy of their own personally identified or personally identifiable data, then if the legal regime fails to protect their personal privacy.[50]

The Internet is an international medium open to sellers and buyers, and this very openness invites fraudulent behavior, even thievery, including identity theft.[51] In May of 2004, only some 24 percent of American homes are without an internet connection. *The Economist* decrees that "better locks and security systems are urgently needed" and exhorts software companies and website builders to try to prevent or minimize "cybercrime."[52] The success of E-commerce in creating a truly global E-market will ultimately depend upon consumer confidence. Yet, the Federal Trade Commission in the U.S. reported around $200 million (U.S.) in internet losses, with about half involving online auctions.[53]

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49. For arguments in support of the proposition that some measure of federal data privacy protection will foster the growth of online industry, see The National Business Coalition on E-commerce and Privacy, *at* http://www.practicalprivacy.org/archive (last vsited Feb. 26, 2005) (on file with the Texas Wesleyan Law Review); *IP: FTC Curbs Personal Data Sales and Ruling on Trespass Tangles Web*, a posting by Daniel Farber, farber@cis.upenn.edu, *at* http://www.interesting-people.org/archives/interesting-people/200006/msg00012.html (June 4, 2000) (on file with the Texas Wesleyan Law Review); Electronic Privacy Information Center, *Public Comment on Barriers to Electronic Commerce*, *avaliable at* http://www.epic.org/privacy/internet/Barriers_to_E-commerce.html (lat visited Feb. 4, 2005) (on file with the Texas Wesleyan Law Review). For commerce-based opposition to federal legislation on data privacy, see Citizens Against Government Waste, *Keeping Big Brother from Watching You: Privacy in the Internet Age*, *avaliable at* http://www.cagw.org/upload/Privacy.pdf (last visited Feb. 4, 2005) (on file with the Texas Wesleyan Law Review); Caslon Analytics, *Privacy Guide*, *at* http://www.caslon.com.au/privacyguide18.htm (last visited Feb. 4, 2005) (on file with the Texas Wesleyan Law Review); U.S. Chamber of Comerce, *U.S. Chamber Rejects Hollings' Internet Privacy Proposal; Calls It a Solution in Search of a Problem*, *at* http://www.uschamber.com/press/releases/2002/april/02-72.htm (last visited Feb. 4, 2005) (on file with the Texas Wesleyan Law Review).

50. *See Unlimited Opportunities?*, THE ECONOMIST, May 15, 2004, at 18, 20 (part of special report entitled *A Perfect Market: A Survey of E-commerce*).

51. *But see* James Van Dyke, Javelin Strategy and Research, *Online Banking and Bill Paying: New Protection from Identity Theft* (October 2003), *avaliable to order at* http://www.javelinstrategy.com/reports.

52. *Unlimited Opportunities?*, *supra* note 50, at 20.

53. *Id.* at 20. Identity fraud victims face more than just intra-national problem as identity theft goes international. Erin Suzanne Davis, *A World Wide Problem on the World Wide Web: International Responses to Transnational Identity Theft via the Internet*, 12 WASH. U. J.L. & POL'Y 201, 203–05 (2003).

In the summer of 2004, the FBI conducted "Operation Web Snare."[54] Amongst those caught are spammers, "phishers" (on-line identity thieves), and spies engaged in corporate espionage. The deterrent to internet commerce presented by on-line crime and fraud is obvious. Although the FBI has begun to mount "sting" operations against on-line scams, it has been the unfortunate experience of your Author, an Internet fraud victim herself, that the FBI's Internet fraud squad sends an automated response and assigns a number to buyers' complaints made online; then nothing happens for months, even years.

The privacy issue cuts both ways in the internet selling and buying of goods and services. In the short term, sellers would argue, restrictions on personal-data gathering and dissemination would inhibit sales. Conversely, buyers would argue that long term they would not participate in the game without feeling secure that data personally identifiable to them would not be sold and re-sold. It is likely to be ultimately in the seller's interest for the buyer to feel secure about privacy of personal data on the Internet. The largest auction company reports that eBay employs around 800 "cyberpolice" for its auction system.[55] Although eBay and Amazon.com have quickly won the confidence of consumers, the same cannot be said for other online sellers. The general rule of "caveat emptor" still applies to internet purchases. Crimes other than identity theft include the holding of phony auctions and making fraudulent requests for data. One of the most persistent nagging problems for email users is posed by requests from abroad for the recipient to place x amount of dollars so as to release their money held in 1st-world country banks which the supplicant's citizenship bars from accessing. Mr. Charles Sykes noted that "[c]oncern over privacy is perhaps the single greatest barrier the Net must overcome before it can achieve its growth potential."[56]

Consumer-to-business E-commerce implicates, in the U.S. but not the E.U., commercial free speech under the First Amendment to the Constitution. The growth of such consumer-to-business E-commerce is likely to be severely limited, in the short term, by privacy concerns.

54. Regarding the FBI's "sting" operations against on-line fraud, see Saul Hansell, *U.S. Tally in Online-Crime Sweep: 150 Charged*, N.Y. TIMES, Aug. 27, 2004, at C1, for a report of more than 150,000 victims identified sustaining losses greater than $215 million U.S.

55. *Unlimited Opportunities?*, *supra* note 50, at 20. Already a term, "phishing," has been coined for unscrupulous sellers who defraud consumers by taking their private credit-card and bank-account numbers with no intention of providing goods and services as offered. *E-commerce Takes Off*, THE ECONOMIST, May 15, 2004, at 9, 9. According to The Economist, the cost of internet fraud to American banks and credit-card companies in the year 2003 was some $1.2 billion (U.S. Dollars). *Id.* And 2003 was a bad year for internet viruses, many spawned by adolescents without true malicious intent. *See* Tony Dawe, *The Battle Business Cannot Afford To Lose*, THE TIMES (London), May 25, 2004, at 29, *available at* 2004 WLNR 5302334.

56. CHARLES J. SYKES, THE END OF PRIVACY 61 (1999).

Relating the privacy issue to online buyers, an important distinction exists between business-to-business (B2B) E-commerce and consumer-to-business commerce. In B2B transactions, natural persons' privacy concerns exist only as to third-party beneficiaries or potential consumers. For example, Business One might be contracting to sell its lists of customers, with personal data referable to specific individuals, to Business Two.

Business must learn to protect its information systems and not leave security to the "techies." It does not suffice to have a firewall or similar data-protecting device. Mr. Tony Dawe warns upper management against being gulled by *technobabble*, asserting that someone must see the forest for the technical trees.[57] It is up to senior managers, he says, to ask *techies* the correct, broad questions. According to the U.K. Department of Trade and Industry, Information Security Breaches Survey, in April 2004, of 1,000 U.K. organizations surveyed, seventy-five percent of businesses reported having experienced a security breach, while fewer than half of these businesses had adequate security measures in place.[58] The U.K. even has a minister for E-commerce, currently Mr. Stephen Timms.

Ahead of the law, technology has already adopted an internationally approved standard for information safety, BS 7799, instructing organizations on establishing a data-security system. Now, internet security should have equal dignity with physical security.[59]

Regarding B2B internet commerce, a business must fear bugging by competing firms. Moreover, Bluetooth technology, intended to make all computer systems compatible, and the resultant Bluetooth telephone followed the law of unintended consequences. The Bluetooth phone is supposed to emit signals only 33 feet afield from the user, more precisely 10 meters, but, in fact, signals may go much further. Mr. Adam Laurie in England in 2003 showed how a laptop computer with a wireless antenna (with a "dongle") may subvert Bluetooth communications, accessing the phones of others and copying or editing material stored therein, including text messages and pictures. The user of a Bluetooth telephone, it seems, must assume themselves to be under technological surveillance, already labeled "bluesnarfing."[60]

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57. Dawe, *supra* note 55.

58. *See* Dep't of Trade and Indus., *Information Security Breaches Survey*, *available at* http://www.entrust.com/resources/pdf/ukdti_infosecbreachessurvey2004_tech.pdf (last visited Mar. 3, 2005) (on file with the Texas Wesleyan Law Review).

59. *See* Dawe, *supra* note 55.

60. Steve Boggan, *Are you being bugged by your rivals?*, THE TIMES (London), May 25, 2004, at 29, *available at* 2004 WLNR 5601151. It has been found that the Nokia 6310, 6310i, 8910i, and the Ericsson T610 phones are the most vulnerable to Bluetooth cybercrime. *Id.* Hacking is called "bluesnarfing" in this particular manifestation of cybercrime—hacking designed to track individual people using Bluetooth telephones without their knowledge or consent. *Id.*

Although the U.K. has in place a Computer Misuse Act, which would make bluesnarfing a violation, the only sure way to prevent bluesnarfing is not through the techies, that is not through Nokia or SonyEricsson, but through turning off the Bluetooth telephone. The notional buyer can be secure from fear of misuse by rivals and other hackers only by shutting down the system of communication. Bluesnarfing can then result in identity theft, taking the victim's address book and diary, and appropriating one's text messages.[61]

1. Fostering E-commerce Through Data Privacy: The E.U. Perspective

The data-privacy chronology is by now familiar. Very soon after World War II the European Convention for the Protection of Human Rights and Fundamental Freedoms recognized the right to privacy[62] and freedom of expression.[63] The European Court of Justice for the EEC recognized, on a case-by-case basis, the right to privacy as guaranteed by the European Convention on Human Rights. And the Organization of American States' American Convention on Human Rights, in its Articles 11 and 13, recognizes the right to personal privacy. (Two important OAS member states, Canada and the U.S., refused to ratify this convention for fear of ceding sovereignty to an international organization.) The E.U. treaty finally adopted outright a guaranty of the right of privacy. And in 1995 the E.U. enacted its Data Privacy Directive, with its extraterritorial reach to the U.S. The directive became effective October 25, 1998, for its fifteen member states[64] (the E.U. comprises of twenty-five member states as of the spring of 2004). The nature of a directive of the E.U. is that it requires the member states of the E.U. to enact domestic (member state or "municipal") legislation implementing the nature and intent of the directive. And so each country's implementing statute may be worded differently but must intend to achieve the effect intended by the E.U. directive.

In the 1995 Data Privacy Directive, mandating privacy for personal data, the E.U. defines personal data as information that is identified or identifiable to a particular individual, restricting the use by anyone

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61. *Id.*

62. ECHR, *supra* note 8, art. 8 at 230; *see also* Protocol No. 6 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, 1496 U.N.T.S. 281, 281 ("*Article 1.* The death penalty shall be abolished. No-one shall be condemned to such penalty or executed . . . . [Article 2 allows certain derogations in wartime.] . . . Article 3. No derogation from the provisions of the Protocol shall be made under Article 15 of the Convention."); ECHR, *supra* note 8, art. 2, at 224.

63. ECHR, *supra* note 60, art. 10, at 230.

64. Marsha Cope Huie, Stephen F. Laribee & Stephen D. Hogan, *The Right to Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues*, 9 TULSA J. COMP. & INT'L L. 391, 394 (2002).

other than the data subject of such data. The data subject does not have to opt-out but has the right to opt-in, to give consent to use of personal data, and to know the identity of the data controller and the intended use of the personal data. A data controller's use of one's personal data must be for a legitimate purpose, and the individual has the right to protest certain uses of her personal information, such as employment, personal evaluations, and creditworthiness. Member state law must grant a private right of legal action to persons against data controllers who violate or allow violations of the controller's obligations. The 1995 Data Privacy Directive requires member states to enact national legislation guaranteeing personal privacy by October 31, 2003. Under Article 1, member states of the E.U. must "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[65]

England, lacking a written national constitution but enjoying a long constitutional tradition of observing certain fundamental rights, has a dualist, not monist, view of international treaties. Thus, the U.K. Parliament, in order to follow E.U. mandates, enacted the Human Rights Act of 1998 and the Data Protection Act of 1998 into U.K. municipal law. Without doubt, the U.K. now recognizes a right to privacy in personal data. Further, because of Article 25 of the E.U. Data Processing Directive, countries wishing to do business with the U.K. must comply with the E.U. Directive. Recall that under Article 25 of the E.U. directive, England, like all member states of the E.U., "shall provide that the transfer to a third country of personal data . . . may take place only if . . . the third country . . . ensures an adequate level of protection [of data privacy]."[66]

Seemingly at odds with the British and European concern about data privacy is the British willingness to submit to surveillance of the person in order to prevent or detect crime. Closed Circuit Television (CCTV) notices, relatively new in England, are omnipresent in the summer of 2004. British law allows CCTV in the employment situation and the employer can monitor email as long as employees know the reason for and the extent of the monitoring by the employer, who

65. Council Directive 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 1, 1995 O.J. (L 281) 31, 38 [hereinafter E.U. Data Privacy Directive]. The 1995 E.U. Data Privacy Directive was implemented in the U.K. as the Data Protection Act of 1998. Also, the relatively new, E.U.-impelled Human Rights Act of 1998 recognizes the right of privacy in the U.K. In accord with the E.U. directive, data subjects, including employees, have a right of access to personal data kept about them, with a right of recourse in the event of error. They can opt in to allowing use of their personal data, but do not have to opt out. In 2002, in conjunction with the Data Protection Act of 1998, a draft was issued of the Employment Practices Data Protection Code. In 2003 came Part 3 of the Employment Practices Data Protection Code, which concerns employer monitoring of the U.K. workplace.

66. *Id.* art. 25.

must give written notice. As a general rule, covert monitoring of employees is disallowed; but as to disclosed monitoring, the Rule of Proportionality applies: the extent of the monitoring must be proportionate to the need to be achieved by the monitoring; and the interests of each party, employer and employee, must be balanced in the equation.

If the monitoring constitutes an interception, then two statutes are implicated in England: The Regulation of Investigatory Powers Act, and a related act, the Lawful Business Practice Regulations. Also, the interceptor of data must be mindful of the Human Rights Act, an act driven into English law by its E.U. membership. The E.U., early on, *de facto* accepted the tenets of the accord establishing the European Court of Human Rights, then *de jure* in the current E.U. treaty. Will there be a new constitution for the E.U.? Chances are roughly 50-50 right now; as we are told in the spring of 2004. The U.K. Human Rights Act specifically recognizes the right to privacy. The E.U. Data Privacy Directive has the power of national law within the European Union.[67] Less clear is whether this right originating in Europe will remain a European right only, or will evolve in as yet unknown ways to become truly international law. It is beyond cavil, though, that because of the 1995 E.U. Data Privacy Directive protection of privacy regarding personal data is legally mandated for twenty-five nations of Europe.

2. Fostering E-commerce Through Data Privacy: The U.S. Perspective

The U.S. perspective on personal privacy, including data privacy, differs from the E.U. perspective. The E.U. "constitution" is really a series of treaties signed by the member states that as of now constitute the E.U., although a true constitution for the E.U. is under consideration in the summer of 2004. In contrast, the U.S. was not subject to invasion or near-invasion by totalitarian regimes in the 20th century and has not amended its constitution specifically to guarantee personal privacy. The U.S. Constitution does not explicitly guarantee a right to privacy. In 1974, the U.S. Congress enacted a privacy law against *government* entities that would invade the privacy of persons, but did not enact overarching national legislation effective against *individual* or *business* intrusion into the privacy of persons. Also, in the last quarter of the 20th century, the U.S. Supreme Court created a sort of second-tier constitutional right to commercial free speech,[68] which the data-privacy issue pits against the right to privacy. In a series of cases beginning in the 1970s, the U.S. Supreme Court has attempted to balance the First Amendment right to assemble, as well as the *Bige-*

67. *See id.* art. 1.
68. *See* Bigelow v. Virginia, 421 U.S. 809, 818–26 (1975).

low-created First Amendment right of business to engage in "commercial speech," against a fundamental (but not explicitly granted by the Constitution) right of privacy.[69]

Does a business's right to advertise under this right include the right to collect and even disseminate the personal data of the data subject? To whom should the data belong that is identified or identifiable to a particular individual? Does the data constitute property that belongs to the data subject or, if property, to the business collecting the personal data? Why should the rights of data-gatherers like ChoicePoint prevail over the data subject's rights to privacy? The opinion of the Author is that personal privacy must be protected by judicially declaring the "propertization" of personal data, with property rights lying solely in the person of the data subject; a constitutional amendment guaranteeing minimal personal privacy is overdue in an electronic society.

At first, Washington expressed indignation at the extraterritorial effect of the 1995 E.U. Data Privacy Directive, with the tacit U.S. statement being, "It has become our post-war role to dictate law to Europe." But even as the U.S. government expressed anger, it prepared to comply just enough as to keep the E.U. from interdicting the transatlantic flow of data about persons.[70] Before September 11, 2001, the U.S. administration protested the E.U. offer of an alternative to allowing data flows to countries that (1) had enacted a comprehensive data-privacy statute; or (2) in the case of U.S. business, to businesses that had voluntarily placed themselves on the Safe Harbor List. The E.U. would allow a third way of complying with its Data Privacy directive: by a business's inclusion in its contracts of E.U.-mandated language guaranteeing personal-data privacy according to the intent of the 1995 E.U. Data Privacy Directive.[71] Then the September 11, 2001, attack on the U.S. inevitably caused privacy interests to take a backseat to security concerns. The Congress rushed to enact the U.S. Patriot Act,[72] protested by only a few lonely, and probably scared, civil libertarians. The Patriot Act sets anti-privacy measures in place that undermine the reluctant U.S. acquiescence to basic principles mandated by the E.U. Data Privacy Directive, a U.S. acquies-

69. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (balancing the right of privacy against the First Amendment right of the abortion protester in sequelae).

70. For an overview of the Safe Harbor framework, see U.S. Dep't of Commerce, *Safe Harbor Overview*, *available at* http://www.export.gov/safeharbor/sh_overview.htm (last visited Feb. 11, 2005) (on file with the Texas Wesleyan Law Review).

71. *See* E.U. Data Privacy Directive, *supra* note 65, art. 26(2).

72. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

cence represented by the Safe Harbor agreement between the E.U. and the U.S.[73]

Concerning privacy on the Internet, given that safeguards must protect both sellers and buyers on the Internet, what has the law done so far to protect E-commerce? And what should the law do henceforward to aid E-commerce? How will the law step in to regulate this new, international internet market, and with what new legal regimes? Legal periodicals are already replete with articles on the jurisdictional issue: precisely who has jurisdiction over an order for goods made in America and received in Great Britain?

Shall we structure a new World Internet Court for Sales of Goods and Services? In regard to this possibility of creating an international internet court, the history of the U.S. does not lean toward relinquishing sovereignty, real or imagined. For example, the U.S. refuses to subject itself to an international criminal court for fear that its soldiers will be charged with war crimes therein, representing a loss of judicial sovereignty; the U.S. signs international accords with the left hand while derogating from them with the right hand by excluding itself from the purview of international tribunals established there under, diminishing the impulse towards 21st-century internationalism; and the U.S. has refused to sign the Kyoto protocol to protect the world environment, at a time when even Russia now (late May 2004) offers to accede, albeit for Mr. Putin's price of gaining entry to the World Trading Organization.[74]

3. Consensus: Fostering E-commerce Through Data Privacy

Hadley's case employs a rationale designed to enhance commerce. What role should the law play today in fostering E-commerce? The U.S. concentrates less on personal privacy than the E.U. The battle still rages in the U.S. between the personal-data privacy interest on the one hand, and businesses' asserted right of freedom of speech on the other hand. In the fall of 2003, one recent cannonade saw the U.S. federal courts holding that the consumer's interest in personal privacy (not being telephoned by telemarketers if the consumer had placed itself on a Do-Not-Call list maintained by a governmental agency) trumped businesses' alleged First Amendment right (à la *Bigelow*) of engaging in commercial free speech or advertising (calling consumers in the latter's homes despite their having opted out of being telephoned). It seems likely that someday, probably from having been compelled to confront the issue by the E.U.'s demands regarding per-

73. *See* MICHAEL L. RUSTAD & CYRUS DAFTARY, E-BUSINESS LEGAL HANDBOOK 8-117 (2003); U.S. Dep't of Commerce, *supra* note 70.

74. *See* Andrew Jack, *Russia Dashes Hopes of Early Move on Kyoto*, FIN. TIMES (London), May 21, 2004, at 8 ("Russia will offer no assurances on ratifying the Kyoto protocol on environmental emissions at its summit with the European Union today . . . .").

sonal-data privacy, the U.S. will include a constitutional guaranty of privacy. That is speculation; one can never underestimate the effectiveness of the business lobby in the U.S. to obviate legislation that is perceived to be against commercial interest.

In summation about the privacy of personal data: after enactment of the 1995 E.U. Data Privacy Directive,[75] which had to become effective in the member states after 3 years, in 1998, the transatlantic flow of data to the U.S. and other lands was to be interdicted if the non-E.U. country failed to have in place an effective system for protecting the privacy of personal data. Under protest, the U.S. government reached an accord in the summer of 2000, creating a Safe Harbor for U.S. companies that wished to place themselves on the Safe Harbor list maintained by the U.S. Department of Commerce. The E.U. Data Privacy Directive as it evolved created three avenues by which a country could satisfy the E.U. and allow transmission of data abroad: one, by enacting a comprehensive data-privacy law protecting personal data (followed in Hungary, Switzerland, Canada); two, by reaching a side agreement with the E.U. such as the Safe Harbor agreement of the summer of 2000; and three, by including in its contracts certain contract clauses that both guarantee the privacy of personal data of the contracting parties and satisfy the requirements of the E.U. Contract clauses that are written and accepted by E.U. institutions as an alternative way of compliance with the 1995 Data Privacy Directive would make third-party beneficiaries of consumers as data subjects whose personal data are transferred to others. This would be done by imposing joint and several liability upon data exporters and importers who violate the contractual clauses guaranteeing privacy. Mandatory jurisdiction lies in Member State courts where the exporter or importer is domiciled. These clauses are mandatory for E.U. financial services and telecommunication industries (not including the Internet), but are voluntary for other industries.

V. CONCLUSIONS

Three conclusions may be drawn from this discussion:

a. This examination of the case law has shown that *Hadley v. Baxendale* is thriving throughout the British Commonwealth and common-law world. Consequential damages have been judicially extended even to include the loss of the use of money from currency-rate fluctuations.

b. The liability-limitation rationale of *Hadley v. Baxendale* may play a factor in a business's decision to locate in a particular country. Not

75. *See* E.U. Data Privacy Directive, *supra* note 65, art. 1 (regarding the privacy of personal data (data identified or identifiable to a particular individual), Article 1 states that "Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data").

enough empirical research has investigated this possibility, but certainly the subject warrants scholarly empirical attention. Thus, in the absence of that sort of scholarship, it is too soon to draw a conclusion about the relationship between liability-limiting rules like *Hadley v. Baxendale* and the business decision to locate in a particular place: but the recent KPMG study would indicate minimal effect on the site-location decision.[76] It must be remembered, though, that each of the countries studied has a highly developed legal system, which means that cost of litigation is a factor closely intertwined with industrial development. This assumes that a direct, not inverse, relationship exists between high economic development and litigation costs.

c. The Author presumes that others at this conference will have made the less controversial connection, the nexus between consequential damages and the international trade regimes, which limit remedies available to consumers, workers, and environmentalists. Concerning the Author's chosen, more controversial, issue of privacy: in the short run, it can be argued that one cannot compare a judicial limitation of damages (*Hadley v. Baxendale*) to a supranational protection of privacy; and protection of personal-data privacy limits the growth of E-commerce industries rather than promotes the blossoming of those industries. Under this latter, short term view, if the European Union successfully forces an international *opt-in* rule,[77] then whole arenas of E-commerce get shut down. Everyone from legitimate electronic marketers to shameless spammers and for-profit medical care providers, will be limited in their ability to market products and services to consumers through electronic media. Under this latter view, taking privacy as a natural right, the Author's position would seem in the short term to limit the spread of international E-commerce rather than to promote it. The European Union makes privacy a natural right, and by virtue of the 1995 E.U. Data Privacy Directive guarantees the privacy of personal data (data identified or identifiable to a particular individual): "Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[78] As to a more general right to personal privacy, the E.U. has now formally adopted as E.U. organic law the European Convention on Human Rights (ECHR); whereas formerly the European Court of Justice incorporated into E.U. jurisprudence case-by-case the various rights granted by the ECHR.

It remains to be seen which regime, or regimes, will dominate in protecting the privacy of personal data. Assurance of personal-data privacy is probably necessary for instilling consumer confidence to

76. *See* KPMG, *supra* note 47.

77. The data subject does not have the initial burden of *opting out* of having his or her privacy invaded.

78. E.U. Data Privacy Directive, *supra* note 65, art. 1.

purchase goods and services on the Internet. It is hoped whatever law evolves will do for internet commerce what *Hadley v. Baxendale* did during the Industrial Revolution for contracting—by limiting the liability of businesses for breaches of contract to consequential damages that are reasonable and foreseeable, prospectively, from the time of contracting.