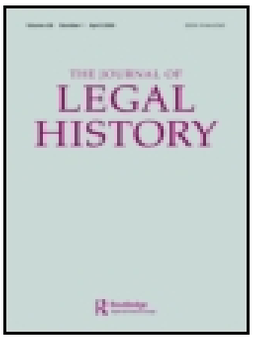

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Hadley v. Baxendale – an Understandable Miscarriage of Justice

FLORIAN FAUST

I INTRODUCTION

Hadley v. Baxendale (1854)[1] is regarded as 'a fixed star in the jurisprudential firmament';[2] it is 'more often cited as authority than any other case in the law of damages'.[3] All this fame is based on the fact that the case formally introduced the rule of foreseeability into the common law of contract:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be 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. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.[4]

Hadley v. Baxendale is not only a case of enormous influence on the law of damages, but it always has been an object of juridical controversy and has elicited contrasting reactions. For example, in 1866 Chief Baron Pollock praised the decision: '[A] more extensive and accurate knowledge of decisions in our law books, and a more accurate power of analyzing

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and discussing them, and ... a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist at the formation of any decision.'[5] On the other hand, more than 100 years later Professor Gilmore wrote:

> [W]hy such an essentially uninteresting case, decided in a not very good opinion by a judge otherwise unknown to fame, should immediately have become celebrated on both sides of the Atlantic is one of the mysteries of legal history.[6]

This controversy is understandable, for *Hadley v. Baxendale* is a puzzling case. There exist contradictory accounts of the facts, and the judgment itself does not even make clear whether it restricted or expanded the award of damages, as compared to the prior law. In consideration of the judgment's significance it is surprising that detailed analyses of the case itself are rare. Especially the fact that the defendant was a common carrier has been almost totally neglected, except for Professor Danzig's detailed article.[7] In this essay, I will try to explain why the four Barons who decided *Hadley v. Baxendale* ruled as they did. Such an explanation has to start long before *Hadley v. Baxendale*; as Justice Holmes said, 'a page of history is worth a volume of logic'.[8]

II ORIGIN OF THE FORESEEABILITY RULE

Although Baron Alderson did not cite any authority in support of the rule of *Hadley v. Baxendale*,[9] the contemplation rule is not at all an invention of the Court of Exchequer.[10] Its immediate[11] model is the rule laid down by Pothier:

> When the debtor cannot be charged with any fraud, and is merely in fault for not performing his obligation, ... the debtor is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit.[12]

Pothier bases this principle on 'reason and natural equity'.[13] He gives the example of the non-delivery of a horse, often cited thereafter: the creditor is entitled to recover the amount that he has to pay for a horse of the like quality. 'But if this purchaser was a canon, who for want of having the horse ... was prevented from arriving at the place of his benefice in time to be entitled to his revenue', the debtor is liable for this loss only if the contract obliges him to deliver so early that the canon can arrive in time to collect his revenue.[14]

Pothier does not apply the contemplation rule to cases of fraud;

'for a person who commits a fraud obliges himself, *velit, nolit*, to the reparation of all the injury which it may occasion'.[15]

Pothier's analysis was well known to Anglo-American lawyers; among the earliest treatises on contract to be published in English were translations of Pothier.[16] As early as 1822, Chipman adopted Pothier's rule, though without the distinction as to fraud.[17] Kent's *Commentaries*[18] cite, besides to Pothier, to Charles Toullier.[19] Sedgwick gives a detailed account of Pothier's explanations, including the distinction between fraudulent and 'normal' breaches, and uses several of Pothier's examples.[20]

Hadley v. Baxendale was not the first case in which the foreseeability rule was cited or even applied. In the United States, in 1839 the Louisiana Supreme Court referred to the contemplation rule, citing to Pothier and Toullier.[21] In the same year, the New York Court for the Correction of Errors was confronted with *Blanchard v. Ely*, a case where the plaintiff sought damages for loss of profits: the defendant had contracted to build a ship for the plaintiff, but due to defects of the ship, its completion was delayed. Judge Cowen stated that, to his knowledge, no common law authority existed with regard to the measure of damages in such a case.[22] 'In short, it will be seen by [many] cases ... that on the subject in question, our courts are falling more and more into the track of the civil law'.[23] He then had recourse to the contemplation rule, citing to Pothier, and refused the award of damages for the profits lost due to the delay. Again citing to Pothier, he remarked, however, that the result might be different where the transaction is accompanied with 'wanton outrage, fraud or gross negligence'.[24]

The Court of Exchequer, which decided *Hadley v. Baxendale*, was confronted with the defense of unforeseeability twice before. *Black v. Baxendale*[25] is especially interesting because the defendant was the same Baxendale as in *Hadley v. Baxendale* and because three of the four judges who decided *Hadley* were involved in the decision: Barons Alderson and Parke as judges, Baron Martin as Baxendale's counsel. The defendants, carriers, were two days late in the delivery of goods, which therefore did not arrive in time to be sold at the market in Bedford. The plaintiffs incurred costs for the removal of the goods to another market and for their clerk's wages. They had not given any notice that the goods had to arrive on a particular day. Baron Pollock, sitting as trial judge, instructed the jury that they were at liberty to award the plaintiffs' costs as damages. The jury found for the plaintiffs. Martin moved for a new trial on the ground of misdirection and argued that the costs incurred by Black were not reasonable consequences of the breach because no notice had been given as to the purpose for which the goods had been sent. The jury should therefore have been directed as a matter of law that the defendants were

not liable for these expenses. All judges argued that whether expenses were reasonable was entirely a question for the jury, and refused to grant a new trial.

In *Waters v. Towers*,[26] the plaintiffs brought an action for loss of profit because the defendants had not fitted up a mill-gearing in a workmanlike manner and had not completed the work within a reasonable time. The defendants argued that the loss of profits 'was not a necessary consequence of the defendants' breach of contract, but a mere contingent damage' and cited to the contemplation rule in Kent's *Commentaries*.[27] Barons Alderson and Martin and Chief Baron Pollock found, *per curiam*, for the plaintiffs without giving any reasons.

Thus, only one year before *Hadley*, two of the judges deciding that case rejected the contemplation rule. These cases demonstrate that the judges were familiar with the idea of foreseeability long before they adopted it. During the oral argument in *Hadley*, Baron Parke explicitly referred to French law and the foreseeability rule as cited by Sedgwick, and the plaintiffs' counsel, too, cited to Sedgwick.[28] Professor Danzig attributes an important role to Sir James Willes, Baxendale's counsel.[29] Willes was perhaps the most learned common lawyer of his time. He was said to have read all the reports from the year-books down to his own time, and he had studied Roman law and foreign systems of law. He had thus acquired a knowledge of legal principles which was both historical and comparative.[30] Thus, he certainly knew the contemplation rule in French law, although he correctly[31] based his arguments not on unforeseeability, but on remoteness of damages.[32]

III HADLEY V. BAXENDALE[33]

1 Facts

The plaintiffs were millers at Gloucester. On 11 May 1853, their mill was stopped by a breakage of the crankshaft by which the mill was operated. In order to replace the shaft, it was necessary to send it as a pattern for a new one to the manufacturer in Greenwich, Kent. On 14 May, the shaft was delivered to Pickford & Co., who were common carriers for goods and chattel from Gloucester to Greenwich. The plaintiffs were told that the shaft would be delivered at Greenwich on the following day. However, by neglect the delivery of the shaft was delayed for five days, and therefore the plaintiffs received the new shaft several days later than they would have otherwise. During that time, the mill could not work and the plaintiffs lost profits.

Unfortunately, the point which is most important for the application

of the foreseeability rule is not clear at all: what information the plaintiffs had given to the defendants. In the report of the trial at the Gloucester Assizes, as well as in the reporter's headnote, it is written: 'The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately [,] ... [and] that a special entry, if required, should be made to hasten its delivery.'[34] On the other hand, Baron Alderson stated in his opinion:

> [T]he only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill.[35]

Several places in the arguments and in later judgments suggest that Baron Alderson was wrong.[36]

The most convincing explanation for the discrepancy of facts was given by David Pugsley.[37] He argues that, according to all accounts, the notice as to the stoppage of the mill was given to the defendants on 13 May, when the plaintiffs were only making inquiries about the defendants' normal delivery times. On 14 May, however, when the shaft was actually sent, no notice was given. Thus, the facts are in accordance with Baron Alderson's statement cited above ('at the time the contract was made'). On the other hand, Baron Alderson's statement of law does not require the notice to be given at the time the contract is made; decisive is that the special circumstances are 'known to both parties'[38] because this knowledge enables them to 'specially provide ... for the breach of contract by special terms as to the damages in that case'.[39] A possible reason for regarding notice on the day before the contract was made as insufficient is that the defendants' employee to whom the notice was given was not the same one who concluded the contract. Unfortunately, the reports do not tell whether Mr Perrett, who talked to the plaintiffs' employee on 13 May, was on duty on 14 May as well.[40] Anyway, it must be heavily doubted whether considerations of this kind really motivated the Court of Exchequer since it would have been natural to embody them in the judgment.

Thus, the facts of *Hadley v. Baxendale* remain in the dark. But the evidence indicating that the clerk was at least informed about the stoppage of the mill is substantial, whereas there is nothing in support of Baron Alderson's account of the facts.

2 Procedure

The owners of the mill, Joseph and Jonah Hadley, brought suit against Pickford & Co. and their managing director, Joseph Baxendale, who was personally liable for the failures of the unincorporated business.[41] They

claimed £300 of lost profits.[42] The claim was based on two counts, which are related to the fact that Pickford & Co. were common carriers.

A common carrier is subject to a special liability: 'The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king.'[43] Besides that duty to protect the goods against loss and injury, the common carrier has to deliver them within a reasonable time.[44] These duties originate from the law of bailment[45] and are based on the 'custom of the realm'. Whether a declaration upon the custom of the realm was in contract or in tort was a hotly disputed question in the eighteenth and the early nineteenth century. It often decided whether or not a plaintiff was successful. For a trover could be joined only with an action in tort, not with a contract action.[46] Also, even more important, in contract, the plaintiff had to join all possible co-defendants – to omit one was as fatal to his action as to wrongly join one. In tort, on the other hand, the plaintiff could pick and choose.[47]

The earliest declarations against carriers are uniformly classified as 'Tort' in the precedent books of the seventeenth century.[48] But at the end of that century, actions against carriers began to be regarded as contractual. In 1690, the King's Bench rejected the plaintiff's argument that a common carrier could be sued either in contract or in tort and gave judgment for the defendant because the plaintiff had not joined all owners of the ship in question: '[O]ne is not a carrier alone.'[49] And in 1695, a plaintiff lost his case because he had joined an action upon the custom and a trover.[50] As late as 1795, a declaration upon the custom was classified as contractual.[51]

However, the practical consequences of this 'contract' approach seem to have required its gradual modification. Thus, in 1766, the King's Bench classified a count against a common carrier as tort and therefore permitted to join it with trover.[52] In 1786, they explained that a plaintiff could sue a common carrier either in assumpsit or upon the custom of the realm; in the latter case, a trover could be joined.[53] Sixteen years later, the King's Bench adopted the same position as to the joinder of parties.[54] The Court of Common Pleas, however, disagreed:

> [T]he duty of a carrier I do not understand, otherwise than as that duty arises out of his contract ... [T]he form of the action cannot alter the nature of the transaction ... How an action against a carrier on the custom ever came to be considered an action in tort I do not understand, but it is so considered, and a count in trover is joined with it; and yet, though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be contract.[55]

The King's Bench kept to their opinion, which finally won general assent; the Common Pleas cases were distinguished by the form of the action.[56]

> [E]ver since *Pozzi v. Shipton* [1838] it has been settled law that an action against a common carrier, as such, is substantially an action of tort on the case, founded on his common law duty to carry safely, independently of the particular contract which he makes.[57]

Thus, a bailor has the choice between two remedies if the goods have either been lost or damaged, or have not been forwarded or delivered within a proper time: he can sue the carrier *in assumpsit* for breach of contract or in tort for breach of duty.[58]

Both forms of action are not easy to distinguish. Hutchinson speaks of a 'very perplexing question' and reports that 'in many cases the astutest judges became perplexed in their efforts to find out to which class the declarations belonged'.[59]

The Hadleys' claim consisted of two counts, one in assumpsit for breach of contract and one in tort for breach of the carrier's common law duty to deliver within a reasonable time.[60]

The first count stated:

> [T]he plaintiffs, at the request of the defendants, delivered to them ... the said broken shaft, to be conveyed by the defendants as such carriers from Gloucester to ... Greenwich, and there to be delivered for the plaintiffs on the second day after the day of such delivery, for reward to the defendants; and in consideration thereof the defendants then promised the plaintiffs to convey the said broken shaft from Gloucester to Greenwich, and there on the said second day to deliver the same ... for the plaintiffs.[61]

The second count reads as follows:

> [T]he defendants being [common carriers], the plaintiffs, at the request of the defendants, caused to be delivered to them as such carriers the said broken shaft, to be conveyed by the defendants from Gloucester aforesaid to ... Greenwich, and there to be delivered by the defendants for the plaintiffs, within a reasonable time in that behalf, for reward to the defendants; and in consideration of the premises in this count mentioned, the defendants promised the plaintiffs to use due and proper care and diligence in and about the carrying and conveying or delivering the said broken shaft from Gloucester aforesaid to ... Greenwich, and there delivering the same for the plaintiffs in a reasonable time then following for the carriage, conveyance, and delivery of the said broken shaft as aforesaid.[62]

The differences in the wording are small, but significant: whereas the first count emphasises the defendants' promise to carry and, as consideration therefor, the reward they were to obtain, their 'promise' in the second count, namely to use due and proper care, does not go beyond the duty imposed upon a carrier by common law. Moreover, in the second count, that promise is not given in consideration of a reward, but merely 'in consideration of the premises in this count mentioned'.[63] Most importantly, the first count is founded on the carrier's contractual promise to deliver the shaft within two days. The second count does not mention that promise, but only the defendants' common law duty to deliver within a reasonable time. Therefore, the first count is in assumpsit, the second one in tort.

To the first count, the defendants pleaded *non assumpserunt*; to the second count, they paid £25[64] into court in satisfaction of the plaintiffs' claim.[65] The plaintiffs entered a *nolle prosequi* as to the first count; as to the second count, they argued that the amount paid into court was not enough to satisfy their claim.[66]

Thus, the plaintiffs did not further pursue their contract action. The reason for that may be that it was not clear whether Pickford's agent who accepted the shaft had authority to contract for delivery at a particular time.[67] *The Gloucester Journal* wrote:

> The declaration had originally contained two counts; the first charging the defendants with having contracted to deliver the crank within the space of two days, which they did in truth do, but there was a doubt how far Mr. Perrett, the agent of the defendants, had authority to bind them by any special contract which would vary their ordinary liability. It was therefore thought not prudent to proceed upon that count, but upon the count of not delivering within a reasonable time.[68]

Therefore, most surprisingly, *Hadley v. Baxendale*, this classic case as to the measure of contract damages, is not a contract case.[69]

At the trial[70] before Mr Justice Crompton, at the Gloucester Assizes, the witnesses testified to only £120 damages.[71] Mr Justice Crompton instructed the jury

> to consider what under the circumstances, was a reasonable time for delivering the shaft; and next, what was the damage caused to the plaintiffs by the delay in the delivery. [T]hey should give their damages for the natural consequences of the defendant's breach of contract, and with that view they would have to consider whether the stoppage of the plaintiffs' works was one of the probable

> and natural consequences of that breach of contract, and then, looking to all the circumstances of the case and the position of the parties, to say what was the amount of the damage occasioned by the stoppage of the works.[72]

The jury found a verdict for £25 damages beyond the amount paid into court. The defendants obtained a rule nisi for a new trial on the ground of misdirection. On 1 February 1854, the plaintiffs showed cause in the Court of Exchequer before Barons Parke, Alderson, Platt and Martin.[73] The oral argument of the defendants' counsel reflects the fact that the plaintiffs' claim was not founded on Pickford's contractual promise, but on the duty imposed upon them by law:

> A carrier has a certain duty cast upon him by law ... Here the declaration is founded upon the defendants' duty as common carriers, and indeed there is no pretence for saying that they entered into a special contract to bear all the consequences of the non-delivery of the article in question. They were merely bound to carry it safely, and to deliver it within a reasonable time.[74]

Some places in unofficial reports are even more explicit. There, the argument of the defendants' counsel is reported as follows: 'In the present case the defendant is sued as a carrier, and consequently is only liable to the ordinary obligations of one.'[75] '*Waters v. Towers* is distinguishable. There, there was a special contract, but here the matter rests on the general liability of carriers.'[76] 'Special contract', which the counsel repeatedly used in the course of his argument, is a specific term in the law of common carriers, describing a contract that modifies the carrier's liability under common law.[77]

The fact that the plaintiffs' action eventually was based on the custom of the realm, and therefore independent of a contract,[78] explains why, in his oral argument, the defendants' counsel did not go into the contemplation rule, although it previously had been subject of the plaintiffs' oral argument and of remarks by Baron Parke,[79] but argued with the remoteness of the damages – the equivalent to the foreseeability doctrine in tort law:[80] '[T]he special damage must be the natural result of the thing done ... This therefore is a question of law, and the jury ought to have been told that these damages were too remote.'[81]

3 Baron Alderson's Opinion

The first issue of the case was whether a trial judge's failure to instruct the jury properly as to the measure of damages was a ground for a new trial. Baron Alderson cited to *Blake v. Midland Railway*[82] and to

Alder v. Keighley[83] and remarked: '[I]f the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice.'[84] Furthermore, he stated: '[W]e deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.'[85] That means that the court of appeal can not only fully review the trial judge's instructions, but can prescribe to him how to instruct the jury in the new trial as well.

Baron Alderson then stated the foreseeability rule.[86] He tried to incorporate older explicit rules for the award of damages (like damages resulting from the non-payment of money[87] or from the lack of title of a vendor of land[88]) into the new rule:

> [A]s, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.[89]

Alderson's assumption that parties to a contract normally know the damage rules governing that specific contract does not seem realistic. Obviously, Baron Alderson tried to reconcile the new rule with the prior case law in order to facilitate its acceptance.

By stating the rule according to which the jury had to be instructed in the new trial, the court of appeals had fulfilled its task. The four Barons, however, went one step further: they applied the new rule themselves.

As to the first part of the rule, that may be justified. It is possible to regard as a question of law whether an amount of injury arises 'generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract', for it is not decisive whether the parties actually contemplated such injury, but whether a reasonable person in their position would have done so.[90] On the other hand, one can argue that the jury, guaranteeing a diversity of viewpoints, is especially suited to apply the reasonable man standard.[91]

Baron Alderson argued that the loss of profits is not a consequence which arises generally, and in the great multitude of cases, from a delay in delivering a broken millshaft. He justified that by drawing several alternative scenarios: the millers might have a spare shaft, or the machinery of the mill might be defective in other respects.[92] A remark of Baron Alderson during the oral arguments indicates that the court might have decided differently if the delivery not of the broken, but of the new shaft had been delayed:

> Suppose the perfect shaft had been delayed, in that case the defendant may have been liable. The difficulty in this case is, that the damage was the indirect consequence of the model for the new shaft not being carried within a reasonable time.[93]

Thus, the court applied the first rule very strictly. It is not sufficient that a certain damage can be foreseen as the possible consequence of the breach; 'alternative stories' of a certain probability exclude a recovery. The alternative story of a spare shaft is of special interest, for, from a legal realist point of view, it may be one of the reasons why the court denied a recovery: the judges might have regarded it as negligent not to have a spare shaft. Lawrence M. Friedman writes:

> The court thus implied that the optimal mill-owner would not allow himself to be caught without a spare. Avoidable consequences must be avoided by those with power to avoid them; it would distort the market system to allow an offender against this principle to cast his losses upon another party, since a market system required the penalties for bad planning of enterprise to fall upon those who planned badly.[94]

As to the second part of the rule, the question whether the special circumstances from which an extraordinary loss might arise were communicated to the defendants is clearly a question of fact, and hence for the jury to decide. However, Baron Alderson simply stated: '[T]hese special circumstances were here never communicated by the plaintiffs to the defendants.'[95] If he is right, the court applied the second rule correctly; but if he is wrong, as the statement of the facts which were found at the trial and several other sources indicate,[96] the court should have held that the damage claimed was recoverable under the second rule.[97]

The purpose of the new trial, which the court granted, seems to be the mere compliance with the rules of procedure. The court explicitly ordered the trial judge to tell the jury that they must not take into consideration the damages resulting from the stoppage of the mill, and other damages were not claimed. Therefore the new trial necessarily was to be a sheer farce.

4 Evaluation

As explained, *Hadley v. Baxendale* is not a contract case. Thus, the court developed the 'principles ... by which ... the jury ought to be guided in estimating the damages arising out of *any* breach of contract'[98] in an action which was independent from the existence of a contract; where the duty whose violation was claimed did not arise out of a contract, but out of common law. Even worse, the only reason that Baron Alderson gave

in support of the new rule is not applicable to the facts of *Hadley v. Baxendale*. Alderson wrote as to the requirement of notice:

> For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.[99]

Thus, the rationale of the requirement to give notice is that the debtor shall be able to protect himself against exceptional damages by contractually limiting his liability. However, a common carrier did not have that possibility.

At the beginning of the nineteenth century, common carriers tried to protect themselves by publishing notices that restricted their liability. Because such practice got more and more out of hand, the question finally was regulated by statute: the Common Carriers Act limited the liability as to certain valuables and eliminated the possibility of further restrictions by public notice.[100] On the other hand, it explicitly allowed the parties to regulate the matter by a special contract.[101] Thus, the interest of the sender seemed to be protected; because he had to assent to a special contract (as opposed to a notice), the carrier could not restrict his liability against the sender's will.

However, the courts were extremely lenient in finding special contracts. For instance, a special contract was inferred from a note personally served on the plaintiff and the plaintiff's subsequent delivery of the goods, although the plaintiff expressly objected to the conditions contained in the note.[102] In 1852, the Court of Exchequer held that a special contract was concluded by a restriction of liability at the foot of the ticket of a railway company.[103]

Thus, the requirement of a contract, with a 'meeting of the minds', was a farce; in fact, a notice was sufficient to limit liability.

> The legislature thought that the companies took advantage of these decisions to evade the salutary policy of the common law, and accordingly intervened and passed the Railway and Canal Traffic Act, 1854 [shortly after the decision of *Hadley v. Baxendale*].[104]

That act provided that a special contract was only binding if signed by the sender and that any notice, condition or declaration which limited the carrier's liability was null and void; conditions which a court found just and reasonable were valid.[105] The House of Lords finally interpreted the 'singularly ill drawn and confused'[106] statute and held that restrictions of a common carrier's liability were only valid if they were both signed and just and reasonable.[107]

Therefore, a common carrier could not restrict his common law liability without consent of the sender, whatever demands are made on that consent. So far, the situation seems to conform to Baron Alderson's rationale of the foreseeability rule, that is to give the common carrier the possibility of providing for a breach of contract by special terms as to damages. However, such analysis neglects the fact that a common carrier is bound to carry the goods delivered to him.[108] If a sender did not consent to special terms as to the carrier's liability, the carrier could not refuse to transport the goods, but he had to transport them under the liability rules of the common law. That clearly is expressed in *Carr v. Lancashire and Yorkshire Railway*.[109] Baron Parke:

> If [the plaintiff] had sought to enforce the defendants' obligation as common carriers, he ought to have tendered a reasonable compensation for the carriage of the chattel; and, upon their refusing to receive it, he might have sued them upon their common law liability. But, instead of doing so, he has entered into a special contract with the defendants.

Baron Martin: '[A carrier] may ... be bound to carry goods; and if he refuses to do so, except on the terms of a special contract, he may subject himself to an action for that breach of duty.'

Consequently, a common carrier could not unilaterally restrict his liability, he could not refuse to carry the goods, and it is even doubtful whether he could charge a higher rate for exceptional risks. For a statute of 1691, which was still in force at least in 1816,[110] provided that the justices of the peace of every county should yearly assess and rate the maximum prices of all land carriage of goods whatsoever.[111]

The dilemma is fully described by Chief Baron Kelly in *Horne v. Midland Railway*:

> [W]hat would be the position of the railway company [after notice has been given]? Would they be less bound to receive and convey the goods? I think clearly not. Then comes the question what is the effect of the notice. Is it to force the company to contract so as to be liable for any damage sustained by the plaintiffs, although the amount in many cases might be indefinitely large, and although the company was bound to receive [at their normal rate]? It seems to me that there is no reason ... to support such a liability.[112]

The judges proposed different solutions. Chief Baron Kelly believed that the company should be liable for consequential damages only under a special contract, Baron Pigott attributed the company a right to decline to carry, and Mr Justice Lush gave them a choice between declining to

carry and charging a higher rate.[113] It is obvious that the rationale that Baron Alderson gave for the second rule of *Hadley v. Baxendale* does not fit the case of a common carrier. Thus, in *Horne v. Midland Railway*, Mr Justice Blackburn called that rule 'a mistake'.[114]

How can it then be explained that the Court of Exchequer adopted that rule in a case for which it was totally inappropriate? The answer cannot be found in the foreseeability rule itself, especially since the court did not invent the rule, but merely adopted it. The key to the understanding of *Hadley v. Baxendale* is the first part of the judgment, where Baron Alderson stated that the trial judge had to instruct the jury as to the measure of damages and that the court of appeals may fix the content of these instructions in advance (and not merely examine them after the trial). From the point of view of legal history, this is the revolutionary aspect of the judgment; in *Black v. Baxendale*,[115] for instance, the Court of Exchequer had rejected the contemplation rule not because the judges did not accept its substance, but because they refused to restrict the jury's discretion. The development of the law of damages is not one of substantive law, but one of procedural law: '[T]he characteristic texture of our law of compensation has been woven in the loom of the jury system.'[116]

IV RESTRICTION OF THE JURY'S DISCRETION

1 The Law before 'Hadley v. Baxendale'

Initially, the award of damages was entirely left to the discretion of the jury.[117] However, it was apparent that there had to be *some* possibility of control over the jurors. 'The limitations upon [their] power of assessment, and the means by which it might be controlled and corrected, formed the main problem of the English law of damages for many hundreds of years.'[118]

Until the middle of the seventeenth century, the remedy against wrong verdicts was the writ of attaint. Then, in connection with the gradual change of the jury's role from neighbour-witnesses to judges of the facts,[119] the writ of attaint was replaced by the granting of new trials. In *Wood v. Gunston* (1655), the King's Bench for the first time set a verdict aside because it awarded excessive damages.[120] Subsequently, the granting of a new trial became the standard remedy in damage cases. The control of the jury's power was entirely based on procedural law. '[Instead of a] reasoned system of rules to guide the [jury] and the Court in the exercise of their duties [,] we find ... a reliance on various mechanisms to check the abuse of discretion.'[121]

However, with the possibility of granting a new trial, the trial judge's instructions became more important.[122] If they were correct and the jury

disobeyed them, the verdict might be set aside.[123] If the charge was incorrect, the court *in banc* might grant a new trial.[124] Motions for granting a new trial either because the jury had not followed the instructions or because of misdirection became the major battlefield within the law of damages.

The increased importance of the jury instructions offered the possibility of developing general rules as to the award of damages.[125] Because these rules were reviewed on appeal under the aspect of misdirection, uniformity across the different judges might have been achieved. However, very few such rules were developed, and the law of damages in the time before *Hadley v. Baxendale* remained diffuse.

In general, the plaintiff's expectation interest was protected.[126] However, it is not clear whether the expectation interest also included consequential damages or whether it was limited to the loss *propter ipsam rem non habitam*,[127] as Baron Parke's statement in *Strutt v. Farlar* indicates:

> [The debtor] must therefore... place the plaintiff in the same situation as if she had performed her promise. If it is to be paid in money, she must pay it; if by the delivery of a thing of ascertained value, that value is the measure of damages.[128]

As early as 1664, the King's Bench sustained a verdict that awarded consequential damages;[129] but that holding might be founded more upon a general unwillingness to interfere with the jury's findings, still prevalent at that time, than upon material considerations as to the law of damages.

In 1816, consequential damages were awarded in two cases. In *Bridge v. Wain*,[130] a buyer of goods which did not conform to an implied warranty recovered not only the difference in value between perfect and defective goods, but also the profits that he would have made in selling the goods to China.[131] In *Lewis v. Peake*,[132] the plaintiff was awarded the costs of an action that he, without success, defended against a sub-vendee who claimed that the goods did not conform to the warranty given both by the seller to the plaintiff and by the plaintiff to the sub-vendee. Furthermore, both in *Black v. Baxendale*[133] and in *Waters v. Towers*,[134] consequential damages were awarded for breach of a contract to perform services. In *Clare v. Maynard*, on the contrary, the buyer of an unsound horse recovered only the difference in value, but not the profits he lost because a resale, which he had already made, failed. As to the award of the lost profits, Lord Denman exclaimed: 'In all the law of the world, I believe this is a new point.'[135]

There are some further clues which may demonstrate that consequential damages were not routinely awarded in the time before *Hadley*.[136] In *Dunlop v. Higgins*,[137] a Scottish case, the Lord Chancellor stated that,

under Scottish law, the damages for non-delivery of goods consisted not only in the contract-market price differential, but included other lost profits as well. He then argued:

> [T]he question is, whether ... your Lordships are to adopt a principle ... which, according to my opinion, is less calculated to do justice to all parties than the one upon which the Court has proceeded. It is very desirable, no doubt, that the law between the two countries shall be assimilated. But that is no ground why your Lordships should introduce into the law of Scotland a rule which ... would do great violence to the law of Scotland, and which you do not altogether approve of here.

This statement indicates that, in 1848, lost profits beyond the contract-market price differential were not awarded under English law. Two English cases from 1873 and 1874, respectively, point into the same direction. In *Die Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel v. Armstrong*, the court explained:

> [S]o far as [*Hadley*] decides that the defendant is not liable for any unusual consequences, arising from circumstances of which he has not notice, the case has often been acted upon. But an inference has been drawn from the language of the judgment, that whenever there has been notice at the time of the contract that some unusual consequence is likely to ensue if the contract is broken, the damages must include that consequence; but this is not, as yet at least, established law.[138]

A similar statement is made in *Horne v. Midland Railway*.[139]

Thus, the situation is not clear with regard to consequential damages in the time before *Hadley*. The award of lost profits may have been regarded as especially problematic because it seemed to violate the principle of the privity of contract: the creditor–debtor relationship was influenced by a contract that the creditor had concluded with a third party.

> There was plainly a feeling that *some* limitation ought to be placed upon the [award of damages], and the tangled case law is largely concerned with attempts to settle the appropriate restrictive principle in terms of which juries could be directed, whilst not being excessively mean to the plaintiff.[140]

One such principle, which did not prevail, was that damages should be awarded for the 'necessary' or 'natural' consequences of the breach.[141] Thus, in *Hadley v. Baxendale*, the trial judge instructed the jury that they should award 'damages for the natural consequences of the defendant's

breach of contract'.[142] Professor Simpson attributes the success of the foreseeability doctrine partly to 'its implied claim that the civilian doctrine being imported amounted in normal cases to the same thing as the common law's 'damages arising naturally'; hence innovation was concealed'.[143] Moreover, the confusion within the law of damages explains itself the favourable reception of *Hadley*: finally, a general rule was found which applied to all kinds of contracts and of damages and was, on the other hand, sufficiently flexible to allow to decide every single case according to its own merits.

2 Foreseeability and Strict Liability

Professor Gilmore alleges that *Hadley v. Baxendale* is indirectly related to another means of controlling the jurors: to withhold from them certain issues at all by transforming questions of fact into questions of law.[144] In contract law, the adoption of a strict liability standard for breach of contract was such an elimination of a factual question: the motives of the breaking party were irrelevant, no inquiry as to negligence was necessary; the breach alone was important.[145] Professor Gilmore argues that 'a restrictive approach toward damage recovery seems a necessary component of any idea of absolute liability'.[146] Horwitz calls that argument 'dubious',[147] but it seems plausible to restrict the damages in order to offset the fact that a party may become liable without any fault. However, if that really was a major reason for adopting the foreseeability rule, it would have suggested itself to distinguish, as Pothier did,[148] between fraudulent and non-fraudulent breaches. Such a distinction has never been made.[149]

3 Conclusion

To summarise, it can be said that the foreseeability rule is 'the outgrowth of a widened control by the judge over the jury'.[150] At the time of *Hadley*, dissatisfaction with juries seems to have been widespread. Thus, the Common Law Commissioners of 1852–53 stated:

> [W]e are not at all blind to the fact that in many instances juries are not so constituted as to ensure such an average amount of intelligence as might be desired; ... in the agricultural districts the common juries are sometimes composed of a class of persons whose intelligence by no means qualifies them for the due discharge of judicial functions. Such persons, unaccustomed to severe intellectual exercise or to protracted thought ... sometimes pronounce verdicts which bring the institution of juries into disrespect.[151]

In the middle of the nineteenth century, it was generally recognised that the jury's discretion in awarding damages had to be severely restricted. In *Alder v. Keighley* (1846),[152] Chief Baron Pollock wrote:

> No doubt, all questions of damages are, strictly speaking, for the jury; and, however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find.

Hadley v. Baxendale seems to have provided the general rule that the English courts had struggled to find for over half a century. In 1858, Sedgwick wrote, citing to *Hadley* (only four years after the case had been decided):

> [I]t is now well settled, that in all actions of contract ... the amount of compensation is to be regulated by the direction of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.[153]

V REASONS FOR RESTRICTING THE JURY'S DISCRETION

1 Determination of Jurisdiction

Professor Danzig[154] alleges that the foreseeability rule played an important role in dividing jurisdiction between the Superior Courts and the county courts, which, in 1846, had been reconstructed in order to relieve the Superior Courts.[155] County court claims were limited to actions where the amount claimed did not exceed £50.[156] Professor Danzig asserts that the foreseeability rule, by producing more certainty as to the amount of recovery, was a means of allocating the cases between the two court systems.

> Moreover, since the rule ... coupled this enhanced predictability with an assertion of limitations on recovery, it tended to shunt cases from the Superior Courts toward the County Courts and thus to protect the smaller system from at least a portion of the workload that if untrammelled would overwhelm it.[157]

Professor Danzig's argumentation is not entirely convincing. It is true that not as many actions were brought in the county courts as the law permitted: in the years until 1877, the average amount claimed in county courts was less than £3.[158] This, however, seems to have been more a psychological than a legal problem. The name of the 1846 act – 'An Act for the more easy Recovery of small Debts and Demands in England' – may have contributed to the hesitation to bring other actions than for the collection of really small debts in the county courts.[159]

It seems improbable that the Court of Exchequer should have tried

to induce parties to sue in the county courts by restricting[160] consequential damages. First, the number of cases where consequential damages in contract law posed a problem probably was relatively small; it certainly was not the number of those cases which overwhelmed the Superior Courts. Second, the foreseeability rule hardly was apt to lead plaintiffs to bring actions in county courts instead of the Superior Courts. Only a rule which made absolutely clear that the plaintiff had no chance of recovering more than £50 might have achieved that. The foreseeability rule, however, was too imprecise to deprive the plaintiff of the hope of recovering for consequential damages. Third, the legislator itself was aware of the hesitant acceptance of the county courts with regard to 'bigger' cases and took countermeasures. In 1850, plaintiffs who recovered not more than £20 in contract actions or £5 in tort actions in Superior Courts were 'punished' by barring recovery of their costs,[161] and in 1852 appeal to one of the common law courts was made possible.[162] It seems impossible that the Court of Exchequer should have considered a modification of the damage rules more effective than those measures.

2 Need of Certainty in Business Life

An argument that is exactly opposite to Professor Danzig's hypothesis seems more plausible: by restricting the jury's power with regard to damages, the common law courts did not want to get rid of litigation, but, on the contrary, they hoped to attract litigants who used to seek justice elsewhere.

In the middle of the nineteenth century, most of the commercial dispute resolution seems to have taken place outside the courts. In 1846, it was estimated that only three cases worth £10,000 or more were tried each year in the Superior Courts.[163] Businesspeople were highly dissatisfied with the way the common law courts worked. Thus, the Liverpool Chamber of Commerce wrote:

> [T]he simplest pecuniary right cannot be recovered, or obligation enforced, except at a cost frequently far exceeding the sum at stake, with a delay and harrassment which, in the rapid requirements of business, is often tantamount to a refusal of justice, and with an uncertainty ... which too often induces the abandonment of the most undoubted rights.[164]

As commerce was continually expanding in the nineteenth century, the need for predictability – an important requirement of the rational, calculating business world – and uniformity in the law was growing.[165] Decision by jury, which 'has always been characterized by the subjectivity of the judgment and the use of informal and internal criteria',[166] could not

satisfy that need. Contract law, and especially its application, got more and more isolated from the purpose of commercial transactions.

Merchants reacted to those deficiencies of the common law courts by avoiding litigating in them. They settled disputes informally among themselves when they could, and when they could not, they referred them to the more formal process of arbitration,[167] 'as it were a plank in a shipwreck'.[168] Thus, for example, the Liverpool Cotton Brokers Association, formed in April 1841, organised the rapid arbitration of disputes between principals, the arbitrators being brokers not directly involved.[169] The questions whether parties were bound by an arbitration clause, whether arbitrators' findings were subject to review by the courts, and whether arbitrators' awards could be enforced were subjects of constant discussion until they were finally resolved by the Arbitration Act (1889).[170]

The courts did not look very favourably on that development, which diminished their jurisdiction. The common law judges traditionally had endeavoured to extend their jurisdiction and done that for solid economic reasons: their income depended on the fees they collected from the parties. In *Scott v. Avery* (1856), Lord Campbell stated:

> There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil... And they had great jealousy of arbitrations whereby Westminster Hall was robbed of [a lot of] cases.[171]

Although the judges' income from fees was taken away in 1825[172] and therefore, at the time of *Hadley*, the judges had no economic incentives to extend jurisdiction, probably the centuries-old endeavour to attract litigation still had an effect in the middle of the nineteenth century. The judges had a further reason for disliking arbitration: their ideological commitment to formal adjudication and the common law was affronted by the frequent recourse to arbitration.

> Central to any profession's ideology is the notion that its members perform a service indispensable to society ... The antipathy of businessmen for law, as evidenced by their preference for arbitration in all its forms, was taken as an affront to the competence, the self-esteem, the indispensability of the legal profession.[173]

The rule in *Hadley v. Baxendale* can be seen as an attempt to correct one of the deficiencies which made merchants resort to arbitration: the unpredictability of damage awards.

3 Intellectualisation of the Law

Besides the judges' endeavour to secure their influence against the competition by extra-judicial dispute resolution, there was another, and perhaps more important, reason for restricting the jury's power. In the early nineteenth century, law was more and more regarded as something scientific, which, like ethics, economy, political behaviour and many other things, had to be governed by principles. '[I]f we would but adhere to principle, the law would be, what it ought to be, a science', wrote Baron Alderson, the author of the opinion in *Hadley v. Baxendale.*[174] The law was to become more certain, more predictable, more intelligible.[175] It was the time of the legal treatise.[176] 'When Pothier's Law of Obligations appeared in English translation in 1806 it was avidly seized upon by English lawyers and judges' because it provided the 'general principles of contract law which modern English lawyers were particularly looking for'.[177]

The fact that the award of damages was not subject to any fixed rules and almost entirely left to the discretion of the jury obviously was an anachronism at a time when the future of the law was seen in its intellectualisation and systematisation. It seems logical that the Court of Exchequer, in order to remedy that deficiency, resorted to legal treatises[178] and adopted a rule set forth there. It seems logical as well that the judges did not confine themselves to a holding that was necessary to decide the case in question, but that they stated a principle that was able to govern all questions of damages in contract law.

Moreover, the contemplation rule was well in accord with other principles prevailing in the nineteenth century: individualism and liberalism. 'The rules of contract law were value neutral, serving only to facilitate private negotiation ... It was not for the state to say what duties were owed by one person to another or to establish general standards.'[179] Rationally acting parties (and it was assumed that all parties were acting rationally) would allocate the contractual risks in a way that the benefit of both was maximised. This, however, was not possible if one side had to bear risks which were unknown to him. Therefore, only foreseeable damage could be recovered. On the other hand, if the debtor was informed of the extraordinary risk involved in the contract, the parties were supposed to take this risk into consideration in fixing the terms of the contract.[180] Thus, Baron Alderson gave as reason for the notice requirement:

> [H]ad the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.[181]

4 Restriction of Business Risk

By setting a relatively clear restriction on damage awards and thus limiting business risk, *Hadley v. Baxendale* is part of a general development in the first half of the nineteenth century. Baxendale was the managing director of a common carrier, Pickford & Co., and personally liable for the failings of the unincorporated business. Thus, the case involves two questions of the limitation of business risk: the limitation of the liability of common carriers and the limitation of a principal's personal liability for the misfeasance of his company.

As to the latter, unlimited liability was the rule, with very restricted exceptions.[182] However, one year after *Hadley v. Baxendale*, the principle of limited liability was generally recognised for incorporated companies.[183] In 1854, the desirability of limiting personal liability was a major item of parliamentary debate and

> the legal world's most hotly disputed subject... [J]udges were, at one and the same time, confronted with a growing acceptance of the idea of limited liability and yet with a situation of unlimited personal liability for commercial misfeasance.[184]

Thus, the fact that the principal defendant was not Pickford & Co. but Baxendale may well have played a role in the decision of the Court of Exchequer. At a time when it was not certain whether personal liability would be excluded by statute, the court reduced personal liability by restraining liability in general and set a rule which could protect personal liable corporation members in the future. With the growth of industry and commerce, such a protection had got more and more necessary: due to increasing agglomerations of capital and a pyramiding and interlocking of transactions, any error could result in the complete loss of the principal's fortune. Patterson argues that *Hadley v. Baxendale* 'manifests a policy to encourage the *entrepreneur* by reducing the extent of his risk below that amount of damage which ... the promisee has actually been caused to suffer'.[185]

Furthermore, *Hadley v. Baxendale* can be seen as the result of a tendency to limit the liability of common carriers. Thus, in 1830 Parliament had limited the liability for the loss of or injury to certain valuables to £10, unless the sender had declared the value and nature of such article at the time of delivery. In that case, the common carrier was allowed to ask for an increased charge.[186] However, with the progress of industrialisation, it became more and more apparent that common carriers ran big risks not only with regard to the shipment of valuables. Delays or losses in shipping pieces of machinery could, as *Hadley v. Baxendale* demonstrates, result

in enormous damages. Five months after the decision of the Court of Exchequer, the Railway and Canal Traffic Act limited the recovery for the loss of or injury to animals to certain amounts 'unless the Person sending or delivering the same ... shall, at the time of such Delivery, have declared them to be respectively of higher Value'. In that case, the company was allowed to demand an increased rate of charge 'by way of Compensation for the increased Risk and care thereby occasioned'.[187] Therefore, the ruling in *Hadley v. Baxendale* is not at all extraordinary; it can be seen as a mere extension of the restriction of common carriers' liability as set forth in the 1830 Act, an extension to cases where, in fact, the restriction of liability was much more important than in the transport of animals.[188] Both statutes provide for an unlimited liability when appropriate notice was given – exactly like the second rule in *Hadley v. Baxendale*. The permission to charge higher rates when the notice requirement is fulfilled resembles Baron Alderson's argument in *Hadley* that the parties might have agreed on different contract terms if they had known the special circumstances.[189] It seems very probable that these similarities are not accidental. The Court of Exchequer may well have used Pothier's contemplation rule in order to restrict the jury's power with regard to damages because in the case in which such restriction was effected, that rule stood in the continuity of the statute law and therefore was likely to be generally accepted.

VI CONCLUSION

Hadley v. Baxendale seems to be the result of several tendencies in the English law of the nineteenth century. The most important one was to restrict the jury's power as to the award of damages. In the middle of the last century, it had become obvious that general rules were necessary to guide the jury, but no such rules had yet been developed. It seems probable that the Court of Exchequer wished to introduce a general rule as to the award of damages, perhaps even the specific rule to which Baron Parke's 'attention ha[d] been drawn ... by reading Mr. Sedgwick's work',[190] for this rule had some features which were likely to foster its acceptance. It was well in accord with the tendency of limiting business risk[191] and with the principles of individualism and liberalism,[192] and its first part was similar to the prior case law's 'damages arising naturally'.[193] The case of *Hadley v. Baxendale* seemed apt to the Barons for taking the innovative step, and they did not want to have that opportunity spoilt by the plaintiffs dropping the contract count. Actually, although the rationale Baron Alderson gave for the foreseeability rule does not fit the special legal situation of a common carrier, it may have suggested itself to adopt the rule in a common carrier case. For the contemplation rule could be seen as

mere generalisation of statute law which provided that, in certain cases, a common carrier's liability was limited unless he had been informed that the goods he had to transport were of high value.[194]

Another possible explanation of *Hadley v. Baxendale* is that the judges simply wanted the defendants to win and took the first rule which enabled them to reach that result, namely the foreseeability rule cited to them by the plaintiffs' counsel.[195] Two of the four Exchequer judges had connections to Pickford & Co.: Baron Parke's brother had been Baxendale's predecessor as Pickford's managing director, and Baron Martin had been Pickford's standing counsel before being called to the bench.[196] In *Black v. Baxendale*, he had argued that the plaintiffs could not recover consequential damages because the carrier had no notice for what purpose the goods were sent.[197] At that time, the argument had not been successful. Another factor may have been more important than the judges' personal connections to Pickford & Co.: the discrepancy between a carrier's compensation and the damages for which he might be held liable. The plaintiffs had paid £2 4s for the carriage, and they claimed £300 of damages.[198] Mayne writes: '[I]n matters of contract, the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance.'[199] One may speculate whether the Court of Exchequer would have come to the same result in an action against the manufacturer of the new shaft for delay in producing that shaft.

> Under these conditions the invention of the case must have seemed particularly appealing to its promulgators. It led not simply to a resolution of this case for Baxendale, but also, more generally, to a rule of procedure and review which shifted power from more parochial [i.e., the jury] to more cosmopolitan decision-makers [i.e., the judges].[200]

The rule of *Hadley v. Baxendale* was an instant success, both in England and in the United States. In 1856, *Hadley v. Baxendale* was incorporated in one of the most important legal textbooks of the time, *Smith's Leading Cases*, whose editors were Sir James Shaw Willes – Baxendale's counsel – and Sir Henry Singer Keating – Hadleys' counsel.[201] In the next edition, it is stated that the rule 'appears now to have been recognised by all the common law courts, and will probably be acted upon for the future', but also that 'it appears to be a merely arbitrary rule, ... not depending in any way upon considerations with reference to the nearness or remoteness of the resulting damage'.[202] Chitty & Temple discussed *Hadley v. Baxendale* in their treatise on the law of carriage,[203] and in 1858, the third edition of Sedgwick's *A Treatise on the Measure of Damages* reported the case in detail.[204]

It may be heavily doubted whether *Hadley v. Baxendale* deserved such fame; perhaps, the case should have gone into the garbage can of legal history instead of every contracts textbook. To summarise most drastically: a court develops a rule of contract law in an action based explicitly not on contract, but on a common law duty. The reason that the judges give for that rule does, of all cases, not fit the case in question. Instead of leaving the application of the rule, which involves questions of fact, to the jury, the judges decide themselves, and in that process they distort the facts of the case and therefore apply the rule wrongly. Why such a case became immediately celebrated on both sides of the Atlantic is indeed one of the mysteries of legal history, but the fact that *Hadley v. Baxendale* became so popular demonstrates, more than anything else, how urgent the need for a general rule as to contract damages must have been in the middle of the last century.

NOTES

I am very grateful to Professors Bruce W. Frier, Avery Katz, A. W. B. Simpson and James J. White for their comments on drafts of this article.

1. Ex. 341; 156 Eng. Rep. 145 (1854).
2. Grant Gilmore, *The Death of Contract* 83 (1974).
3. S. A. L. Corbin, *Corbin on Contracts* 5, 93 (1951).
4. *Hadley v. Baxendale*, 9 Ex. 341, 354–5; 156 Eng. Rep. 145 (1854).
5. *Wilson v. Newport Dock Co.*, 35 L.J.R. (N.S.) Ex. 97, 103 (1866).
6. Gilmore, note 2, at 49.
7. Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. Leg. Stud. 249 (1975).
8. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).
9. 9 Ex. 341; 156 Eng. Rep. 145 (1854).
10. See Chief Baron Pollock in *Wilson v. Newport Dock Co.*, 35 L.J.R. (N.S.) Ex. 97, 103 (1866); Mr Chief Justice Campbell in *Smeed v. Ford*, 1 Ellis & Ellis 602, 613; 120 Eng. Rep. 1035 (Q.B. 1859).
11. As to the derivation of the concept of foreseeability from Roman law by Molinaeus, see Reinhard Zimmermann, *The Law of Obligations* 828–9 (1990); J. L. Barton, *Contractual Damages and the Rise of Industry*, 7 Oxford J. Legal Stud. 40 (1987).
12. Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts*, translated from the French by William David Evans, part 1, ch. 2, art. 3, s. 160 (London 1806).
13. Ibid., s. 164.
14. Ibid., s. 161–2.
15. Ibid., s. 166.
16. S. F. C. Milsom, *A Pageant in Modern Dress* (Book Review), 84 Yale L.J. 1585, 1589 (1975) (reviewing Gilmore, *The Death of Contract*). In 1802, an American translation was published by Martin & Ogden (Newbern, N.C.) under the title 'A Treatise on Obligations, Considered in a Moral and Legal View'. As to the British translation of 1806, see note 12.
17. Daniel Chapman, *An Essay on the Law of Contracts, For the Payment of Specifick Articles* 121–3 (1822).

18. Vol. 2, p. *480, note (4th edn 1840).
19. Charles Toullier, *Le Droit Civil Français* 3, 336 (Nouvelle Edition 1847).
20. Theodore Sedgwick, *A Treatise on the Measure of Damages* 64–7 (1847).
21. *Williams v. Barton*, 13 La. 404, 410 (1839).
22. *Blanchard v. Ely*, 21 Wendell *342 (N.Y. 1839).
23. Ibid., at *348.
24. Ibid., at *348–50.
25. 1 Ex. 410; 154 Eng. Rep. 174 (1847). The case is referred to by the plaintiffs in *Hadley v. Baxendale*. 9 Ex. 341, 348; 156 Eng. Rep. 145 (1854).
26. 8 Ex. 401; 155 Eng. Rep. 1404 (1853). In *Hadley v. Baxendale*, the plaintiffs cite *Waters v. Towers* in support of their action. 9 Ex. 341, 348–9; 156 Eng. Rep. 145 (1854).
27. *Waters v. Towers*, 8 Ex. 401, 402–3; 155 Eng. Rep. 1404 (1853). As to Kent's *Commentaries*, see note 18.
28. *Hadley v. Baxendale*, 9 Ex. 341, 345–6; 156 Eng. Rep. 145 (1854).
29. Danzig, note 7, at 257–8.
30. William Holdsworth, *A History of English Law* Vol. 15, 506 (7th edn 1965).
31. See III, 2.
32. *Hadley v. Baxendale*, 9 Ex. 341, 351–2; 156 Eng. Rep. 145 (1854).
33. 9 Ex. 341 (1854); 156 Eng. Rep. 145 (1854); 23 L.J.R. (N.S.) Ex. 179 (1854); 2 The Weekly Reporter 302 (1853–4); 18 Jur. 358 (1854); 23 Law Times Reports 69 (No. 578; 29 April 1854).
34. 9 Ex. 341, 344; 156 Eng. Rep. 145 (1854).
35. Ibid. at 355.
36. See Danzig, note 7, at 262 n. 53; David Pugsley, *The Facts of Hadley v. Baxendale*, 126 New L.J. 420 (1976).
37. Pugsley, note 36.
38. *Hadley v. Baxendale*, 9 Ex. 341, 354; 156 Eng. Rep. 145 (1854).
39. Ibid., 355.
40. *The Times* wrote in the account of the Assize trial: 'After communicating with the defendants' agent at Gloucester, the plaintiffs, on the 14th of May, delivered the broken shaft and crank to the defendants' agent at the railway station there ...', *The Times* (London), 8 Aug. 1853, 10, col. 1. However, the fact that both times the word 'agent' was used does not necessarily mean that it actually was the same person. 'Agent' may have been intended to refer not to a specific person, but to the defendants' local branch.
41. Danzig, note 7, at 251.
42. Hadley v. Baxendale, 9 Ex. 341, 343; 156 Eng. Rep. 145 (1854).
43. *Coggs v. Bernard*, 2 Lord Raymond 909, 918; 92 Eng. Rep. 107 (Q.B. 1703). See also *Brind v. Dale*, 8 Carrington & Payne 207, 211; 173 Eng. Rep. 462 (Ex. 1837); H. Jeremy, *The Law of Carriers, Inn-Keepers, Warehousemen, and Other Depositories of Goods for Hire* *31–2 (London 1816, Reprint New York); Tompson Chitty and Leofric Temple, *A Practical Treatise on the Law of Carriers of Goods and Passengers* *34–5 (American edn 1857).
44. *Raphael v. Pickford*, 5 Manning & Granger 551; 134 Eng. Rep. 680 (C.P. 1843); *Davis v. Garrett*, 6 Bingham 716; 130 Eng. Rep. 1456 (C.P. 1830); Edward Beal, *The Law of Bailments* 499 (1900); G. A. Bonner, *British Transport Law by Road and Rail* 44 (1974); Chitty & Temple, note 43, at *89.
45. Bonner, note 44, at 33; Lars Gorton, *The Concept of the Common Carrier in Anglo-American Law* 53 (1970).
46. *Dalston v. Janson*, 5 Modern 90; 87 Eng. Rep. 538 (K.B. 1695).
47. Holdsworth, note 30, at 107.
48. M. J. Prichard, *Scott v. Shepherd (1773) and the Emergence of the Tort of Negligence* 26 (1976).
49. *Boson v. Sandford*, 1 Shower 101, 104; 89 Eng. Rep. 477 (K.B. 1690).
50. *Dalston v. Janson*, 5 Modern 90, 92; 87 Eng. Rep. 538 (K.B. 1695).
51. *Buddle v. Willson*, 6 Term Reports 369, 373; 101 Eng. Rep. 600 (K.B. 1795) (dictum), *citing to Dale v. Hall*, 1 Wilson 281, 282; 95 Eng. Rep. 619 (K.B. 1750).

52. *Dickon v. Clifton*, 2 Wilson 319, 321; 95 Eng. Rep. 834 (K.B. 1766).
53. *Brown v. Dixon*, 1 Term Reports 274, 279; 99 Eng. Rep. 1091 (K.B. 1786).
54. *Govett v. Radnidge*, 3 East 62, 70; 102 Eng. Rep. 520 (K.B. 1802).
55. *Powell v. Layton*, 2 Bosanquet & Puller (N.R.) 365, 369–70; 127 Eng. Rep. 669 (C.P. 1806); followed in *Max v. Roberts*, 2 Bosanquet & Puller (N.R.) 454; 127 Eng. Rep. 706 (C.P. 1807).
56. *Ansell v. Waterhouse*, 6 Maule & Selwyn 385, 389; 105 Eng. Rep. 1286 (K.B. 1817); *Bretherton v. Wood*, 3 Broderip & Bingham 54, 62–3, 129 Eng. Rep. 1203 (Ex. Ch. 1821).
57. *Tattan v. Great Western Ry.*, 2 Ellis & Ellis 844, 853–4; 121 Eng. Rep. 315 (Q.B. 1860) *per* Crompton J.
    In *Pozzi v. Shipton*, the Queen's Bench had decided that a declaration may be read as founded upon the custom of the realm even if it does not contain a positive averment that the defendants are carriers, and that the custom need not be set out because it is the law and the court will take notice of it. 8 Adolphus & Ellis 963, 974–5; 112 Eng. Rep. 1106 (Q.B. 1838).
58. *Tattan v. Great Western Ry.*, 2 Ellis & Ellis 844, 852; 121 Eng. Rep. 315 (Q.B. 1860); Robert Hutchinson, *A Treatise on the Law of Carriers as Administered in the Courts of the United States and England* 577 (1880); Chitty & Temple, note 43, at *119 and *130 as well as at 201 note 3 as to American law; Jeremy, note 43, at *36–7 and *117.
59. Hutchinson, note 58, at 579.
60. In 1852, the Common Law Procedure Act allowed one to join actions in contract and in tort: 15 & 16 Vict. c. 76 sec. 41 (1852). Under prior law, contract and tort actions could not be joined. *Denison v. Ralphson*, 1 Ventris 365, 366; 86 Eng. Rep. 235 (K.B. 1682) (dictum). An exception is *Golden v. Manning & Peyton*, where no objection was taken to joinder of two counts upon the custom (one of them for not delivering within a reasonable time) with a count in contract: 3 Wilson 429; 95 Eng. Rep. 1138 (K.B. 1773).
61. *Hadley v. Baxendale*, 9 Ex. 341, 342; 156 Eng. Rep. 145 (1854).
62. Ibid., 342–3.
63. According to Hutchinson, the averment of a promise and a consideration decides the nature of the action, 'while the allegation of a promise in the declaration will not be sufficient to impress upon it the distinctive feature of a declaration upon the contract', Hutchinson, note 58, at 579–80.
64. In an unofficial report, it is stated that the £25 were the estimated value of the broken shaft. 18 Jur. 358 (1854). The *Gloucester Journal* is more precise: The defence contended 'that the whole value of the shaft was only 10l. at the utmost . . .; and submitted, as a matter of law, that his lordship should direct the jury that the defendants were not liable for more than the value of the thing itself. This point they urged was well considered; and they had, therefore, paid into court two and a half times the utmost value of the article, so as to be beyond all hazard', *Gloucester Journal*, Supplement 13 Aug. 1853, 1, col. 4. The underlying idea may have been that the value of the shaft was the upper limit of the possible damages because nothing worse could happen than the shaft being lost. The argument was rejected by the trial judge: 'His Lordship in summing up said that he would rule very positively that the value of an article had nothing to do with the amount of the damages', ibid.
    In another unofficial report, the defendants' counsel is reported to have said: 'The judge ought to have told the jury . . . that they were to give the value of the piece of shaft lost', 23 Law Times Reports 69, 70 (No. 578, 29 April 1854). In consideration of the fact that nowhere else the loss of a piece of the shaft is reported, this seems to be a misstatement of the facts.
65. *Hadley v. Baxendale*, 9 Ex. 341, 343; 156 Eng. Rep. 145 (1854). Payment of an amount into court is an offer to settle for that amount: Common Law Procedure Act, 15 & 16 Vict. c. 76 s. 70–3 (1852).
66. *Hadley v. Baxendale*, 9 Ex. 341, 343–4; 156 Eng. Rep. 145 (1854).
67. Danzig, note 7, at 260 n. 48.

68. *Gloucester Journal*, 13 Aug. 1853, 1, col. 4.
69. Only Professor Danzig has made that observation, but he did not develop it further. Danzig, note 7, at 260.
70. Accounts of the trial can be found in *The Times* (London), 8 Aug. 1853, 10, cols. 1–2 and in *Gloucester Journal*, Supplement 13 Aug. 1853, 1, cols. 3–4.
71. *Gloucester Journal*, Supplement 13 Aug. 1853, 1, col. 4.
72. Ibid. Thus, in his instructions Mr Justice Crompton, like the Court of Exchequer, focused on the breach of contract instead of the defendants' liability as common carriers. Awarding damages for the 'natural consequences' of the breach of contract was in accordance with prior case law; see IV, 1.
73. *Hadley v. Baxendale*, 18 Jur. 358 (1854). Professor Danzig wrongly does not mention Baron Platt. Danzig, note 7, at 253.
74. *Hadley v. Baxendale*, 9 Ex. 341, 352; 156 Eng. Rep. 145 (1854).
75. *Hadley v. Baxendale*, 18 Jur. 358, 359 (1854).
76. *Hadley v. Baxendale*, 23 L.J.R. (N.S.) Ex. 379, 382 (1854); as to *Waters v. Towers*, see note 26.
77. *See, e.g.*, 11 G. 4 & 1 W. 4, c. 68 s. 6 (1830); 17 & 18 Vict. c. 31 s. 7 (1854).
78. See note 57.
79. *Hadley v. Baxendale*, 9 Ex. 341, 345–6; 156 Eng. Rep. 145 (1854).
80. Ibid., 350–51. That casts doubt on Professor Danzig's theory that one of the defendants' lawyers, Sir James Shaw Willes, was the 'animating force behind the decision'. Danzig, note 7, at 257–8 and 275–6. Willes, the 'ablest commercial lawyer of his time', ibid., 257, was too good a lawyer to defend a tort case on the basis of a contract theory.
81. Ibid., at 352.
82. 18 Q.B. 93, 111–12; 118 Eng. Rep. 35 (1852).
83. 15 Meeson & Welsby *117, *120; 153 Eng. Rep. 785 (Ex. 1846); see note 152.
84. *Hadley v. Baxendale*, 9 Ex. 341, 354; 156 Eng. Rep. 145 (1854).
85. Ibid., 353–4.
86. See note 4.
87. *Robinson v. Bland*, 2 Burrow 1077, 1085; 97 Eng. Rep. 717 (K.B. 1760).
88. *Flureau v. Thornhill*, 2 Blackstone W. 1078; 96 Eng. Rep. 635 (C.P. 1726).
89. *Hadley v. Baxendale*, 9 Ex. 341, 355; 156 Eng. Rep. 145 (1854).
90. *Hammond & Co. v. Bussey*, 20 Q.B.D. 79, 88 (1887).
91. In *Smeed v. Ford*, 1 Ellis & Ellis 602, 616; 120 Eng. Rep. 1035 (Q.B. 1859), Mr. Justice Crompton states that the question which damages naturally arise from a breach of contract is for the jury to decide.
92. *Hadley v. Baxendale*, 9 Ex. 341, 355–6; 156 Eng. Rep. 145 (1854).
93. 2 The Weekly Reporter 302, 303 (1853–4).
94. Lawrence M. Friedman, *Contract Law in America* 126–7 (1965).
Compare *Smeed v. Ford*, 1 Ellis & Ellis 602, 614; 120 Eng. Rep. 1035 (Q.B. 1859): Lord Chief Justice Campbell did not accept the defendant's argument that it was not foreseeable that the plaintiff could not get a substitute for the machine whose delivery was delayed. As long as he actually could not get a substitute, he can recover the consequential damages. Thus, the question here is correctly framed not as one of foreseeability, but as one of contributory negligence.
95. *Hadley v. Baxendale*, 9 Ex. 341, 356; 156 Eng. Rep. 145 (1854).
96. See note 36.
97. *Victoria Laundry Ltd. v. Newman Industries Ltd.*, 2 K.B. 528, 537 (1949).
98. *Hadley v. Baxendale*, 9 Ex. 341 355; 156 Eng. Rep. 145 (1854) (emphasis added).
99. Ibid.
100. 11 G. 4 & 1 W. 4, c. 68 s. 4 (1830).
101. Ibid., s. 6.
102. *Walker v. York and North Midland Ry.*, 2 Ellis & Blackburn *750; 118 Eng. Rep. 948 (Q.B. 1853).

103. *Carr v. Lancashire and Yorkshire Ry.*, 7 Ex. *707, *715; 155 Eng. Rep. 1133 (1852). Barons Parke and Alderson agreed as well, Baron Platt dissented.
104. *Dickson v. Great Northern Ry.*, 18 Q.B.D. 176, 190 (1886).
105. 17 & 18 Vict. c. 31 s. 7 (1854).
106. *Peek v. Northern Staffordshire Ry.*, 10 H.L.C. *473, *565; 11 Eng. Rep. 1109 (1862).
107. Ibid., e.g., at *509, *525, *546–8, *576; dissenting opinion of Baron Martin at *534.
108. *Jackson v. Rogers*, 2 Shower *327; 89 Eng. Rep. 968 (K.B. 1683); *Pickford v. Grand Junction Ry.*, 8 Meeson & Welsby *372, *377; 151 Eng. Rep. 1083 (Ex. 1841); *Crouch v. London and North-Western Ry.*, 14 C.B. 255; 139 Eng. Rep. 105 (1854); Jeremy, note 43, at *6 and *59.
109. 7 Ex. *707, *709 and *715; 155 Eng. Rep. 1133 (1852).
110. Jeremy, note 43, at 113–14.
111. 3 & 4 W. & M. c. 12 s. 24 (1691). Unfortunately, I could not establish whether or not public authorities were still determining maximum prices for carriage as late as 1854 and whether or not the transport of the shaft from Gloucester to Greenwich was subject to such prices. A remark by Chief Baron Kelly suggests that, in the 1870s, maximum prices were assessed for railway companies: '[T]he company has no power to say they will not accept the goods unless an extra charge for carriage be paid ...', *Horne v. Midland Ry.*, 42 L.J.R. (N.S.) C.P. 59, 60 (Ex. Ch. 1873). On the other hand, in 1880, Robert Hutchinson wrote: 'Further than his charges shall be reasonable, the common law seems to have put no restrictions upon the carrier in respect to his demand for compensation ... [T]he extraordinary responsibility of the carrier for the safety of the goods must always ... be taken into consideration ...', Hutchinson, note 58, at 362.
112. *Horne v. Midland Ry.*, 42 L.J.R. (N.S.) C.P. 59, 60 (Ex. Ch. 1873).
113. Ibid., 60–62.
114. Ibid., 61.
115. 1 Ex. 410; 154 Eng. Rep. 174 (1847); see note 25.
116. Charles T. McCormick, *Handbook of the Law of Damages* V (1935).
117. For a detailed description of the role of the jury and the review of the verdict, see George Washington, *Damages in Contract at Common Law*, 47 Law Q. Rev. 345 (1931) and 48 Law Q. Rev. 90 (1932).
118. Washington, note 117, at 346.
119. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Legal Hist. 201 (1988).
120. Style 466; 82 Eng. Rep. 867 (K.B. 1655).
121. Washington, note 117, at 90. Sedgwick wrote: 'Indeed, for a long time after the distinction between law and fact was clearly established, and the separate province of judge and jury defined with considerable accuracy, there appears to have been an almost total want of any clear and definite understanding of [the] rules of damages', Theodore Sedgwick, *A Treatise on the Measure of Damages* s. 19 at 14–5 (9th edn 1912). See also E. A. Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum. L. Rev. 1145, 1157 (1970).
122. P.S. Atiyah, *The Rise and Fall of Freedom of Contract* 394 (1979).
123. See, e.g., *Flureau v. Thornhill*, 2 Blackstone W. 1078; 96 Eng. Rep. 635 (1776).
124. Washington, note 117, at 91; see, e.g., *Gainsford v. Carroll*, 2 Barnewall & Cresswell 624; 10 Eng. Rep. 516 (1824).
125. McCormick, note 116, at 26–8.
126. *Robinson v. Harman*, 1 Ex. *850; 154 Eng. Rep. 363 (1848). As to the time when the expectation interest became the measure of damages, see the Horwitz–Simpson dispute. However, even Horwitz acknowledges that by the early nineteenth century, expectation damages were awarded. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917, 920–22 and 936–41 (1974); A. W. B. Simpson, *The Horwitz Thesis and the History of Contracts*, in *Legal Theory and Legal History*, 203, 217–31 (1987).

127. See Barton, note 11, at 41.
128. 16 Meeson & Welsby *249, *251; 153 Eng. Rep. 1181 (Ex. 1847).
129. *Nurse v. Barnes*, Sir T. Raymond *77; 83 Eng. Rep. 43 (K.B. 1664). In *Hadley v. Baxendale*, the plaintiffs cite the case as authority. 9 Ex. 341, 346–7; 156 Eng. Rep. 145 (1854).
130. 1 Starkie 504; 171 Eng. Rep. 543 (K.B. 1816).
131. However, in his instruction to the jury, Lord Ellenborough disguised the award of consequential damages as application of the normal difference-in-value rule: '[Y]ou are to consider, the effect of [the goods'] being of no use or value in China. I am decidedly of opinion that by value, is to be understood, the value which the plaintiff would have received had the defendant faithfully performed his contract', ibid. at 506.
132. 7 Taunton 153; 129 Eng. Rep. 61 (C.P. 1816).
133. Note 25.
134. Note 26.
135. *Clare v. Maynard*, 7 Carrington & Payne 741, 744; 173 Eng. Rep. 323 (Nisi Prius 1837), *affirmed*, 6 Adolphus & Ellis 519; 112 Eng. Rep. 198 (K.B. 1837).
136. Professor Gilmore argues that *Hadley v. Baxendale*, for the first time, opened to admit special or consequential damages. However, none of the cases he cites addresses the question of consequential damages, and he does not deal with any of the cases in which consequential damages were awarded. Gilmore, note 2, at 51.
137. 1 H.L.C. *381, *403–4; 9 Eng. Rep. 805 (1848).
138. *Die Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel v. Armstrong*, L.R. 9 Q.B. 473, 478 (1874).
139. L.F. 8 C.P. 131, 141 (Ex. Ch. 1873).
140. A. W. B. Simpson, *Innovation in Nineteenth Century Contract Law*, in *Legal Theory and Legal History* 171, 198 (1987).
141. *Boorman v. Nash*, 9 Barnewall & Cresswell 145, 152; 109 Eng. Rep. 54 (K.B. 1829); *Walton v. Fothergill*, 7 Carrington & Rayne 392, 394; 173 Eng. Rep. 174 (C.P. 1835).
142. Gloucester Journal, Supplement August 13, 1853, at 1, col. 4; see note 72.
143. Simpson, note 140, at 199.
144. Gilmore, note 2, at 42; Atiyah, note 122, at 391; Barton, note 11, at 52.
145. See, e.g., *Paradise v. Jane*, Aleyn 26; 82 Eng. Rep. 897 (K.B. 1647).
146. Gilmore, note 2, at 48.
147. Morton J. Horwitz, Book Review, 42 U. Chi. L. Rev. 787, 792 (1975) (reviewing Gilmore, *The Death of Contract*).
148. 1 Pothier, note 12, part 1, ch. 2 art. 3, s. 166.
149. McCormick, note 116, at 581. As late as 1875, the Common Pleas Division left the question open. *Smith v. Green* 1 C.P.D. 92, 95 (1875). Of course, from a legal realist point of view, the defendant's motives for the breach may well play a part in the assessment of damages by a jury or a court. See McCormick, note 116, at 575 n. 46.
150. Charles. T. McCormick, *The Contemplation Rule as a Limitation upon Damages for Breach of Contract*, 19 Minn. L. Rev. 497, 499 (1935).
151. (1852–3) H.C. *Parliamentary Papers*, XL 701, 708, cited according to Atiyah, note 122, at 390.
152. 15 Meeson & Welsby *117, *120; 153 Eng. Rep. 785 (Ex. 1846).
153. Theodore Sedgwick, *A Treatise on the Measure of Damages* 210 (3d edn 1858).
154. Danzig, note 7, at 269–71.
155. 9 & 10 Vict. c. 95 (1846).
156. 13 & 14 Vict. c. 61 s. 1 (1850). Originally, the maximum sum was £20 (9 & 10 Vict. c. 95 s. 58 [1846]); it was raised in 1850.
157. Danzig, note 7, at 271.
158. Harry Smith, *The Resurgent County Court in Victorian Britain*, 13 Am. J. Leg. Hist. 126, 127 n. 13 (1969). On the other hand, Andrew Amos reports that in a 'multitude of instances parties would abandon what they claimed in excess of [£50] for the

sake of cheapness and expedition', Andrew Amos, *A Lecture on County Courts* 3 (1851).

159. Smith, note 158, at 127.
160. As explained, it is not even clear whether *Hadley v. Baxendale* actually *restricted* recoverable damages. See IV.1.
161. 13 & 14 Vict. c. 61 s. 11 (1850).
162. 15 & 16 Vict. c. 54 s. 2, 3 (1852).
163. H.W. Arthurs, *Without the Law* 56 (1985).
164. Liverpool Chamber of Commerce, *Report of the Special Committee on Mercantile Law Reform*, 15, cited according to Arthurs, note 163, at 56.
165. Atiyah, note 122, at 390.
166. Clare Dalton, Book Review, 24 Am. U.L. Rev. 1372, 1381 (1975) (reviewing Gilmore, *The Death of Contract*).
167. Horwitz, note 147, at 927.
168. Amos, note 158, at 6.
169. A.W.B. Simpson, *The Origins of Futures Trading in the Liverpool Cotton Market*, in *Essays for Patrick Atiyah* 179, 183 (Peter Cane and Jane Stapleton eds. 1991).
170. 52 & 53 Vict. c. 49 (1889); Arthurs, note 163, at 70–76.
171. *Scott v. Avery*, 25 L.J.R. (N.S.) Ex. 308, 313 (1856). The context does not make clear to what time Lord Campbell referred. The unofficial report continues: 'Therefore [the judges] said that the Courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so. That really grew up only subsequently to the time of Lord Coke [1552–1634]'.
Scott v. Avery is interesting because it demonstrates that the judges who decided *Hadley v. Baxendale* were especially hostile to arbitration. In the Court of Exchequer, Barons Alderson, Martin, Parke and Platt had held that the arbitration clause in question was illegal. 8 Ex. *487; 155 Eng. Rep. 1442 (1853). Their decision was reversed by the Exchequer Chamber, whose decision the House of Lords upheld. Barons Alderson and Martin, whose opinions are reported, still argued that the arbitration clause was void. 5 H.L.C. 811, 853; 10 Eng. Rep. 1121 (1856).
172. 6 G. 4, c. 84 s. 6 (1825).
173. Arthurs, note 163, at 78, see also at 69.
174. *Ingate v. Christie*, 3 Carrington & Kirwan 61, 63; 175 Eng. Rep. 463 (Ex. 1850).
175. Atiyah, note 122, at 351.
176. A.W.B. Simpson, *The Rise and Fall of the Legal Treatise*, in *Legal Theory and Legal History* 273 (1987).
177. Atiyah, note 122, at 351 and 399, respectively.
178. See II.
179. Dalton, note 166, at 1380.
180. Atiyah, note 122, at 432.
181. *Hadley v. Baxendale*, 9 Ex. 341, 355; 156 Eng. Rep. 145 (1854).
182. See 6 Geo. 4, c. 91 s. 2 (1825); 4 & 5 Wm. 4, c. 94 (1834); 7 & 8 Vict. c. 110 s. 45 (1844).
183. 18 & 19 Vict. c. 133 s. 7 (1855). That 'Limited Liability Act' was repealed one year later and replaced by the more comprehensive 'Joint Stock Companies Act', 19 & 20 Vict. c. 47 (1856).
184. Danzig, note 7, at 263.
185. Edwin W. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 Colum. L. Rev. 335, 342 (1924).
186. 1 W. 4, c. 68 s. 1, 2 (1830).
187. 17 & 18 Vict. c. 31 s. 7 (1854).
188. Cf. Danzig, note 7, at 264–5.
189. 9 Ex. 341, 355; 156 Eng. Rep. 145 (1854). If Baron Alderson had given as rationale for the foreseeability rule that special circumstances have to be communicated to the debtor in order to give him the opportunity to charge a higher rate, the parallelism would have been perfect. But Baron Alderson argued that the debtor must not be

deprived of the possibility of 'specially provid[ing] for the breach of contract by special terms as to the damages in that case'. This argument, however is wrong with regard to common carriers because they were under an obligation to carry the goods without being able to limit their liability unilaterally. See III.4.

190. *Hadley v. Baxendale*, 23 L.J.R. (N.S. Ex. 179, 181 (1854). Baron Parke explicitly said: 'I wish the sensible rule was established, that damages must be confined to what the parties reasonably anticipated', Ibid.
191. See V.4.
192. See V.3.
193. See IV.1.
194. See V.4.
195. *Hadley v. Baxendale*, 9 Ex. 341, 345; 156 Eng. Rep. 145 (1854).
196. Danzig, note 7, at 267.
197. *Black v. Baxendale*, 1 Ex. 410, 411; 154 Eng. Rep. 174 (1847); see note 25.
198. *Hadley v. Baxendale*, 9 Ex. 341, 343–4; 156 Eng. Rep. 145 (1854).
199. John D. Mayne and Lumley Smith, *Mayne's Treatise on Damages* 9 (3rd edn 1877); see also John Edward Murray, *Murray on Contracts* 688 (3rd edn 1990). When, in the trial of *Hadley v. Baxendale*, the defendants' counsel argued that the defendants' profits on the carriage were not more than 10s., Mr. Justice Crompton stated that the sum paid for the carriage had nothing to do with the amount of the damages. *Gloucester Journal*, Supplement 13 Aug. 1853, 1, col. 4.
200. Danzig, note 7, at 273.
201. 2 *Smith's Leading Cases* 431–2 (4th edn 1856). The editors wrote that the foreseeability rule is 'one which it would be in many cases difficult to apply in its precise terms'.
202. 2 *Smith's Leading Cases* 472–3 (F. Ph. Maude and Th. E. Chitty 5th edn 1862).
203. Chitty & Temple, note 43, at *144–5, *312, *315.
204. Theodore Sedgwick, *A Treatise on the Measure of Damages* 77–8 (3rd edn 1858).