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## NOTES

### REMOTENESS IN CONTRACT: UNDER REVISION IN THE HOUSE OF LORDS TOO?

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#### INTRODUCTION

Liability for consequential losses in the law of contract has traditionally been limited by a peculiar contractual view of legal causation, or remoteness. Hence while a particular breach of contract may be the factual ('but for') cause of a particular item of damage, that item may be deemed to be too remote to warrant a claim for compensation. The traditional test used in the remoteness inquiry was adopted by the Appellate Division in *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 (see further the less expansive adoption of a contemplation principle with regard to damages in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22). In the main judgment given in *Lavery*, Curlewis JA imported the English law approach to remoteness, the so-called 'rule in *Hadley v Baxendale*' ((1854) 9 Exch 341. This rule was adopted in *Lavery* supra by Curlewis JA at 162–4 and by Wessels JA (for the majority) at 174). In the original form (see *Hadley v Baxendale* (supra) at 354, per Alderson B) this rule stated that recoverable damages were

'such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from [the] 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 it'.

A close reading of the rule in *Hadley v Baxendale* reveals that it is in fact two rules, the first dealing with the position where damages 'arise naturally according to the usual course of things' and the second from where the damages could 'reasonably be supposed to have been within the contemplation of both parties at the time they made the contract'. In the conventional remoteness discourse, the first rule applies to 'general' damages and the second to 'special' damages (compare *Shatz Investments (Pty) Ltd v Kalovyrmis* 1976 (2) SA 545 (A) at 550B–E). In the *Shatz Investments* case (supra), the

Appellate Division confirmed the distinction between general and special damages. General damages represent the losses which the 'law presumes that the parties contemplated . . .' as a result of the breach, while special damages represent those losses which would ordinarily be considered too remote, but which in the 'special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated' (*Shatz Investments* (supra) at 550B–E). This distinction was confirmed in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687 (see also paras 46–50 of *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA), per Nienaber JA).

By way of illustration, Pothier cites the example of a contract for the sale of a horse (Pothier *Obligations* vol 1, part 1, ch 2, art 3, para 161 — translated by William David Evans (1853)). If the seller breaches the contract and fails to deliver the horse timeously, he will be liable in damages for a subsequent increase in the price of horses due to a shift in the market, should the buyer have to procure a horse from a different seller. This would be general damages, since anyone in the buyer's position would suffer this loss. Should the buyer be a canon, however, and due to the failure of the seller to deliver the horse, the canon is unable to collect his tithes at the appointed time and place, this consequential loss would be special damages since it arises because of the particular circumstances of the plaintiff. According to the rule in *Hadley v Baxendale*, the canon would only be able to claim for this loss if the seller knew of the nature of his profession (and perhaps also of the necessity of a horse for the collection of tithes) at the time of conclusion of the contract of sale.

As the above example illustrates, the traditional *Hadley v Baxendale* approach to damages relies on the actual or imputed foresight of loss by the defendant at the time of contracting (known as the 'contemplation' principle). In South Africa a further rider was placed upon this test by Wessels JA in the original *Lavery* case: namely that the defendant must also have accepted liability for this type of damage at the time of contracting (*Lavery* (supra) at 175). This further requirement, which had the stamp of approval of the majority of the court, represents an embellishment on the *Hadley* principle and came to be known as the 'convention principle'. This rule seems to have its origins in Pothier (*Obligations* vol 1, part 1, ch 2, art 3, para 162) and a certain amount of case support in English law (eg *British Columbia Saw Mills Co v Nettleship* (1868) LR 3 CP 499 at 509; *Horne v Midland Ry* (1873) LR 8 CP 131 at 139,145; and *Elbinger Aktiengesellschaft v Armstrong* (1874) LR QB 473 at 478). However, such rule has been criticised (although not actually overruled) in subsequent Appellate Division cases as well as by academic commentators (see *Shatz Investments* (supra) at 552–4; *Thoroughbred Breeders'* (supra) para 51; J C de Wet & A H van Wyk *Kontraktereg en Handelsreg* 5 ed (1992) 227–8). There is thus scope for development of the law of remoteness in South African law, as was foreshadowed by Nienaber JA in *Thoroughbred Breeders'* (supra) paras 51–2. This argument has the support of Schalk van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract — General Principles* 3 ed (2007) 431–3). This point will be developed below.

English law has also not been static since the *Hadley* decision in the mid-nineteenth century. Two landmark judgments were handed down by the House of Lords in the twentieth century, namely *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 and *Koufos v Czarndnikow Ltd (The Heron II)* [1969] 1 AC 350. These cases developed the rule in *Hadley v Baxendale* by refining the degree of foresight necessary to qualify as ‘contemplation’ of the loss ultimately occurring. These cases established that a substantial degree of foresight on the part of the defendant is necessary, which was described by Lord Reid in *The Heron II* as being damage which was ‘not unlikely’ to occur as a result of the breach (*The Heron II* (supra) at 383). ‘Not unlikely’ denoted ‘a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable’ (ibid). Once the degree of likelihood of the harm foreseen had been established, it would be possible to determine whether it was such as would flow naturally from the act of breach (ie general damages), or whether some further special circumstances known to the parties would be necessary to impute liability to the defendant (ie special damages) (*The Heron II* (supra) at 385). Recent common law commentators have criticised this approach as being largely semantic and unhelpful (eg Adam Kramer ‘An agreement-centred approach to remoteness and contract damages’ in Nili Cohen & Ewan McKendrick (eds) *Comparative Remedies for Breach of Contract* (2005) 249 at 273–4 and Andrew Tettenborn ‘*Hadley v Baxendale* foreseeability: A principle beyond its sell-by date?’ (2007) 23 *Journal of Contract Law* 120 at 136–7), but these developments by the House of Lords indicate an increase in the specificity of the remoteness test, particularly with regard to the foreseeability threshold.

Thus, in sum, English law is the origin of the current South African position on remoteness in contract with the exception of the convention principle, which appears to have developed locally directly from Pothier. Indeed, the rule in *Hadley v Baxendale* provides the basis for limiting contractual damages in many common law and even civil law countries around the world (this is demonstrated convincingly by Kramer op cit at 249). The latest House of Lords decision in point is thus highly relevant, particularly since two of the law lords attempted to revise the traditional doctrine. The approach of Lord Hoffmann (concurring in by Lord Hope) in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] 3 WLR 345, [2008] UKHL 48, seems to indicate a shift in the direction of what would be called the ‘convention principle’ in South Africa. This is an interesting shift since our own country seems intent on abandoning this rule (see the sources cited above such as *Thoroughbred Breeders’* (supra) and Van der Merwe et al op cit). This contribution will evaluate the separate judgments in *The Achilleas* and weigh them against a possible South African re-evaluation, as presaged by Nienaber JA in *Thoroughbred Breeders’*.

### THE ACHILLEAS

In this case the owners of a bulk carrier vessel (the respondents) chartered their ship to the appellants (the charterers). The charter-party was entered

into in January 2003 and was extended in September of that year for a further five to seven months. The daily hire rate was fixed at \$13 500. The return date was later set at 2 May 2004, but the vessel was returned late on 11 May 2004. Prior to the return date, the owners had entered into a further contract for the lease of the ship to a third party to begin immediately after the return of the ship and at a daily rate of \$39 500. This contract was to run for four to six months. The large discrepancy between hire rates was explained as being due to the volatility of the charter-party market. The contract with the third party was not cancelled, but was rather renegotiated to begin on 11 May 2004. Due to a market decline, however, the daily rate in this subsequent contract was fixed at only \$31 500. The owners claimed from the charterers for the \$8 000 dollar per day difference for the entire period of the subsequent fixture, which amounted to \$1.36 million.

Despite evidence that the custom in the shipping market was to pay damages only for the period by which the return of the ship was overdue, the arbitrators, as well as the High Court and the Court of Appeal, found for the owners. On appeal to the House of Lords, however, all five judges found for the appellants charterers. Five separate speeches were delivered, of which two found for the charterers based on the rule in *Hadley v Baxendale*, two further went in their favour based on the notion that the charterers had not assumed liability for a risk of this magnitude, and a final speech basically concurred in the reasons of both approaches set out above.

The basis of Lord Hoffmann's opinion (and to a large extent the separate concurring opinion of Lord Hope) was that the extent of a party's liability for damages was to be 'founded upon the interpretation of the particular contract . . . as a whole, construed in its commercial setting' (*The Achilles* (supra) para 11, following authorities and academic writings). This was because 'anyone asked to assume a large and unpredictable risk [would] require some premium in exchange' (ibid para 13). Lord Hoffmann relied on his earlier decision in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* (sub nomine *South Australia Asset Management Corporation v York Montague Ltd*) [1997] AC 191 (*SAAMCO*), a case dealing with professional negligence, to pose the question as to whether the defendant had assumed liability for the 'kind' or 'type' of loss which was claimed in the case at hand (ibid para 15). In terms of this principle, Lord Hoffmann held in *SAAMCO* that the duty of care imposed on the defendant in terms of the nature of his contractual undertaking (in that case the valuation of property as a service to a bank who intended to pass a mortgage bond over that property) should not be greater than he thought (or could reasonably be expected to have thought) he was undertaking (*SAAMCO* at 212, cited in *The Achilles* (supra) para 15). Hence, although a party may be held liable for damages which are foreseeably or unforeseeably large in terms of the rule in *Hadley v Baxendale*, it may not be held liable if those damages are not of the type for which it assumed liability (*The Achilles* (supra) para 21). This principle seems to have been echoed by the Court of Appeal in a subsequent case where the risk unforeseen loss — flooding of a basement due to the simultaneous failure of

fail-safe devices — was held to have been contractually assumed by the manufacturer of a sprinkler system (see *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349 para 45).

Since the expectations of the parties were in accord with customary practice within the charter-party market, the defendant would not have thought it was undertaking liability for damages of the type which was sought by the owners and hence the charterers' appeal should be upheld (*The Achilleas* (supra) paras 23–4 (Lord Hoffmann) and 34–6 (Lord Hope)).

The opinion of Lord Rodger was based firmly on the rules in *Hadley v Baxendale*. It was within the contemplation of the charterers that if they returned the ship late, they would have to pay the hire costs for the additional days (ibid para 54). The nature of the market was such, however, that they could safely assume that there would be a subsequent charter-party with a third party and hence a payment of damages for the overdue period might not be at the hire rate, but at a higher market rate (ibid). This was also the accepted position in shipping law and was based on the assumption that the owners would be able to obtain a charter-party at a later date. Hence the damages of this type would constitute those falling under the first rule in *Hadley v Baxendale* (general damages), since they were likely to eventuate as the 'ordinary consequence' of the breach in question (ibid paras 59–60). The damages claimed by the owners, however, would not have been within the reasonable contemplation of the charterers' at the time of conclusion of the contract as they were likely to arise out of late delivery and hence were too remote (ibid para 60).

Lord Walker gave his own reasons for upholding the appeal, but concurred in the reasoning of Lord Hoffmann, Lord Hope and Lord Rodger (ibid para 87). Finally, Baroness Hale also upheld the appeal, but preferred the reasoning of Lord Rodger. She expressly distanced herself from the reasoning of Lord Hoffmann, arguing that his incorporation of the principle in the *SAAMCO* case would introduce rules from professional negligence into contract law (ibid para 93). This had not been explored in argument before the court, but stemmed largely from academic writing which had been cited particularly in Lord Hoffmann's opinion (ibid).

#### COMMENT ON *THE ACHILLEAS*

As Peel notes, the lack of a clear direction on remoteness in contract from the House of Lords in *The Achilleas* is unfortunate (Edwin Peel 'Remoteness revisited' (2009) 125 *LQR* 6 at 12.) The interesting feature of this case, however, is the reasoning employed by Lord Hoffmann and concurred in by Lord Hope. A South African readership will be struck immediately by the endorsement of the convention principle, which has long been maligned in our own country. As Baroness Hale demonstrated, this development seems to owe a lot to academic writing. Lord Hoffmann cites three articles in his opinion (Kramer op cit, Tettenborn op cit and Andrew Robertson 'The basis of the remoteness rule in contract' (2008) 28 *Legal Studies* 172). As Lord

Hoffmann pointed out (*The Achilles* (supra) para 11) these sources provide a very helpful critique of remoteness in contract, with the first two articles cited, those by Kramer and Tettenborn, coming out in favour of something akin to the convention principle and the third, by Robertson, arguing instead for an allocation of risks by the courts based on information beyond what can be gleaned from the parties' contract. The Robertson article seems most helpful in the South African context where the impetus is to move away from the convention principle.

Robertson sets out to disprove the convention principle, for which, he demonstrates, there is currently a good deal of support in the common law world (Robertson op cit at 173–5). He argues instead that the remoteness principle represents a gap-filling device, where judicial discretion fills a lacuna left open in the parties' contract (ibid at 175–81). A tacit term can usually not be found here, he argues, since the parties simply did not think of the eventuality in question (ibid at 180). (In South Africa it would be possible to impute an intention to the parties following *Van den Berg v Tenner* 1975 (2) SA 268 (A), but this does not seem right here either.) The purpose of the remoteness rule is not only to allocate risks, but also to ensure a just result (Robertson op cit at 184). Robertson makes a lot of the role of fairness in the remoteness determination, arguing that while it is imprecise, this imprecision can be cured by a judge giving detailed reasons for his exercise of discretion (ibid at 190). He lists a few possible examples of these, the most notable being commercial practice and the availability of possible methods of insurance (ibid at 192).

What is more interesting about Lord Hoffmann's opinion is the purported linkage between the determination of contractual remoteness and that of professional negligence. This represents a convergence of remoteness in tort and contract of the type foreshadowed in the South African case law in *Thoroughbred Breeders'* ((supra) paras 51–2, per Nienaber JA). If tort and contract were to converge, however, surely there should be a move away from looking merely to the contract to determine the extent of liability? In *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 Lord Denning suggested that remoteness in contract should depend on the type of loss caused — if it was economic loss, a higher degree of foresight of possible harm was required on the part of the defendant than if the loss was to person or property, where the lower standard of foresight required for remoteness in tort would suffice (ibid at 802–3). This type of analysis clearly focuses on the harm suffered, rather than any interpretation of the contract, and therefore represents a choice based on policy factors.

To illustrate how reasonable foreseeability alone does not always produce the correct answer to the remoteness problem, Peel cites the textbook example of a taxi driver engaged to drive a businessman to the airport to catch a plane to an important meeting (Peel op cit at 10). If the taxi driver, in breach of contract, does not get the businessman to the airport on time he is not liable for the full extent of damages consequent on missing the meeting (ibid). The reason for this (according to Lord Hoffmann's approach) is that

the taxi driver did not 'accept the risk' for this type of damage (ibid). One might add that the taxi fare was not commensurate with accepting this type of risk and hence the businessman cannot shift the burden of his loss onto the driver. Peel argues that other factors such as policy considerations of what is 'reasonable' or 'proper' based on the facts of the case might also solve this conundrum (ibid). One might argue thus that normative factors play a greater role in the determination of liability in the taxi driver's case than any contractual assumption of risk theory — pointing to a judicial policy decision being the determinant of liability rather than convention. The merits in Lord Hoffmann's opinion (with respect) may lie in its referral to objective market based factors and other external indicators apart from reasonable foreseeability to determine liability. The problem with *Hadley v Baxendale* is that it draws too strongly on reasonable foreseeability, rather than viewing the transaction against the backdrop of the full surrounding circumstances, as well as policy considerations, to determine the extent of liability. In a way this represents a convergence with tort in that the contract itself becomes of secondary importance and policy factors come to the fore.

Lord Hoffmann argues that remoteness should ask the question whether the defendant has assumed liability for the *type or kind* of risk at hand (see the summary of *The Achilles* case (supra) above). This is to be determined from the contract at hand, market expectations and the price charged. Peel notes that although evidence about the actual contractual intentions of the parties may be difficult to come by, an economic analysis of remoteness in contract may be useful (Peel op cit at 11). Indeed, economic factors should play an important role if loss is to be allocated on a more flexible basis. Law and economics scholars, such as Posner, have argued for contractual remoteness to be determined based on which party is the most efficient loss avoider (Richard Posner *An Economic Analysis of Law* 5 ed (1998) at 140–1). This point will be developed in the discussion of South African law in the following part of this note.

The convention principle has been rightly questioned in the South African courts, for the reasons that it is too strict on the plaintiff and requires too high a standard of proof where there might be little evidence to establish a tacit term. Rather than focusing on the traditional enquiry as to what the express terms of the contract are, or failing this, what terms are so obvious as to go without saying (the 'officious bystander' test), the focus in the remoteness inquiry should move beyond the intentions of the parties to what the market requires and who is the better loss avoider. It is this major criticism which can be leveled against the reasoning of Lord Hoffmann and it is on this basis that the obiter dicta of Nienaber JA in *Thoroughbred Breeders* are to be preferred. Hence, since the focus of this note is on revision of the remoteness test, it will close with suggestions for the revision of this principle in South Africa.

#### RE MOTENESS IN CONTRACT UNDER REVISION IN SOUTH AFRICA TOO?

In a minority opinion in *Thoroughbred Breeders*, the latest word from the Supreme Court of Appeal on this topic, Nienaber JA reviewed the authori-

ties relating to remoteness in contract (*Thoroughbred Breeders'* (supra) paras 46–53). He came to the conclusion that it was not necessary in that case to overhaul the rules in *Hadley v Baxendale* as evinced in the South African case law, but nevertheless expressed an opinion as to the direction in which he thought remoteness should move. Nienaber JA's suggestion was that the flexible test of legal causation, which was based on a conglomeration of various tests with a good deal of judicial discretion and policy considerations thrown in, should be employed in contract in the same way as it is in criminal law, delict, insurance and perhaps even estoppel (ibid para 51). He went on to spell out this approach as being based largely on 'reasonable foreseeability' (by the defendant at the time of contracting, or where appropriate, the time of breach), along with 'practical common sense based on the judicial officer's years of experience' (ibid para 52).

This approach reflects the criticism of De Wet & Van Wyk that the appropriate time for the determination of foreseeability is the time of the breach, rather than the conclusion of the contract (De Wet & Van Wyk op cit at 227). Rather than adopting this rule verbatim, however, a conciliatory nod is given in its direction to the extent that it will apply where applicable. Also reflected in Nienaber JA's opinion is a willingness to abandon the convention principle — also in line with the criticism of De Wet & Van Wyk (ibid. See also Van der Merwe et al op cit at 432). Despite the support offered to this principle by Lord Hoffmann, the interpretation of the contract (including the determination of the existence of tacit terms) should be no more than a factor in determining remoteness, as argued above in the comment on *The Achilles*.

The convergence of the determination of remoteness in contract and delict should not be lamented in South Africa. Despite the reluctance of Baroness Hale to endorse this suggestion (see the previous part of this note above), the support shown for this by Lord Hoffmann and Lord Hope (as well as the weighty support of Lord Denning in *Parsons*) indicates that this trend is not unique to South Africa. The causing of harm to another as a consequence of a delict is not far removed from loss due to the breach of a contract, since both actions cause losses to the plaintiff which are compensable in a civil suit and are limitable by reference to principles of legal causation. Following the recognition of liability for pure economic loss in the law of delict, even the nature of the wrongfully caused harm is comparable. The question is essentially how to limit liability and, if this is to be by a fettered form of judicial discretion, then how exactly to guide that discretion.

In delict various tests exist for remoteness, with one of the most important of these being the reasonable foreseeability of harm. A measure of discretion is permitted in judicial decision-making to ensure that the boundaries of liability do not exceed what is reasonable, fair and just in the circumstances (*International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700–1, adopting the 'flexible' test for remoteness into delict from the earlier criminal case, *S v Mokgethi* 1990 (1) SA 32 (A)). If there is to be convergence between these approaches, then the contractual principles as found in the rule in *Hadley v Baxendale* should not be jettisoned entirely, since the enquiry here

too rests on foreseeability. Thus, as per Nienaber JA's dicta, reasonable foreseeability will continue to play an important role, particularly with regard to general damages. With special damages, however, the element of flexibility is more important and the need to determine the proper allocation of risks all encompassing. The criterion of what is just, reasonable and fair — a formula inviting an exercise of discretion — becomes of utmost importance.

One might argue that if one were to abandon the *Hadley v Baxendale* approach and simply apply a flexible test for remoteness, the distinction between general and special damages would no longer be of importance. To a certain extent this may be so, but if the flexible test truly is a conglomeration of all the previously suggested theories, then *Hadley v Baxendale* could still be applied, subject to the rider that the outcome must be congruent with the demands of public policy. Thus the established case law on general and special damages would guide judges, and need not be jettisoned.

Fairness in contracting has become a catch-word of recent times, following the Constitutional Court decision in *Barkhuizen v Napier* 2007 (5) SA 323 (CC). Although it may have appeared that fairness was a requirement in contracting following this case, this interpretation was curtailed by the Supreme Court of Appeal in *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) (see especially para 50). Of course, the determination of remoteness in contract involves fairness as imposed by a judicial officer, as opposed to fairness in the enforcement of contractual rights by one party, but the jurisprudence surrounding the concept of fairness should still provide an informative basis as to how to exercise policy decisions. Are we then to follow *Barkhuizen* and say that it all depends on a balancing of constitutional values as to how remoteness is to be determined? This would be a rather vague standard and would need qualification. Parties to a contract base their consensus on the negotiated terms before them, as well as on the circumstances surrounding their transaction, such as the prevailing market conditions and trade customs. Thus the suggestion by Lord Hoffmann that these should be influential considerations when making decisions in this context is (with respect) most enlightening. Thus public policy and the notions of justice, reasonableness and fairness which it entails should be one of the factors used in determining remoteness, but other influences such as the economic considerations (alluded to above) should be considered too.

A final consideration needs to be given to the work of law and economics scholars in this field, since the line taken by judges with regard to remoteness in awarding damages is likely to have a profound effect on the behaviour of contracting parties in drafting contracts and reaching agreement on the proper allocation of contractual risks. If one accepts the premise that one of the leading goals in contract law should be economic efficiency, as law and economics scholars posit, this colours one's view of the remoteness rules. As set out above, Posner argues that the rules of remoteness should be structured so as to ensure that the risk of loss is borne by the most efficient loss avoider (Posner *op cit* at 140–1). Hence, if it is cheaper for the plaintiff to take precautions against incurring loss than to recover that loss from the defendant

in damages, then perhaps no recovery should lie (*ibid*). Posner argues that as the rule in *Hadley v Baxendale* is applied at present, the duty to take precautions against loss should lie with the plaintiff if the knowledge of the attendant risks is solely within his contemplation (*ibid*). If the plaintiff thinks it would be cheaper to pass this risk to the defendant, he should expressly inform him of the attendant risks, passing the burden of risk to him (*ibid*).

How would this apply to the example used earlier of the taxi driver who transports the businessman to the airport? Clearly loss is most easily avoided by the businessman departing timeously for the airport or some other form of contingency plan. If he informs the taxi driver of the risk one still feels that some overriding criterion of fairness should limit the taxi driver's liability, unless a taxi fare is charged which is commensurate with his risk. Practical economics is likely to prevail here, as even in this hypothetical example the ridiculousness of trying to hold a taxi driver liable in this situation is obvious. It would be clear on standards such as what is reasonable (as suggested by Peel *op cit* at 10) or, to use the language of *Barkhuizen*, what public policy requires, that liability should not be imposed in this type of scenario.

A more detailed economic analysis of the rule in *Hadley v Baxendale* has been undertaken by Eisenberg (Melvin Aron Eisenberg 'The Principle of *Hadley v Baxendale*' (1992) 80 *California LR* 563). Eisenberg presents an argument that in both contract and tort remoteness is determined by foreseeability; it is just the degree of foreseeability which differs (Eisenberg *op cit* at 567). He argues that the determination of the appropriate degree of foreseeability required should not depend on whether the action is brought in contract or tort, but 'on the nature of the interest invaded and the wrong involved' (*ibid* at 568). This argument has a lot in common with the judgment of Lord Denning in *Parsons* (*supra*). Eisenberg also offers useful criticism of Posner's thesis along the lines that economic efficiency on the part of the plaintiff is caused by over-reliance on the availability of damages (*op cit* at 582–3). Practical economics (or a consideration of what is reasonable on the facts) would dictate that the degree of reliance on the part of the plaintiff would be determined by the likelihood of breach by the defendant (*ibid*). Thus one reverts to reasonable foreseeability not only on the part of the defendant, but also on the part of the plaintiff, which spreads the burden and is possibly fairer on both parties. Thus a special risk known only to the plaintiff (special damages) should be disclosed to the defendant or contemplated by him to spread or transfer this risk. If the plaintiff fails to disclose this risk and does not take adequate precautions against its occurrence, the loss should lie with him.

As is often the case with law and economics arguments, it is easy to get lost in abstraction. However, some points of practical relevance are highlighted by Posner and Eisenberg and illustrate (if nothing else) that the economic implications of an exercise of judicial discretion in determining remoteness in contract must be considered. Economics should not be the only factor considered, however, but should rather play a role in determining what the

requirements of public policy are. This would ensure that the ultimate result is not only economically justifiable, but also reasonable and fair.

## CONCLUSION

The purpose of this note was to draw attention in South Africa to the latest development in the law of remoteness in contract in English law. Particularly the opinion of Lord Hoffmann in *The Achilles* is remarkable for moving away from the separation between the tests for remoteness in contract and tort and for introducing a greater element of objectivity in the form of market considerations to the test for reasonable foresight. The lack of a clear majority in this case is lamentable, but the move away from traditional *Hadley v Baxendale* analysis is noteworthy. In South Africa, of course, this trend has been a possibility since *Thoroughbred Breeders'* ten years ago. While this author does not entirely support the approach of Lord Hoffmann, particularly with regard to its adoption of the convention principle, his search for factors beyond mere reasonable foreseeability to guide the exercise of the element of judicial discretion in determining remoteness is useful. If remoteness is to be determined by justice, reasonableness and fairness, then economic considerations as alluded to by Lord Hoffmann should play an important role. Reasonable foreseeability alone is not sufficient to determine remoteness and the intricacies of the test in *Hadley v Baxendale* also do not entirely solve this problem. An element of judicial discretion is required, and the peg upon which to hang this is the considerations of public policy.