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**ASSESSMENT OF CONTRACTUAL DAMAGES: DEVELOPMENTS IN
THE TEST FOR REMOTENESS IN CONTRACTUAL DAMAGES UNDER
ENGLISH AND SOUTH AFRICAN LAW, WITH PARTICULAR REGARD
TO THE 2008 HOUSE OF LORDS JUDGEMENT IN *THE ACHILLEAS*.**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Shipping Law and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Melissa Emma Deacon

February 2012

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1. INTRODUCTION

The test for remoteness of damages laid down in *Hadley v Baxendale*¹ has survived more than a century and a half with comparatively little meddling from the English courts. That is not to say there has been no attempt at refinement or clarification.² The recent decision in *The Achilles*³ saw five Law Lords coming to the same conclusion as to the rule's effect but for very different reasons.

This dissertation will consider the historical development of the *Hadley v Baxendale* rule, its rationale, its application in the later English cases of *Nettleship*,⁴ *Victoria Laundry*⁵ and *The Heron II*,⁶ the approaches adopted by the House of Lords in *The Achilles*, its subsequent effect in *The Amer Energy*⁷ and *The Sylvia*,⁸ the difference in approach adopted in tort and finally will conclude with a comparison of the approaches to assessing remoteness of damages in English and South African law.

How the claimant/plaintiff proves his breach, the quantum of his losses and issues surrounding factual causation, including mitigation, fall beyond the scope of this dissertation.

¹ *Hadley v Baxendale* (1854) 150 ER 145.

² "Although the principle stated in *Hadley v Baxendale* (note 1) remains the *fons et origo* of the modern law, the principle itself has been analysed and developed, and its application broadened, in the 20th century" per Robert Goff J in *The Pegase* [1981] 1 Lloyd's Rep 175 at 181.

³ *The Achilles* [2008] 2 Lloyd's Rep 275 (HL).

⁴ *The British Columbia and Vancouver's Island Spar, Lumber and Saw-mill Company Limited v Nettleship* [1868] LR 3 CP 499.

⁵ *Victoria Laundry v Newman* [1949] 2 KB 528 CA.

⁶ *The Heron II* [1967] 2 Lloyd's Rep 457 (HL).

⁷ *The Amer Energy* [2009] 1 Lloyd's Rep 293.

⁸ *The Sylvia* [2010] 2 Lloyd's Rep 81.

2. OVERVIEW OF CONTRACTUAL DAMAGES

The legal rules governing contractual damages are developed by the courts through the doctrine of precedent and with reference to case law in other jurisdictions and recognised legal writings. There is comparatively little statutory interference in this area of law, allowing for more flexibility in interpretation than in those other areas more closely regulated by the legislature. For the common law “is not static and inert but a living and growing thing, ready to meet and adapt itself to the changing needs of time.”⁹

The general rule¹⁰ under both English and South African law is that a claimant/plaintiff is entitled to claim a sum of money, known as damages, from the defendant sufficient to place him in the same position as if the contract had been performed¹¹ provided he can prove (a) the defendant breached their contract (b) as a result of which (c) he suffered a loss and (d) that loss is not too remote.

Under the principle of “he who avers must prove” the onus falls on the claimant/plaintiff to show, on a balance of probabilities, that he is entitled to the damages claimed.¹²

Without the limitations of causation and remoteness,¹³ the defendant breaching a contract faces a potentially large exposure. An unlucky

⁹ Per Salmon LJ in *The Heron II* [1966] 1 Lloyd's Rep 595 (AC) at 612.

¹⁰ The position may be different, for example, in a claim for specific performance or in the case of a repudiatory breach.

¹¹ “[W]here a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.” per Baron Parke in *Robinson v Harman* (1848) 1 Ex 850 at 855. Also “there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken” per Chief Baron Pollock in *Alder v Keighley* (1846) 15 M & W 117 at 120 as cited in *Hadley v Baxendale* (note 1) at 355. This model (referred to as “expectation interest” under English law or “positive interest” under South African law) is not the only basis for calculating damages following breach of contract. In addition, English law recognises the principles of restitutionary interest and reliance interest (see Richard Stone *The Modern Law of Contract* 8ed (2009) see at 601 to 610) while South African law applies the theory of negative interest to delictual claims (see van der Merwe *Contract General Principles* 3ed (2008) at 420 to 425).

¹² Harvey McGregor *McGregor on Damages* 18ed (2009) at 105 and Van Der Merwe (note 11) at 415.

¹³ McGregor (note 12) at 104 argues that the term “remoteness” incorporates both causation in law and the “scope of the protection afforded by the law”. For the purposes of this thesis, the former is referred to as causation and the latter as the test laid down in *Hadley v Baxendale* (note 1).

defendant could find himself facing a substantial claim for damages following a comparatively minor breach while the claimant/plaintiff stands to gain “a complete indemnity for all losses de facto resulting from a particular breach, however improbable, however unpredictable.”¹⁴

The test laid down in *Hadley v Baxendale* was designed to address these issues of fairness and justice by limiting the damages a claimant/plaintiff might be awarded in the event of a contractual breach, though the facts of *The Achilleas* have tested its very construction.

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¹⁴ *Victoria Laundry* at 539.

3. ENGLISH LAW

3.1. The facts, the decision and the original rule in *Hadley v Baxendale*

3.1.1. The facts in *Hadley v Baxendale*

On 11 May 1853 the crankshaft of the steam engine that the claimants used to work their lucrative flourmill broke. The claimants contracted with the common carrier defendants¹⁵ to transport the broken crankshaft to the repair yard where it was required for use as a template in manufacturing the new one. Its delivery to the yard was delayed when the defendants shipped it by canal on its final leg to the repairers' yard instead of using the newer and faster rail service available.¹⁶

The claimants contended that, as a result of the unreasonably long time taken by the defendants to transport the broken crankshaft to Greenwich, the manufacture and delivery of the new crankshaft was delayed by some five days. The claimants claimed their loss of profit for those additional five days.

The defendants argued that the damages claimed were too remote.¹⁷

3.1.2. The rule in *Hadley v Baxendale*

Delivering a single judgement for the court, Baron Alderson defined the modern test for remoteness of damages in the now famous passage as follows:

“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

¹⁵ Trading as Pickfords & Co, today a household name.

¹⁶ Richard Danzig ‘*Hadley v Baxendale*: A Study in the Industrialization of the Law’ (1975) 4 *Journal of Legal Studies* 249 at 251.

¹⁷ Prior to *Hadley v Baxendale* (note 1), the courts generally awarded all losses proved as factually caused by the breach and that were not aggravated by the claimant's actions, per Danzig (note 16) at 253.

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 claimants 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. 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.”¹⁸

Baron Alderson went on to apply this rule to the facts, finding that the loss in question fell under neither its first limb (because it did not flow naturally from the breach “in the great multitude of such cases occurring under ordinary circumstances”) nor its second limb (because there were no “special circumstances ... communicated to or known by the defendants” which might “have made it a reasonable and natural consequence of such breach”).¹⁹

Suggesting the claimants were not entitled to damages for the additional loss of profits claim, the court concluded that the first instance judge should

¹⁸ *Hadley v Baxendale* (note 1) at 355.

¹⁹ *Supra* at 357.

“have told the jury, that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages.”²⁰

3.1.3. One rule or two? Analysing the test in *Hadley v Baxendale*

Initially *Hadley v Baxendale* was regarded as establishing three rules²¹ and later two rules with separate tests but today it is generally seen as one rule or principle with two limbs or branches.²²

Linking the two limbs is the idea of “relevant”²³ or “particular”²⁴ knowledge. A degree of general knowledge is required under the first limb while the second limb depends on actual knowledge of some special facts, conditions or circumstances at the time of contracting.

On the given facts of a case, there may be differences of opinion as to which limb applies and there may even be some losses that fall under both limbs.²⁵ The damages awarded in *Victoria Laundry* are an example of the latter – they were both specifically notified to the defendants as well as considered to be within the defendants’ imputed knowledge.

Not everyone is persuaded by the usefulness of referring to limbs rather than rules²⁶ but it does serve to underscore the role played by knowledge in both limbs, as identified in *Victoria Laundry*. It also allows for the possible extension of the principle of assumption into the first limb advocated in *The Achilleas*.²⁷

²⁰ *Supra* at 356 – 357. Most civil trials in the mid-19th Century were still resolved by a jury who determined the sum of damages to be awarded in accordance with guidelines issued by the judges. The jury’s power to do so was not completely unfettered and could be reviewed on appeal by a panel of judges, as happened in the case of *Hadley v Baxendale* (note 1). Although it would have been unusual for the judge to go so far as to set out how the jury should have applied the facts in that case and what their outcome should be, as Baron Alderson did in *Hadley v Baxendale* (note 1). See Danzig (note 16) at 254 - 255.

²¹ McGregor (note 12) at 201 – 202.

²² “[I]t was [not] intended that there were to be two rules or that two different standards or tests were to be applied” *per* Lord Reid in *The Heron II* (note 6) HL at 463. This approach has found widespread support in the judgements of *Victoria Laundry* (note 5), *The Heron II* (note 6), *The Pegase* (note 2) and *The Achilleas* (note 3).

²³ *The Pegase* (note 2) at 182.

²⁴ Lord Walker in *The Achilleas* (note 3) HL at 288.

²⁵ Lord Pearce in *The Heron II* (note 6) HL at 481.

²⁶ *The Heron II* (note 6) HL at 484.

²⁷ Lord Walker in *The Achilleas* (note 3) HL at 288.

3.1.4. Why was it necessary? The rationale behind the rule

Even before *Hadley v Baxendale*, the courts had started to recognise the potentially inequitable result of determining damages through a factual causation test alone but, until then, had failed to formulate a satisfactory test limiting such damages.²⁸

Considerations of fairness and justice dictate that parties who have freedom of contract should bear responsibility for failing to regulate their risks under that contract. Put another way, a defendant who fails to regulate his liability in respect of a risk that he is aware of at the time of contracting, should not be allowed to benefit by later avoiding liability in the event of a loss.

While it may be a simplistic view of commercial realities to suggest that a defendant who fails to do so due to his weaker bargaining position can simply choose to either accept those risks or refuse to contract on those terms, the rule does fulfill a function in allocating risks between the contracting parties on grounds of fairness and justice.

From this it follows that considerations of fairness also require parties to be put on notice of any “special circumstances” that might influence the terms on which they choose to contract.²⁹

3.1.5. How was it applied? Important later cases referring to *Hadley v Baxendale*

Numerous judgements have applied the rule in the intervening century and a half since *Hadley v Baxendale*. It is not within the scope of this dissertation to consider all of them.

The cases of *Nettleship*, *Victoria Laundry* and *The Heron II* stand out as having played an important role addressing issues such as the nature and interpretation of the rule. The influence of this triumvirate of judgements is clear in the more recent decision of *The Achilles* and its subsequent application in *The Sylvia*.

²⁸ Andrew Tettenborn ‘Hadley v Baxendale: Contract Doctrine or Compensation Rule?’ (2005) 11 *Texas Wesleyan Law Review* 505 at 506.

²⁹ *Hadley v Baxendale* (note 1) at 356.

3.2. Implied terms in *Nettleship*

The *Nettleship* claimants engaged the defendants to carry boxes of machinery from Glasgow to Vancouver but one of the boxes was not delivered.

Without the machinery contained in that crucial box, the claimants could not complete the construction of their sawing-mill. They had to send for replacement machinery from England, delaying the construction of the mill by nearly a year.

In addition to the costs of obtaining and transporting the replacement parts, which losses were agreed to be due by the defendants, the claimants also claimed damages resulting from the delay to the construction of the mill. It was this latter loss of profits claim that was the subject of the dispute.

At the time he agreed to carry the goods, the Master³⁰ was found to be aware that the various boxes contained machinery for the construction of a sawing-mill for the claimants' business of timber sawing and cutting in British Columbia.

However, the court found that the defendants were not made aware that the missing box contained parts essential for completing the construction of the mill and that replacement parts could only be sourced from England.

Applying the second limb of the *Hadley v Baxendale* test, the court decided that the defendants did not have the necessary special knowledge required to hold them liable for the additional loss of profits claimed.

3.2.1. Is mere knowledge enough?

Willes J³¹ in *Nettleship* suggested that, under the second limb of the test, the defendant must have had both actual knowledge of the special conditions and also have accepted those special conditions as forming part of the contract, such that the defendant can reasonably be taken to have contemplated accepting liability for a breach at the time of contracting.³²

³⁰ Who was also part-owner of the vessel in question, as was common at that time.

³¹ In an interesting connection, Danzig (note 16) at 276 identifies Willes J as having acted as counsel for Baxendale in *Hadley v Baxendale* (note 1) on appeal before he became a judge.

³² *Nettleship* (note 4) at 509.

While the incorporation of a term into the contract as suggested by *Nettleship* has since been rejected,³³ the idea that knowledge alone is not enough has found support from time to time in the authorities and academic writings. Most recently, Lord Hoffmann's judgement in *The Achilles* has reignited this debate.

3.3. Restatement of the rule in *Victoria Laundry*

Nearly a century after *Hadley v Baxendale*, "the abundance of phraseology and the breakdown of the rule into two parts, led to confusion, and a restatement of the rule for modern conditions became a real need. This restatement came with the Court of Appeal decision in 1949 in *Victoria Laundry*."³⁴

The defendant engineering company sold a boiler, which they were told was for immediate commercial use, to the claimant laundry and dyeing company. However, the unit was only delivered some five months after the contractual delivery date as it had been dropped by the defendant's sub-contractors prior to delivery and needed to be repaired.

The claimants claimed for (a) loss of profits from the "ordinary" new business they would have gained if the boiler had been delivered on time and (b) loss of profits from a series of highly lucrative dyeing contracts for the Ministry of Supply, which they said they would have been awarded if the delivery had not been delayed.

Lord Justice Asquith extracted various propositions³⁵ from his detailed analysis of the relevant authorities, which included *Hadley v Baxendale* and *Nettleship*, concluding, in short, the benchmark for the defendant's liability to

³³ *The Heron II* (note 6) HL at 484 and McGregor (note 12) at 226 - 227.

³⁴ McGregor (note 12) at 202.

³⁵ *Victoria Laundry* (note 5) at 539 - 540.

be reasonable foreseeability³⁶ as defined and as determined by the actual or implied or imputed knowledge of the parties, objectively ascertained.³⁷

Applying these principles to the facts in question, the court considered what information the defendants would have known and what information they could be taken to have known at the material time.

The court concluded that the portion of losses alleged in respect of (b) the highly lucrative dyeing contracts, could not be claimed. The defendants were not put on notice, at the time of contracting, of the prospects and terms of these particular dyeing contracts. Therefore this loss did not fall under the second limb of the *Hadley v Baxendale* test and the claimant's claim failed.

This did not preclude the claimants from claiming in respect of their (a) ordinary loss of profits under both limbs of the test. Although the defendants were not manufacturers or dealers in boilers, the court found that they knew more than the "plain man" about boilers and the purposes for which they are used by laundries. The defendants were told, at the time of contracting, that the claimants wanted the boiler for immediate use in their laundry and dyeing business.

Therefore, the defendants had sufficient information to know that a delay in delivery was likely or liable to result in a loss of business for the claimants. It was clear to a reasonable man in the place of the defendants that, even without such express notification, a delay in delivery was likely or liable to result in loss of business.

3.3.1. Determining knowledge under the first limb

The defendant is taken to possess the same basic knowledge as a reasonable man in his position, allowing him to identify those losses that would be "liable to result"³⁸ in the ordinary course of things from a particular breach. The actual knowledge held by the particular defendant is not taken into account under this limb.

³⁶ The use of the phrase "reasonable foreseeability" was criticised by Lord Reid in *The Heron II* (note 6) HL for blurring the line between the test under tort and contract. See discussion below at 3.7.4.

³⁷ McGregor (note 12) at 203.

³⁸ See criticism of the phrase "liable to result" below at 17.

In determining the basic level of knowledge held by a reasonable man in the defendant's position, the court will consider the nature of the parties' business or profession and the type of the contract.³⁹

So where the defendant carrier is not in the same business field or trade as the claimant,⁴⁰ he cannot be expected, in the absence of special knowledge, to contemplate losses other than those "liable to result" in the ordinary course of things.

A common carrier defendant such as in *Hadley v Baxendale*, is generally taken to know less about a claimant seller's business and, therefore, less about the sort of consequences that might result from delayed delivery of the cargo, than a manufacturer or a supplier or even a specialist engineer defendant, such as in *Victoria Laundry*.⁴¹

Claims against carriers for loss of profits after failing to deliver goods, delivering goods late or delivering damaged goods often fail for this reason.⁴² Although the basic principle remains the same, its application to different facts leads to different results.⁴³

Where a defendant fails to supply or accept goods, the courts will generally consider him "to have contemplated that changes might arise in the state of the market."⁴⁴ Even a carrier, though not supplying or accepting goods, can be taken to have contemplated changes in the market at the port of discharge if the vessel is delayed through his fault.⁴⁵

³⁹ McGregor (note 12) at 221 - 224.

⁴⁰ *The Heron II* (note 6) HL at 487.

⁴¹ "A carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods, or about other 'special circumstances' which may cause exceptional loss if due delivery is withheld" per *Victoria Laundry* (note 5) at 537. Also see *The Achilleas* (note 3) HL at 288 per Lord Walker.

⁴² McGregor (note 12) at 232.

⁴³ *Victoria Laundry* (note 5) at 536 and *The Pegase* (note 2) at 185. In *Hadley v Baxendale* (note 1) the court found that the defendants could assume the claimants would have had a back-up crankshaft. This is a strange conclusion if the defendants are supposed to have little or no knowledge of the claimants' business. Danzig (note 16) at 267 reminds us that at least some of the bench had intimate knowledge of the defendants' business so they may have been applying their existing knowledge to the facts.

⁴⁴ McGregor (note 12) at 224.

⁴⁵ "In most cases the loss of market will be found to be within the contemplation of the parties in carriage of goods by sea" per *The Heron II* (note 6) HL at 483.

3.3.2. Determining knowledge under the second limb

For a defendant to be liable for losses arising over and above those “in the usual course of things” under the first limb, he must be made aware, at the time of contracting, of special circumstances that a reasonable person in his position would consider as “liable to result”⁴⁶ in such losses in the event of a breach. Again this is an objective test but founded on the defendant’s actual knowledge.

Although the court found no such notice was given to the defendant in the case of *Hadley v Baxendale*, in fact evidence was led to show that the claimant had informed the defendant’s local representative of the urgency of their situation when booking the shipment. However, according to the underdeveloped laws of agency and liability in play at the time of the judgement,⁴⁷ mere notice to a representative was not sufficient to bind the defendant. Had the facts repeated themselves today, perhaps this evidence would have carried more weight and influenced the court’s ultimate decision.

The claimant in *Victoria Laundry* was also unsuccessful under the second limb, having failed to show that he put the defendant on notice, at the time of contracting, of the potentially lucrative dyeing contracts.

The second limb test does not necessarily work in the claimant’s favour every time. Any benefit that the claimant might have gained but for the breach can be taken into account when assessing damages, potentially reducing (rather than increasing) the amount due to the claimants. An example of such a benefit would be the profit the claimant would have made under a sub-sale.⁴⁸

⁴⁶ See criticism of the phrase “liable to result” below at 17.

⁴⁷ Danzig (note 16) at 262 – 263.

⁴⁸ As suggested in *Biggin v Permanite* [1951] 1 KB 422 as cited in McGregor (note 12) at 220 and later followed in *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] 2 Lloyd’s Rep 243 as cited in McGregor (note 12) at 221.

Victoria Laundry has been said to sit “uneasily with the principle that it is the type or kind of loss which matters and not its extent”⁴⁹ but can be explained through the distinction between the different kind or type of contracts usually entered into between such parties: The *Victoria Laundry* claim for the particularly lucrative contracts did not fail because the contracts were lucrative but because they were not of the kind or type of contract that the parties could reasonably be taken to have foreseen.⁵⁰

3.3.3. Timing

The actual or imputed knowledge held by the defendant is determined as at the time of contracting. Knowledge gained after the parties entered into the contract, even if gained before the breach, will not bind the defendant.

This is clear from the wording used in *Hadley v Baxendale*⁵¹ and also flows logically from the rationale behind the rule.⁵² If the parties are to be given an opportunity to regulate their risks then the time for determining those risks must be at or before the time of contracting. A cut-off point is necessary to limit recovery under factual causation.⁵³

3.3.4. Where/who must the knowledge come from?

The extent of the knowledge imputed to the defendant under the first limb comes from the general knowledge attributed to a reasonable man in his position.

Knowledge held by the defendant under the second limb comes from the special circumstances communicated to him by the claimant. Under the general principles of causation, the claimant cannot be liable to the defendant where the losses arise from facts told to the defendant by a third party.⁵⁴

⁴⁹ Paul CK Wee “Contractual interpretation and remoteness” (2010) *Lloyds Maritime and Commercial Law Quarterly* 151 at 153.at 172.

⁵⁰ Wee (note 49) at 172. However, Robert Duxbury in *Contract Law* (2008) at 383 suggests the ordinary and the lucrative dyeing contracts in *Victoria Laundry* could arguably be considered as the same kind or type of loss and that the only distinction might therefore be their extent.

⁵¹ *Hadley v Baxendale* (note 1) at 355.

⁵² McGregor (note 12) at 225.

⁵³ *Jackson v Royal Bank of Scotland* [2005] 1 Lloyd’s Rep 366 at 370.

⁵⁴ McGregor (note 12) at 227.

3.4. Refinement in *The Heron II*

While subsequent decisions largely agree with *Victoria Laundry's* "lucid restatement of principle",⁵⁵ it has been criticised, particularly in *The Heron II*, for its use of the phrase "reasonable foreseeability" and the ambit of the phrase "liable to result".⁵⁶

The claimant charterers, shippers and cargo owners in *The Heron II* entered into a voyage charterparty with the defendant ship owners for the carriage of a cargo of sugar from Constantza to Basrah.

The owners knew there was a market for sugar at Basrah and that the charterers intended to sell the cargo on arrival at Basrah but they did not have detailed knowledge of that market.

En route to Basrah, the owners deviated to load and discharge a cargo of livestock for their own account and to take on additional bunkers. This deviation caused a delay of nine days in the vessel's journey. During this time, the market for sugar at Basrah fell.

The parties agreed damages for delay as a result of the breach were payable. They disagreed as to how those damages should be calculated.

The charterers claimed damages for delay calculated as the difference between the market values of the cargo at the day when it should have arrived and at the day when it did in fact arrive.

The owners countered that loss of market was too remote to be recoverable as damages. Applying *The Parana*,⁵⁷ they argued the correct measure of damages for delay in the case of carriage of goods by sea (as opposed to carriage by land) was not loss of market but interest on the value of the cargo over the period of the delay.

The charterers succeeded before the House of Lords by applying the first limb of the *Hadley v Baxendale* test, there being no suggestion of any "special circumstances" such as to bring the claim under the second limb.

⁵⁵ McGregor (note 12) at 203.

⁵⁶ Supra at 205 - 206 and *The Heron II* (note 6) HL at 466.

⁵⁷ *The Parana* (1877) 2 P.D. 118.

Lord Reid set out the test to be applied as follows:

Is the loss in question “of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from the breach ... the words ‘not unlikely’ ... denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable”?⁵⁸

3.4.1. Development of the *Victoria Laundry* principles

Lord Reid’s refinement of the test, as quoted above, largely follows the principles laid down in *Victoria Laundry*.⁵⁹

His emphasis on the importance of determining whether the loss in question was of a particular “kind” or “type” has generally found favour in subsequent decisions.⁶⁰ This issue is particularly relevant when considering the extent of the losses that can be claimed.⁶¹

Lord Reid objected, however, to *Victoria Laundry*’s use of the phrase “reasonable foreseeability” for being too close to the test in tort and the phrase “liable to result” for not denoting the correct degree of probability with which the defendant ought to foresee the loss occurring. He was concerned that these phrases could easily be misunderstood and lead to an unacceptable extension of contractual liability.⁶²

Lord Reid’s rejection of “reasonable foreseeability” in the context of contract is generally accepted as correct⁶³ but consensus as to the appropriate word or phrase for denoting the degree of probability required has proved more elusive.

While some judges in *The Heron II* found the phrases used in *Victoria Laundry*⁶⁴ to be natural and acceptable,⁶⁵ others felt them to be an

⁵⁸ *The Heron II* (note 6) HL at 462.

⁵⁹ McGregor (note 12) at 205.

⁶⁰ See, for example, *The Achilleas* (note 3) HL and *Parsons (Livestock) v Uttley Ingham & Co* [1977] 2 Lloyd’s Rep 522.

⁶¹ See below at 30 and 43 for discussion as to the extent of loss that can be claimed.

⁶² *The Heron II* (note 6) HL at 466.

⁶³ See discussion below as to the test in tort at 41.

⁶⁴ Such as “liable to result”, a “serious possibility”, a “real danger” and “on the cards” as referred to in *Victoria Laundry* (note 5) at 540.

unreasonable and undesirable extension of the test in contract.⁶⁶ An event might be very unlikely to occur and therefore not “foreseeable” under the test but a reasonable man in the defendant’s position might still consider there to be a “real danger” of it occurring. *Victoria Laundry*’s suggestion of “on the cards”⁶⁷ was comprehensively rejected in *The Heron II* as being too colloquial, uncertain and subjective in meaning.

In summary⁶⁸ the court in *The Heron II* considered the test to be whether a reasonable man in the position of the defendant would have known, through actual or imputed knowledge, that the type or kind of loss suffered by the claimant as a result of his breach would:

- be “not unlikely to occur”;⁶⁹
- have a “considerably less than an even chance” of happening;⁷⁰
- be “not very unusual and easily foreseeable”;⁷¹
- be “fairly and reasonably ... considered as arising in the normal course of things”;⁷² or
- occur “in the great multitude of cases”.⁷³

⁶⁵ *The Heron II* (note 6) HL at 480.

⁶⁶ *Supra* at 466.

⁶⁷ *Victoria Laundry* (note 5) at 540.

⁶⁸ McGregor (note 12) at 204 - 206.

⁶⁹ *The Heron II* (note 6) HL at 465.

⁷⁰ *Supra* at 462.

⁷¹ *Supra* at 462.

⁷² *Supra* at 470.

⁷³ *Supra* at 478.

3.5. The Achilleas

Restatements such as those in *Victoria Laundry* and *The Heron II* played an important role in clarifying the *Hadley v Baxendale* test, which appeared all but settled until its application in *The Achilleas*.

3.5.1. The facts

The bulk carrier “Achilleas” was chartered to Transfield in January 2003 on an amended NYPE 1946 form. Under the terms of an extension to the charter in October 2003, the daily hire rate was increased to USD16,750 and the charterers were obliged to re-deliver the vessel to the owners by latest midnight on 2 May 2004.

On 20 April 2004, the charterers gave the owners the required ten days notice of redelivery between 30 April and 2 May 2004.

On or about 21 April 2004, the owners concluded a subsequent fixture with new charterers, Cargill International SA (“Cargill”). The Cargill charter was for a period of four to six months at a daily rate of USD39,500 and with a laycan from 28 April to 8 May 2004.

Cargill were entitled to cancel the Cargill charter if the vessel was not delivered to them by midnight on 8 May 2004. The rise in the market⁷⁴ meant that the owners had been able to negotiate a substantially higher daily hire rate under the new Cargill charter than under the existing Transfield charter.

On 23 April 2004, the charterers gave the owners seven days notice of redelivery between 30 April and 2 May. The charterers indicated their intention to redeliver at the Japanese port of Oita, where the vessel was due to discharge the balance of her cargo of coal carried under a sub-charter from Qingdao in China to Tobata and Oita in Japan.

Following discharge at Tobata, the vessel arrived at Oita on 30 April 2004 and the charterers gave the owners a further revised notice of redelivery

⁷⁴ The market almost doubled between September 2003 and April 2004.

between 8 and 9 May 2004, to take into account the anticipated delays with discharge.

By 5 May 2004 the owners realised the vessel would not be redelivered in time for on-delivery to Cargill by midnight on 8 May 2004, being the cancelling date for the Cargill charter.

There was no suggestion that the charterers or the owners were at fault or caused these delays. It was simply “bad luck”. The charterers had kept the owners informed as to the vessel’s schedule and redelivery estimates.

The owners asked Cargill to extend the cancelling date of the Cargill charter to 11 May 2004. However, there had been a sharp fall in the market between 21 April 2004 when the Cargill charter was originally fixed and 5 May 2004 when the Cargill charter was renegotiated. So while Cargill agreed to extend the cancelling date, they were able to negotiate a reduction in the daily hire rate from USD39,500 to USD31,500 (a difference of USD8,000 per day).

The vessel was, in the end, only re-delivered at Oita to the owners on 11 May 2004 when she was immediately on-delivered to Cargill and operated under charter to them until 18 November 2004.

3.5.2. The claim

It was common ground between the parties that the charterers were contractually bound to redeliver the vessel by midnight on 2 May 2004 and that, by failing to do so, the charterers had breached the contract and were therefore liable to the owners in damages.

The parties agreed that the original 21 April 2004 and renegotiated 5 May 2004 Cargill fixtures were negotiated at market rates.⁷⁵ The charterers did not criticise the owners’ renegotiation of the charter rate in exchange for an extended cancelling date.⁷⁶ There was no suggestion that the original Cargill

⁷⁵ *The Achilleas* [2007] 1 Lloyd’s Rep 19 (QBD) at 21.

⁷⁶ *The Achilleas* (note 3) HL at 283.

fixture had an unusually short cancelling date or that it had any unusual or peculiar terms.⁷⁷

The issue in dispute was the period over which the owners' damages should be calculated. The options presented to the tribunal were either as:

(a) A loss of profit claim: The owners claimed damages in the amount of USD1,364,584.37. This was calculated as the difference between the original Cargill charter rate (of USD39,500 as agreed on or about 21 April 2004) and the reduced rate (of USD31,500 as renegotiated on 5 May 2004) over the whole period of the fixture (from 08h15 on 11 May 2004 when the vessel was in fact redelivered until 08h15 on 18 November 2004 when the renegotiated Cargill charter ended), less any amounts earned under the original Transfield charter in the overrun period up to redelivery. Lord Rodger described the owners' primary claim as including the owners' "loss of profit" under a follow-on fixture.⁷⁸

(b) Or, in the alternative, a loss of use claim: The owners claimed damages in the amount of USD158,301.17. This was calculated as the difference between the market rate (of USD31,500 being the renegotiated Cargill fixture of 5 May 2004) and the Transfield charter rate (of USD16,750 as agreed in the 12 September 2003 addendum) over the period of the overrun only (from midnight of 2 May 2004 when the vessel should have been redelivered, to 08h15 on 11 May 2004 when the vessel was in fact redelivered). This is essentially a claim for the loss of use of the vessel for the period that the charter was overrun.

The charterers were prepared to accept the owners' alternative loss of use claim, arguing that that the owners were "entitled only to the difference between the market rate and the charter rate for the nine days during which they were deprived of the ship"⁷⁹ from midnight on 2 May to 08h15 on 11 May 2004, amounting to the lower figure of USD158,301.17.

⁷⁷ *The Achilles* (note 75) QBD at 21.

⁷⁸ *The Achilles* (note 3) HL at 283.

⁷⁹ *Supra* at 277.

3.5.3. The Arbitration Tribunal

Applying the text of *Hadley v Baxendale* as elucidated by Lord Reid in *The Heron II* and refined by Staughton J in *The Rio Claro*,⁸⁰ the majority held that the owners' claim fell within the first limb and the owners succeeded in their principal claim for USD1,364,584.37.

The tribunal found that parties engaged in the shipping market would expect a vessel to remain in near continuous employment and for the markets to move up and down, sometimes even rapidly.⁸¹ The charterers conceded during submissions that the loss of a follow-on fixture was a "not unlikely" consequence of late redelivery.⁸²

In their award, the arbitrators made a further important finding that damages for late redelivery were generally understood by those in the shipping market to be limited to the overrun period only, despite there being no recorded case law to this effect.⁸³

For the dissenting arbitrator, this meant that the charterers could not have understood themselves to be assuming liability for the risk of the larger loss of profits claim. He was concerned about the commercial uncertainty that might result if the award did not follow this general understanding.

The majority were not persuaded. They found that the loss of USD8,000 a day over the full period of the Cargill charter was loss of a kind that, at the time they entered into the addendum, the charterers "ought to have realised was not unlikely to result"⁸⁴ from the vessel's late redelivery. The fact that the quantum of the loss was not easily identifiable due to unpredictable market movements or that it was much larger than expected, was immaterial.⁸⁵

⁸⁰ [1987] 2 Lloyd's Rep 173 as cited in *The Achilles* (note 75) QBD at 22.

⁸¹ *The Achilles* (note 75) QBD at 22.

⁸² *Supra* at 22.

⁸³ *The Achilles* [2007] 2 Lloyd's Rep 555 (AC) at 566 and 567.

⁸⁴ *The Heron II* (note 6) HL at 462.

⁸⁵ *The Achilles* (note 75) QBD at 22.

3.5.4. The Commercial Court

The charterers appealed before Mr Justice Christopher Clarke in the Commercial Court, Queens Bench Division, alleging that the majority arbitrators had not properly applied the rule in *Hadley v Baxendale*.

Under English law, the grounds for appeal from arbitration awards are limited to issues of law not fact. Insofar as the tribunal made various findings of fact, therefore, the courts were obliged to follow them.

Following a thorough review of the case law, Mr Justice Christopher Clarke found the majority arbitrators had not erred in law and that the true measure of the owners' loss was the difference between the Cargill fixtures for the full period of the follow on charter.⁸⁶

3.5.5. The Court of Appeal

The charterers appealed and again the Appeal Court found in favour of the owners.

Lords Justice Rix, Tuckey and Ward concurred that the losses claimed by the owners were of a type clearly foreseeable under the *Hadley v Baxendale* test as properly applied by the earlier courts.

Furthermore, there were no "reasons of authority, principle and pragmatism"⁸⁷ justifying a rule, as was now argued by the charterers, that damages for late redelivery under a time charter should be limited to the overrun period in the absence of any special knowledge of the follow on fixture. If this decision did not sit comfortably in the shipping market, parties were free to regulate their potential exposures more clearly through agreement.⁸⁸

3.5.6. The House of Lords

Having failed on their three earlier attempts, the charterers finally succeeded with their arguments before the House of Lords.

⁸⁶ Supra at 36.

⁸⁷ *The Achilles* (note 83) AC at 569.

⁸⁸ Supra at 577.

Although unanimous in their decision, the individual reasoning of the five Law Lords falls into two opposing camps: One headed by Lord Rodger, the other by Lord Hoffmann, with the remaining Lords in the middle, leaning to one side or the other.⁸⁹

3.5.7. The Orthodox Approach – Lord Rodger and Baroness Hale

Lord Rodger applied the orthodox “ordinary course of things” test from *Hadley v Baxendale* and *Victoria Laundry*. Baroness Hale agreed that this should be the test though voiced her doubts about its application on the facts in this case.⁹⁰

In Lord Rodger’s view, the owners’ loss of profit claim arose because of “an extremely volatile market” and could not have been known to or quantified by the charterers at the time of contracting.⁹¹ Therefore, he concluded, the parties could not have contemplated the kind of loss claimed by the owners as “likely to result from the breach”.⁹² This application of the facts to the existing rule does not sit comfortably and is discussed in more detail below.⁹³

Despite her reservations, Baroness Hale preferred this orthodox approach to Lord Hoffmann’s broader approach.

3.5.8. The Broader Approach – Lord Hoffmann and Lord Hope

Lords Hoffmann and Hope referred to the test adopted in *The Pegase*⁹⁴ with its emphasis on responsibility and suggested that the correct question for the court to ask is: Is the loss of a “kind” or “type” for which the defendant, objectively assessed, assumed or accepted liability at the time of contracting, within the commercial context of the particular contract.⁹⁵

⁸⁹ The categorisation of the two approaches into “orthodox” and “broader” respectively is taken from the judgement of Mr Justice Hamblen in *The Sylvia* (note 8).

⁹⁰ *The Achilleas* (note 3) HL at 293.

⁹¹ *Supra* at 286.

⁹² *Supra* at 285.

⁹³ See criticism of the Orthodox Approach at 29 below.

⁹⁴ *The Pegase* (note 2) at 183 suggests the test is “[H]ave the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach.”

⁹⁵ *The Achilleas* (note 3) HL *per* Lord Hoffmann at 278 and 279 and *per* Lord Hope at 282.

Baroness Hale points out that this approach requires the contract breaker to have, or be taken by the court to have, contemplated both the type of loss and having liability for that type of loss,⁹⁶ thereby extending the classic *Hadley v Baxendale* test to include an assumption of liability requirement.

Lord Hoffmann's view is that, in most cases, where parties are shown to have objectively contemplated a type of loss they can also be taken to have contemplated assuming liability for that type of loss.⁹⁷ This is based on the assumption "that all contractual liability is voluntarily undertaken".⁹⁸

This approach is also known as the "agreement-centered" approach.⁹⁹

Lord Hoffmann recognises this is not an absolute rule and that in some unusual cases there might be evidence that a party cannot reasonably be taken to have assumed liability for that type of loss.¹⁰⁰ He suggests this is more likely to happen in certain markets such as banking and shipping, where general expectations might arise out of particular types of contracts.¹⁰¹

The Achilles is, in Lord Hoffmann's view, an example of one of these unusual cases because (a) the tribunal found that there was a general understanding in the shipping market that the owners' losses would be limited to the overrun period only and (b) the parties would not have been aware, at the time of contracting, of the terms (date, length, rate) of any potential follow-on fixture and therefore unable to quantify the risks involved.¹⁰²

Lord Hope supports Lord Hoffmann's approach and finds that the charterers did not assume responsibility in *The Achilles* for the owners' loss of profit because the charterers would have had no knowledge of or control over the

⁹⁶ Baroness Hale in *The Achilles* (note 3) HL at 293.

⁹⁷ Lord Hoffmann in *The Achilles* (note 3) HL 277.

⁹⁸ Wee (note 49) at 153.

⁹⁹ Adam Kramer "An Agreement-Centered Approach to Remoteness and Contract Damages" in Nili Cohen et al (eds) *International Studies in the Theory of Private Law: Comparative Remedies for Breach of Contract* (2005) at 251 and Wee (note 49) at 153.

¹⁰⁰ The judgement in *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349 (CA) suggests that this can operate the other way as well, to allow for parties to have assumed liability for a particular type of loss against the contractual and commercial background in place.

¹⁰¹ Lord Hoffmann in *The Achilles* (note 3) HL at 278.

¹⁰² *The Achilles* (note 3) HL at 280.

terms of any follow-on fixture and therefore no ability to quantify or determine the extent of their potential liability.¹⁰³

Most interpretations align Lord Hope with Lord Hoffmann, although one writer suggests Lord Hope is “a Rodger in Hoffmann’s clothing”¹⁰⁴ in that he appears to support the assumption approach but in fact decides the matter by applying the orthodox approach.

3.5.10. Lord Walker

Lord Walker refers to both approaches but does not appear to choose one over the other. He concludes by saying he agrees with the reasons given by Lords Hoffmann, Hope and Rodger¹⁰⁵ despite their very different positions.

Some writers consider him to be in Lord Hoffmann’s camp¹⁰⁶ while others put him in Lord Rodger’s camp¹⁰⁷. He appears to apply an interpretation of the orthodox approach¹⁰⁸ yet specifically approves the approach of Lord Hoffmann.¹⁰⁹

As with Lords Hoffmann, Hope and Rodger before him, he does not believe the charterers should be liable for loss of profit where they would have “had no knowledge of, or control over, the new fixture entered into by the new owners.”¹¹⁰ However, he does not go so far as to decide, in this case, if the defendant had or could be taken to have assumed liability.

¹⁰³ Supra at 283.

¹⁰⁴ Robert Gay ‘*The Achilles* in the House of Lords: Damages for late delivery of time chartered vessel’ (2008) 14 *The Journal of International Maritime Law* 295 at 302.

¹⁰⁵ Lord Walker in *The Achilles* (note 3) HL at 292.

¹⁰⁶ Gay (note 104) at 302.

¹⁰⁷ McGregor (note 12) at 210.

¹⁰⁸ Lord Walker in *The Achilles* (note 3) HL at 291

¹⁰⁹ Supra at 292.

¹¹⁰ Supra at 291.

3.6. Comment on House of Lords decision in *The Achilleas*

3.6.1. Ratio decendi

There is no clear ratio decendi from the five House of Lords judgements. There can be little doubt that Lord Rodger and Baroness Hale are on one side with Lord Hoffmann on the other but the allegiances of Lord Hope and Lord Walker are not obvious.

Not even the leading academic writers agree on whose reasoning should be binding. Chitty argues that Lord Hoffmann's approach is the *ratio*, suggesting the test for remoteness has changed to now include an "additional and probably separate" requirement that the parties "assume responsibility for losses of the particular kind suffered".¹¹¹ McGregor rejects this and favours a *ratio* in line with Lord Rodger's views.¹¹²

Mr Justice Hamblen in *The Sylvia* suggests Lord Hope and Lord Walker support Lord Hoffmann, making the assumption of responsibility approach the majority reasoning,¹¹³ though the courts have been careful to point out that they do not consider a new test to apply.¹¹⁴

3.6.2. Context of the judgement

The particular arguments raised on the facts of *The Achilleas* had not been considered by the English courts before. One reason for this is that it was only until the relatively recent decision in *The Peonia*¹¹⁵ that a charterers' duty to redeliver by the contractual date was considered to be a strict-liability obligation, allowing the owners to claim damages such as to put them in the same position as if the contract had been properly performed.¹¹⁶ Another reason proposed for the lack of case law about unliquidated damages in the

¹¹¹ Chitty *The Law of Contracts* 30ed (2008) at 26-100A. The implications thereof are considered at 26-100F.

¹¹² McGregor (note 12) at 210.

¹¹³ *The Sylvia* (note 8) at 85. See discussion of *The Sylvia* at 35 below.

¹¹⁴ *The Amer Energy* [2009] 1 Lloyd's Rep 293 and *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349 (CA).

¹¹⁵ *The Peonia* [1991] 1 Lloyd's Rep 100.

¹¹⁶ *The Achilleas* (note 83) AC at 563.

shipping context is the established practice of providing for liquidated damages by way of demurrage.¹¹⁷

Previously the courts had accepted that an owner would be entitled to claim the difference between the hire payable under the charter and the market rate for hire for the period of the overrun by way of compensation for the loss of use of the vessel.¹¹⁸ The owners in *The Achilles* asked the court to decide whether they were entitled to claim for the additional loss of a follow-on fixture.¹¹⁹

The English commercial courts place considerable emphasis on rendering judgements that offer certainty and predictability¹²⁰ and that reflect the commercial realities of the parties who choose to apply English law to their disputes. Commercial certainty was cited as a reason for both allowing and disallowing the owners' loss of profits claim in *The Achilles*.

The House of Lords clearly felt that it would be unjust to hold the charterers liable for potentially disproportionately large losses following a comparatively minor breach of charter.

However, the legal reasoning behind their decision is arguably flawed, particularly in light of the factual finding by the arbitrators¹²¹ that shipping lawyers would have considered the owners to be entitled to claim the difference between the market rate and charter rate for the overrun period only, despite no clear authority on the point.

As Baroness Hale points out, "[t]o rule out a whole class of loss, simply because the parties had not previously thought about it, risks as much uncertainty and injustice as letting it in."¹²²

¹¹⁷ McGregor (note 12) at 209.

¹¹⁸ Terence Coghlin et al *Time Charterers* 6ed (2008) at 111.

¹¹⁹ Supra at 112.

¹²⁰ *The Golden Victory* [2007] 2 Lloyd's Rep 164 at 172.

¹²¹ At para 17 of the arbitration judgement.

¹²² Baroness Hale in *The Achilles* (note 3) HL at 292.

3.6.3. Criticism of the Orthodox Approach applied by Lord Rodger

Appeals from arbitration awards under English law are allowed on very limited grounds. These include challenges on points of law but not on findings of fact.¹²³ Deciding whether or not a particular kind of loss is too remote involves a mix of fact and law.¹²⁴ For an appeal to succeed, the tribunal must have either applied the wrong legal test or have come to a conclusion that no reasonable person would have reached on the facts in applying the correct test.¹²⁵

Lord Rodger concluded that the appeal should fail on the latter basis but this is a high standard to meet.

The Achilleas is a claim under the first limb of *Hadley v Baxendale*. The terms of the follow-on fixture were not agreed at the time the owners and the charterers contracted. There could be no possibility of the charterers having special knowledge of the terms of the follow-on fixture at the time of contracting.

The charterers had already conceded before the tribunal that the loss of a follow-on fixture was a “not unlikely” consequence of late redelivery. There was no finding by the tribunal that the follow-on fixture was not at the market rate or that the market was unusually volatile in this case. On the contrary, the tribunal found that market movements, even quite rapid ones, were common knowledge to both parties.¹²⁶ Damages for loss of market are recognised as recoverable under English law.¹²⁷ Given these findings alone, under the orthodox approach, the owners ought to have been entitled to claim the higher rate of loss.¹²⁸

¹²³ Unless excluded by agreement, parties can only challenge awards for lack of jurisdiction, serious irregularity and on a point of law under sections 68 and 69 of The Arbitration Act 1996.

¹²⁴ *The Sylvia* (note 8) at 87. But earlier judgements of *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 at 223 and *The Heron II* (note 6) HL at 470 suggest it is a question of fact alone, as referred to by David Semark and Chirag Karia ‘Damages for Loss of Fixture - The “Achilleas” and The “Sylvia”’. Available at www.simsl.com/Publications/Articles/Sylvia0810.html. [Accessed 19 December 2011]

¹²⁵ *The Nema* [1981] 2 Lloyd’s Rep 239 at 254.

¹²⁶ *The Achilleas* (note 83) AC at 566.

¹²⁷ *The Heron II* (note 6) HL.

¹²⁸ Semark (note 124) and Wee (note 49) at 153. Also see Adam Kramer “The New Test of Remoteness in Contract” (2009) 125 (July) *Law Quarterly Review* 408 at 409.

It is also a well established principle that, irrespective of how large the loss is, a defendant will be liable if the loss is of a kind or type so as to fall under one of the two limbs of *Hadley v Baxendale*.¹²⁹ Put differently, a defendant should not be able to avoid liability simply because the loss was greater than the parties could have anticipated at the time of contracting.¹³⁰

McGregor suggests that Lord Rodger's conclusion is based on an interpretation of the phrase "kind of loss" to refer to the losses arising from the particular fixture in question.¹³¹ This is a short step away from suggesting that the loss of profit claim failed because the parties did not foresee the large scale of the loss. It also highlights the difficulties that the courts face in determining what the type or kind of loss in question might be.¹³²

Victoria Laundry is cited in support¹³³ but this does not assist. The claim for the loss of the lucrative dyeing contracts in *Victoria Laundry* failed because of a lack of special knowledge about the existence of the lucrative contracts generally and not because their unusually lucrative nature was not foreseen.¹³⁴

Lord Rodger's approach has also been criticised for leaving open the option for an owner to claim the loss of a follow-on fixture as a "general loss of business profits".¹³⁵

In an attempt to arrive at a result he believed to be fair, Lord Rodger has at best wrongly applied the tribunal's findings to the law and at worst distorted the well-established test of *Hadley v Baxendale*.

¹²⁹ Lord Hoffmann in *The Achilleas* (HL) at 280 cites Staughton J in *The Rio Claro* [1987] 2 Lloyd's Rep 173 at 175 and *Jackson* (note 53) in support.

¹³⁰ See *Parsons Livestock* (note 60) and below at 30 and 43.

¹³¹ McGregor (note 12) at 217.

¹³² *Duxbury* (note 50) at 382 to 383.

¹³³ McGregor (note 12) at 217 - 218.

¹³⁴ Semark (note 124).

¹³⁵ Kramer (note 128) at 409.

3.6.4. Criticism of the Broader Approach applied by Lord Hoffmann

Nettleship is generally credited¹³⁶ with attempting to extend the second limb of *Hadley v Baxendale* by additionally requiring the defendant to have agreed, through either an express or an implied term in the contract, to be liable for losses following from special circumstances of which he was made aware.¹³⁷

Viewing the defendant's assumption of liability as a term of the contract has previously proved controversial in English law¹³⁸ even if, as previously contended, it has little practical application between parties who have freedom of contract¹³⁹ and is "unnecessary".¹⁴⁰

The concern is that such a term will come too close to a warranty or put the doctrine of notice in jeopardy.¹⁴¹ Simply putting a party on notice of special circumstances should be sufficient. It should not also require the incorporation of a term into the contract or for the defendants to warrant that they will be liable.¹⁴²

Robertson suggests those judgements purporting to decide a matter based on the "idea of an implied undertaking" in fact decide based on the existence or absence of special knowledge, with no finding made that there was express or implied agreement to assume liability.¹⁴³

The extension of the assumption principle into the first limb of *Hadley v Baxendale* also falls within a larger debate surrounding the roles of judges and parties in "shaping contractual rights and obligations"¹⁴⁴ and freedoms of contract. It raises concerns about allowing the courts to determine the terms of a contract that the parties themselves, in reality, might not have actively considered.

¹³⁶ *Victoria Laundry* (note 5) at 538 and *The Heron II* (note 6) HL at 484.

¹³⁷ Chief Justice Bovill in *Nettleship* (note 4) at 506 and Justice Willes in *Nettleship* (note 4) at 509.

¹³⁸ See *Lavery* (note 228) at 47 below as to the application of the convention principle in South African law.

¹³⁹ The exception would be "a person, like a common carrier, who has no right to decline to enter into a contract" *per The Heron II* (note 9) AC at 605.

¹⁴⁰ *The Heron II* (note 6) HL at 484 and *The Achilleas* (note 83) AC at 576.

¹⁴¹ McGregor (note 12) at 227.

¹⁴² *Supra* at 227.

¹⁴³ Andrew Robertson 'The basis of the remoteness rule in contract' (2008) 28 *Legal Studies* 172 at 181 and at 188.

¹⁴⁴ Robertson (note 143) at 175.

This is rooted in the fiction that the courts are required to apply when determining what the parties would have agreed if they had thought about breach at the time of contracting.

One rationale behind the assumption theory is that it protects a party who has knowledge, be it general or special, but who does not want “to accept the risk”.¹⁴⁵ But a defendant in this position is free to make his choice clear through specific terms in the contract, such as limiting a carriers’ liability.¹⁴⁶ The voluntary nature of contracts means that parties are free to decide in advance what damages they are, or are not, prepared to accept liability or responsibility for in the event of a breach.¹⁴⁷

Although he recognises there are difficulties with this approach, Lord Hoffmann suggests that it is possible to determine whether parties accepted responsibilities for certain kinds or types of losses in contracts concluded in certain markets, such as banking and shipping, by virtue of the type of contract.¹⁴⁸ He does not go so far as to suggest this requires the courts to in fact imply a term into the contract.

Singling out certain types of contracts for different treatment raises its own difficulties. This goes against *The Heron II* in which the court made it clear that there are no special rules applying to charterparties and may well lead to an inequitable result in other cases.¹⁴⁹

Although it is not a new idea, the broader approach was put forward by Lord Hoffmann¹⁵⁰ on the basis of his subsequent research and not debated by counsel during submissions.¹⁵¹ Baroness Hale questions whether *The Achilles* was the appropriate case in which to raise these issues.¹⁵²

¹⁴⁵ McGregor (note 12) at 227.

¹⁴⁶ Supra at 227. This is the proposal made by Lord Justice Rix in *The Achilles* (note 83) AC.

¹⁴⁷ “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” per Baron Alderson in *Hadley v Baxendale* (note 1) at 356.

¹⁴⁸ *The Achilles* (note 3) HL at 278.

¹⁴⁹ Baroness Hale in *The Achilles* (note 3) HL at 293.

¹⁵⁰ Lord Hoffmann in *The Achilles* (note 3) HL at 278 cites the academic works he consulted. Lord Walker in *The Achilles* (note 3) HL at 290 comments that Lord Hoffmann brought these papers to the attention of the rest of the bench while they were writing their judgements.

¹⁵¹ Baroness Hale in *The Achilles* (note 3) HL at 293.

¹⁵² Supra at 293.

There is also a strange logic in applying potentially outdated opinions of lawyers regarding the extent of losses that may or may not be claimed to justify a new approach.¹⁵³ The House of Lords in *The Heron II*, for example, had no hesitation in disregarding any established shipping industry understanding as to the difference in approaches to foreseeability in land and sea carriage cases developed in *The Parana* nearly a century before, on the basis that it was incorrect.¹⁵⁴ There does not appear to be any justification for extending the rule to allow parties to claim for losses based on a shared incorrect interpretation of the law.¹⁵⁵

The agreement-centered approach to remoteness applied by Lord Hoffmann is not a new concept.¹⁵⁶ However, there is an inherent fiction involved in the idea of the courts determining the parties' actual intentions where they are not expressly set out in the contract. Such an approach potentially creates uncertainty for the parties, and their legal advisors, as to how the court will decide what they did or did not agree.¹⁵⁷

If a more flexible test is to be preferred then more case law will be required to make it clear which issues the court would take into account in which cases, in order to avoid uncertainty. Robertson suggests the courts should consider the extent of the defendants' liability, the proportionality of the claimants' loss against the defendants' gains, the commercial consequences of the losses and whether there was any opportunity to contractually limit liability.¹⁵⁸

Arguably, as the decision in *The Sylvia* suggests, *The Achilleas* is just such a case, identifying the circumstances in which the court will consider applying a broader approach to remoteness of contractual damages and the circumstances in which the court will continue to follow the established *Hadley v Baxendale* approach. Lord Hoffman, however, views *The Achilleas* as

¹⁵³ Gay (note 104) at 301.

¹⁵⁴ Wee (note 49) at 173.

¹⁵⁵ Supra at 173.

¹⁵⁶ Kramer (note 128) at 409.

¹⁵⁷ Wee (note 49) at 169.

¹⁵⁸ Robertson (note 143) at 192.

an opportunity “to look for a broader principle” in determining damages over a range of different contracts.¹⁵⁹

3.7. Application and effect of *The Achilleas*

It is not the purposes of this dissertation to analyse all subsequent decisions considering the application of *The Achilleas* but three recent judgements in particular merit discussion within the shipping context and with a view to understanding the impact of *The Achilleas* on the shipping industry and general principles of remoteness.

As will be seen, despite the concerns raised by a change to the orthodox approach in *The Achilleas*, subsequent decisions do not consider the test for remoteness to have changed: The orthodox approach remains the primary test with assumption of responsibility only applied in certain rare cases.¹⁶⁰

A brief consideration will also be given to the difference between the test for remoteness in tort and contract.

3.7.1. *The Amer Energy*

In deciding whether or not to grant the owners’ late application for leave to appeal an arbitration award, the Commercial Court had to consider whether the tribunal’s decision was “obviously wrong”¹⁶¹ in awarding the charterers damages for loss of profit on a cancelled sale contract following the owners’ breach in delivering the vessel late under her laycan period.

Mr Justice Flaux found it was not for two reasons: Firstly, he believed the majority of the House of Lords, with the possible exception of Lord Hoffmann, in *The Achilleas* did not intend to lay down a “completely new test as to recoverability of damages in contract and remoteness different from the

¹⁵⁹ Lord Hoffmann “*The Achilleas: Custom and Practice or Foreseeability*” (2010) 14 1 *The Edinburgh Law Review* 47 at 54 and at 61.

¹⁶⁰ *The Sylvia* (note 8) at 85.

¹⁶¹ *The Amer Energy* (note 7) at 295.

so-called rule in *Hadley v Baxendale*¹⁶² based on an assumption of responsibility by the party in breach.

Even Lord Hoffmann acknowledged that a departure from the established *Hadley v Baxendale* test would be unusual¹⁶³ and it could not be correct to say that the *Hadley v Baxendale* test should not apply to shipping cases.¹⁶⁴ The tribunal was therefore correct to apply the established *Hadley v Baxendale* test, as they had done.

Secondly, on the tribunal's particular findings of fact in this case,¹⁶⁵ the owners' claim would fail irrespective of which test was applied.¹⁶⁶ The type of loss in question fell under both the first and second limb of *Hadley v Baxendale* and was also "of a kind or type for which the owners ought fairly to be taken to have accepted responsibility"¹⁶⁷ under the test formulated by Lord Hoffmann.¹⁶⁸ So even if the owners were right and a new test had been formulated in *The Achilleas*, the owners would fail on the facts and their request for leave to appeal was denied.

3.7.2. *The Sylvia*

At first blush, the facts in *The Sylvia* and *The Achilleas* appear similar but their outcomes were very different.

In both cases, the court was asked to decide the correct measure of damages for the loss of a fixture following a breach of the primary charter. The key difference is that *The Sylvia* concerned the loss of a sub fixture under a continuing head charter while the charterers' breach in *The Achilleas* caused the owners to miss the laycan of a follow on (not sub) fixture after redelivery under the primary charterparty.

The tribunal found the owners of *The Sylvia* failed to exercise due diligence and breached their maintenance obligations under the applicable amended

¹⁶² *The Amer Energy* (note 7) at 295.

¹⁶³ *The Achilleas* (note 3) HL at 278.

¹⁶⁴ *The Amer Energy* (note 7) at 295.

¹⁶⁵ Under the English Arbitration Act 1996, appeals to the Courts are only permitted on findings of law and not on findings of fact.

¹⁶⁶ *The Amer Energy* (note 7) at 295.

¹⁶⁷ *Supra* at 295.

¹⁶⁸ *The Achilleas* (note 3) HL at 279.

NYPE 1946 charter by failing to maintain the vessel's cargo holds. As a result, the vessel was detained by Canadian Port State Control, had to undergo repairs and missed her laycan date under a sub voyage charter that had been fixed by the charterers with Conagra before the vessel's deficiencies were identified. Conagra cancelled their sub fixture and the charterers negotiated a substitute sub fixture with York at a less favourable rate, to commence after completion of the repairs.

The owners argued (applying *The Achilleas*) that the charterers were only entitled to claim the difference between the market and missed charter rates while the repairs were being done (the period of delay). The owners argued that the loss of profit on the cancelled Contra sub-charter was too remote.

However, the charterers successfully both at arbitration and on final appeal to the Commercial Court, claimed for this loss of profit calculated as the difference between the market and missed charters for the full period of the Conagra charter. This is in contrast to *The Achilleas* where the owners were unable to recover their losses under the follow on fixture.

Acknowledging the "confusion" surrounding the binding majority decision in the House of Lords¹⁶⁹ Mr Justice Hamblen of the Commercial Court differentiated between the orthodox approach to remoteness of damages endorsed by Lord Rodger and Baroness Hale in *The Achilleas* (applying the ordinary *Hadley v Baxendale* test to determine whether the parties could reasonably be taken to have contemplated the kind of loss in question) and the broader approach preferred by Lords Hoffmann and Hope (considering whether the parties would reasonably have contemplated, in addition to the kind of loss under the ordinary rule, an assumption of liability or responsibility for the loss in question).¹⁷⁰

He was at pains to make it clear that, as was the view taken in *The Amer Energy*¹⁷¹ and put forward by Chitty,¹⁷² "there is no new generally applicable

¹⁶⁹ *The Sylvia* (note 8) at 85.

¹⁷⁰ *Supra* at 84 - 85.

¹⁷¹ *The Amer Energy* (note 7) at 295.

¹⁷² Chitty (note 111) at paragraph 26.100-G.

legal test of remoteness in damages. ... [T]he orthodox approach ... remains the 'standard rule' and it is only in relatively unusual cases, such as *The Achilleas* itself, where a consideration of assumption of responsibility [Lord Hoffmann's broader approach] may be required."¹⁷³ For losses arising under the orthodox approach, an assumption of responsibility can often be imputed in any event.¹⁷⁴

Applying the orthodox approach in *The Sylvia*, Mr Justice Hamblen agreed with the tribunal's finding that the loss in question fell under the first limb of *Hadley v Baxendale* and was "of a kind or type which would have been within the reasonable contemplation of the parties at the time that the contract was made as being not unlikely to result".¹⁷⁵ Sub letting by way of a voyage charter is common and often expressly permitted under a time charter.¹⁷⁶ Damages for loss of a sub fixture are generally considered as recoverable.¹⁷⁷

Mr Justice Hamblen did not find *The Sylvia* to be "one of those 'unusual' cases in which it might be said that assumption of responsibility had to be addressed"¹⁷⁸ because:

- (a) There is no "general market understanding"¹⁷⁹ limiting the recoverable damages as was the case in *The Achilleas*. In fact, the general understanding is that the loss of a sub voyage fixture under a continuing head charter is recoverable;¹⁸⁰
- (b) Unlike *The Achilleas*, the maximum period of damages in a claim for a lost sub fixture under a continuing time charter cannot exceed the maximum period of the time charter. Therefore, the damages awarded will not "be unquantifiable, unpredictable, uncontrollable or disproportionate" as is the case with a follow-on charter of (potentially) any length;¹⁸¹

¹⁷³ *The Sylvia* (note 8) at 86.

¹⁷⁴ *Supra* at 86 and at 91.

¹⁷⁵ *Supra* at 88.

¹⁷⁶ *Supra* at 88.

¹⁷⁷ *Supra* at 88 – 89.

¹⁷⁸ *Supra* at 88.

¹⁷⁹ *Supra* at 89.

¹⁸⁰ *Supra* at 89 and summarising Cooke and Young *Voyage Charters* 3ed at para 21.90.

¹⁸¹ *The Sylvia* (note 8) at 90.

- (c) Parties will not usually be protected by the market for the loss of a sub voyage fixture in the same way as they would usually be for the loss of a follow on time fixture. *The Achilleas* was an unusual case where the loss was much greater than might usually have been anticipated as a result of the particularly volatile market at that time. There was no suggestion of a similarly volatile market at play here;¹⁸² and
- (d) The Conagra and York charters were at a market rate.¹⁸³ As with *Victoria Laundry*, the loss in question fell squarely under the first leg of the *Hadley v Baxendale* test. There was no suggestion of any special knowledge or unusual terms being a factor at play.¹⁸⁴

Leave to appeal was refused so there will be no further judgement in this case from the Appeal Court or Supreme Court, as the House of Lords is now known.

Mr Justice Hamblen's reasoning for not applying the broader approach in *The Sylvia* suggests that there are only very few circumstances in which this approach would be appropriate.¹⁸⁵

3.7.3. The Paragon

The Amer Energy and *The Sylvia* have gone some way to clarify the changes, if any, to the existing test but how can the owners protect their position? For example, what options are available to the owners where the last voyage order of their time charterers is illegitimate?

A time charterers' last voyage order is considered to be illegitimate where, at the time the order is given, "it cannot reasonably be expected that" the charterers will redeliver before the end of the charter period.¹⁸⁶ The owners can call on their charterers to give revised legitimate last voyage orders. If the charterers fail to do so, the owners can choose to perform the illegitimate last voyage or not.¹⁸⁷ The owners are entitled to claim damages for losses

¹⁸² Supra at 90.

¹⁸³ Supra at 91.

¹⁸⁴ Supra at 91.

¹⁸⁵ Semark (note 124).

¹⁸⁶ *The Paragon* (note 199) at 660.

¹⁸⁷ *The Gregos* [1995] 1 Lloyd's Rep 1.

that they suffer as a result of an illegitimate last voyage order, whether they have chosen to perform the voyage or not.¹⁸⁸ The measure of damages, where the owners choose to perform an illegitimate last voyage, is at the charter rate until the end of the charter period and thereafter at the market rate for the time of the overrun.¹⁸⁹

In one view, the effect of the decision in the *The Achilleas* is that damages will be calculated in the same way, even where the charterers knowingly order an illegitimate last voyage.¹⁹⁰

The legitimacy of the last voyage in *The Achilleas* was not in dispute¹⁹¹ so any views expressed by the courts on illegitimate last voyages were made *obiter*.

Baroness Hale¹⁹² suggested the owners could avoid their damages being limited to loss of use only by simply refusing to perform an illegitimate last voyage and having the vessel redeliver early. While this may be effective in some cases, disputes about illegitimate last voyages often arise precisely because there is not enough evidence at the time the order is given to make an accurate prediction as to whether the voyage will be completed within the required timeframe or not.¹⁹³ This leaves the owners in a difficult position.

Alternatively, Baroness Hale suggested the owners could get the charterers' express agreement to pay the higher rate of damages on a "without prejudice" basis¹⁹⁴ if the last voyage is later judged to be illegitimate.¹⁹⁵ The obvious difficulty with this approach is that the charterers are not obliged to agree and may not be inclined to agree to such a proposal.

Lord Justice Rix's¹⁹⁶ suggestion that owners put the charterers on notice of the next fixture will no longer assist in light of the House of Lords' reasoning.¹⁹⁷

¹⁸⁸ *The Dione* [1975] 1 Lloyd's Rep 115 at 118.

¹⁸⁹ Lord Hoffmann in *The Achilleas* (note 3) HL at 280 and cited in *The Paragon* (note 199) at 662.

¹⁹⁰ Gay (note 104) at 299.

¹⁹¹ Lord Rodger in *The Achilleas* (note 3) HL at 283.

¹⁹² *The Achilleas* (note 3) HL at 292.

¹⁹³ Gay (note 104) at 299.

¹⁹⁴ As was agreed in *The Gregos* (note 187).

¹⁹⁵ *The Achilleas* (note 3) HL at 292.

¹⁹⁶ *The Achilleas* (note 83) AC at 577.

Another proposal is for the law to impose a rule on the parties such that that the owners, faced with a potentially illegitimate last voyage and insufficient information to form a view on its legitimacy, could accept the voyage order on the basis that, if it later turned out to be illegitimate, they are entitled to claim the loss of profit from a lucrative subsequent fixture they lost as a result of late redelivery.¹⁹⁸ While this may address concerns about apparent fairness in allowing the owners to claim a larger amount where their charterers are at fault for late redelivery, introducing the notion of fault into the determination of recoverable losses is not without its difficulties.

The owners in *The Paragon*¹⁹⁹ attempted to deal with the issue by inserting the following clause in their time charter:

"The Charterers hereby undertake the obligation/responsibility to make thorough investigations and every arrangement in order to ensure that the last voyage of this Charter will in no way exceed the maximum period under this Charter Party. If, however, Charterers fail to comply with this obligation and the last voyage will exceed the maximum period, should the market rise above the Charter Party rate in the meantime, it is hereby agreed that the charter hire will be adjusted to reflect the prevailing market level from the 30th day prior to the maximum period [d]ate until actual redelivery of the vessel to the Owners."

In the event, the charterers redelivered six days late in a rising market. In contravention of the agreed clause, they paid hire at the agreed charter rate up to the date of delivery and then at the (higher) market rate for the six days overrun. The owners claimed hire payable at the market rate for thirty days before the end of the charter.

The arbitration tribunal at first instance found the clause to be a penalty and therefore unenforceable. The owners appealed but Mr Justice Blair agreed

¹⁹⁷ Gay (note 104) at 299.

¹⁹⁸ Supra at 299 to 300.

¹⁹⁹ *The Paragon* [2009] 1 Lloyd's Rep 658.

with the tribunal in first instance that the clause in question was a penalty.²⁰⁰ In reaching this conclusion, he had to consider what losses the owners would have been entitled to claim for the charterers' breach of their redelivery obligations. He acknowledged that the owners face difficulties in determining whether a voyage is legitimate or not at the time the last voyage orders are given. However, the owners would not have been entitled to claim for the losses envisaged by the clause had the charterers not breached their redelivery obligations. If the owners had chosen to accept early redelivery, they would still only have been entitled to claim at the market rate for any overrun period.²⁰¹

As the law currently stands, therefore, owners facing a potentially illegitimate last voyage cannot protect their position by agreeing to a clause with their charterers for the payment of damages higher than they would otherwise be entitled to claim.

3.7.4. The test in tort – “reasonable foreseeability”

While the test for factual causation remains the same whether in contract or in tort,²⁰² despite the suggestion in earlier cases²⁰³ that there is or should be only one principle of damages applicable to both contract and tort, the modern approach has been to view the tests for remoteness of damages in contract (“contemplation”) and tort (“reasonable foreseeability”)²⁰⁴ as different.²⁰⁵

The tortfeasor defendant is liable to his innocent claimant for losses “reasonably foreseeable as liable to happen even in the most unusual case,

²⁰⁰ Under established English law principles, clauses providing for liquidated damages to be payable in the event of a breach are valid only where they are a genuine pre-estimate of recoverable loss in the context of that agreement, aimed at compensating a party for his losses and not designed to deter the other party from breaching the contract. See summary of the authorities on penalties in *The Paragon* (note 199) at 662.

²⁰¹ *The Paragon* (note 199) at 664.

²⁰² McGregor (note 12) at 768.

²⁰³ Lord Pearce in *The Heron II* (note 6) HL at 479 refers to the arguments put before the court in *The Wagon Mound No 2* [1966] 1 Lloyd's Rep. 657.

²⁰⁴ *The Wagon Mound No 1* [1961] 1 Lloyd's Rep. 1.

²⁰⁵ *The Heron II* (note 6) HL at 479.

unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it.”²⁰⁶

The contract breaker, on the other hand, is liable to his innocent claimant for losses flowing naturally from the breach or within the parties’ contemplation at the time of contracting.

The concern with adapting a single test to fit both is that it will result in “a rule that is satisfactory for neither.”²⁰⁷

Rationale behind the different approach in tort

The justification for this difference has its origins in the nature of the relationship of the parties in contract as opposed to tort.²⁰⁸

Freedom of contract is a fundamental principle of English law. Parties to a contract come together voluntarily. They have an awareness of one another and they undertake mutual duties. They can choose how to regulate their relationship. They have the option to cater, through additional clauses, for any reasonable or foreseeable risks they are particularly concerned about²⁰⁹ even so far as to agree liquidated damages clauses or disclosure of special circumstances. Given these opportunities, it would be unfair to make the claimant bear losses that do not flow naturally from the breach.²¹⁰

Where a tort is committed, on the other hand, the innocent claimant has “no opportunity ... to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing.”²¹¹

Parties to a tort claim do not come together voluntarily. They are often strangers with no prior knowledge of one another. The law imposes a duty of care on the tortfeasor to act in such a way as not to harm strangers. The

²⁰⁶ Supra at 464.

²⁰⁷ Supra at 479.

²⁰⁸ “The approach in tort will ... normally be different simply because the relationship of the parties is different” per Lord Hodson in *The Heron II* (note 6) HL at 478.

²⁰⁹ *The Heron II* (note 6) HL at 464.

²¹⁰ *Cory and Others v Thames Ironworks and Shipbuilding Company Ltd* (1868) LR 3 OB 181.

²¹¹ *The Heron II* (note 6) HL at 464.

innocent claimant usually has no earlier opportunity to protect himself should the tortfeasor breach that duty of care.

Type/kind/extent of damage

The English law of tort recognises a well-established rule that the tortfeasor should take his victim as he finds him, also referred to as the eggshell skull rule. This means that even if the greater extent of the particular damage was not reasonably foreseeable or caused intentionally, the tortfeasor defendant will still be liable for the higher level of damage.

Similarly, where a breach of contract causes physical injury or damage, it is irrelevant that the plaintiff suffered losses to a greater extent than were foreseeable, as long as the type or kind of loss was foreseeable.²¹²

Effect of the difference

“Reasonable foreseeability ... may result in [the defendant] having to pay for something that, although reasonably foreseeable, was very unusual, not likely to occur and much greater in amount than he could have anticipated.”²¹³

While not every reasonably foreseeable loss arises naturally or is in the parties’ contemplation, all losses arising naturally or within the parties’ contemplation are reasonably foreseeable²¹⁴ suggesting that “[t]he modern rule in tort ... imposes a much wider liability” than in contract.²¹⁵

In truth, there is no hard and fast rule as to which results in a wider liability. Liability for damages in contract could be less, the same or greater than in tort depending on the facts and claim in question.²¹⁶

Indeed, Lord Denning suggests that the tests in contract and tort will often amount to the same test, depending on the nature of the tort or contractual damage.²¹⁷

²¹² *Parsons Livestock* (note 60) at 527 and *McGregor* (note 12) at 216.

²¹³ Lord Hope in *The Achilles* (note 3) HL at 281.

²¹⁴ *The Heron II* (note 6) HL at 466.

²¹⁵ *Supra* at 464.

²¹⁶ *McGregor* (note 12) at 775.

²¹⁷ *Parsons Livestock* (note 60) at 526 to 528.

In *SAAMCO*,²¹⁸ which preceded *The Achilleas*, Lord Hoffmann advocated an assumption of responsibility approach to the breach of a duty of care,²¹⁹ considering that even natural and reasonably foreseeable losses could be unrecoverable in tort or contract in certain circumstances.²²⁰ This approach was rooted in the idea that the courts should consider the assumption of responsibility within the context of the “scope” of the contractual obligations or duty owed. Lord Hoffmann’s attempts to extend this concept in *The Achilleas* have been criticised on the basis that considerations as to the scope of the contract are more easily applied to breach of duty type-cases and less easily applied to strict-liability obligations such as those in *The Achilleas*.²²¹

If *Hadley v Baxendale* or *The Achilleas* had been decided on the basis of the test in tort rather than contract, would the outcomes have been different?

While the losses suffered by the Hadley claimants might have been unlikely, they were still a possibility.²²² Similarly, it would have been at least reasonably foreseeable that *The Achilleas* defendants would suffer a loss of profit for the full period of the new fixture in the event of a late redelivery.²²³

So, in these cases liability in tort might be wider than in contract, but the acquisition of special knowledge under the second limb of the rule in *Hadley v Baxendale* can sometimes lead to liability being wider in contract than in tort.²²⁴ A loss that is not reasonably foreseeable is not recoverable in tort but might be recoverable in contract if the parties were aware of special circumstances that increase liability.

Application of a broader approach in tort

Kramer suggests that it may sometimes be appropriate to apply the agreement-centered contractual test to claims brought in tort, for example

²¹⁸ *South Australia Asset Management Corporation v York Montague* [1997] AC 191.

²¹⁹ The claim was made both in tort of contract and the scope of the duty of care obligation considered as being the same for both.

²²⁰ Kramer (note 128) at 410.

²²¹ Gay (note 104) at 301.

²²² *The Heron II* (note 6) HL at 464.

²²³ McGregor (note 12) at 769. The influence of the *SAAMCO* (note 218) test in tort may have led to the same outcome had *The Achilleas* (note 3) HL been decided in tort.

²²⁴ McGregor (note 12) at 773.

where the parties have a pre-existing relationship or an opportunity to allocate risk, but this does not go so far as to suggest that this amounts to “an agreement as to the allocation of that risk” in tort.²²⁵

Lord Hoffmann’s endorsement of the agreement-centered approach in *The Achilles* and his emphasis of the scope of duty in *SAAMCO* may narrow the differences between the tests, at least for some, torts and contracts.²²⁶

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²²⁵ Kramer (note 99) at 284.

²²⁶ See criticism of the application of the *SAAMCO* “scope” principle to strict liability obligations per Gay (note 104) at 301.

4. SOUTH AFRICAN LAW

Similar to the English law approach from *Hadley v Baxendale*, the general rule in South African law is:

“To ensure that undue hardship is not imposed on the defaulting party ... the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach ... The damages described in limb (a) and the first rule in *Hadley v Baxendale* are often labelled "general" or "intrinsic" damages, while those described in limb (b) and the second rule in *Hadley v Baxendale* are called "special" or "extrinsic" damages.”²²⁷

Though unlike the English courts, the South African courts have expressly recognised the application of the convention principle to special damages.

²²⁷ As restated by Corbett JA in *Holmdene Brickworks* (note 242) at 687 – 688 and approved by Nienaber JA in *Thoroughbred Breeders* (SCA) at 579.

4.1. *Lavery v Jungheinrich*

Some 75 years after *Hadley v Baxendale*, no doubt influenced by *Nettleship* but without the benefit of the subsequent *Victoria Laundry* restatement or *The Heron II* analysis, the South African Appellate Division considered the test for remoteness of contractual damages in *Lavery v Jungheinrich*.²²⁸

While allowing a claim for general damages for loss of profit, by a unanimous decision the Appellate Division rejected the *Lavery* plaintiffs' claim for special damages, finding their loss of future business and business reputation (calculated as the difference between the profit made the previous year and the following year) could not be supposed to have been within the reasonable contemplation of the defendants at the time of contracting, as the probable consequence of supplying a defective product to the plaintiffs.²²⁹

To succeed with a claim for special damages, the defendant must have, or must be taken by the court to have, either contracted "on the basis of"²³⁰ special knowledge that the loss suffered would probably result from the breach in question or must have agreed, as a term of the contract, to pay damages for the loss in question in the event of the breach in question.²³¹

The test applied in *Lavery*, particularly the latter requirement as laid down by Wessels JA, requires the court to go further than just determining which special damages could be supposed to have been within the parties' reasonable contemplation as inferred from any special circumstances known to them at the time of contracting or from the subject matter of the contract itself.²³² The parties must also have contracted "on the basis of" such special knowledge or have agreed it as a term of the contract.²³³

²²⁸ *Lavery & Co Ltd v Jungheinrich* 1931 AD 156.

²²⁹ *Supra* at 177.

²³⁰ Curtlewis JA in *Lavery* (note 228) at 172.

²³¹ Wessels JA in *Lavery* (note 228) at 177.

²³² *Lavery* (note 228) at 169. Referred to as the "contemplation principle" in *Shatz Investments* (note 234) at 552.

²³³ Referred to as the "convention principle" in *Shatz Investments* (note 234) at 552.

4.2. Shatz Investments

After a forty-five year gap, Trollip JA's assenting judgement in *Shatz Investments*²³⁴ confirmed that the convention principle continues to apply in South African law.²³⁵ Though he recognised that this approach was not without criticism both locally and abroad²³⁶ and that many subsequent South African decisions had applied the contemplation principle,²³⁷ he upheld *Lavery's* approach.²³⁸

From the terms of the commercial lease agreement between the parties in *Shatz Investments*, it was clear that the plaintiffs' business was likely to be successful and therefore develop goodwill as it was the only such business in the area sporting a large potential client base. It was also clear that the parties had contemplated it might be disposed of in the future given the long term of the lease and the particular provisions on sub-letting.²³⁹

By virtue of these express contractual clauses, Trollip JA concluded that the defendant had contemplated, at the time of contracting, that the plaintiff would suffer the loss of his business' goodwill if the defendant let a nearby property to a competitor in breach of their agreement and that the defendant had also "virtually or tacitly assumed liability for such damages".²⁴⁰

²³⁴ *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A).

²³⁵ *Supra* at 554.

²³⁶ *Supra* at 554.

²³⁷ *Supra* at 554.

²³⁸ *Supra* at 554.

²³⁹ *Supra* at 555.

²⁴⁰ *Supra* at 555.

4.3. Holmdene Brickworks

The defendants supplied the plaintiffs with defective bricks resulting in the plaintiffs having to demolish and rebuild the structure using replacement bricks purchased from another source. Confirming and re-stating the approach to remoteness in contractual damages in *Shatz Investments*,²⁴¹ Corbett JA in *Holmdene Brickworks*²⁴² allowed the plaintiffs' claim for loss of profits under the heading of general damages.²⁴³

4.4. Thoroughbred Breeders

The *Thoroughbred Breeders*²⁴⁴ plaintiffs were awarded contractual damages from their auditors, who were found to have failed to identify discrepancies in the plaintiffs' accounts and thereby preventing further losses from occurring.

On appeal to the Supreme Court, Nienaber JA confirmed *Holmdene Brickworks*' restatement quoted above.²⁴⁵

He considered the degree of probability required for a claim in general damages²⁴⁶ and concluded that there did not have to be a high likelihood of the loss occurring but that it should at least be "not improbable" and "tend[ing] to follow upon the breach as a matter of course."²⁴⁷

The court *a quo* had found that the auditors "virtually or tacitly assumed liability" for the loss suffered²⁴⁸ but it was not necessary to decide on appeal whether South African law should continue to support the convention principle or not.

²⁴¹ *Holmdene Brickworks* (note 242) at 687.

²⁴² *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

²⁴³ *Supra* at 688.

²⁴⁴ *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA).

²⁴⁵ *Supra* at 579 - 580.

²⁴⁶ Being "those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach" per *Holmdene Brickworks* (note 242) at 687 - 688.

²⁴⁷ *Thoroughbred Breeders* (note 244) SCA at 581.

²⁴⁸ *Thoroughbred Breeders' Association v Price Waterhouse* 1999 4 SA 968 (W) at 1030. Christie in *The Law of Contract in South Africa* 5ed (2007) at 552 suggests that this finding was a "stretch" by the court, in trying to comply with the requirements of the convention principle.

Nienaber JA did, however, note that the convention approach had “long been discredited in England” with particular reference to the English case of *The Pegase*.²⁴⁹ He pointed to the “flexible or supple test”²⁵⁰ for causation recently evolved in fields such as crime, delict and estoppel suggesting that this could be extended to develop a similar flexible approach for remoteness of contractual damages where “[t]he circumstances of each case will determine where the emphasis belongs.”²⁵¹

The flexible or supple test that he referred to was described in *Standard Chartered Bank* as “one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part”.²⁵²

The difficulty with this approach in contract, as recognised by Nienaber JA,²⁵³ is that parties have an opportunity to determine the ambit and extent of their obligations, unlike in the case of crimes or delicts or estoppel.

Nienaber JA suggested this could be dealt with through the judicial application of a more flexible test.²⁵⁴ While that may be so, it could also have the effect of creating more uncertainty for parties trying to establish their likely exposure to a breach or potential breach.²⁵⁵

The majority of the bench concurred with Nienaber JA’s decision but did not adopt his suggestion of a more flexible test.²⁵⁶ The majority felt that “[w]hile the approach has attractions” its shortcomings had not been sufficiently considered so preferred to let the question stand over for another case.²⁵⁷

²⁴⁹ *Thoroughbred Breeders* (note 244) SCA at 582.

²⁵⁰ *Supra* at 582.

²⁵¹ *Supra* at 583.

²⁵² *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765.

²⁵³ *Thoroughbred Breeders* (note 244) SCA at 583.

²⁵⁴ *Supra* at 583.

²⁵⁵ The difficulties with this approach in the English courts are discussed at 28 above.

²⁵⁶ *Thoroughbred Breeders* (note 244) SCA at 597.

²⁵⁷ *Supra* at 597.

4.5. *The Snow Crystal*

More recently, the Supreme Court of Appeal had opportunity to consider remoteness of contractual damages in *The Snow Crystal*.²⁵⁸

The vessel was unable to make full use of the dry dock facilities reserved at Cape Town due to a contractual breach of the contract entered into with the owners by the port authorities. As a result, the vessel underwent temporary work at Cape Town in the time available and the balance of the work was completed at dry dock in Bulgaria a year later. The vessel's owners claimed against the port authorities for the additional costs and off-hire at the Bulgarian dry dock. Unlike in *The Achilleas* and *The Sylvia*, there was no additional loss of a follow-on fixture as a result of the port authorities' breach.

The Appeal Court disagreed with the defendant port authority that the losses claimed by the owners were special damages²⁵⁹ and found that the off-hire and additional costs at Bulgaria flowed "as a natural consequence of the breach".²⁶⁰ It was to be expected that a dry docking scheduled some six months in advance such as the one in Cape Town was planned for a period when the vessel was off hire and that, on completion of the works, the vessel would go back on-hire. There were no special circumstances at play. The costs and off-hire at Bulgaria were foreseeable.

In summary, the test for remoteness of damages was set out by the court as follows:

"[T]o answer the question whether damages flow naturally and generally from the breach one must inquire whether, having regard to the subject-matter and terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility. In the case of 'special damages', on the other hand, the foreseeability of the harm suffered will be dependent on

²⁵⁸ *Transnet Ltd v The MV Snow Crystal* 2008 (4) SA 111 (SCA).

²⁵⁹ *Supra* at para 34.

²⁶⁰ *Supra* at para 36 - 37.

the existence of special circumstances known to the parties at the time of contracting.”²⁶¹

While the test as set out in *The Snow Crystal* requires the South African court to take into account the subject matter and terms of the contract, no reference is made to the importance of considering the particular kind or type of loss. This is an aspect emphasised in the tests laid down in the more recent English court decisions, including *The Achilles*. The earlier decision in *BAT Rhodesia*²⁶² suggests that the South African courts would consider the type or kind of loss, despite the difficulty in determining which losses might be classed as the same kind or type.²⁶³

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²⁶¹ Supra at para 35.

²⁶² *BAT Rhodesia Ltd v Fawcett Security Organisation (Sailsbury) Ltd* 1972 4 SA 103 (R) as referred to in Christie (note 248) at 552.

²⁶³ Christie (note 248) at 553.

5. CONCLUSION

None of the judgements that followed *Lavery* considered it appropriate to decide whether South African law should continue to apply the convention principle to special damages.

The point was not argued in *Shatz Investments* while the court in *Holmdene Brickworks*, *Thoroughbred Breeders* and *The Snow Crystal* considered it unnecessary to decide because losses were awarded as general damages and not as special damages.

It would seem, therefore, that the convention principle remains applicable to special damages and has not been extended to claims for general damages under South African law.

Given the widespread judicial and academic criticism of the convention principle, a South African court having cause to consider the matter in the future would probably dispense with the strict convention principle in the case of special damages.

In the English courts, the additional “term of the contract” requirement of the convention principle has not generally found favour and certainly not in the form of an express term.²⁶⁴ Lord Hoffmann’s broader approach in *The Achilles* does not go so far as to adopt the convention principle into English law. It does, however, propose a shift to a more flexible agreement-centered approach.

Lord Hoffmann is at pains to emphasise the importance of the common intention of the parties when considering contractual remoteness²⁶⁵ and has separately described his vision for the test as follows:²⁶⁶

“If the effect of *The Achilles* is, as I hope, to free the common law from the need to explain its decisions on contractual remoteness of damage

²⁶⁴ As was made clear in *Victoria Laundry* (note 5) and *The Heron II* (note 6) HL. More recently Diplock LJ suggested that the defendant gives the claimant an “implied undertaking ... to bear the larger measure of loss” per *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1448.

²⁶⁵ *The Achilles* (note 3) HL at 278.

²⁶⁶ Lord Hoffmann (note 159) at 61.

by the single criterion of probability and to enable it to recognise that liability for damages may be influenced by common sense distinctions between different commercial relationships, it will be the result of a combination between judicial decision-making and academic writing.”

While this may widen the scope for the bench, contracting parties and their legal advisors are potentially left uncertain and unable to accurately predict how the courts will view their exposure in the event of breach.

As one writer comments: “The desire to uphold the parties’ intentions has never been thought to justify conferring a broad, unstructured and unfettered discretion on judges to ascertain the parties’ intentions from all the circumstances.”²⁶⁷ Clearly any extension of the *Hadley v Baxendale* test cannot be at the expense of commercial certainty.

While not binding precedent in South African, the South African courts would certainly take close note of the development of the English law rule of remoteness in *The Achilleas* and subsequent cases such as *The Sylvia*.²⁶⁸

The Sylvia makes it clear that, for now at least, the English courts are unlikely to apply Lord Hoffmann’s broader approach except in the most unusual of cases.²⁶⁹ *The Sylvia* is a judgement in the first instance and it may be that the Supreme Court as the House of Lords is now known, will seek to re-assert the broader approach of *The Achilleas* in the future.

For now, though, the English “law of remoteness in contract damages remains as it has stood unchallenged for the century and a half since its first exposition in *Hadley v Baxendale*”.²⁷⁰

²⁶⁷ Wee (note 49) at 176.

²⁶⁸ Nienaber JA in *Thoroughbred Breeders* (note 244) SCA at 580 - 581.

²⁶⁹ Semark (note 124).

²⁷⁰ McGregor (note 12) at 210.

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