

IUS COMMUNE

Veröffentlichungen des Max-Planck-Instituts
für Europäische Rechtsgeschichte
Frankfurt am Main

VI

Herausgegeben von
HELMUT COING
Direktor des Instituts



Vittorio Klostermann Frankfurt am Main

1977

RICHARD DANZIG

Hadley v. Baxendale:
A Study in the Industrialization of the Law **, **

Hadley v. Baxendale is still, and presumably always will be, a fixed star in the jurisprudential firmament.
— Grant Gilmore, *The Death of Contract* 83 (1974)

Of the many thousands of students who graduate from American law schools every year, probably all save a few hundred are required to read the 1854 English Exchequer case of *Hadley v. Baxendale*¹. It is, indeed, one of a startlingly small number of opinions to which graduates from law school will almost assuredly have been exposed even if they attended diffe-

* The interdisciplinary nature of this study and its focus on a subject—nineteenth-century English legal history—which has been generally ignored in the published writings of both historians and modern lawyers has made the assistance of others unusually significant in bringing this project to fruition. Without the support of the American Bar Foundation's Legal History Project, the expenses of examining primary materials in England could not have been borne and this work would not have been done. Beyond this, I very much appreciate the personal interest taken in the project by Professor Spencer Kimball, the Executive Director of the Bar Foundation, and by Professor Stanley Katz, a member of the Foundation's Legal History Committee.

In England, Professor Cornish, at the London School of Economics, and Mr. Turnbull, at the University of Leeds, were extraordinarily kind in proffering advice, in sharing their unpublished manuscripts, in critiquing this work, and in making an American feel at home both in present-day and nineteenth-century England. Among colleagues at American law schools, Lawrence Friedman, Robert Stevens, and William Whitford encouraged this project from the outset and provided important advice on its development. Professors Geoffrey Hazard, Willard Hurst, Morton Horwitz, Stewart Macaulay, John Merryman, and Robert Rabin all offered valuable criticisms. Discussions with Richard Markovits, Mitchell Polinsky, and Mary Cranston were especially helpful in regard to Part VI of this article. Two research assistants, Larry Robinson and Jim Liebman, did typically fine jobs in rooting out evidence bearing on some of the hypotheses here advanced.

** Zuerst erschienen in *The Journal of Legal Studies* (The University of Chicago Law School) IV (2), 1975. Abgedruckt mit freundlicher Genehmigung des Autors und des Verlages.

¹ 9 Ex. 341, 156 Eng. Rep. 145 (1854).

rent institutions, used a variety of textbooks, and opted for disparate electives². The exceptional pedagogical centrality of the case is further underscored by the similarly widespread attention the case receives in the curricula of all Commonwealth law schools.

But if the case is unusually widely read, it is typically narrowly studied. In the first-year law curriculum, where the opinion usually appears, cases are normally treated like doctrinal fruits on a conceptual tree: some bulk large, some are almost insignificant; some display a wondrous perfection of development, others are shown to be rotten at the core; some are further out along conceptual branches than others; but all are quite erroneously treated as though they blossomed at the same time, and for the same harvest.

This ahistorical view may have some didactic advantages, but it overlooks much that is important. Cases are of different vintages; they arise in different settings. It matters that *Hadley v. Baxendale* was decided in 1854 in England, and not in 1974 in California. Without reflecting on the ramifications of these facts of timing and setting, perhaps teachers and students can understand black letter law as it now is, but neither can comprehend the processes of doctrinal innovation, growth, and decay.

By focusing on one central case in its historical setting I hope in this article to provide an experiential supplement to the legal reader's steady diet of logic³. My theme is that *Hadley v. Baxendale* can usefully be analyzed as a judicial invention in an age of industrial invention. After des-

² Thus, for example, the authors of the leading hornbook on the Uniform Commercial Code remark that knowledge of "The Rule" in *Hadley v. Baxendale* "has become a *sine qua non* to second-year standing in law school." J. WHITE & R. SUMMERS, *Handbook of the Law Under the Uniform Commercial Code* 314 (1972).

³ It should be emphasized that I do not purport to offer a perfect or a certain understanding of *Hadley v. Baxendale* in its historical context. Much of what follows is speculative both because scholarly inquiry into nineteenth-century British legal history has been limited and because widespread inquiries have yielded only a minimum of primary source material relevant to the case. Docket sheets are still available from the mid-nineteenth century, but contemporary Queen's Court records were commonly returned to the parties and have consequently disappeared. On the contemporary practice, see Chitty Archbold's *Practice of the Court of Queen's Bench* 446 (S. Prentice ed., 10th ed. 1858). On the modern effects of the practice see *Guide to the Contents of the P[ublic] R[ecord] O[ffice]* London 127 (1968). Those interested may find a small sampling of court papers of the period which have been retrieved from private collections in the British Public Record Office (hereafter P.R.O.) in P.R.O. file 30/44. Manuscript collections reflecting the thought of the principals either were never collected, no longer survive, or proved valueless. Company records were destroyed, some of them as recently as a few years ago.

cribing the facts and the holding of *Hadley v. Baxendale* in the first section that follows, my concern in succeeding sections is to discuss why the "rule of the case" was invented in its particular form and in this particular case, to assess the relationship between this judicial invention and the existing legal and economic technology, to underscore the impact of the rule in effecting a specialization of judicial labor and a standardization, centralization, and mass production of judicial products, and to demonstrate that the rule of the case became widely known and generally accepted because, as with other successful inventions, it was well advertised and marketed. I shall conclude by suggesting that although this invention was useful for the age in which it was created, it is very possible that it is now of limited significance and in need of modernization.

I.

In Gloucester, England, on Thursday, May 12, 1853, the engine shaft at City Flour Mills⁴ broke, preventing the further milling of corn. On May 13, the mill proprietors, Joseph and Jonah Hadley, dispatched an employee to Pickford and Co., "common carriers", to inquire as to the fastest means of conveying the shaft to W. Joyce and Co., Greenwich, where it would serve as a model for the crafting of a new shaft. A Pickfords employee, Mr. Perrett, represented that it would be delivered "on the second day after the day of . . . delivery" to Pickfords.

The shaft was delivered to Pickfords on Saturday, May 14, but it did not, in fact, reach W. Joyce and Co. until the 21st, because at the last stage of the voyage the shaft was shipped with a consignment of iron bound for Joyce and Co. by canal⁵ rather than by rail. In consequence, the Hadleys calculated that the steam mill stoppage was prolonged an unnecessary five days, at a cost in lost profits of £300⁶. When Pickfords refused to make good these losses, the Hadleys brought suit before the Queen's judges,

⁴ The enterprise is described in the official reports as City Steam Mills, but contemporary commercial directories list Joseph and Jonah Hadley as proprietors of "City Flour Mills." See Slater's Royal National Commercial Directory and Topography of Gloucester and Hereford 195 (1858—1859), and the Gloucester Post Office Directory 296 (1856).

⁵ "... [I]nstead of being forwarded by wagon immediately, it was kept for several days in London, and was at length forwarded by water on the 20th, along with many tons of iron goods which had been consigned to the same parties." Assize Report, *The Times* (London), Aug. 8, 1853, at 10, col. 1.

⁶ 9 Ex. 341, 343, 156 Eng. Rep. 145, 146 (1854),

sitting in the Assize Court for Gloucester, naming Joseph Baxendale, the London-based managing director of Pickford's, as the defendant. (Baxendale was personally liable for the failings of his unincorporated business.) Baxendale paid £25 into court as a settlement offer, but this was spurned, and the case went to trial before a "special jury" (about which more later) in August, three months after the alleged damages were inflicted. The Hadleys, now claiming "near £200" damages⁷, presented witnesses to show the nature of their understanding with Pickford and the magnitude of the damages they incurred as a result of the delay. (It developed that the witnesses testified to only £120 damages⁸.) The well-known barrister, Sir Henry Singer Keating, then summarized the plaintiff's case:

The issue they (the jury) had to try was extremely simple, and peculiarly fitted for them to decide, namely, whether what he could not help designating the paltry sum of £ 25 was sufficient to compensate them [the Hadleys] . . . The defendants Messrs. Pickford and Co., were common carriers, and as such possessed certain rights, and took upon themselves certain obligations⁹.

Against this the defendants argued that the damages incurred were "too remote."

Sir Roger Crompton, the new but by all accounts careful and competent¹⁰ Assize judge, instructed the jury

⁷ Gloucester Journal, Supplement August 13, 1853, at 1, col. 4.

⁸ *Ibid.* Some idea of the magnitude of the amounts involved in the litigation can be obtained by comparing the sums mentioned with income and expense figures culled from contemporary newspaper accounts and social histories. One commentator summarizes this price information as follows:

A good wage for a day labourer on a farm in 1851 was 2s. a day and for a farm servant £14 a year and board. . . . A working-class couple could begin married life without discomfort in a furnished room at 4s. a week. . . . The Times in 1851 carried advertisements of dwellings for single men at 2s.6d a week, and at a lower level of living there was an appreciable difference between the type of accommodation provided in a lodging-house for 4d a night and that provided for 3d. . . .

The rent of what was probably fairly described as a "desirable residence" in the suburbs of London was was £40 a year, and in Piccadilly an unfurnished first floor or, as it would now be called, a flat, was advertised in 1851 as to let at 31s.6d a week. A good suit of black clothes was made to measure for £3 10s; a private school would educate the sons of gentlemen for between £20 and £30 a year; a first-class ticket from London to Paris via Calais cost £2 15s, a good piano cost 25 guineas, and five-year-old vintage champagne cost £2 per dozen.

P. HOWARTH, *The Year is 1851*, at 81-84 (1951).

⁹ As reported in the Gloucester Journal, *supra* note 7, at 1, col. 3.

¹⁰ "On the bench he proved himself to be a very sound lawyer and a good judge." W. S. HOLDSWORTH, *A History of English Law* 13, 437 (7th ed., rev. 1956). A contem-

to consider what, under the circumstance was a reasonable time for delivering the shaft; and next, what was the damages caused to the Plaintiffs by the delay in the delivery. . . . They should give their damages for the natural consequences of the defendant's breach of contract, and with that view they would have to consider whether the stoppages of the Plaintiff's works was one of the probable and natural consequences of that breach of contract, and then, looking to all the circumstances of the case and the position of the parties, to say what was the amount of the damages occasioned by the stoppage of the works¹¹.

So instructed, the jury retired for about a half an hour and returned with a compromise verdict: damages were assessed at £50¹².

Baxendale promptly appealed. The case was heard in the Exchequer on February 1 and 2, by Barons Alderson, Parke and Martin, and then, after "great pains were bestowed upon" the question¹³, Baron Alderson delivered an opinion on February 23, 1854. This opinion, the only one rendered in *Hadley v. Baxendale* (for no further appeal was taken), refashioned the substantive law of contract damages by effecting a subtle but significant change in the contemporary understanding of the rule that damages be awarded only for the "natural consequences" of a breach. Other judges, and indeed, this same Exchequer bench at other times, read the limitation as a simple rule tending by the criterion of "naturalness" to exclude that portion of damages which the plaintiff had himself exacerbated (and thus unnaturally sustained), and by the criterion of "consequence" to exclude those injuries which could not, in fact, be causally related to the breach¹⁴. In contrast, Baron Alderson here read the phrase "natural consequences" as though it meant normal consequences and thus predictable conse-

porary recorded his impression: "Crompton, J., was remarkable for learning, depth and acuteness and was painfully conscientious about speaking accurately when he spoke judicially. I believe also that he never recognized the notion that the common law adopts itself by a perpetual process of growth to the perpetual roll of the tide of circumstances as society advances." SIR W. ERLE, Memorandum on the Law Relating to the United States 38-39 (1869). I am indebted to Prof. Cornish for this reference.

¹¹ Gloucester Journal, *supra* note 7, at 1, col. 4.

¹² The decision was a compromise in every respect. The Gloucester Journal reported: "The jury retired to consider the amount of damages, and after an absence of more than half an hour returned into court, when it appeared that eleven out of the twelve had agreed to put it at £45, while one considered it ought to be £75. It was ultimately agreed to take the damages at £50." Gloucester Journal, *supra* note 7, at 1, col. 4.

¹³ Chief Baron Pollock later remarked: "The argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it." *Wilson v. Newport Dock Co.*, 35 L.J. Ex. 97, 103 (1866).

¹⁴ See note 25 *infra*.

quences—obviously a more rigorous standard. In the most critical sentence of the opinion, he said:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it¹⁵.

Not content with simply ordering a new trial after the articulation of the standard, Baron Alderson went on to “apply the principles above laid down” to the case at hand, and advanced three rather remarkable propositions. First, he asserted that “the only circumstances here communicated by the plaintiffs to the defendants” at the time the contract was made were that they were millers whose mill shaft was broken. According to Baron Alderson, there was no notice of the “special circumstances” that the mill was stopped and profits would be lost as a result of delay in the delivery of the shaft¹⁶. Thus, the Baron concluded that damages for lost profits could not be awarded under the contemplation branch of the rule.

Second, Baron Alderson held that “it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances”¹⁷ the mill would not be idle and profits lost during the period of shipment. Millers, he held, ordinarily would have spare shafts or, at any rate, if their mills were stopped it would usually be a consequence of other difficulties as well. Thus, there could be no recovery for lost profits under the “usual course of things” branch of the rule.

Third, Baron Alderson held “that the Judge ought, therefore, to have told the jury, upon the facts before them, they ought not to take the loss of profits into consideration at all in estimating the damages¹⁸.”

The first of these propositions is remarkable because it flies in the face of what the reporter of Baron Alderson’s decision apparently thought was established by the record. The reporter’s headnote says unequivocally that the

¹⁵ 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854).

¹⁶ 9 Ex. 341, 355-56, 156 Eng. Rep. 145, 151 (1854).

¹⁷ 9 Ex. 341, 356, 156 Eng. Rep. 145, 151 (1854).

¹⁸ *Ibid.*

defendant's clerk "was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery . . ."¹⁹

The second and third propositions are remarkable because they hold that the trial judge, and in case of his error, the appellate judge, ought to preempt a local jury in determining commercial error, even though the issue appears to be one of fact and not one of law. These latter propositions serve to underscore an important, although generally less noticed, procedural innovation corresponding to the substantive change effected by *Hadley v. Baxendale*: the case not only modifies instructions to juries, it also directs judges to keep some issues from the jury.

II.

The novelty of the changes effected in procedural and substantive law by *Hadley v. Baxendale* suggests that the opinion may be examined as an invention. The innovation effected in the law is here unusually stark. Baron Alderson, in support of the central proposition he advanced, cited no precedent and invoked no British legislative or academic authority in favor of the rule he articulated²⁰. Nor was this due to oversight. The opinion broke new ground by establishing a rule for decision by judges in an area of law—the calculation of damages in contracts suits—which had previously been left to almost entirely unstructured decision by English juries.

Chitty's preeminent 1826 treatise on contracts, for example, even in its 771 page 1850 edition, had allocated only 13 of its pages to the subject of damages, and virtually all of those pages concerned issues associated with penalty clauses. As to damages in the normal run of cases, Chitty had only one comment to offer:

¹⁹ 9 Ex. 341, 344, 156 Eng. Rep. 145. (1854).

²⁰ Baxendale's counsel in the case argued at the time that the rule eventually articulated was foreshadowed by other British decisions and this argument was reflected in the comments of the academic treatise he co-edited when it touched on the case: "The rule that damage must not be too remote, but must be the natural and immediate result of the injury complained of, has been long established, but the application of that rule to the varying circumstances of different cases is sometimes attained with great difficulty . . ." Smith's Leading Cases 430 (WILLES & KEATING eds., 4th ed. 1856 (commenting on *Hadley v. Baxendale*). But later editors of the same text saw the matter rather more objectively: "In truth . . . the rule in *Hadley v. Baxendale* . . . appears to be a merely arbitrary rule, laid down in our courts for the first time in that case . . ." Smith's Leading Cases 473 (Mande & Chitty eds., 6th ed. 1862).

When the parties have not furnished the criterion of damages by stipulating for a liquidated sum to be paid as such, it is, in general, entirely the province of the jury to assess the amount, with reference to all the circumstances of the case²¹.

Similarly, *Smith's Treatise on Contracts*, prominent in the same period, mentioned damages not at all²², and Smith's general collection of leading law cases touched on damages only in the context of tort²³. Thus, the Hadleys' counsel seems to have fairly summarized the state of prior thinking on the subject when he argued "the difficulty which . . . exists in the estimation of the true amount of damages, supports the view . . . that the question is properly for decision of a jury" without elaborate instruction or review²⁴.

The strikingly novel nature of the innovation in English law effected by *Hadley v. Baxendale* must have been particularly apparent to the participants in the case because among the cases outmoded by this opinion²⁵, one decided seven years earlier involved this same Baxendale and these same

²¹ J. CHITTY, *A Practical Treatise on the Law of Contracts* 768 (4th ed. 1850).

²² J. W. SMITH, *The Law of Contracts* (1847). See also the second edition (1855), which similarly omits the subject.

²³ Smith's *Leading Cases* 430 ff. (WILLES/KEATING eds., 3rd ed. 1849).

²⁴ 9 Ex. 341, 347, 156 Eng. Rep. 145, 148 (1854). Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917, 925-26 (1974), describes a similar "failure . . . to instruct juries" or to reverse them on matters of damages in eighteenth century America.

²⁵ See, e.g., *Bridge v. Wain*, 1 Stark 504, 171 Eng. Rep. 543 (1816) (jury instructed to give trader "all the loss" he sustained from non-delivery of goods for resale, though some of that loss was attributable to the peculiar circumstance that his trade was with China); *Ward v. Smith*, 11 Price 19, 147 Eng. Rep. 388 (1822) (on breach of contract to lease a house, injured plaintiff can recover lost profits from enterprise he would have run in the house); *Startup v. Cortazzi*, 2 Cr. M. & R. 165, 150 Eng. Rep. 71 (1835) (in suit for lost profits on non-delivery of goods for resale, jury is constrained only by the instruction not to give punitive or vindictive damages); and *Waters v. Towers*, 8 Ex. 401, 155 Eng. Rep. 1404 (1853) (suit for failure to provide machinery within a reasonable time; Baron Alderson said: "The defendants undertook to perform a contract within a reasonable time and failed to do so; the plaintiffs say, 'We should have made certain profits had the contract been performed. . . . If reasonable evidence is given that the amount of profit would have been made as claimed, the damages may be assessed accordingly.'" 8 Ex. 401, 402.)

G. T. WASHINGTON's excellent article, *Damages in Contract at Common Law*, Part II, 48 L.Q. Rev. 90 (1932), summarizes the prior case law and concludes: "If *Black v. Baxendale* and *Waters v. Towers* had remained the law, we should be troubled with few questions of remoteness today. Physical causation would determine the extent both of the *damnum* and the *injuria*. . . . [T]here was but little preparation [for *Hadley v. Baxendale*] in the previously-decided cases." *Id.* at 102-03.

judges²⁶. In *Black v. Baxendale*, Pickfords was two days' late in the delivery of "five bundles of haycloths" thus causing Black's employee to incur both wasted time (valued at £1/1/0 per day) and on otherwise unnecessary "removal cost" of 10 shillings. At trial, Chief Baron Pollock "directed the jury that they were at liberty to give these expenses as damages if they should think fit²⁷." Inexplicably the jury awarded £10 damages—apparently more than the amount the most generous calculation of damages would have justified. Baron Martin, who was to sit on the panel that decided *Hadley v. Baxendale*, argued the case on appeal for Baxendale, claiming, *inter alia*, that the jury verdict should be overturned because Pickfords "had no notice for what purpose the goods sent"²⁸ or what expenses would ensue on failure to deliver. Neither Baron Parke nor Baron Alderson, both later to sit with Baron Martin in *Hadley v. Baxendale*, would accept this argument. Baron Parke said, "The defendants are responsible only for reasonable consequences of their breach of contract. It was a question for the jury whether [the expenses were] . . . reasonable²⁹." And Baron Alderson added, "[w]hether these expenses were reasonable was entirely a question for the jury³⁰." Had the sum been larger both judges would have reversed on grounds of miscalculation of the expenses, but both (joined by the rest of the court) agreed that the type and limit of the liability incurred was exclusively a matter for the jury. This view, of course, was what *Hadley v. Baxendale* rejected³¹.

²⁶ *Black v. Baxendale*, 1 Ex. 410, 154 Eng. Rep. 174 (1847). It is not so improbable as it may seem that the earlier case on point also involved Baxendale. An historian who has studied Pickfords has remarked about Baxendale: "he was a formidable litigant and fought stubbornly for his rights as he saw them. . . . A note in Pickford's records relates that from 1 January 1858 to 25 May 1863, 34 actions were brought [by Baxendale] against railroad companies." G. TURNBULL, *Pickfords 1750-1920: A Study in the Development of Transportation* (unpublished Ph.D. dissertation, Univ. of Glasgow, Scotland). I note, in the period of concern here, *Hart v. Baxendale*, 6 Ex. 769, 155 Eng. Rep. 755 (1851), and *Hudson v. Baxendale*, 2 H & N 574, 27 L.T. Ex. 93, 157 Eng. Rep. 237 (1857), as well as the litigation involving Black and the Hadleys.

²⁷ *Black v. Baxendale*, 1 Ex. 410-11, 154 Eng. Rep. 174-75 (1847).

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ There was a flicker of the future in this case when Chief Baron Pollock suggested that exceptional liability might be incurred in the event of notice, but he concluded his observation by firmly reiterating the accepted general rule. "If the carriers had had distinct notice that the goods would be required to be delivered at a particular time, perhaps they would have been liable for those expenses, for which, without such notice, they would not otherwise be liable; but whether any particular class of expenses is rea-

In a lecture given at the Seldon Society while this article was in draft³², Professor A.W.B. Simpson of the University of Kent pointed out that both Pothier's treatise on the French civil Code (translated into English in 1806)³³ and Sedgwick's American treatise in its first and second editions of 1847 and 1852³⁴ argued for rules of contract liability essentially like that adopted by the Court in *Hadley v. Baxendale*³⁵. Further, Professor Simpson noted that Baron Parke remarked in the course of the argument in *Hadley v. Baxendale* that he thought that "[T]e sensible rule appears to be that which has been laid down in France... and which is... translated by Sedgwick³⁶. . . ." From this Professor Simpson concludes that "the moving spirit behind *Hadley v. Baxendale* was surely Baron Parke"³⁷ and argues, more generally, that this illustrates a proposition advanced in his lecture: that innovation in the law in the nineteenth century was largely prompted by the quiet absorption of the observations of treatise writers, particularly treatise writers influenced by the civil law, into the decisions of English common law judges.

There is much to be said for this position. But Professor Simpson's otherwise admirable discussion seems insufficient in two ways. First, in looking to Baron Parke as the animating force behind the decision, Simpson neglects to consider the role of Baxendale's counsel, Sir James Shaw Willes. As we shall see, the fact that Willes was a principal actor in the case was of no small significance in effecting the spread of the rule.

Contemporary descriptions convey a portrait of Willes as extraordinary on three counts, all of which must have operated to his advantage in this

sonable or not depends on the usages of trade, and various other circumstances. It is not a question for the Judge, but for the jury, to decide what are reasonable expenses." 1 Ex. 410, 412, 154 Eng. Rep. 174, 175 (1847).

³² A. W. B. SIMPSON, *Innovation in Contract Law* (unpublished manuscript available from Prof. Simpson, Keynes College, The University of Kent, Canterbury, England).

³³ [ROBERT JOSEPH] POTHIER, *A Treatise on the Law of Obligations, or Contracts*, pt. I, ch. II, art. III, §§ 16 ff. (William David Evans transl. 1806).

³⁴ T. SEDGWICK, *A Treatise on the Measure of Damages* (1st ed. 1847; 2d ed. 1852).

³⁵ "In a recent case in Louisiana, it is said, recognizing the authority of Pothier and Toullier, that 'the damages which a party can recover on the breach of a contract, are those which are incidental and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract'; and this is perhaps the clearest and most definite line that can be drawn in the matter." Theodore Sedgwick, *A Treatise on the Measure of Damages* 67 (2d ed. 1852).

³⁶ 9 Ex. 341 at 346, 156 Eng. Rep. 145 at 147 (1854).

³⁷ A. W. B. SIMPSON, *supra* note 32, at 48.

litigation. He was reputed to be the ablest commercial lawyer of his time³⁸, he was co-editor of the most prominent, annotated volume of British legal cases³⁹; and he was remarkably cosmopolitan. It was said of Willes that he spoke seven languages, many of them so fluently that when, for example, he was accused in Spain of having murdered a coachman who fell under the horses of a carriage in which Sir James was riding, Sir James successfully defended himself before the Spanish Court without assistance. It seems clear that his commercial interests combined with his academic orientation and his cosmopolitan outlook caused Willes to be thoroughly familiar with the French Civil Code's provision on damages and with the similar views of Sedgwick, then the outstanding American commentator on the subject⁴⁰. Indeed, the official report of the arguments before the appellate bench makes it clear that the counsel on both sides came to court well primed on Pothier and Sedgwick and that they cited them to the judges more often than vice versa.

I shall return to Willes' influence later. Obviously, the fact that Willes had read Pothier and especially Sedgwick only reinforces Mr. Simpson's point as to the influence of treatise writers. Two years after the case was decided, when Willes had occasion to comment on it in his next edition of *Smith's Leading Cases*, he underscored Sedgwick's influence:

... the subject is discussed at length in the very learned work of Mr. Theodore Sedgwick "On the Measure of Damages" Ch. 3 ... The suggestion of Mr. Sedgwick ... seems to agree in substance with the decision of the Court of Exchequer in the case of *Hadley v. Baxendale* and others. ...⁴¹

³⁸ Willes came to the bar in 1840, "and perhaps no man ever achieved so rapidly a first rate practice of so important a kind. ... Few great questions of mercantile law have been mooted for the last thirteen years without his services on one side or the other, and indeed few have been the important cases of any kind—so sudden and universal became the recognition of his acute judgment and profound acquaintance with the common law—on which some person concerned has not sought his opinion." 25 *The Law Times* 175 (editorial of August 14, 1855, on the occasion of Willes' elevation to the bench). See also MacKinnon, Sir James Shaw Willes, 60 *L.T. Rev.* 129 (1944), where the author, pupil of T. E. Scrutton, recalls that Scrutton "used to tell us that Sir James Shaw Willes was the best commercial lawyer since Lord Mansfield. ..." Alan Harding, *A Social History of English Law* 353 (1966), reports that Willes "made his name as counsel for the Treasury and Lloyd's." See generally R. Hueston, Sir James Shaw Willes, 16 *No. Ire. Leg. Q.* 193 ff. (1965).

³⁹ *Smith's Leading Cases*, *supra* note 23, at 430 ff.

⁴⁰ And see the entry on Willes in 56 *The Dictionary of National Biography* 286 (1900): "his unsparing industry and lucid mind soon made him learned in foreign as well as in English Law."

⁴¹ *Smith's Cases* 430-31 (WILLES / KEATING eds., 4th ed. 1856).

However—and this is the second, more significant regard in which Professor Simpson's discussion can be faulted—if an understanding of the rule in *Hadley v. Baxendale* must begin with some recognition of the influence of foreign models on British thinkers, it need not end there. As Friedman and Ladinsky note in another context, an interest in foreign ideas may be prompted by "dissatisfaction" with existing law. "A foreign model here sharpens discussion and provides a ready made plan. Yet the felt need for such [a law change] has domestic origins⁴²." Why was there a felt need for an innovation in the law of damages at the time of *Hadley v. Baxendale*? The search for a more satisfactory answer than that provided by reference to foreign treatise writers requires us to look further.

III.

To understand the origins and the limitations of the rule in *Hadley v. Baxendale* we must appreciate the industrial and legal world out of which it came and for which it was designed. In 1854 Great Britain was in a state of extraordinary flux. Between 1801 and 1851 its population rose from 10.6 to 20.9 million people and its gross national product increased from £232.0 to £523.3 million. By 1861 its population was 23.2 million and its GNP £668.0 million⁴³. Contemporaries saw the magnitude of this change and were aware of its impact on the law. As one writer, surveying the scene in 1863, put it:

What our Law was then [in 1828], it is not now; and what it is now, can best be understood by seeing what it was, then. It is like the comparison between England under former, and present, systems of transit, for persons, property, and intelligence: between the days of lumbering wagons, stage coaches, and a creeping post—and of swift, luxurious railroads and lightening telegraphs. All is altered: material, inducing corresponding moral and social changes⁴⁴.

Arising squarely in the middle of the "industrial revolution" and directly in the midst of the "Great Boom" of 1842—1874, *Hadley v. Baxendale* was a product of these times. The case was shaped by the increasing soph-

⁴² LAWRENCE M. FRIEDMAN / JACK LADINSKY, Social Change and the Law of Industrial Accidents, 67 Colum. L. Rev. 50, 78 (1967).

⁴³ P. DEANE / W. A. COLE, British Economic Growth 1638-1959 8, 166 (2d ed. 1969).

⁴⁴ S. Warren, A Popular and Practical Introduction to Law Studies 12 (3d ed. 1863).

istication of the economy and the law—and equally significantly by the gaps, the naiveté, and the crudeness of the contemporary system.

The raw facts of the case should alert the reader to the half-matured and unevenly developing nature of the economy in which the decision was rendered. For example, the Hadley mill was steam-powered. While it was not hand-run, animal-driven, wind-powered, or water-powered, as in an earlier age, it was also not powered by electricity as it would be in the next century. So with the now famous broken shaft. It was a complicated piece of machinery, manufactured by a specialized company on the other side of England. But it was neither a standardized nor mass-produced machine. It was handcrafted. Thus, the transaction in *Hadley v. Baxendale*: the old shaft had to be brought to eastern England as the “model” for the new one.

The circumstances of the breach similarly reflect a half-way modernized society. The breach occurred because the shaft was sent by canal, the early industrial transport form, rather than by rail, the mature industrial transport form. That both co-existed as significant means of shipment suggests the transitional nature of the period⁴⁵. The ready acceptance of the notion that delay gave rise to damages, that time meant money, suggests the affinity of the modes of thought of this age to our own. But the units of account for measuring time in *Hadley v. Baxendale* suggest the distance between our period and this one: speed for a trip across England was measured in days, not hours.

If the facts of the case offer us a glimpse of an economic world in transition, what of the legal system which had to deal with that transition? This system was also modernizing, but at the time of *Hadley v. Baxendale*, it was still strikingly underdeveloped. The case itself indicates the rudimentary and uneven development of the commercial law of the period. *Hadley v. Baxendale* is frequently described as a case involving a claim for damages consequent on a breach of a negotiated contract for especially quick delivery of a consigned package; but in fact, although this was the first of two counts on which the Hadleys initially pressed their suit, both the official and the contemporary press reports make it clear that before going to trial against Baxendale they abandoned all claim to damages based on a specific contract⁴⁶. Instead their pleadings claimed damages arising as a

⁴⁵ Actually canal shipment at this time was an anachronism for Pickfords which had modernized its operation more rapidly than most of its competitors. See G. Turnbull, *Pickfords and the Canal Carrying Trade, 1780-1850*, 6 *Transport History* 5 (1973).

⁴⁶ “The defendants pleaded non assumpsit to the first count; and to the second

consequence of Pickford's failure to effect delivery "within a reasonable time" as it was obliged to do because of its status as a common carrier. If, as Maine posited ten years after *Hadley v. Baxendale*, the process of modernization involves a movement from status to contract⁴⁷, this most famed of modern contract cases is peculiarly antiquarian!

The pleadings' emphasis on status rather than contract appears to have been related to the underdeveloped nature of the law of agency in England at the time⁴⁸. The *Gloucester Journal* report of the Assize trial comments:

The declaration had originally contained two counts; the first charging the defendants with having contracted to deliver the crank within the space of two days, which they did in truth do, but there was a doubt how far Mr. Perrett, the agent of the defendants, had authority to bind them by any special contract which would vary their ordinary liability. It was therefore thought not prudent to proceed upon that count, but upon the count of not delivering within a reasonable time⁴⁹.

The Hadleys' counsel apparently reasoned that a jury verdict against Baxendale predicated on what was said to or by the Pickfords' clerk might be upset by an appellate court on a theory that personal liability could not be imputed to Baxendale through comment to or by an agent⁵⁰. The situation was summarized by Baxendale's counsel in the argument on appeal:

payment of £25 into Court in satisfaction of the plaintiffs' claim under that count. The plaintiffs entered a nolle prosequi as to the first count; and as to the second plea, they replied that the sum paid into Court was not enough ... upon which replication issue was joined." 9 Ex. 341, 343-44, 156 Eng. Rep. 145, 146-47 (1854).

⁴⁷ Henry Maine, *Ancient Law* 165 (1864).

⁴⁸ It may also be related to the particular authority that Pickfords accorded its agents at this time. "A note in a manuscript book of Pickford's canal rates, of the period 1828-1836, reads: 'In the event of any goods offering for conveyance that are not provided for by a specific rate, no agent of the parties to have power to state terms, except in concert with agents of the other carriers, nor under any circumstances should such authority be exercised if there is time to correspond with the Principals.'" G. Turnbull, *supra*, note 45, at 17. It is unclear what authority, if any, Pickfords accorded its agents to contract for delivery at a particular time, or to assume special liability for damages arising from delay. Nor is it clear what, if any, notice was given to the public about agents' powers.

⁴⁹ *Gloucester Journal*, *supra* note 7, at 1, col. 3.

⁵⁰ It is difficult to say with certainty whether this tactical judgment was well founded, but it is made more understandable by observation of the fate of another litigant whose position was similar, though not identical, to that of the Hadleys and whose case arose at the time of the *Hadley* litigation. In *Walker v. The York and North Midland R.R. Co.*, 2 Ellis and Bluckburn 750, 118 Eng. Rep. 948 (1853) a railway company sent one of its employees "down to the sands" at Scarborough "where the fishing boats were

Here the declaration is founded upon the defendants' duty as common carriers, and indeed there is no pretense for saying that they entered into a special contract to bear all the consequences of the non-delivery of the article in question. They were merely bound to carry it safely, and to deliver it within a reasonable time. The duty of the clerk, who was in attendance at the defendants' office, was to enter the article, and to take the amount of the carriage; but a mere notice to him, such as was here given, could not make the defendants, as carriers, liable as upon a special contract. Such matters, therefore, must be rejected from the consideration of the question⁵¹.

Baxendale's counsel here overstates the case, but at the least it appears that there was an uncertainty in the rudimentary law of agency as it existed at the time⁵².

This uncertainty may explain Baron Alderson's surprising assertion that the Hadleys failed to serve notice that the mill operations were dependent on the quick return of the shaft. It may be that as a factual matter the

coming in" with a notice indicating that because fish were a "perishable and consequently a hazardous article of traffic" the rail company would not take responsibility for the delivery of the fish "in any certain or reasonable time." The notice further provided that "[t]he station clerks and servants of the company have no authority to alter or vary these conditions." As the facts developed at trial, it appeared that the plaintiff had received such a notice, but that "persons served were very angry; that many tore up the notices" and that he probably reacted in the same way. When the plaintiff's employee consigned his fish to the railroad he indicated that he would not be bound by the notice; nonetheless, the defendant's agent accepted the fish and shipped them. The fish were delayed and spoiled but the defendant denied liability.

Faced with this situation the appellate judges held that the station-master's acceptance of the shipment along with the special notification of the alleged complete liability did not effect an agreement assuming total liability. The station master had no authority to make such an agreement.

In this case, of course, the company's notice explicitly foreswore the right of the agent to encumber his principals. We have no information as to whether Pickfords gave notice to the same effect, see *supra* note 48, but it seems probable that even if they did not do so, the Hadley's counsel thought his clients best advised to avoid the tangle of the agency problem.

⁵¹ 9 Ex. 341, 352, 156 Eng. Rep. 145, 150 (1854).

⁵² Chitty's contemporary summary of that law was as follows:

The usage of trade, or mode of transacting business in that department, in which an agent is employed to act for his principal, will likewise, in the absence of express directions, frequently determine a doubt as to the liability of the latter.

Thus an agent may bind his principal by selling goods upon a reasonable credit, if it be customary in the particular trade to dispose of goods on such terms. . . . [But] it is unusual to sell stock on credit or to give credit for goods sold at an auction and, accordingly, a stock-broker, or auctioneer, has no authority to act in opposition to the custom in this respect, without the express order of his principal.

J. Chitty, *supra* note 21, at 203.

Hadleys never served notice on the Pickfords' clerk of their extreme dependence of the shaft, and that the Court reporter simply erred in asserting that notice had been served to this effect⁵³. But it is also possible that Baron Alderson saw the case as the Pickfords' counsel urged: "... a mere notice ... was here given ... [but it] could not make the defendants liable ... [and therefore it was to] be rejected from the consideration of the question⁵⁴."

This agency problem underscores the fact that the case is *Hadley v. Baxendale*, not *Hadley v. Pickford's Moving Co.*; in other words, that the opinion was handed down at a time and in a situation in which principals were personally liable for the misfeasance of their companies. Although the principle of limited liability was already recognized in England for exceptional "chartered" companies, it was not until 1855 that Parliament

⁵³ Lord Asquith took this position ("the headnote is definitely misleading") in *Victoria Laundry v. Newman Indus. Ltd.* 2 K.B. 528, 537 (1949). The best available account of the Assize trial supports this view. It reports the Hadleys' counsel as saying only: On the morning of the 12th of May, it was discovered that the shaft of the steam-mill was broken, rendering it necessary to forward it to Messrs. Joyce. ... A clerk of the plaintiffs was therefore dispatched on Friday, the 13th of May, to the office of Messrs. Pickford and Co., where he saw their agent, Mr. Perrett, to whom he stated what had occurred and that the plaintiffs were anxious that the crank should be delivered to Messrs. Joyce and Co. as soon as possible. ... The shaft was not [promptly] received by Messrs. Joyce. Meanwhile the mills of the plaintiff were stopped. Gloucester Journal, *supra*, note 11, at 1, col. 3. A contemporary newspaper report of the Exchequer proceedings, moreover, paraphrases Baxendale's counsel as saying, "there was no special contract, and the defendants had no knowledge of the inconvenience to which the plaintiff was subject by the delay." 7 Cty. Cts. Chron 133 (June 1854).

On the other hand, two remarks in the course of argument strongly suggest that notice of the stoppage was in fact given to Pickfords' clerk. Baron Parke attempted to distinguish *Waters v. Towers*, *supra* note 25, by saying that "[t]he defendants there must of necessity have known that the consequence of their not completing their contract would be to stop the working of the mill. But how could the defendants here know that any such result would follow?" 9 Ex. 341, 349, 156 Eng. Rep. 145, 149 (1854). To this the Hadleys' counsel is reported as having answered flatly: "There was ample evidence that the defendants knew the purpose for which this shaft was sent, and that the result of its non-delivery in due time would be the stoppage of the mill; for the defendants' agent, at their place of business, was told that the mill was then stopped, that the shaft must be delivered immediately, and that if a special entry was necessary to hasten its delivery, such an entry should be made." *Ibid.*

The comment of Baxendale's counsel (which I have quoted in the text accompanying note 51 *supra*) is even more striking. The argument is that "a mere notice [to the clerk], such as was here given, could not make the defendants, as carriers, liable as upon a special contract. Such matters, therefore, must be rejected from the consideration of the question." 9 Ex. 341, 352, 156 Eng. Rep. 145, 150 (1854) (emphasis added).

⁵⁴ *Ibid.*

extended the right to ordinary entrepreneurs⁵⁵, and it was not until 1901 that Pickfords (and many other companies) incorporated. In 1854 the desirability of limiting personal liability for corporate debts was a major item of parliamentary debate⁵⁶ and the legal world's most hotly disputed subject. This contemporary ferment was fed by, and in turn reinforced, related areas of concern about the run of liability: a Royal Commission was meeting in 1854 to consider expanding the right to petition for bankruptcy⁵⁷, the right to limit liability for torts by means of a prior contract was being pondered in the courts; and the alleged right of common carriers to limit liability for property loss by mere prior notification was being keenly debated⁵⁸.

Under these conditions the concept of a severe restriction on the scope of damages in contract actions must have seemed both less alien than it would have appeared to a judge a decade earlier, and more important than it would have seemed to a judge a decade later. For in 1854 judges were, at one and the same time, confronted with a growing acceptance of the idea of limited liability and yet with a situation of unlimited personal liability for commercial misfeasance. This was a time, moreover, when commercial interactions involved increasing agglomerations of capital and a pyramiding and interlocking of transactions, so that any error might lead to damages that could significantly diminish annual profits⁵⁹ or even destroy the personal fortunes of those sharing in thinly financed ventures.

Two particular aspects of the incomplete evolution of ideas about limited liability appear to be especially intertwined with the litigation in *Hadley v. Baxendale*. A quarter of a century before the litigation, Par-

⁵⁵ The relevant statutes are 7 & 8 Vict. c. 110 (1844), 6 Geo. 4, c. 91 § 2 (1825), and 4 & 5 Wm. 4, c. 94 (1834). See generally B. HUNT, *The Development of the Business Corporation in England 1800-1867* (1936), and H. SHANNON, *The First Five Thousand Limited Companies and Their Duration*, Econ. J. No. 2, at 396 (Econ. Hist. Supp. 1932).

⁵⁶ See the First Report of the Mercantile Law Commission, Gt. Brit., Parl. Papers, H.C. 1854, vol. XXVII, p. 653, opposing limited liability, and the debates in Commons, 134 Parl. Deb., H.C. (3d ser.) 752-800 (1854), suggesting that sentiment in the house was more favorable to the innovation.

⁵⁷ See Report of the Royal Commission on Bankruptcy, Gt. Brit., Parl. Papers, H.C. 1854, vol. XXIII; and see generally Welbourn, *Bankruptcy Before the Era of Victorian Reform*, 4 Cambridge Hist. J. 51 (1932).

⁵⁸ See text *infra* accompanying notes 64-69.

⁵⁹ Pickfords' profits during the period 1853-1857 have been estimated at £21,954 per year. G. TURNBULL, *Pickfords' 1750-1920: A Study in the Development of Transportation* 271 (unpublished Ph.D. dissertation, University of Glasgow, Scotland 1970). By this calculus, the Hadley damage claim of £300 would alone absorb 1.5% of those profits.

liament had addressed the question of substantial claims against coach and canal carriers for loss of sealed boxes which contained jewels, currency and the like, but whose exceptional value was not superficially apparent and which were consequently carried for regular fees and with no more than regular care. Parliament's solution in the Common Carriers Act of 1830, was to declare that shippers of "articles of great value in small compass" were required to give notice of that value or otherwise have their right of recovery limited to £10⁶⁰.

That the act did not control *Hadley v. Baxendale*—a case involving a bulky object—must have been evident. But it is doubtful that the Act was irrelevant to *Hadley v. Baxendale*. If the Hadley's agent went out of this way to assert that the mill's operations depended on the speedy return of the shaft, it may have been because of the pattern established by the Act's notice requirement. It is yet more probable that by the time of litigation the lawyers involved had turned to the Act as the first legislative referent in cases involving loss by a common carrier such as Pickfords. Further, it is worth noting that Baron Parke, a member of the *Hadley v. Baxendale* panel, was the author of the authoritative opinion on the 1830 Act⁶¹. Given this familiarity, it seems reasonable to suggest that in their emphasis on the interplay between notice and liability and in their ready acceptance of the notion of the desirability of limiting damages for cases which are not signalled as (if the pun will be forgiven) more than run-of-the-mill affairs the *Hadley v. Baxendale* judges followed patterns already established by Parliament.

Viewed from this perspective, the common law innovation promulgated in *Hadley v. Baxendale* may be seen as a technical adaptation of an older idea to new circumstances. The Act of 1830 may have been sensibly phrased given the state of carriers' and shippers' business when it was enacted, but by mid-century commerce was more complicated. Bulk ship-

One can assume that claims from loss and delay were not uncommon and that damages were not trivial. In a survey of P.R.O. assize returns for the Oxford Circuit in 1858, I counted 14 cases that went to trial for breach of contract. Nine of these were won by the plaintiffs: three returned damages between one and three thousand pounds; one, between 50 and 100 pounds, and five were under £50. P.R.O. Assi. 10/- [Nisi Prius Returns]. For an example of high damages for breach of contract, see *Fletcher v. Tayleur*, 17 C.B. 21, 139 Eng. Rep. 973 (1855) (jury award of £2,750 damages for five-month delay in delivery of a ship held not excessive).

⁶⁰ 1 Will. 4, c. 68 (1830).

⁶¹ *Walker v. Jackson*, 10 M & W 161, 152 Eng. Rep. 424 (1842).

ments had increased with the advent of the railroad, and it may reasonably be supposed that this increase was not so much the product of increases in shipments of horses, cows, produce and other things easily recognized and valued as it was a consequence of more shipments of machinery which—like the Hadley's mill shaft—performed complex functions and was of uncertain worth and importance⁶². By 1854 it must have been strikingly apparent that an item did not have to be of "small compass" to be "of uncertain value"⁶³.

If from one vantage point *Hadley v. Baxendale* simply effected a judicial extension of the Act of 1830, from another vantage point *Hadley v. Baxendale* stands as an example of a tension between Parliament and the judiciary. This tension grew from an ambiguity in section 6 of the Act of 1830. That section was open to the interpretation that by posting notice carriers could limit their liability for loss or injury to £10. The consequent railroad practice of limiting liability by published handbills or printed notice on tickets or bills of lading aroused much public anger. A modern British legal historian has summarized the situation:

... while it could be said that many carriers had the check of competition to oblige them to take an accommodating line with dissatisfied customers, the railways could afford to face claims for loss and injury with the disdainful wave of an exemption clause. By the early 1850's there had been a number of well publicized refusals to pay which made the railways extremely unpopular with the press and in Parliament⁶⁴.

In 1852, the Exchequer, in an opinion by Baron Parke in *Carr's Case*⁶⁵, held effective the practice of limiting liability by notice as within the meaning of the 1830 Act⁶⁶. By the time of *Hadley v. Baxendale*, a year and a

⁶² See generally the discussion in P. MATHIAS, *The First Industrial Nation* 243ff. (1969), of the change in the nature of the national product between 1801 and 1851.

⁶³ Mathias points out that by 1850 railroads were performing the economic functions both of post roads ("rapid communication for people and specialized freights, such as mail, samples of goods and gold") and of canals ("bulk staples"). *Id.* at 275.

⁶⁴ Cornish, unpublished, untitled manuscript, in the possession of Professor Cornish, London School of Economics, London, England.

⁶⁵ *Carr v. L & Y Ry.*, 7 Ex. 707, 155 Eng. Rep. 1133 (1852). See also *Walker v. The New York and North Midland R.R. Co.*, discussed in note 50 *supra*. It is interesting that *Walker* significantly overshadowed *Hadley v. Baxendale* in contemporary attention when the decisions in both cases were rendered close to one another. Compare, e.g., the relatively brief precis of *Hadley v. Baxendale* with the extended discussion of *Walker* in 20 *The Law Rev. & Q.J. of Brit. and Foreign Juris.* 194-96 (London 1854).

⁶⁶ As one British expert wrote in 1932:

Since the date of *Carr's case* ... the doctrine of full contractual freedom has received

half later, it was clear that this would not be allowed to continue. "The effect of nineteenth century parliamentary reform was to compel the parties to have competitive legislative programmes on every subject⁶⁷," and this issue was no exception. In December of 1852 a Parliamentary Select Committee was charged with considering revision of the 1830 Act, and by July 1853 it had held hearings and submitted five reports, urging revision of the 1830 Common Carriers Act⁶⁸. Although the Committee had not focussed on Carr's case, and the bill effecting reversal of the case was not passed until April of 1854⁶⁹, as *Hadley v. Baxendale* was being argued and decided in January and February of 1854 it must have seemed very probable that this legislation was coming. Seen in this light *Hadley v. Baxendale* effected a judge-made limitation on damages as a matter of public law just as Parliament was about to inhibit severely carriers' capacities to limit their liability as a matter of private law.

Other more comprehensive studies of Victorian judges and legislators will have to explore this tension between Parliamentary and judicial dispositions toward the entrepreneur⁷⁰, and particularly the common carrier, but insofar as a case study can shed any light on the matter, it is worth noting that the predisposition of this panel seems clear. Two of the three Exchequer judges were tied to Pickfords in contexts likely to make them

unrestrained free play from the judiciary. In England, unlike America, no contract made by a carrier has, apart from statute, been held unenforceable or void merely because it exonerates the carrier from responsibility, in circumstances, however blameworthy.

E. FLETCHER, *The Carrier's Liability* 205 (1932).

⁶⁷ A. HARDING, *supra* note 38, at 337.

⁶⁸ See Gt. Brit., Parl. Papers, H.C. 1852-53, vol. XXXVIII.

⁶⁹ This legislation was passed in April 1854—two months after *Hadley v. Baxendale*—as the Railway and Canal Act of 1854. Section 7 of the enactment nullified limitations of liability by mere notice. A. LESLIE, *The Law by Railway* (London 1928), observes that the Act was prompted by Carr's case. See the debates of 19 May 1854, 133 Parl. Deb. (3d ser.) 601ff. (1854).

In fact, the Act of 1854 did not immediately accomplish its purpose because of an ambiguity as to the relationship between its first section (which appeared to permit limitation of liability on posting of reasonable conditions) and its fourth section (which required that limitations be effected by special signed contracts). This ambiguity was not resolved until 1862, when in *Peck v. North Staffordshire Ry.*, 10 H.L.C. 473, 11 Eng. Rep. 1109 (1862), the House of Lords held that limiting conditions had to be both reasonable and signed.

⁷⁰ The interaction of Parliamentary and judicial law-making becomes of particular interest in this period, as the propensity for legislation rose dramatically. See generally A. HARDING, *supra* note 38, especially at 355, quoting POLLOCK: "Our modern law of real property is simply founded on judicial evasions of Acts of Parliament."

I do not mean to imply by this discussion that one can simplistically say that the

sympathetic to the company. Baron Martin had represented Pickfords before ascending to the bench⁷¹, and Baron Parke's brother had been the managing director of the company before Baxendale⁷².

The opinion in *Hadley v. Baxendale* is written in general terms and has had a broad impact on the law of contracts for 120 years. But at the time of its conception it was probably seen and shaped by its authors in the context of uncertainties about the law of agency and conflicts about the shape of the law of liability—particularly common carriers' liability—which are now generally forgotten.

IV.

An understanding of the relationship of the rule in *Hadley v. Baxendale* to the contemporary law affecting common carriers may be a predicate to comprehending the impulse behind the rule and its form, but standing alone it tells only a part of the story. I think the rule in *Hadley v. Baxendale* may have had its most significant contemporary effects not for the entrepreneurs powering a modernizing economy, but rather for the judges caught up in their own problems of modernization.

By the middle of the nineteenth century Parliament had acted to modernize the judicial system in a number of important ways. Successive law

courts were sympathetic to the nationwide entrepreneur and Parliament antithetic to him. This dichotomy is blurred for example, by evidence that in 1847, 178 M.P.s were directors of railway companies, P. MATHIAS, *supra* note 60, at 282, and by LASKI's observation (cited in Cornish, *supra* note 62) that between 1832 and 1906 57% of the judges appointed had been M.P.s.

⁷¹ "... [T]o a barrister Pickford's custom must be worth having, as most of Pickford's standing counsel have found their way to the bench—the present Chief Baron and Mr. Baron Martin, among others." H. Mayhew, *The Shops and Companies of London* 50 (1865).

As a barrister before his appointment to the bench, Baron Martin argued *Black v. Baxendale*. See the case report at 1 Ex. 410, 154 Eng. Rep. 174 (1847).

⁷² See Evidence of Joseph Baxendale, Select Committee on Railroads, Gt. Brit., Parl. Papers, H.C. 1844, Vol. XI, at 249, Q. 3402, remarking that his predecessor as manager was "the brother of Mr. Baron Parke, Major Parke." That this web of relationship seems to have been not uncommon or thought improper at the time provides yet another indication of the distance between this period and our own age. The idea of impersonalization of business relationships, which the "rule" of this case both reflected and encouraged, had not yet been applied, it appears, to relations between those on the bench and those before them. These personal involvements may go some way, it should be noted, to explaining Baron Alderson's activism in asserting what he took to be common practice when mill shafts were shipped.

revision commissions and ensuing enactments had effected changes in the substantive laws of tort, debt, criminal law and, as we have seen, contractual liability. Antiquated aspects of pleading and procedure were similarly remodeled. But the size and case disposition capacity of the common law courts remained remarkably stagnant.

In 1854 the entire national judiciary⁷³ of Britain and Wales sitting in courts of general jurisdiction numbered fifteen. These judges, distributed equally between three benches—the Court of Common Pleas, the Queen's Bench and the Exchequer⁷⁴—sat individually to hear all cases in London and at Assize (court held in major provincial towns) for two terms of about four weeks each year⁷⁵. They convened as panels of three or four to hear appeals in London at other times. They sat in panels usually numbering seven (confusingly denominated as the Exchequer Chamber) to hear appeals from the panels of three or four⁷⁶. Only appeals from the panels of seven would be heard by another body of men: The House of Lords.

A quarter of a century earlier, in a famous speech in the House of Commons, Lord Brougham had asked: "How can it be expected that twelve judges can go through the increased and increasing business now, when the affairs of men are so extended and multiplied in every direction, the same twelve, and at one time fifteen, having not been much more than sufficient for the comparatively trifling number of causes tried two or three centuries

⁷³ The following discussion makes no reference to the chancery, ecclesiastical, admiralty or other specialized courts of the time. For an unusually lucid and comprehensive overview of the judicial systems of this period see BOWEN, *Progress in the Administration of Justice During the Victorian Period*, in 1 *Select Essays in Anglo-American Legal History*. 518-48 (1907).

⁷⁴ These benches were originally quite distinct in their jurisdiction as well as personnel. But by the nineteenth century each had rationalized a system of essentially comprehensive jurisdiction—the Common Pleas by recognizing new forms of pleading; the Queen's Bench, originally concerned only with offenses against the Crown, by adopting the form that all civil wrongs offended the crown; and the Exchequer, originally concerned only with cases involving the royal revenues, by asserting that all wrongs ultimately affected the Crown's revenues. See generally T. F. T. PLUCKNETT, *A Concise History of the Common Law* 141-56 (5th ed. 1956), and Bowen, *supra* note 71.

By mid-century it also appears to have been accepted that counsel entitled to appear before one bench could appear before the others. See, e.g., T. DAX, *Practice on the Plea Side of the Exchequer* 11 (1831), on this point. S. WARREN, *supra* note 44, records that by 1863 the three branches found "their business equalized, subject only to the free preference by the public of one court rather than another."

⁷⁵ See generally 1 W. S. HOLDSWORTH, *supra* note 14, at 278-80. See, e.g., the docket entries on circuit business in P.R.O. Assi 1/60 Nisi Prius Records.

⁷⁶ See 11 Geo. 4, c. 70, § 1 (1830).

ago⁷⁷?" Brougham's call for more judges was answered in 1830 by the addition of one judge to each court. But even with this improvement, it was apparent that there was a severe limitation on the number and intricacy of the trials and appeals that these judges could process. Indeed over the fifty years surrounding the decision in *Hadley v. Baxendale* the number of cases brought to trial in the common law courts each year remained remarkably stable and low (around 2400 cases)⁷⁸ despite the extraordinary increase in commercial transactions over the period⁷⁹. Although the modern observer is likely to approach this situation with his view colored by images of the endless, enervating litigation described in Dickens' *Bleak House* (published in 1853), this stability in case processing apparently was not achieved by allowing a case backlog to accumulate. Extant docket sheets show that at any given Assize no more than half a dozen cases would typically be held for later sittings⁸⁰. The *Hadley v. Baxendale* litigation is suggestive of this speed in disposition. The Hadleys suffered their injury in May; they brought their suit and received prompt jury trial and judgment in August. Baxendale appealed on the fifth of November, had the appeal argued on the first of February, and received a favorable decision by the end of the month⁸¹.

Probably the most critical factor in enabling the Courts at Common Law to operate on so intimate a basis was the reconstruction, by act of Parliament in 1846⁸², of the haphazardly functioning local "Courts of Re-

⁷⁷ 18 Parl. Deb. (2d ser.) 127, 140 (1828).

⁷⁸ See, as providing the basis for this estimate, Report from the Common Law (Judicial Business) Commissioners Gt. Brit., Parl. Papers, H.C. 1857 [2], vol. XXI, at 121-22, 172-73.

⁷⁹ This increase was probably even more substantial than the total production and population figures suggest. "Apart from the growth of trade consequent upon greater perfection of the market, retailers and other traders, in any part of the country, were enabled to order goods regularly, even daily, and in small quantities, rather than in bulk as before. Both wholesaler and railroad companies found that, as a result, the number of individual orders and consignments grew out of all proportion to the absolute growth of traffic." G. TURNBULL, *supra* note 59, at 264.

⁸⁰ In fact, the number of cases in arrears in the common law courts declined steadily from 1825 to 1850. See Report from the Common Law (Judicial Business) Commissioners, *supra* note 76, at 37 (testimony of Baron Martin as to the promptness with which the Exchequer conducted business), 178 (arrearage by court), 181 (decline in Queen's Bench backlog over time).

⁸¹ The precise dates may be found in 22 Law Times Reports 91, 262, 276 (1853-1854), and 23 Law Times Reports 69 (1854).

⁸² 9 & 10 Vict., c. 95 (1846).

quests"⁸³ into an extensive and competent court system capable of handling a large volume of cases. This system of "country courts" was rendered inferior to the Common Law Courts (which began being called "Superior Courts") by permitting appeal from County Court judgements to a Common Law Court⁸⁴ and by limiting county court claims to sums less than £20⁸⁵. Further, the intent of the legislature to effect a transfer of minor cases away from the Superior Courts was manifested by the enactment of a statute assessing costs against even a victorious plaintiff in Superior Court if his recovery in a contract case amounted to no more than £20, or in a tort case to £5⁸⁶.

After their creation in 1846, the County Courts immediately became the journeyman carriers of the judicial workload. Within their first year of operation they reported receiving 429,215 cases⁸⁷. In 1857 they dealt with 744,652 "plaints⁸⁸." We are properly cautioned to discriminate between substantial judicial business and routine administrative debt collection cases in assessing the significance of case loads over this period⁸⁹. This advice is particularly apt because the County Courts were initially conceived as debtor-creditor courts⁹⁰ and always drew the bulk of their business from this context. But it seems clear that the County Courts also quickly began handling a substantial number of more substantial lawsuits⁹¹, and this de-

⁸³ See generally Winder, *The Courts of Requests*, 52 *Law Q. Rev.* 369 (1936).

⁸⁴ 15 & 16 *Vict.*, c. 54, §§ 2, 3 (1852).

⁸⁵ Suits involving greater sums could be heard in these courts on consent of both parties, but the number of cases heard by consent was insignificant. See *Returns County Courts* 4 (1856, L).

⁸⁶ 13 & 14 *Vict.*, c. 61, § 11 (1850).

⁸⁷ H. SMITH, *The Resurgent County Court in Victorian Britain*, 13 *Am. J. Legal Hist.* 126, 128 (1969).

⁸⁸ S. WARREN, *supra* note 44, at 46.

⁸⁹ L. FRIEDMAN, *Trial Courts and Their Work in the Modern World*, in *Jahrbuch für Rechtstheorie und Rechtssoziologie* (forthcoming).

⁹⁰ The Act which created them was formally captioned: "An Act for the more easy Recovery of Small Debts and Demands in England," 9 & 10 *Vict.*, c. 95 (1846), and was colloquially titled "The Small Debts Act." See, e.g., 36 *Law Magazine* 189 (1st ser. 1846). See B. ABEL-SMITH and R. STEVENS, *Lawyers and The Courts* 32-37 (1967), for an enlightening discussion of the relationship between the need for these courts and the growth of a credit economy.

⁹¹ They were, however, explicitly deprived of jurisdiction in suits involving ejectment, wills, title, slander, libel, breach of promise of marriage, and false imprisonment; but jurisdiction could be had in any other case. 9 & 10 *Vict.*, c. 95, § 58 (1846); 13 & 14 *Vict.*, c. 61 (1850). See generally J. DAVIS, *Manual of Practice and Evidence in the County Courts* (1857).

velopment was strongly reinforced by an Act of Parliament in 1850 which expanded County Court jurisdiction to encompass claims of up to £50. By the time of *Hadley v. Baxendale* the County Courts were very probably handling many times the number of tort, contract, and other nondebt cases then being processed by the Superior Court judges at Assizes⁹².

Against this backdrop the rule in *Hadley v. Baxendale* can be seen to have had significant contemporary implications which are normally invisible to the modern observer. The bifurcation of the County and Superior Court systems effected a specialization of labor insofar as it tended to discriminate between unimportant and important cases at least on the basis of the amount of recovery they involved. This division of labor was perfectly sensible so long as County Court work was almost exclusively concerned with debts, because in that form of litigation the amount likely to be awarded can be ascertained with great certainty. But by 1854 the events I have sketched probably prompted an increase in contract litigation in the County Courts. If brought in Superior Courts these cases were pressed at the peril of securing only minor recovery and then having that success washed out by the burden of costs⁹³. Under such conditions it is not surprising that previously ignored questions of the calculation of damages in contracts cases began to receive attention, not so much because these rules were considered important as matters of substantive law as because they were important as rules of jurisdiction. By identifying the criteria by which damages were to be assessed,

⁹² In Judicial Statistics, Part II, England and Wales, Common Law-Equity—Civil and Canon Law, Preliminary Report Gt. Brit., Parl. Papers, H.C., 1857-58, vol. LVII [p. 383], at 125, the compiler asserts that centralized statistics for civil cases in county courts had never been collected. Certainly I could find no extant statistics on the subject. What impressionistic evidence there is, however, tends to support the assertion in the text. See, e.g., the complaints of E. L. Rowcliffe, a solicitor, before the Common Law Commissioners:

With regard to the County Courts, they are no doubt most useful tribunals for the recovery of debts and the determination of trifling disputes; but if the present system of throwing business of every description into them—insolvencies, references from the Superior Courts . . . business connected with charities, probate of wills, and so forth,—is continued, and if their jurisdiction is still further increased, it seems to me . . . from this cause alone the County Court will lose those very essentials to their usefulness, cheapness and speedy results.

Report from the Common Law (Judicial Business) Commissioners, *supra* note 78, at 81-82. And see 7 County Courts Chronicle 77 (June, 1854), Questions with Respect to the Common Law Jurisdiction of the County Courts (raising questions about costs due in county court tort and contracts cases).

⁹³ For a particularized breakdown (but, alas, not an aggregation) of costs in Assize proceedings see W. MARSHALL, *A Practical Treatise on the Law of Costs* (1862).

the *Hadley v. Baxendale* court enhanced the predictability of damages and therefore the correct allocation of cases between the systems. Moreover, since the rule of the case coupled this enhanced predictability with an assertion of limitations on recovery, it tended to shunt cases from the Superior Courts toward the County Courts and thus to protect the smaller system from at least a portion of the workload that if untrammelled would overwhelm it.

Some standardization of court decisions was implicit in these developments. But this standardization afforded more advantages than simply those associated with caseload allocation and (because of enhanced predictability of outcome) caseload reduction through settlement. Standardization was a means by which the Superior Courts could enhance their authority over County Courts at the very moment they were yielding primary jurisdiction to them.

In 1854 it must have been apparent to the fifteen judges who composed the national judicial system that they had no hope of reviewing half a million cases or even that fraction of them which dealt with genuinely contested issues. Moreover the relatively small stakes involved in County Court cases left all but a miniscule proportion of litigants disinclined to incur the costs of appeal⁹⁴. Under these conditions it is not surprising that *ad hoc* review gave way to attempts at a crystallized delineation of instructions for dispute resolution which more closely resembled legislation than they did prior common law adjudication.

In its centralization of control, the judicial invention here examined paralleled the industrial developments of the age. The importance of the centralization of control is particularly evident when the rule is put back into the context in which it was promulgated: in terms of judges' control over juries⁹⁵. Told at its simplest level, *Hadley v. Baxendale* is the tale of a litigation contest between two local merchants and a London-based entrepreneur in which the local jury decided for the local merchants and the London judges asserted the priority of their judgment for the national entrepreneur. The tension inherent in the conflict of perspectives between the two decisionmaking centers—local juries and appellate judges—is un-

⁹⁴ Extant County Court Returns show a total of only 142 appeals for the years 1850-1855, and 55 of these were dropped before they were decided. Returns, County Courts 4 (1856, L). WARREN, *supra* note 43, at 46, reports that there were only 20 appeals generated from 744, 652 county court complaints filed in 1857.

⁹⁵ Samuel Prentice's contemporary text on civil practice cites *Hadley v. Baxendale* as an example of a case in which a judgment was reserved because the judge failed to give "sufficient direction" to the jury. Chitty Archbold's Practice, *supra* note 3, at 1451.

derscored when one focuses on the particular decision-makers in this case. It was a *special* jury that rendered a verdict for the Hadleys. Special juries were drawn, at the request of a party (probably on assertion of unusual complication in the litigation)⁹⁶ from a limited list of property owners⁹⁷. At the Baxendale trial nine of the twelve jurors were designated "merchants." Three were labelled simply "Esquire⁹⁸." If life in the mid-nineteenth century was anything like life in our times, the jury members, themselves local merchants who must have suffered frustration or injury from the then frequent occurrence of carrier error, probably sympathized much more readily with the Hadleys than with Baxendale⁹⁹. In contrast, the panel which heard the case on appeal was "special" in a way quite different

That the rule figured significantly in expanding judges' control over jurors has not escaped modern commentators. See, e.g., C. T. McCORMICK, *Handbook on the Law of Damages* 562 (1935).

⁹⁶ T. TOMLINS' *Law Dictionary*, Jury (4th ed. 1835) (no pagination): "Special juries were originally introduced in trials at bar, when the causes were of two [*sic*] great nicety for the discussion of ordinary freeholders. . . ."

⁹⁷ See CPL Act 1852 § 109 and First Report of Her Majesty's Commissioners for Inquiry into the Process, Practice, and Systems of Pleadings in the Superior Courts of Common Law Gt. Brit., *Parl. Papers*, H.C. 1851, vol. XXII [p. 567], at 43-44. It is difficult to reconstruct the exact procedure relating to special juries; but see Chitty Archbold's *Practice*, *supra* note 7, at 346 ff. This volume reports that to qualify as a juror one was required to "hold" at least £10 in land rents or to hold a household rated at £20 or more. (This at a time when the average wage was 2s./day.) He continues: "... all those described in the juror's book as Esquire; or persons of higher degree, or as bankers or merchants, shall be qualified and liable to serve on special juries. . . ." For a brief modern review of the special jury system see also W. CORNISH, *The Jury* 33-34 (1968).

P.R.O. Assi/10 includes Oxford Circuit data on special juries for 1865 and 1866. It shows that special juries were summoned and sworn for about one case to every two involving a common jury.

⁹⁸ Gloucester Journal, *supra* note 11, at 1, col. 4.

⁹⁹ A speech of Viscount Midleton's some twenty years later gives us a sense of the performance of these local juries.

... take the case where the parents of a young man at the University refused to pay for things supplied, on the ground that they were such things as no tradesman ought to supply to youths under age, the creditor brought an action in local or other Courts, where a jury of his own class had to decide the question whether the goods were "necessaries" or not, and they seldom had any difficulty in arriving at the conclusion that they were necessaries. He would mention two or three cases in illustration of his meaning. An Oxford jury held that champagne and wild ducks were necessaries for an undergraduate; another jury of the same place found that studs of emeralds set in diamonds came within the same category; and a third jury found that expensive prints—proofs before letters—were necessary furniture for the rooms on an undergraduate of moderate expectations.

Speech in Support of the Infants' Contracts Bill, 219 *Parl. Deb.* (3rd ser.) 1225 (1874).

from the jury. Two of the panel's members had experienced the difficulties and adopted the perspective of Pickford's at one time or another. Under these conditions the invention of the case must have seemed particularly appealing to its promulgators. It led not simply to a resolution of this case for Baxendale, but also, more generally, to a rule of procedure and review which shifted power from more parochial to more cosmopolitan decision-makers. As Baron Alderson put the matter, "we deem it to be expedient and necessary to state explicitly the rule which . . . the jury [ought] to be governed by . . . for if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice¹⁰⁰."

From a less personal perspective the invention also effected a modernization by enhancing efficiency as a result of taking matters out of the hands of the jurors. Whatever its other characteristics, jury justice is hand-crafted justice. Each case is mulled on an *ad hoc* basis with reference to little more than, as Chitty put it, "the circumstances of the case¹⁰¹." In an age of rapidly increasing numbers of transactions and amounts of litigation, a hand-crafted system of justice had as little durability as the hand-crafted system of tool production on which the Hadleys relied for their mill parts. By moving matters from a special jury—which cost £24, untold time to assemble¹⁰², and a half hour to decide—to a judge, the rule in *Hadley v. Baxendale* facilitated the production of the judicial product¹⁰³. And by standardizing the rule which a judge employed, the decision compounded the gain—a point of particular importance in relation to the County Courts where juries were rarely called¹⁰⁴.

Thus, the judicial advantages of *Hadley v. Baxendale* can be summarized: after the opinion the outcome of a claim for damages for breach of contract could be more readily predicted (and would therefore be less often litigated)

¹⁰⁰ 9 Ex. 341, 353—54, 156 Eng. Rep. 145, 150 (1854).

¹⁰¹ J. CHITTY, *supra* note 21.

¹⁰² Each special jury member was paid one pound and one shilling, and the costs of assembling the jury were estimated to be about that sum again. See First Report of Her Majesty's Commissioners for Inquiry into the Process, Practice, and System of Pleading in the Superior Courts of Common Law, *supra* note 97, at 43.

¹⁰³ It is doubtful that the parties to the decision in *Hadley v. Baxendale* were insensitive to this phenomenon. In the early 1850's Sir James Shaw Willes and Baron Martin were principal members of the Common Law Commission, whose second report decried the inefficiencies associated with jury trial.

¹⁰⁴ H. SMITH, *supra* note 87, at 131, reports only 800 county court jury cases in 1847 and only 1,101 in 1877.

than before; when litigated the more appropriate court could more often be chosen; the costs and biases of a jury could more often be avoided; and County Court judges and juries alike could be more readily confined in the exercise of their discretion. Clearly the rule invented in the case offered substantial rewards to the judges who promulgated it and in later years reaffirmed it¹⁰⁵.

V.

How does an opinion whose primary functions seem to correlate with a quarrel over an 1830 transport act and with the needs of a judicial system in the 1850's come to be viewed as "a fixed star in the jurisprudential firmament" 120 years later¹⁰⁶?

The fame and widespread acceptance of the innovation effected by this case seems particularly remarkable when we remember that this was a decision of one of three equal intermediate courts. Other Exchequer opinions were vulnerable to rejection or recasting by Queens Bench and Common Pleas judges sitting either in their appellate capacity as the Exchequer Chamber, or within their own systems as Assize and nisi prius judges. Why did this case escape overruling and anonymity? The theme of invention suggests an answer. For an invention to be widely employed it must not only fill a need and be well fabricated; it must also be marketed. In mid-nineteenth century England it was perhaps easier than ever before for a judge-created rule to take hold and influence other judges and lay conduct.

¹⁰⁵ I suspect there is far more opportunity for study of the relationship between judges' caseloads and their articulation of rules of law than researchers have thus far demonstrated. On this point we have only a few suggestive remarks by academics (*e.g.*, Llewellyn: "The whole history of the English Constitution could be written in terms of pressure of work," quoted in William Twining, *Karl Llewellyn and the Realist Movement* 116 (1973); and Posner: "models of the firm that stress personal utility maximization by the executives may be relevant" to the Supreme Court of the United States, Richard A. Posner, *Economic Analysis of the Law* 326 (1972); an occasional hint from a sitting judge (see, *e.g.*, the remarks of Mr. Justice White, *Supreme Court Review of Agency Decisions*, 26 *Ad. Law Rev.* 107, 109 (1974)); and the very brief reflections of one legal historian (see J. Dawson, *A History of Law Judges* 278-80 (1960), comparing the small number of national judges in the English system from the 13th to 17th centuries with the much larger numbers in France and Germany during this time, and suggesting a possible effect of this difference on the nature of appellate review).

¹⁰⁶ G. GILMORE, *The Death of Contract* 49 (1974).

Prompt press reporting of opinions and an expanding bar¹⁰⁷ served to transmit at least the gist of commercial opinions to those likely to be affected by them. More important, an increasing professionalization of the system of court reporting made the then common tactic of "doubting" the accuracy of an adverse reported opinion¹⁰⁸ more difficult, and thus enhanced the power of precedent.

There was another factor at play which has been lost sight of by modern observers. Sir James Shaw Willes, overlooked by Professor Simpson but to whom I have ascribed much of the responsibility for the invention in the case, appears to have been remarkably situated to effect the marketing of the invention by virtue of his position as co-editor of the foremost legal textbook of the time: *Smith's Leading Cases*. Yet more remarkably—and this underscores the already mentioned intimacy of the mid-century British legal world—Willes' opposing counsel on appeal (and the counsel for the Hadleys at trial), Sir Henry Singer Keating¹⁰⁹, was the other editor of *Smith's*.

The two "editors" wasted no time in converting their litigation arguments into an academic analysis, so that a primary difference between the 1852 edition of *Smith's Leading Cases* and the 1856 edition was a lengthy description of and commentary on *Hadley v. Baxendale*. The impact of such notoriety cannot, of course, be precisely ascertained, but it seems fair

¹⁰⁷ S. Warren, *supra* note 43, at 196, presents the following statistics:

	1835	1845	1863
Dc.	53	69	129
Sgts.	24	26	29
Barristers	1,300	2,317	4,360
Special Pleaders	106	126	68
Attys. & Solicitors	10,436	10,188	10,418

It is indicative of the poverty of modern British legal historical studies that there is no study of this alleged rise in the number of barristers which might explain its causes and effects, or even its validity.

¹⁰⁸ The argument in *Hadley v. Baxendale* itself provides an example of this practice. When counsel for the Hadleys cited *Borradaile v. Brunton*, 8 Taunt. 535, 2 B. Moo. 582 (1818), the official reports record Baron Parke as remarking that "Sedgwick doubts the correctness of that report," and the reporter adds the footnoted observation that "the learned Judge has frequently observed of late that the 8th Taunton is of but doubtful authority, as the cases were not reported by Mr. Taunton himself." 9 Ex. 341 at 347, 156 Eng. Rep. 145, 148 (1854). (22 Law Times Reports 69 (1854) attributes the remark to Baron Alderson in the form: "I should very much doubt that case, both in law and in fact.")

¹⁰⁹ See generally 30 Dictionary of National Biography—"Keating, Sir Henry Singer" (1892).

to surmise that it was substantial. The breadth of *Smith's* readership and the respect with which it was regarded can be inferred in part from the frequency with which it is noted as referred to by judges in the official reports¹¹⁰. Our rudimentary sources, moreover, show *Smith's* note on Hadley quoted by litigants in cases where the *Hadley* rule might apply and in public discussion of the rule¹¹¹.

Nor did Sir Henry and Sir James end their association with *Hadley v. Baxendale* upon enshrining the opinion in *Smith's*. Both culminated illustrious careers by elevation to the Superior Courts; and Sir James, in particular, in his capacity as an appellate judge had frequent occasion to endorse and expound on the opinion in *Hadley v. Baxendale*. Within a year of arguing for *Baxendale* he was one of three judges offering an opinion in the case in which the Court of Common Pleas accepted the Exchequer rule¹¹². Over the next decade Willes established himself as the outstanding commercial law judge of the latter half of the century¹¹³. He then crafted the most significant nineteenth century opinion interpreting and endorsing *Hadley v. Baxendale*¹¹⁴, and followed it, four years later, with the next most often cited elaboration of the rule¹¹⁵—in this instance in an opinion reviewed and sustained by the Exchequer Chamber¹¹⁶.

In sum, Sir James was a central actor in the importation, spread and interpretation of the rule of *Hadley v. Baxendale*; and he contributed toward these ends as an academic, as a litigator and as an esteemed appellate judge. If the common law is thought to be some "brooding omnipresence" working itself pure, it obviously acquired some substantial human assistance in this instance¹¹⁷.

¹¹⁰ See, e.g., Chief Judge Cockburn's citation to a note in *Smith's* in *Collen v. Wright*, 8 E. & B. 647, 654, 120 Eng. Rep. 241, 244 (1857), and Judge Crompton's remark in *Emmens v. Elderton*, 4 H.L. Cas. 624, 646, 10 Eng. Rep. 606, 615 (1852) (a case argued by Willes!) that "the result of the modern authorities [in regard to wrongful discharge of a servant] is well discussed in the passage in *Smith's* Leading Cases. . . ."

¹¹¹ See, e.g., the argument of counsel for the defendants in *British Columbia Saw-Mill v. Nettleship*, 3 C.P. 499, 505 (1868).

¹¹² *Fletcher v. Tayleur*, 17 C.B. 20, 28 (1855).

¹¹³ "... The great judges, Bramwell, Blackburn and Willes, ... led the bench between 1852 and 1875." A. HARDING, *supra* note 38, at 336.

¹¹⁴ *British Columbia Saw-Mill v. Nettleship*, 3 C.P. 449 (1868).

¹¹⁵ *Horn v. Midland Rail Co.* 7 C.P. 583 (1872).

¹¹⁶ *Horn v. Midland Rail Co.*, 8 C.P. 131 (1873).

¹¹⁷ I do not, of course, mean to imply that the rule in *Hadley v. Baxendale* became

VI.

But if we have some idea of the first causes of the spread of the invention, what explains its staying power? Here, I think, the histories of industrial and legal inventions part company. As a rule industrial inventions are prized in proportion to their use. If, like the model T Ford, some inventions remain valued long after they have lost their general utility, it is only because some aficionados treasure them as acknowledged antiques. The present curricular predominance and asserted intellectual centrality of *Hadley v. Baxendale* suggests that this is not so in the law. For as presently taught and ensconced in the Uniform Commercial Code, the rule is almost as irrelevant to the modern age as are those artifacts—the Hadley hand-crafted shaft and the Baxendale canal barge—which provided the occasion for its articulation.

I have suggested that the rule's utility for nineteenth-century judges and entrepreneurs was as a control mechanism. It tended to make damages both predictable and limited by constraining them to the bounds of the normal, in the absence of special notice leading to advance contemplation of an abnormal state of affairs. In another context Professor Posner suggests that the rule is of societal advantage because it increases the chances of optimization of precaution-taking. He describes the "general principle" of the case as "that where a risk of loss is known to only one party to the contract, the other party is not liable for the loss if it occurs," and then suggests that this principle "induces the party with knowledge of the risk either to take any appropriate precautions himself or, if he believes that the other party might be the more efficient loss avoider, to disclose the risk to that party¹¹⁸."

famous solely because of Willes. Obviously there were quite a few other cases in *Smith's* that have been largely forgotten. Moreover, it is clear that Willes' view of *Hadley v. Baxendale* did not, in all respects, prevail. (See text accompanying note 122, *infra*.) Certainly, also, the case's functional significance for the other judges, its perfect meld with the theory Sedgwick was propounding in America and Sedgwick's own efforts (he devoted increasing space to the case in his third, fourth, and fifth editions, spanning the years 1858—1868), all were critical to the prominence of the decision.

¹¹⁸ R. A. POSNER, *supra* note 105, at 61. See also J. H. BARTON, *The Economic Basis of Damages for Breach of Contract*, 1 J. Leg. Studies 277, 296 (1972), and L. FRIEDMAN, *Contract Law in America* 126 (1965) ("avoidable consequences must be abided by those with power to avoid them; it would distort the market system to allow an offender against this principle to cast his losses upon another party . . .")

He illustrates this advantage by the following hypothetical:

A commercial photographer purchases a roll of film to take pictures of the Himalayas for a magazine. The cost of development of the film by the manufacturer is included in the purchase price. The photographer incurs heavy expenses (including the hire of an airplane) to complete the assignment. He mails the film to the manufacturer but it is mislaid in the developing room and never found.

Compare the incentive effects of allowing the photographer to recover his full losses and of limiting him to recovery of the price of the film. The first alternative creates little incentive to avoid similar losses in the future. The photographer will take no precautions. He is indifferent as between successful completion of his assignment and the receipt of adequate compensation for its failure. The manufacturer of the film will probably not take additional precautions either; the aggregate costs of such freak losses are probably too small to justify substantial efforts to prevent them. The second alternative, in contrast, should induce the photographer to take precautions that turn out to be at once inexpensive and effective: using two rolls of film or requesting special handling when he sends the roll in for development¹¹⁹.

It should be obvious that the rule's achievement of the advantages Professor Posner describes or the benefits I have noted earlier has been and continues to be premised on the viability of its underlying concepts of normalcy and notification. Yet the manner in which these concepts were pressed into service by the Exchequer panel is characteristic of the half-way industrialized period in which the case arose.

On the one hand, the panel helped to bring the law in phase with the industrializing economy. By its presumption of normalcy the rule invented in the case eroded the prior legal deference to idiosyncrasy and opened the prospect of a standardization of damages as a concomitant of the standardization of transactions effected by mass production¹²⁰. Moreover, in its emphasis on contemplation as the only alternative to natural damages, the rule signalled an evolution away from the pre-industrial emphasis on status and towards the more modern volitional concepts of contract¹²¹. On the other hand, as developed in *Hadley v. Baxendale*, these concepts were tainted by anachronism, and as they were applied over the following years their antique aspects became more salient.

¹¹⁹ R. A. POSNER, *supra* note 105, at 60—61.

¹²⁰ See L. FRIEDMAN, *supra* note 118, at 126 (1965): "*Hadley* was a rule of abstraction... [T]he rule of the case was a risk-limiting rule, and therefore a way of standardizing costs and rationalizing enterprise."

¹²¹ See generally M. J. HORWITZ, *supra* note 24, at 946—52.

Consider, first, the notification or "contemplation" branch of the rule. Willes¹²² and some others¹²³—in America, most notably Holmes¹²⁴—interpreted this as requiring at least a tacit agreement or assumption of risk as a prerequisite to recovery of abnormal consequential damages. This interpretation of the rule, has, however, been rejected both in England¹²⁵ and America¹²⁶. It is now almost universally recognized that, in the words of the Uniform Commercial Code, if at the time of the making of the contract the seller has "reason to know" of possible consequential damages, that is enough to make him liable for recovery of those damages.

Whether viewed as a simple "notice" or a more exacting "contemplation" requirement, however, this portion of the rule in *Hadley v. Baxendale* runs counter to the tide of an industrializing economy. It was already somewhat out of date when expressed in the Exchequer opinion. For in *Hadley v. Baxendale* the court spoke as though entrepreneurs were universally flexible enough and enterprises small enough for individuals to be able to serve "notice" over the counter of specialized needs calling for unusual arrangements. But in mass-transaction situations a seller cannot plausibly engage in an individualized "contemplation" of the consequences of breach and a subsequent tailoring of a transaction. In the course of his conversion of a family business into a modern industrial enterprise, Baxendale made Pickfords itself into an operation where the contemplation branch of the rule in *Hadley v. Baxendale* was no longer viable. Even in the 1820's the Pickford's operations were "highly complex."

The bulk of Pickfords' traffic was of an intermediate kind, which came on to the main north-south route from east and west. This was directed to certain staging

¹²² See *British Columbia Saw-Mill v. Nettleship*, 3 C.P. 499, 509 (1868), and *Horn v. Midland Rail Co.*, 7 C.P. 583, 591 (1872).

¹²³ See, e.g., *Salter, J.*, in *Patrick v. Russo-British Grain Export*, 2 K.B. 535, 540 (1927).

¹²⁴ For a judicial expression of his views see *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544—47 (1903). For an extra-judicial expression see Holmes to Sir Frederick Pollock, Oct. 8, 1904, in *Holmes-Pollock Letters* 119 (Mark DeWolfe Howe ed. 1941): "I fear we are not at one on the limit of damages in contract, I adhere to my old tendencies, The Common Law, and highly approve of Willes in *British Columbia Saw Mills Co. v. Nettleship*. I had a chance to fire off my mouth in *Globe Refining... & I done it*."

¹²⁵ See *Victoria Laundry v. Newman Indus. Ltd.*, 2 K.B. 528, 540; *Koufos v. Czarnikow*, 1 A.C. 350, 421, 422 (1969).

¹²⁶ See American Law Institute, *Restatement of Contracts*, § 330, Comment a (1973); Uniform Commercial Code § 2—715, Comment 2; 5 A. Corbin, *Corbin on Contracts*, § 1010, at 79 (1964).

points, sorted, and thence dispatched to its destination. Cross-traffic of this kind was tricky to organize, and required very clear methods of procedure. According to Joseph Baxendale, then a senior partner in Pickfords, a cargo of 15 tons might involve up to 150 consignees and thus the same number of invoices¹²⁷.

By 1865 the business had grown to the point where it left that contemporary chronicler of industry, Henry Mayhew, without words to "convey . . . to the reader's mind a fair impression of the gigantic scale upon which the operations of the firm are conducted." This was "an enormous mercantile establishment with a huge staff of busy clerks, messengers and porters. . . . It is divided into innumerable departments, the employees in each of which find it as much as they can comfortably do to master its details without troubling themselves about any other¹²⁸."

A century later most enterprises fragment and standardize operations in just this way. This development—and the law's recognition of it—makes it self-evidently impossible to serve legally cognizable notice on, for example, an airline that a scheduled flight is of special importance¹²⁹ or on the telephone company that uninterrupted service is particularly vital at a particular point in a firm's business cycle.

In its comments about "normal" damages the Exchequer panel speaks in terms which again seem singularly antique. Businesses are assumed to be so straightforward as to admit of a rule of damages which characterizes a single mode of operation as "normal" and one set of consequences as "predictable." This leads the panel to announce, apparently on the basis of nothing more than its a priori impressions, that it "is obvious that . . . millers sending off broken shafts to third persons" would not normally be dependent on the prompt return of these shafts for the operation of their mills¹³⁰. Futher, the panel implies that if millers were normally dependent

¹²⁷ G. TURNBULL, *supra* note 45, at 14. For a description of the complex operation of Pickford's London warehouse, see G. TURNBULL, 'The Railway Revolution and Carriers' Response: Messrs. Pickford & Company 1830—50, 2 Transport History 48, 57—58 (1969).

¹²⁸ H. MAYHEW, *supra* note 71, at 50—55.

¹²⁹ It is notable that the Civil Aeronautics Board, while appearing to maintain the option of utilizing the *Hadley v. Baxendale* rule, now grants airline passengers who are victims of overbooking the alternative right to recovery of the price of a ticket over and above their normal refund. 14 CFR § 250.1—10 (1973). See Ian Macneil, Cases and Materials on Contracts 22 (1971). This obviates any need for notice of special consequential damages within the range of the extra payment (not less than £25 nor more than £200) authorized by the statute.

¹³⁰ 9 Ex. 341, 356, 156 Eng. Rep. 145, 151 (1854).

on the return of shafts, then one could readily assess the run of damages which would normally follow from delay.

Contemporary British cases indicate that this approach was freighted with enormous difficulties at the time it was conceived. A survey of the most recent American cases brings home the fact that as the economy has become more diverse and complex, the rule has become less viable¹³¹. Elements of standardization in the modern economy produce some regularities in dealing, but by and large the normalcy rule does not now function so as to afford anything like the certainty that would optimize risk planning or render litigation unnecessary because outcomes were predictable.

The inadequacies of the rule are masked by still more fundamental phenomena which render the case of very limited relevance to the present economy. At least in mass-transaction situations, the modern enterprise manager is not concerned with his corporation's liability as it arises from a particular transaction, but rather with liability when averaged over the full run of transactions of a given type. In the mass-production situation the run of these transactions will average his consequential-damages pay-out in a way far more predictable than a jury's guesses about the pay-out. In other words, for this type of entrepreneur—a type already emerging at the time of *Hadley v. Baxendale*, and far more prevalent today—there is no need for the law to provide protection from the aberrational customer; his own market and self-insurance capacities are great enough to do the job.

Another modern development has yet further displaced *Hadley v. Baxendale*. Though the right to limit liability by agreement was disputed at the time of the case, the entrepreneur now has the undoubted capacity to set a

¹³¹ See, e.g., *Lewis v. Mobile Oil Corp.*, 438 F.2d 500 (8th Cir. 1971), a case as much like *Hadley v. Baxendale* as any likely to arise in modern times. There a federal court held a supplier who provided the wrong fuel to a sawmill liable for all profits lost while the mill was stopped because of the improper oil. It premised this conclusion on its assertion (quite contrary to the intuition of the *Hadley v. Baxendale* court) that "Where a seller provides goods to a manufacturing enterprise with knowledge that they are to be used in the manufacturing process, it is reasonable to assume that he should know that defective goods will cause a disruption of production, and loss of profits is a natural consequence of such disruption." *Id.* at 510 (interpreting Arkansas law). After finding liability, however, the court had immense difficulty in reviewing the jury's assessment of damages. In remanding for a new trial on the damage question the court said: "Plaintiff's recovery for a loss of profits must take into account these different market conditions, his actual production capacity, his type of operation, its efficiency and any and all other relevant factors that would have a bearing upon and that would influence the amount of profits during the period that profits are recoverable as well as the years used for comparative purposes." *Id.* at 513.

ceiling on his liability by a contract clause¹³². Almost without exception large-scale entrepreneurs now avail themselves of that privilege. In consequence, they limit as well as normalize damages on their own initiative.

Even Posner's hypothetical is belied by the ubiquitous limitation-of-liability clause. For when a case approximating this hypothetical arose in the real world, the developer (Kodak) apparently readily conceded the magnitude of the consequential damages due (the cost of retaking photographs in Alaska) and rested its case instead on the scope of its limitation-of-liability clause¹³³.

It is only for small-volume sellers, those who deal in custom-made transactions or with a small number of customers—i.e., for those transactions most like early nineteenth century commerce—that the rule invented in *Hadley v. Baxendale* is arguably of commercial significance. These sellers also, of course, may limit their liability by contract or cushion their liability by insurance, but since their sales transactions are less routinized (and also often less professionalized) they are more likely to miscarry and their miscarriage is less likely to have been provided for through economic precautions such as insurance, or legal precautions effected as a result of consulting farsighted counsel. As unexpected difficulties arise these small volume sellers may therefore be most likely to feel the impact of the residual common law of contracts, and thus of the *Hadley v. Baxendale* rule¹³⁴.

Even within this realm, however, it can be doubted that the rule much effects economic life. It is doubtful that it affects information flow at the time of the making of the contract, because by hypothesis the parties are not very accurate or self-conscious planners. A more sophisticated rationale for the rule in this context might focus on its effect on a seller not at the time of his entering a contract, but rather at the time of his deciding whether to voluntarily breach or to risk breaching. Only at that time and only where an option exists as to whether to breach or to increase the risk

¹³² See Uniform Commercial Code, § 2—719(3): "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not."

¹³³ Willard Van Dyke Productions Inc. v. Eastman Kodak Co., 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963). See also the Appellate Division Report at 16 A.D. Rep. 2d 366, 288 N.Y.S.2d 330 (1962).

¹³⁴ They are also more likely, however, to resolve difficulties by negotiation which bears little if any relation to formal contract law doctrine. See S. Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963).

of breach, does it seem likely that a seller who has not opted for a limitation of liability clause will consult a lawyer, and consequently be affected by the legal rules. It can be argued that the societal gain from the rule in *Hadley v. Baxendale* stems from its improvement of the seller's calculus about whether to breach in this situation.

To put this observation in context, consider the position of a truck owner, A, who has a contract to sell his truck to B, and assume that B would suffer a "normal" net loss of \$200 if the truck were not made available as scheduled. If C arrives on the scene and bids to preempt the truck for an urgent need, A can estimate the damages he will "normally" owe B. He will presumably sell to C only if the new sale price will exceed the old sale price plus \$200 in damages. If C is willing to buy for such a high price, it is to everybody's advantage to let him do so. C benefits because he values the truck more highly than he values the money he is paying for it; B benefits because he receives his expected profits by way of damages; A benefits because he makes more money, even after paying damages than he would have made had the truck not been sold to C. Society benefits because one party, C, has gained while no other party has lost¹³⁵. If B were in an abnormal situation and so expected to suffer greater damages than \$200, the rule of *Hadley v. Baxendale* would coerce him into signalling these higher damages, so that the proper damage calculation and subsequent truck allocation would be made. Thus, in theory, by facilitating an accurate calculus of breach, the rule optimizes resource allocation.

But if this is its modern rationale, it is apparent that considerable thought ought to be given to restructuring the rule. Resting the seller's liability on whether the type of damages incurred was "normal" (or, in the UCC's words, whether it was a type of damage of which the seller had "reason to know"), seems undesirable because it lets an all-or-nothing decision ride on an indicator about which many sellers cannot, at the time of breach, speculate with confidence. Further, if the recoverability of a type of damages is established, a seller may often have no reasonable basis for determining the magnitude of the damages involved. On this dimension—obviously critical to any calculus of the care warranted to avoid breach—the rule has

¹³⁵ For a similar discussion of the desirability of breach in some circumstances, see J. H. BARTON, *supra* note 118, at 287. I assume that there are no other significant effects on parties other than A, B, and C (e.g., their customers); but it seems a fair assumption that insofar as such effects exist they will cancel each other out.

nothing to say. Lastly, if the rule were truly finely geared to optimizing the allocation of resources, it would place its emphasis on the damage known to the seller at the time of breach, rather than at the time of contract, at least where the breach was voluntary. When the rule was framed stress had to be placed on communication at the time of the making of a contract because that was the only occasion on which information exchange could be coerced without fear of imposing enormous transaction costs. Now the telephone and vastly improved telegraphic facilities make it possible to mandate discussion at the time of breach. Would it be desirable to move the focus of the rule to this point? On this question, some empirical evidence would be desirable. Do the average transaction costs associated with information exchange at the time of the contract multiplied by the number of instances in which such information is exchanged exceed the average transaction costs of information exchange at the time of voluntary breach multiplied by the number of occasions when breach is seriously considered? If so, there is much to be said for a revision in the rule.

Of course the rule may be defended on purely equitable grounds. Even if its economic repercussions are trivial or counterproductive, when the parties do not prospectively or retrospectively agree on damages this may be the fairest means of assessing them. But is it? Why should the courts look exclusively to whether a defendant could foresee a type of damages (e.g., lost profits from the stoppage of a manufacturing enterprise), but not attend to whether he could foresee their magnitude? Does the recovery of tens of thousands of dollars, where most parties would have anticipated hundreds of dollars, comport with our sense of fairness? Conversely, is the analysis of fairness so well developed in contract law that we can say with confidence why, in the above hypothetical, A rather than B ought, on equitable grounds, to obtain the special profits from dealing with C?

This brief discussion of the functioning of *Hadley v. Baxendale* in the modern world is not intended to resolve arguments about how UCC 2-715 (2) or the common law consequential-damages rule ought to be phrased or interpreted. Rather, it is intended to provoke such arguments. I do not think anyone can explain why we should now accord this mid-nineteenth century rule such curricular predominance, much less how it functions, and still less how it ought to function, in the modern world. Yet it retains its place because it seems as though it has always held this place. It seems, as one English judge at the time of *Hadley v. Baxendale* wryly commented in another context, that when "a rule is well established by decisions, it is not

necessary to give any reasons in its support, or to say anything to show it to be a good and useful one¹³⁶."

VII.

My aim in this article has been to supplement the 120 years of doctrinal explication lavished on the text of *Hadley v. Baxendale* with a sufficient understanding of context to afford some insights—albeit speculative ones—into the process of law-change. I would hope that this discussion would serve as a counterpoise to the tendency to regard some rules of law as "fixed stars" in our legal system. Judicial rules are more like inventions, designed to serve particular functions in particular settings. I have tried to demonstrate that an analysis of the original setting and functions of one particular rule will enhance an understanding of that rule even when it has long outlived that setting and those functions. Further, I have sought to suggest that if a rule is to be regarded as an invention, then it ought to be subject to review, lest we make too big an investment in it even as it is becoming outmoded.

¹³⁶ Judge Maule in *Emmens v. Elderton*, 4 H.L. Cas. 624, 658, 10 Eng. Rep. 606, 619 (1852).