

CASE COMMENT

COLONIAL CONTRACTS AND EXPECTATION DAMAGES: *GIRARD V BIDDULPH*, NEW SOUTH WALES SUPREME COURT, 1834

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INTRODUCTION

In 1854, three judges of the Exchequer Court in London delivered one of the most famous judgments in the common law, *Hadley v Baxendale*.¹ The plaintiffs were the owners of a steam-driven mill which had a broken crankshaft. They had to send the broken part from Gloucester, in the west of England, to Greenwich, near London, where it would be used as a model in the manufacture of a replacement part. It was important to have the part transported quickly, as the plaintiffs did not have a spare, and were losing profits while the engine was out of order. Pickfords, the shipping firm, was late in the delivery of the part, and the plaintiffs sued for the lost profits caused by the delay. Pickfords sent it by canal rather than rail.

The Exchequer judges found for the defendants, the carrier. They held that the damages to be awarded for 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 a breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it’.² This passage has come to be known as the two rules, or two parts of the rule, in *Hadley v Baxendale*. On the facts, the court found, neither the first nor the second part of the test was satisfied. Losses of this kind did not arise according to the usual course of things, they held, and the plaintiffs had failed to disclose their potential loss of profits at the time of making the contract. The second part of this test introduced the notion of foreseeability as the remoteness test in the law of contract. Only damage that could be foreseen (or contemplated as some judges continue to insist) at the time of entry into the contract, is recoverable in damages.

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¹ (1854) 9 Ex 341.

² Ibid 354.

In 1975, 120 years after the judgment, this famous case was subjected to a rich contextual analysis by Richard Danzig,³ followed by another article by Florian Faust in 1994.⁴ Danzig argued that the mass-produced world that was gathering pace in 1854 was matched by a mass-produced approach to the writing of judgments. In *Hadley v Baxendale*, he argued, the court took away the almost unrestricted control enjoyed by juries over the assessment of damages, under which damages were awarded simply for the natural consequences of the breach of contract. Damages would now be more predictable, but the principles would be centralised in judicial hands. Faust provided a more intellectual history of the decision, emphasising that the notion of foreseeability in law was not invented in this case: it had been promoted in an influential work by Pothier at the beginning of the nineteenth century. The courts had been struggling to find a general rule on the assessment of damages for 50 years, according to Faust, and in *Hadley v Baxendale* they now found one. The new rule was influenced by the developing (positivist) notion of the science of law, and by the individualist, liberal values⁵ of the mid-nineteenth century ruling class of Britain. Damages would also be more predictable, to match the calculating business mind of the Victorian era.

By 1854, expectation damages for breach of contract were commonly being awarded.⁶ If a breach of contract caused the plaintiff to lose profits, then the jury could award damages to compensate for that loss. Six years earlier, the Exchequer Court stated the basic principle ‘that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed’.⁷ This meant, typically, that if a seller refused to deliver goods on a rising market, the disappointed buyer could go into the market, purchase alternative goods and sue for the difference between the contract price and the market price at the date of breach. As a general rule, it did not mean, according to Faust, that consequential losses, such as those incurred in *Hadley v Baxendale*, were generally recoverable even in the middle of the nineteenth century. That happened occasionally in this period, but not usually. To recover damages of this kind, the court in *Hadley v Baxendale* required the plaintiff to tell the defendant that it was out of business while the part was in transit.

³ R Danzig, ‘*Hadley v Baxendale*: a Study in the Industrialization of the Law’ (1975) 4 *Journal of Legal Studies* 249.

⁴ F Faust, ‘*Hadley v Baxendale* - an Understandable Miscarriage of Justice’ (1994) 15 *Journal of Legal History* 41. See also P Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 431-433.

⁵ On the links to utilitarianism, see Atiyah, above n 4, 432.

⁶ The historical development of expectation damages has been the subject of heated academic debate: see Atiyah, 200-203; M Horwitz, *The Transformation of American Law* (1977) 173-181; AWB Simpson, ‘The Horwitz Thesis and the History of Contracts’ (1979) 46 *University of Chicago Law Review* 533; P Karsten, *Heart versus Head: Judge-made Law in Nineteenth Century America* (1997) 59-61.

⁷ *Robinson v Harman* (1848) 1 Ex 850, 855.

THE FACTS OF *GIRARD V BIDDULPH*

Twenty years before *Hadley v Baxendale*, a remarkably similar case was heard on the other side of the world, in the penal colony of New South Wales. At that time, 1834, the colony's Supreme Court was only 10 years old. Its Chief Justice was Francis Forbes, whose legal and judicial experience had mostly taken place in North America. Before coming to Sydney in 1824, his most significant experience was as Chief Justice of Newfoundland, the other great oddity among the colonies of the British empire. Forbes was a liberal in two senses of the word: his basic values were founded on individual liberty, and he often allowed local colonial laws and practices to flourish even when they differed from the laws of England. His jurisprudence was based on natural law, rather than the positivism that would soon dominate legal thought throughout the empire. This meant that he carefully examined each law that was sought to be imported from England, checking it against the colony's needs and current practices, and against broad notions of justice and liberty.

This colonial version of *Hadley v Baxendale* was called *Girard v Biddulph*.⁸ It, too, was an action taken by the owner of a steam-powered mill for the loss of profits while the steam engine was out of action. In this case, however, the defendant was the manufacturer of the steam engine who breached the contract by the late completion of the machine. By the time of the trial, the engine was still not working, and the plaintiff claimed £2000 for consequential loss of profits. The jury found a verdict for the plaintiff of £250. As would have happened under English civil procedure, the defendant then sought to have the jury's verdict set aside and a new trial ordered.

THE FINDINGS

Chief Justice Forbes wrote what was in effect the appeal judgment. He stated that 'it is the duty of the Court to apply the principles which apply to it in common with all other cases of contract and to see that the damages which may be assessed by the Jury are founded on proper allegation & proof'. As in *Hadley v Baxendale* then, he wanted to treat all contract cases in the same way, and to oversee the jury's assessment of damages. His aim was to lay down the general principle under which damages were to be assessed for breach of contract.

One complication was that the contract contained a liquidated damages clause, under which the parties agreed that certain breaches would attract automatic damages of £25. Forbes thought that the clause was not binding, and so he went on

⁸ Along with a large selection of the cases decided during the Chief Justiceship of Francis Forbes, this and the other New South Wales cases discussed below are online at www.law.mq.edu.au/scnsw. The core of the judgment in *Girard v Biddulph* was recorded by Justice Dowling, in *Proceedings of the Supreme Court*, State Records of New South Wales, 2/3288, vol 105, 144.

to state the general principles of assessment of damages for breach of contract. He said:

It is clear that the parties contemplated the probability of the work not being completed within the time limited, and they provided a specific penalty for the failure viz. 25£. Now without binding the plf to this sum, as one by which he had consented to measure his own damage, yet, without allegation or proof of special damage the Plf could only recover such reasonable and moderate damages, as he might be supposed to have sustained from the time that the Deft might, by the agreement to have completed his contract, to the time of action brought.

That is, he stated that the usual measure was of 'reasonable and moderate damages' from the time of breach until the time of the action being brought. There could, however, be more damages if there were an 'allegation or proof of special damage'. He continued:

The only allegation, of damage in the declaration, is the loss of the profits which the plf expected to derive from the quantities of flour which he might have ground in his mill. Assuming this averment to be sufficient to support the proof of special damage, and advertent to the proofs it is established in evidence, that the foundation of the engine was completed on the 8th February 1834. The deft had by the agreement, from that time 10 weeks to complete the erection of the engine, which would have expired on the 21st April. The action was brought about the 30th April. So that there would be only nine days interval of time, during which the plf could have been deprived of any profit from the operations of the engine, had it been able to work for those nine days. It was also proved by Mr. J. Hughes, that such a mill (14 horse power) would at the utmost only earn 35£ a week. So that upon this calculation, the plf could scarcely be entitled to damages to the amount of 250£ for the 9 days prior to the action brought.

The sum calculated by reference to 9 days at £35 per week was not necessarily the maximum recoverable, however. Future damages could also be awarded for the period after the date the action was brought. Forbes continued:

And even admitting that the Jury were not tied down to this mode of computing the damages, but might take into their calculation the time that might elapse before the Plf's engine & flour mill could be placed in working condition, yet there was no evidence to warrant so large a measure of damages as they awarded.

Forbes went on to point out that this was a case of nonfeasance rather than misfeasance, although he did not state what significance this had. He also pointed out that in a separate action, *Biddulph*, the defendant in this case, had successfully sued Girard on a 'quantum' for the value of what he had supplied (the steam engine), and that Girard had received an allowance for the work he had done in preparation for the contract. This meant that the action Forbes was considering was mainly for consequential loss of profit. Forbes concluded on behalf of his fellow judges (either Dowling or Burton, or both):

that the damages awarded by the Jury are more unreasonable & extravagant & that justice has not been done. Upon these grounds, we have after a renewed & anxious consideration of the case arrived at the conclusion that there ought to be a new trial.

Consequently, the case was retried, and the second jury awarded Girard £83. This was apparently for the cost of putting the almost completed engine into working order, and for the loss of profits in the meantime.

Ultimately, then, Forbes approved the award of expectation damages for consequential loss of profits in a situation analogous to that in *Hadley v Baxendale*, where the Exchequer judges later refused it. There was a difference in defendants, of course: it may be that the manufacturer of a machine was expected to carry more liability than a carrier, either because it was assumed to know more about the plaintiff's business, or because the contract price was more proportional to the damages sought. Faust also pointed out that Baron Alderson remarked in *Hadley v Baxendale* that a carrier of a new shaft might have been held liable to pay damages for its delayed delivery. It might have been expected to know that a new shaft would prevent the plaintiff from making profits, but not that a broken shaft was so crucial to its business.

Girard v Biddulph is not the only New South Wales case in this period in which damages were awarded for consequential loss of profits. In *Taylor v Mackaness*, 1828, the owner of a ship sued the colony's sheriff in trespass for illegally detaining the vessel. The plaintiff claimed damages for the loss of income from written contracts to carry passengers and goods to Hobart Town. He also claimed for the profits he had expected from return freight back to Sydney on which he had a verbal promise, and for a planned voyage to the Isle of France once she had arrived back in Sydney. Stephen and Dowling JJ 'ruled that the plaintiff could not recover for the speculative or contingent damages claimed in respect of the expected freight from Hobart Town to Sydney and thence upon the voyage to the Isle of France'. The assessors awarded £300 for the loss of profits on the voyage to Hobart, having deducted expenses. We would now say that the losses from the later planned voyages were too remote. *Taylor v Mackaness* was a tort action rather than one in contract. What we would now describe as a remoteness issue was also raised in *Wilson v Johnstone*, 1829. This was an action for breach of contract, brought by a passenger who had been on a voyage from London. The claim included loss of salary foregone due to the delay in arrival, but this was rejected. This was not because of a concern for remoteness, but because there was no proof that the ship would have arrived earlier but for the ship putting in for repairs at Lisbon for three months. Implausible as that may seem, it means that the claim for loss of salary turned on causation rather than remoteness.

CONCLUSION

Was *Girard v Biddulph* a remoteness case? It had much in common with *Hadley v Baxendale*, including the general facts and the kind of damages sought. Like the

Exchequer Court, Forbes, too, wanted to lay down the general principles of the assessment of damages for breach of contract, and to control the awards being issued by juries. He was not concerned about the general notion of consequential loss of profits, although here the difference in facts may have been significant. He, too, appeared to lay down two classes of damages, the first being the normal 'reasonable & moderate damages'. More than that required an 'allegation or proof of special damage'. In this case, he accepted that there had been proof of the loss of profits as special damage. However, this distinction between the two types of damages apparently turns on a point of pleading rather than remoteness. Earlier in the judgment, Forbes does use the word 'contemplation', which might excite the pulse of a remedies scholar, but he does so in reference to the liquidated damages clause rather than in the sense of the word which we now use after *Hadley v Baxendale*. In Forbes' judgment, there is no notion of damages being restricted to what an objective observer in the position of the parties might have foreseen at the time of their entering into the contract. Forbes carried some of the intellectual baggage evident in that famous judgment, but not all of it. Nor was this self-consciously a judgment for posterity: it contains little of the detailed discussion that was evident in *Hadley v Baxendale* and in some of Forbes' other judgments.

Girard v Biddulph is not a remoteness case then, although it might have been important had it been reported more widely. The newspapers found it too dull to report in detail.⁹ There were no contemporary law reports in the 1830s, and the volume which did eventually cover that period, volume one of *Legge's Reports*, was based on the newspapers. Our only record of Forbes' judgment is buried among the 250 volumes of notebooks left by his colleague Dowling J. Soon after *Hadley v Baxendale* was decided, that celebrated case received wide publicity. *Girard v Biddulph* slumbered on in a small paper-bound handwritten book.

⁹ See the comments in the report of the first trial, published by the *Australian*, 8 July 1834.