CONSEQUENTIAL DAMAGES IN CONTRACT

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In General

At the outset it should be mentioned that the method of determining measure of damages in contract has never, in any period, been uniform, nor has it closely approached uniformity. It may be said also that the tendencies and methods used in the assessment of such damages have varied in the different periods. The history of the common law of the measure of damages in contract falls, roughly, into three periods: first, the period in which no attempt was made to formulate any exact rule of damages in contract; this period ended in England and in most American jurisdictions with the decision of *Hadley v. Baxendale*,¹ decided by the Court of Exchequer in 1854; second, the period in which the rules stated in *Hadley v. Baxendale* (actual decision and *dicta*) with some modifications here and there, were followed in England and the United States, from 1854, or soon thereafter, until early in this century; third, the period now in existence, which had its genesis when *Globe Refining Co. v. Landa Cotton Oil Co.*² and other cases began to show a tendency to regard the "contemplation of the parties" formula of *Hadley v. Baxendale* as an inadequate test of liability. In England, the adequacy of this formula as a test was questioned as early as 1868 in *British Columbia Saw Mill Co. v. Nettleship*,³ and more recently the need of such a test is virtually denied in *In re Polemis v. Furness, Withy & Co.*⁴

In all the cases prior to 1854, there seems to have been, on the whole, a fair and just determination of the issue of damages in each case, without the use of any even fairly distinct rule.⁵ Each court merely applied its own

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¹ 9 Ex. 341 (1854).

² L. R. 3 C. P. 499 (1868). See also *Horne v. Midland R. Co.*, L. R. 7 C. P. 583 (1872), L. R. 8 C. P. 131 (1873).

³ [1921] 3 K. B. 560, 90 L. J. K. B. 1353.

⁴ *E. g.*: "He ought to recover what would make him reasonably whole at the time of the breach, all the circumstances of the case being considered." *Jones v. Van Patten*, 3 Ind. 107, 110 (1851). "Damages and interests", says the civil law and the continental writers, "are the loss which a person has sustained, or the gain which he has missed". *Shannon v. Comstock*, 21 Wend. 457, 462 (N. Y. 1839). "If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing, which he contracted to do; and such value to be estimated at the time, when the act in question should have been executed." *Wells v. Abernethy*, 5 Conn. 222, 227 (1824). The decision in *Town of Royalton v. Royalton & Woodstock Turnpike Co.*, 14 Vt. 311, 324 (1842), states the measure of damages to be "the difference between what they (the plaintiffs) were to pay the defendants and the probable expense of performing the contract". In *Smith v. Sherwood*, 2 Tex. 460, 464 (1847); it is said that "the compensation recovered in damages consists solely in the *direct pecuniary loss*" quoting SEDGWICK, DAMAGES (1st ed.

notions of justice to the particular case before it, usually doing justice with only a vague statement of supposed law as to damages.

Prior to the attempt in *Hadley v. Baxendale* to reduce the law on the measure of damages to a complete and unerring set of rules always leading to easily predictable results, there certainly was uncertainty and diversity in the rules stated in the various cases; but, in the actual results, perhaps not much more of uncertainty and diversity than there is today. Evidently the usual judicial process one hundred years ago, just as today, was to seek a just result in the particular case and then to write an opinion of rationalization seemingly justifying the result. Naturally, on this point as on every other, this made for widely varying statements of supposed rules of law.

In an Indiana case, decided in 1851,⁶ the plaintiff agreed to furnish defendant a good flat-boat, with a crew, for the purpose of transporting some corn. Defendant agreed to supply the cargo and to pay freight at the rate of 18 cts. per bushel. Defendant failed to supply the cargo or to pay freight. The trial judge instructed the jury *inter alia*: ". . . in assessing the damages, the law requires that you should award to the plaintiff, as damages, all the plaintiff could have made and cleared, had he been furnished with the corn and taken it to New Orleans, or the point of destination, from which the present value of the boat should be deducted." The supreme court said: "We think the Court erred in laying down the rule of damages. That rule places the plaintiff in just as good a condition, without the risk and labor of making a trip down the river, as he could possibly be in on his return from an entirely successful trip. This is certainly not equitable. There being nothing in this case to justify vindictive damages, the plaintiff should have had such damages as would have placed him in as good a condition at the time the contract was broken, as he would have been in had he not made the contract."

In a California case decided in 1854,⁷ presumably before the court had heard of the decision in *Hadley v. Baxendale*, the court said: "The general rule as to measure of damages in an action for breach of contract, is correctly given by appellant's counsel. It 'is not the whole price agreed to be paid, but the actual loss sustained, which will consist of the value of the services rendered and the damage sustained by the refusal to allow performance of the rest of the contract.'

1847) 36, 37. "In general", says Pothier (1 Ev. Poth. 91, concerning the civil law rule), "the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs: the debtor is therefore not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation, *damni et interesse ipsam rem non habitam*." *Masterton v. Mayor etc. of Brooklyn*, 7 Hill 61, 68 (N. Y. 1845); quoted with approval in *Bridges v. Stickney*, 38 Me. 361, 368 (1854).

⁶ *Jones v. Van Patten*, 3 Ind. 107 (1851).

⁷ *Baldwin v. Bennett*, 4 Cal. 392 (1854).

"To this rule there are, however, some exceptions. Where, from the nature of the contract (as in this case), no possible mode is left of ascertaining the damage, we will have presented the anomalous case of a wrong without a remedy, unless we adopt the only measure of damages which remains, and that is, the price agreed to be paid."

The facts in *Hadley v. Baxendale* were as follows: The shaft of plaintiffs' steam-mill, being broken, was placed by plaintiffs in the hands of defendant, a carrier, to be carried to a certain engineer, to serve as a model for a new shaft. Defendant's clerk, at the time of the making of the contract, was informed that plaintiffs' mill was stopped, and that the shaft must be sent immediately. In consequence of defendant's delay in delivery of the broken shaft, there was a delay in the making and delivery of the new shaft, which resulted in a continuance of the idleness of plaintiffs' mill. In an action for breach of contract, plaintiffs claimed as specific damages the loss of profits during the time when the mill was idle.

The court held that, inasmuch as it did not appear that the defendant knew, at the time of the making of the contract of carriage, that the want of the shaft was the only thing that was keeping the mill idle, he could not be held liable for a loss of profits resulting from the idleness of the mill. The court, speaking through Alderson, B., said:

"Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

This portion of Baron Alderson's opinion naturally falls into two parts: first, the statement of the rule actually governing the case, which is that losses neither natural and probable, nor specially contemplated by the parties, cannot be recovered; and second, the statement of rule that is purely *obiter dictum*, to the effect that the converse of the first rule is true, that is, that consequential damages are recoverable if natural and probable or contemplated. The principal difficulties that have arisen from following *Hadley v. Baxendale* as precedent have come from following this *dictum*.

On the facts in *Hadley v. Baxendale*, the "contemplation of the parties" formula was used as a restriction upon the amount of the damages. The formula was not one that could properly be used to increase damages, but the seemingly unwise application of the *dictum* that damages may be recovered for contemplated loss has led to numerous recoveries of damages for losses of such a nature that it seems at least highly questionable whether the defendant could possibly have regarded himself as assuming any liability for them when he made the contract.⁸

The question of a general rule governing the measure of damages in contract had, for some time, been a source of considerable controversy and difficulty, which one can now readily believe to have been grounded more in a notion that such a rule was needed than in any genuine necessity for delimiting by law the exact boundaries within which damages for breach of contract were recoverable. Indeed, when one examines the English and American cases that preceded *Hadley v. Baxendale*, one is prone to wonder whether, on the whole, justice was not meted out just as surely prior to this decision as it has been since. At any rate, the Court in *Hadley v. Baxendale* evidently felt that the time had arrived when the legal profession of England and America desired a rule, whether it was really possible to make a good rule or not. It was felt that a more or less mechanical rule must be had.⁹

To understand the readiness with which the Court of Exchequer laid down its rather sweeping *dictum*, which subsequently paved the road to the collection of vast damages for a breach of contract by a poorly paid promisor, who had never intended to assume the least risk of such liability, we must

⁸ Referring to *Hadley v. Baxendale*, *supra* note 1, Dean Leon Green says, in his *RATIONALE OF PROXIMATE CAUSE* (1927) 50-51: "In determining proper instructions for assessing the damages, the court formulated the well-known 'contemplation of the parties' formula. It has thus come to be treated as a damage formula. The court further said: 'The judge ought therefore to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages.' This sentence discloses the true purpose of the formula. Loss of profits from the mills operation was an interest outside the scope of the agreement made for the carriage of the broken shaft. The court so declared. Courts do so in every instance if the facts are clear. The only function for a jury in such a case is to settle disputed facts. The formula is one for use in determining whether the interest involved is protected by the agreement. And it is not a contemplation of consequences from a possible breach, but a contemplation of interests which may be protected by the contract."

⁹ On the futility of pursuing the ideal of reducing the common law to exact rules, the two recent and brilliant books, FRANK, *LAW AND THE MODERN MIND* (1930) and GREEN, *JUDGE AND JURY* (1930), dwell at length.

scan the economic background of 1854. The factory system and carriage by railroad were fairly new. Most of the manufacture of goods was on a very small scale, carriage of goods by land was by cart or wagon, and carriage by sea was still largely by sailing-vessel. A breach of contract to carry machinery or material to a manufacturer would usually, at that time, tie up only a small business. Besides, a factory of that period was not organized with such interdependence of parts as we see today, and a tying-up of one part of a factory by what occurred in another part was not so certain as it would be in modern times, and was not a natural or normal result of the breach of a contract to carry a part of one machine. Also, the factories of that period were small, and it was unlikely that the courts would be called upon to deal with cases in which the plaintiff had sent a piece of machinery by defendant carrier, at a small freight charge, notified the carrier of a possible and probable loss of many thousands of dollars by the closing of a million-dollar factory in consequence of a single day's delay in the carriage, and had suffered such a loss by reason of defendant's negligent delay. The spectre of so hard a case can scarcely have haunted the minds of English judges in 1854. Further, the consequences of holding a carrier for somewhat far-fetched but possibly contemplated results were not considered in their relation to transcontinental railroad systems, for such did not exist. With only a vague notion, if any notion at all, of the economic significance of their words, did the court state the *dictum* in *Hadley v. Baxendale*, for it was in no way possible for the judges in 1854 to visualize natural and probable, or contemplated but perhaps unassumed, damage running into a sum thousands of times as large as the consideration paid to the defendant.

Because of widespread familiarity with the general trend of the cases following *Hadley v. Baxendale*, both on the point therein actually decided and on the *dicta* therein stated, it is not thought that it would be advantageous to discuss here more than a very few of these cases. Besides, it may well be noted, in passing, that, although there have been cases actually applying the *dictum*, that damages for the natural and probable loss resulting from the breach can be recovered so as to bring about extreme results, such cases are rare. But there are a great many *dicta* pronounced in admiring imitation of this *dictum*, and there are many opinions following in their reasoning those *dicta* in cases wherein the result is the same or nearly the same, whether this reasoning is followed or the perhaps more sensible reasoning that the defendant is liable for damage with reference to which he has contracted and for which he has expressly or impliedly contracted to assume liability.

In *Crail v. Illinois Central R. Co.*,¹⁰ a federal district court makes a statement in accord with the *dicta* in *Hadley v. Baxendale*, saying: "In cases of breach of contract the party in default may be required to pay such dam-

¹⁰ 2 F. (2d) 287 (D. Minn. 1924).

ages as usually or naturally result from such a breach, and also such unusual or special damages, if any, as fairly might be anticipated by and within the contemplation of the parties at the time the contract was made." This statement was not necessary to the decision of the case, and, in view of the decision in *Globe Refining Co. v. Landa Cotton Oil Co.*,¹¹ it seems remarkable.

In a recent case,¹² the Supreme Judicial Court of Massachusetts, quoting an earlier Massachusetts case,¹³ says: "The fundamental principle of law upon which damages for breach of contract are assessed is that the injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties as reasonable men as a probable result of the breach, and so far as contemplation of the parties as reasonable men as a probable result of the breach, and so far as compensation therefor in money can be computed by rational methods upon a firm basis of facts."

In *Lukens Iron & Steel Co. v. Hartmann-Greiling Co.*,¹⁴ the Supreme Court of Wisconsin, in holding the defendant, who had furnished the material late and had furnished defective steel (for a boiler head), liable for the consequences of the delay and liable also for the cost of reflanging the hole in the defective boiler head, said: ". . . plaintiff [against whom this damage was in issue on a counterclaim] was chargeable with such damages as might fairly and reasonably be considered as either arising naturally—that is, according to the usual course of things—from such breach, or such as may reasonably be supposed to have been in contemplation by both parties at the time they made the contract as the result of a breach thereof."

In England, the value of the *dicta* in *Hadley v. Baxendale* was questioned for the first time in 1868, when Mr. Justice Willes said, in his opinion in *British Columbia Saw-Mill Co. v. Nettleship*,¹⁵ "I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. . . . If that (in this case a very heavy liability for profits that might have been made by machinery transported by defendant) had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable

¹¹ *Supra* note 2.

¹² *Eastern Mass. St. Ry. Co. v. Union St. Ry. Co.*, 269 Mass. 329, 168 N. E. 781 (1929).

¹³ *Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 95 N. E. 961 (1911).

¹⁴ 169 Wis. 350, 172 N. W. 894 (1919), citing *Hadley v. Baxendale*.

¹⁵ *Supra* note 3, at 500. See the remarks of the same judge in a later case, *Horne v. Midland R. Co.*, *supra* note 3.

conclusion that the mere fact of knowledge cannot increase liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

In *Polemis v. Furness, Withy & Co.*,¹⁶ action was brought, on a charter-party, for the total loss of a ship chartered by plaintiff to defendant. Defendant negligently dropped a plank into the hold, the plank struck some object, evidently producing a spark by friction, which ignited petrol in the hold of the vessel, and the ship was destroyed. The charter-party expressly excepted loss by fire from the liability of defendant. The important question in this case was whether a loss actually caused by a negligent act of

¹⁶ *Supra* note 4.

"It will be recollected by students of the law of torts that in *Polemis, In re*, the rule as to remoteness of damage in the law of negligence was restated and that the test adopted was not, 'is the damage the natural and probable result of the wrongful act, *i. e.*, could it be reasonably anticipated?' but 'would any reasonable person foresee that the act would cause damage?' If so, the defendant is liable for all damage directly traceable to his act, *i. e.*, for all damage not due to 'the operation of independent causes having no connection with the negligent act, except that they could not avoid its results.' How far does this rule apply to damages arising from breach of contract? The case itself arose on a clause in a charter-party, which, of course, is a contract, and one would have no hesitation in regarding it as of general application to contracts but for the curious fact that while writers on the law of contract ignore *Polemis, In re*, books on the law of torts claim it as within their province, and hold it to extend to all torts and not simply to negligence, a view which seems to be correct. It is, however, perhaps safe to infer from *Weld-Blundell v. Stephens*, that the principle of the *Polemis* case includes all contracts . . . [1920] A. C. 956. 'The damage must be such as would flow from the breach of duty in the ordinary and usual course of things. That is the general rule, both in contract and in tort, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was made. Subject to that, only such damages can be recovered as were immediately and naturally caused by the breach.' Professor Percy H. Winfield, in SALMOND & WINFIELD, LAW OF CONTRACTS (1927) 506-507.

"The Court of Appeals [in the *Polemis* Case] clearly intended to lay down a rule for the measure of damages in tort, without regard to what the rule might be where the cause of action was breach of contract. No reference was made to the classical judgment in *Hadley v. Baxendale*, delivered in 1854, undisputed ever since, and recognized by co-ordinate authority now forty years ago, as having settled the law. Clearly the Court of Appeal could not now overrule *Hadley v. Baxendale*, if it would, neither is it credible that the House of Lords would if it could. In 1927, however, a very learned writer [Professor Winfield, in the passage quoted immediately above] pointed out that in *Polemis*' case the cause of action was on a charter-party, therefore in contract. In *Hadley v. Baxendale* the possible foresight of a reasonable man is clearly made the paramount test of remoteness or no remoteness. It may be just possible to reconcile the conclusions of the Court of Exchequer with those of the Court of Appeal by a violent artificial construction; such a construction would have to involve the position that damages arising 'according to the usual course of things' (first branch of the rule in *Hadley v. Baxendale*) may include such damage as no reasonable man, with the knowledge of the parties at the time, could have foreseen; and then it would be hard to see what is left for the second branch of the rule (as to the effect of special circumstances within the knowledge of the parties) to operate on. Even so, the stubborn fact would remain that the points of view and lines of reasoning are quite different. Add to this that the notion of one rule for consequential damages in contract and another in tort is quite novel. Judicial opinion, so far as there is any, is to the contrary. Lord Esher said in 1884 that 'the rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort.' The result, surprising as it may seem, appears to be that the judgments in *Polemis*' case were delivered *per incuriam* as regards the nature of the cause of action, and the reasons given are only extra-judicial opinions fully open to reconsideration, and perhaps not binding even in courts of first instance." POLLOCK, TORTS (13th ed. 1928) 37-39.

defendant, but at the same time a loss of an entirely unexpected kind, should come within or without this exception from liability.¹⁷ In opinions that discuss the case as if it were an ordinary negligence case, with no apparent notice of the fact that it was a contract case, the court proceeds to find the defendant liable. Treating the case as one of negligence, Scrutton, L. J., repudiates the test of naturalness and probability, the test so often applied both to negligence cases and contract cases. No mention is made of *Hadley v. Baxendale* or of the doctrine promulgated therein in regard to contract cases, nor is there any indication that the court realized that it was doing anything that might be interpreted as overruling the principal rule in *Hadley v. Baxendale*. Apparently no one took special notice of the fact that the *Polemis Case* was a contract case until six years after it was decided, when, in 1927, Professor Winfield, in England, and Professor Green, in the United States, called attention to this fact.¹⁸

Within the present century, judicial reverence for the *dicta* in *Hadley v. Baxendale* is clearly diminishing. *Globe Refining Co. v. Landa Cotton Oil Co.*¹⁹ was an action for breach of contract to sell and deliver crude oil. In deciding this case, the Supreme Court of the United States, speaking through Mr. Justice Holmes, says: "The question arises then, what is sufficient to show that the consequences were in contemplation of the parties in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing.²⁰ But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, in *Elbinger Actien-Gesellschaft v. Armstrong*,²¹ 'it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability?' Mr. Justice Willes answered this question, so far as it was in his power, in *British Columbia Saw-Mill Co. v. Nettleship*.²² . . . It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods."²³

¹⁷ ". . . the court's first function, after holding that the interest was protected (*i. e.*, not excepted by the contract), was to say whether this peril fell within the protection afforded by the rule (requiring reasonable care in unloading the ship) alleged to have been violated. Clearly this was the court's function exclusively. Its exercise was clearly antecedent to any functions that a jury might have been called to perform." GREEN, *op. cit. supra* note 8, at 119.

¹⁸ See *supra* notes 16 and 17.

¹⁹ *Supra* note 2.

²⁰ Citing *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422 (1869), and *Sawdon v. Andrew*, 30 L. T. (N. S.) 23 (1874).

²¹ L. R. 9 Q. B. 473, 478 (1874).

²² See text *supra* and *supra* note 15.

²³ It is interesting to notice that, as early as 1874, the Supreme Court of Illinois reached a similar result, refusing to allow a \$44,000 liability for a consequential loss brought about by

*Stamford Extract Mfg. Co. v. Oakes Mfg. Co.*²⁴ was an action for goods sold and delivered. The answer set up five counterclaims, among them one for demurrage. In the district court, judgment was for defendant, dismissing plaintiff's complaint, and giving judgment on defendant's counterclaims for \$18,497.52. In affirming this judgment, Circuit Judge Learned Hand said: "The item of demurrage was also properly left to the jury. As we have shown, the parties contemplated that a vessel should be sent. They knew that the defendant was to carry it to New York; that the vessel must call and lift the cargo at Haiti; and it inevitably followed that, if it was compelled to wait, the defendant must pay demurrage. *Globe Refining Co. v. Landa Cotton Oil Co.*²⁵ was quite another case. The seller did not know from how far the buyer would bring his cars to load. It is indeed at times a nice question what facts of which the parties have knowledge may measure proximate damages. . . . Yet we know of no test other than the loose one that the loss must be such that, had the promisor been originally faced with its possibility, he would have assented to its inclusion in what he must make good. It seems to us quite unreasonable to suppose that a seller in the plaintiff's position could have refused to recognize, under these circumstances, that he was chargeable with so direct a loss as this. It seems hardly serviceable to cite instances from the multitude of cases in which losses have been held remote or proximate, or in which the general rule has been repeated." Judge Hand indicates, with no equivocation, that he is not obsessed by any notion that other than a loose rule is necessary. It is clear that he realizes the futility of any hope for a mechanically working rule of damages in contract, and that he fully understands the necessity of exercising a wise judgment in the decision of each case as it arises. Furthermore, it is evident that he deems directness of resulting damage important only as indicating that the party sought to be charged may fairly be said to have assumed liability for it.

In *Monger v. Lutterloh*,²⁶ the Supreme Court of North Carolina said: "The rule is too firmly embedded in our jurisprudence to need repeating,

the existence of other contracts known of by defendants at the time of making the contract. The court said: "It is, no doubt, true, if the road had been completed by the first day of January, 1872, appellants would have obtained a rebate of the interest on the total amount of the construction bonds; but if it was intended to hold appellees responsible in case of nonperformance of their contract, according to the terms of their private agreement with the lessee of the road, they should have made it a part of the contract the damages should be so measured. Although appellees may have known there was such an agreement between appellants and the lessee, they will not be presumed to have contracted with reference to any such mode of ascertaining the damages, and in the absence of any special contract they are bound by no such rule. Had it been known that it was expected appellees would be held responsible for such extraordinary damages, it is hardly probable they would have entered into the contract, for the consequence of a failure for only a few days would be most disastrous. The damages insisted upon, under this rule, exceed \$44,000—a sum enormously out of all proportion to the amount to be paid for the entire work." *Snell v. Cottingham*, 72 Ill. 161, 169 (1874).

²⁴ 9 F. (2d) 301 (C. C. A. 2d, 1925).

²⁵ *Supra* note 2.

²⁶ 195 N. C. 274, 142 S. E. 12 (1928).

that ordinarily the amount of loss which a party to a contract would naturally and probably suffer from its nonperformance, and which was reasonably within the minds of the parties at the time of its making, including such special damages as may be said to arise directly from circumstances existent to the knowledge of the parties, and with reference to which the contract was made, is the measure of damages for the breach of said contract. . . . Such was the rule laid down in the celebrated case of *Hadley v. Baxendale*, 9 *Exch.* 341; and this case has been consistently followed by us." Apparently without realizing it, the court appreciably deviated from the rule in *Hadley v. Baxendale* and wandered in the direction of *Globe Refining Co. v. Landa Cotton Oil Co.*, when it said, "with reference to which the contract was made." This case presents the strange phenomenon of stating a better rule than that stated in *Hadley v. Baxendale* and then crediting the Court of Exchequer with this better rule.

Williston says, in his work on *Contracts*, Section 1357: "It seems generally held that notice prior to the formation of the contract is sufficient to charge the defendant with the damages which might naturally be foreseen as a consequence of the breach by one having such notice, without other evidence of a promise to assume liability for unusual consequences." *British Columbia Saw-Mill Co. v. Nettleship*, *Horne v. Midland R. Co.*, *Globe Refining Co. v. Landa Cotton Oil Co.*, *Snell v. Cottingham*, and *Monger v. Lutterloh*, all above cited, and many other cases, do not support this assertion by Professor Williston. Besides, it should be noticed that in comparatively few cases has the rule thus stated been permitted to bring about verdicts and judgments that were unreasonable under the theory that the defendant is liable only for that for which he has assumed liability, all of the facts affecting the question of reasonableness being considered.

In the same section, Professor Williston states further: "To assert . . . as is sometimes done expressly or impliedly, that the measure of damages for breach of a contract is based on the terms of the contract is to assert a fiction which obscures the truth and invites misapprehension which may lead to error. One who on borrowing money agrees to pay it the following month does not stipulate for the alternative right to keep the money at legal interest until the lender can get judgment and levy execution, though this is the only remedy the law can enforce. Nor can it be supposed that a seller contracts to be liable for the difference between the contract and the market price, or for consequential damages according as he does or does not know certain facts. Parties generally have their minds addressed to the performance of contracts—not to their breach or the consequences which will follow a breach. The fiction here criticised is a manifestation of the broader fiction that parties contract for whatever obligations or consequences the law may impose upon them. The true reason why

notice to the defendant of the plaintiff's special circumstances is important is because just as a court of equity under circumstances of hardship arising after the formation of a contract may deny specific performance, so a court of law may deny damages for unusual consequences where the defendant was not aware when he entered into the contract how serious damage would flow from its breach." But, it may be asked, is the limiting of damages thus based upon an equitable doctrine or upon something analogous to an equitable doctrine? It may also properly be contended that this suggestion seems to recognize a *prima facie* right in a plaintiff to recover for all damage whatsoever resulting from the breach of contract, with a mere equitable limitation to the effect that a showing that the damage was not natural and probable or contemplated will prevent the assessment of damages as compensation for such loss. That many courts of the period preceding 1854 did recognize a *prima facie* right to recover for all damage resulting from the breach may be properly inferred, it seems, from numerous statements in the opinions of that time.²⁷

Writing in 1883, Professor Henry T. Terry said:²⁸ ". . . There remains a question whether and how far express notice of the likelihood of certain consequences ensuing or an express statement that the promisee intends to hold the promisor responsible for them can be taken to raise a *prima facie* or conclusive presumption of law—there is no doubt, I suppose, of its admissibility as evidence of the fact—that the conditions of the rule have been fulfilled. On this point the authorities are not harmonious. Perhaps it may depend upon whether the breach is wilful. It is hardly necessary to add that this assumed consent, whether, as usually, merely hypothetical or actual, forms no part of the agreement. It is not subject to any requirements of form, to the statute of frauds, nor to the rule of evidence that forbids a written agreement to be varied by parol testimony; nor need it ever be pleaded."

In his work *The Rationale of Proximate Cause*, in 1927, Dean Leon Green says:²⁹ ". . . It must be determined in every case that the injured interest of the plaintiff was within the protection of the agreement, or the statute, or the rule of common law, as the case may be, as against the particular hazard encountered, and, if not, the plaintiff's loss is wholly immaterial. Just as in tort cases, the methods used by the courts in making this preliminary determination are not always clear. If the meaning of the words of the agreement is reasonably certain, the courts usually declare whether the interest asserted by the plaintiff is within its terms. If not so clear, or if there are perhaps other factors outside the agreement which bear upon it, they make use of a jury by means of the 'contemplation of the

²⁷ See quotations from decisions, *supra* note 5.

²⁸ TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW (1889) 576.

²⁹ *Op. cit.* at 49, 50.

parties' formula. This formula has generally been considered as a formula for the determination of the damages recoverable. It is so only incidentally. Primarily its function is to determine whether plaintiff's interest is covered by the contract; whether the loss incurred was one of the defendant's risks under his agreement."

Decisions in some cases, and mere *dicta* in others, have made proximity of results of a breach of contract the criterion, discarding the formulas of "natural and probable consequences" and "contemplation of the parties." The Supreme Court of Alabama says, in *Daughtery v. American Union Telegraph Co.*:³⁰ "What is meant by the words, *in contemplation of the parties*? It would seem that contracting parties—certainly honest ones—do not contemplate the breach of their contracts when they enter into them, and, hence, cannot contemplate the consequences of a breach." The court then proceeds to apply the doctrine of proximity of result. Stone, J., by way of *dictum* in the Minnesota case of *Bergquist v. Kreidler*,³¹ says: "Personally, I have never been able to see any basis for the reference, in discussing measures of damages, to what the parties may have contemplated, or to what they may be supposed to have contemplated. My own idea is that whatever a wrongdoer and his adversary may or may not have contemplated, as the result either of breach of contract or a tort, has nothing to say in answer to the question whether a given element of resulting loss should be considered legal damage. The rule of causation furnishes a better formula for the solution of such a problem." In *Altman v. Miller*,³² a Kansas case, the court finds certain results of a breach of contract both not contemplated and not proximate. In *McRae v. Hill*,³³ an Illinois Appellate case, the word "proximate" is used broadly as referring to legal cause both in contracts and in torts.

If proximity of result were to be made a kind of mechanical test in contracts, as has often been attempted in torts, results just as unexpected and strange and unreasonable as those which have occurred in torts would probably follow. As a legal measuring-stick, to be applied with a showing of rigid exactness and certainty by a judge pretending seriously to use it as an unfailing test, proximity is a failure, whether applied to contracts or to torts. Probably one thing that has made the use in contracts of the criterion of proximity seem feasible to some judges is that usually the proximate result is also a natural and probable result to be anticipated by the parties. Besides, it seems likely that at least some of the judges making use of the proximity formula in contracts are as unaware of the real meaning of the term "proximate" as are some of the judges who have used the term

³⁰ 75 Ala. 168, 176, 177 (1883).

³¹ 158 Minn. 127, 196 N. W. 964 (1924).

³² 128 Kan. 120, 276 Pac. 289 (1929).

³³ 126 Ill. App. 349, 351 (1906).

in relation to torts. If we accept the proposition that "proximate" and "recoverable" are merely synonymous, we may say, "This element of damage is recoverable because it is proximate, and it is proximate because it is recoverable." Such reasoning cannot be useful. Of course, the most complete and exact code of legal terminology cannot render careful thought and responsible judgment unnecessary in the judging of any actual case; but the laxity and uncertainty and even ignorance of some judges in the use of the term "proximate" have caused unnecessary confusion. "Proximate" has been used to mean many different things.³⁴ The word "proximate," as a legal term, has so many meanings that it has come to have virtually no meaning. The term is so rich in profitless meanings that it is bankrupt.

One important tendency of courts, as well as of juries, both in contract and in tort cases, is to apply rules of causation so-called, of certainty of proof, and of measure of damages, more severe upon the defendant if he has clearly been guilty of wanton and wilful misconduct, and to apply less severe rules or to apply them in a less severe manner, if the defendant's fault seems unintentional. Undoubtedly there exist in the minds of judges and jurors not merely two or three degrees of fault, but rather an infinite number of such degrees, depending upon the facts of each case, and this has a genuine effect upon the administration of justice. It is true that, outside the field of exemplary damages in tort, there is recognized no general rule putting upon a defendant in a civil case greater liability because of the greatness of his fault; but the tendency exists in a marked degree. Many lawyers, while frankly acknowledging that this tendency exists and making the fullest use of it in the actual handling of cases for defendants as well as for plaintiffs, feel that it is a matter to be talked about only in private, and then only in whispers; for this tendency is one of those great living and functioning parts of the common law which do positive violence to the conception of the common law as merely a body of exact rules. If there are rules, this tendency is comparable in importance with any of them, for it cuts across and modifies the operation of them all.

In the third edition of his work on *Damages*, in 1858, Theodore Sedgwick, in treating consequential damages in tort,³⁵ calls attention to the

³⁴ See Bauer, *Confusion of Terms "Proximate" and "Direct"* (1918) 86 CENT. L. J. 226.

³⁵ SEDGWICK, *DAMAGES* (3d ed. 1858) 117 n., quoting Hasse, says: "Schuld (*culpa*) und Zurechnung gehen Hand in Hand; jene bezeichnet dasjenige in dem Handelnden was ihm zur moralischen Ursache der Handlung machte, und daher bewirkte das sie ihm zugerechnet werden kann daher; diese Ausdrücke im ganzen denselben Sinn hervordringen, und es so oft für *in culpa est* heisst *ei imputatur*. . . . Nach der Aquilia haben *dolus* und *culpa* gleiche Wirkungen, und die *culpa* umfasst jederzeit alles; im Obligationen recht richtet sich der Grad der *praestatio culpa* nach dem Grad der besondern Verpflichtung welche das bindende Verhältniss mit sich bringt, und es wird zuweilen nur *dolus* und die ihm gleichstehende *culpa lata* gewöhnlich, aber auch mehr prästirt. Diese noch unbestimmte Bemerkung reicht hier noch hin um zuvörderst die Nothwendigkeit zu zeigen den *dolus* von der *culpa* s. str. genauer unterscheiden als es bei der Aquilischen *culpa* nöthig war, und dabei vornämlich den Begriff der *culpa lata* so scharf als möglich zu fassen." ("Culpa, or legal fault, goes hand in hand with *imputatio*, or legal liability. It is that which fastens on the person charged the

remarks of J. C. Hasse, in his *Die Culpa des Romischen Rechts*, published in Bonn, in 1838, in which Hasse indicates the relation of the degree of fault to liability under the Roman law, saying that fault and liability go hand in hand and expounding the civil law scheme of degrees of fault. Sedgwick expresses his dread that recognition of any such doctrine will bring about a condition of the law in which, in torts, even where vindictive damages cannot be demanded, the degree of fault will govern not only the question of liability, but also the amount of remuneration, and that accordingly, as the act is more or less morally wrong, the courts will make the guilty party responsible for the consequences, more or less remote, of his conduct. He then proceeds to indicate what he regards as being the danger of recognizing any such doctrine.³⁶ Sedgwick clearly indicates his preference for exactly working rules, uninterfered with by any plan that may give too much scope to the play of mere human tendencies.

Notwithstanding the great desire of Sedgwick to bar this tendency from operating in the law of torts, where there was reason to expect it, it has apparently operated for generations past and is continuing to operate, even in the law of contracts. Great and powerful human tendencies like this cannot be kept from operating in the administration of law, whether by judge or by jury. Aversion and disgust and hatred excited by a defendant's wilful breach of contract, and pity aroused by the predicament in which another defendant is placed by his honest and unintentional breach of contract, have swayed judges, as well as juries, in the actual administration of the law.

Although this tendency to make the lot of the transgressor more at fault a harder lot is ordinarily a silent one, to be discerned only by a careful study of the facts, verdict, and judgment in the case, there are many in-

responsibility of the transaction; and consequently the phrases are often convertible, and in *culpa est*, he is in fault, has the same meaning as *ei imputatur*, he is responsible. *Culpa* relates both to acts of trespass, or those embraced under the Aquilian Law (*damnum injuria datum*) and to violations of contract. In the latter cases only is the learning of *culpa* intricate and difficult; in the former easy and simple. In the cases which come under the Aquilian Law, *dolus* and *culpa* have the same effect, and the latter embraces almost everything; but in matters of contract the liability depends on the nature of the duty imposed upon the party charged; he is sometimes answerable for *dolus* or *culpa lata*; sometimes for *culpa* merely. It hence becomes necessary to distinguish more carefully between *dolus* and *culpa*, and especially to make the definition of *culpa lata* as clear as possible." (Translation in Sedgwick's text.)

³⁶ After quoting and translating the above matter in note 35, *supra*, Sedgwick, *op. cit.* *supra* note 35, at 118, says: "The danger to be apprehended is, either that the courts will lose themselves in a maze of abstract casuistry, as to the different degrees of fault; or that in despair of reducing the subject to principle, they will throw the responsibility of the matter on the jury, leaving everything to their vague, fluctuating, and all but uncontrolled decision. Better, I humbly think, it would be, in all matters of tort where the wrong it not so flagrant as to warrant vindictive damages, to adhere as closely as possible to a fixed rule,—to declare that in no case shall the measure of relief depend on the motive of the party, and that the remuneration is in all cases to be limited to the natural and proximate consequences of the act. Even this is vague enough; for language confesses itself incompetent to depict the nicer shades of right and obligation; and all rules will be found valueless unless applied and expounded by tribunals as sagacious as they are learned."

stances, even in contract cases, where a court has expressly recognized the propriety of so administering justice as to make the result more severe upon the defendant more seriously at fault in the breach of his contract. In a *dictum* in the New York case of *Shannon v. Comstock*,³⁷ the court states that selfishness or fraud of the defendant in breaking his contract may be considered to enhance damages. In *Benton v. Fay & Co.*,³⁸ in assessing damages for consequential results, the Supreme Court of Illinois calls attention to the effrontery of the defendant in wilfully breaking his contract. In another Illinois case,³⁹ Lawrence, J., in an action of covenant for wilful refusal of a landlord to admit a tenant to possession, decides that the measure of damages is the difference between the value of the term and the rent to be paid, plus the amount of the expenses incurred by plaintiff by reason of the breach; but he gives a *dictum* to the effect that a less severe rule would prevail were the eviction of the tenant by a third person having a paramount title. Many cases of similar import could be cited. To the lawyer desiring that everything be settled by a complete set of exact legal rules, and that all judgments of courts be predictable, the situation brought about by this tendency may seem to be chaos; but no more of chaos results here than is found in the normally unpredictable and sometimes incredible disposition of even slightly complicated cases by juries. Such a tendency may not appeal to the lawyer-logician attempting to apply supposed exact rules of law with ideal syllogistic regularity; but the tendency, actually existing and functioning in an important way, must be noticed and reckoned with. It often affects seriously the measure of damages.

Another factor in some cases, chiefly those brought against carriers, seems to be notice after the contract is made, but before breach, that breach of the contract may bring certain damage. In some railroad cases, such notice has been held to make the promisor liable for results concerning which notice of the probability has been given after the making of the contract but before the breach by the railroad company. The typical case is one of delay by the carrier in violation of a contract, after notice that the damage in question will occur if the carrier delays. The assumption of a few courts seems to be that the shipper always has the right thus to put extra liability on the carrier, perhaps on the theory that the shipper ought to have a right to demand prompt service. This is discussed at length further on.

In actions brought for breach of contract, little or no trouble arises in determining that the defendant is liable for consequential damage that was so probable, either generally, or specially because of circumstances known to the defendant at the time of making the contract, that, considering the

³⁷ 21 Wend. 457 (N. Y. 1839).

³⁸ 64 Ill. 417 (1872).

³⁹ *Green v. Williams*. 45 Ill. 206 (1867).

terms of the contract and all of the circumstances of the transaction, the defendant may fairly be taken to have assumed liability for such damage. Courts have found difficulty in the following types of case: (1) where reasonable men may differ on the question whether, at the time of making the contract, there was an inherent general probability that damage of the type in question would occur as a result of such breach by defendant; (2) where reasonable men may differ on the question whether the facts operated to give defendant knowledge, at the time of making the contract, that there was a special probability that damage of the type in question would occur as a result of such a breach; (3) where notice of the probability of such damage as a result of a breach by defendant has been given by the plaintiff subsequent to the making of the contract but before the breach; and (4) where the damage was clearly enough a probable result, but the circumstances make it seem questionable whether liability for such damage has been assumed by the defendant.

With the real decision in *Hadley v. Baxendale*, based upon the rule that damage neither actually contemplated nor natural and probable cannot be recovered, probably no one has any quarrel. Damages in this class are clearly not within the terms of the contract. There seems to be no ground on which to say that the defendant has assumed liability.

The *dictum* that probable damages, or the damages contemplated by the parties, can be recovered, has not commanded the same respect of courts as has the principle rule of the case, and it would seem that it is right that it should be so. Such a *dictum* seems extreme. Even results actually contemplated and discussed by the parties when making the contract may actually be elements for which the defendant has not assumed liability. For instance, let us consider two hypothetical cases: *First*, a case of express exclusion of some contemplated results from among possible elements of loss for which damages may be assessed. *A* and *B* are discussing a projected contract under which *A* is to undertake to build and equip a large building, in which *B* intends to conduct a factory and a store. Elements of probable loss from breach of a contract to build on time are: (1) loss of use of the building; (2) inconvenience; (3) loss of good will; and (4) loss to *B* by reason of his consequent failure to fill contracts with third parties, who may bring actions against *B*. *A* and *B* having discussed these matters, *A* says: "I am willing to assume liability for losses arising from items (1) and (2), but not for losses arising from (3) and (4)." The contract is drawn and signed accordingly. No one will contend that *A* is liable for (3) and (4), in the event of a breach, although they have been contemplated by both parties. These have been expressly excluded by the provisions of the contract. *Second*, a case in which *C*, a carrier, contracts to carry for *D* a crank shaft to be used in *D*'s mill. The shaft is worth \$10. The freight charge is 50

cents. If the shaft is not delivered on time, the loss to *D* may be \$5,000 a day during the delay. Assume that notice of the likelihood of such loss by reason of the delay has been given to *C* at the time of the making of the contract. Still may not the non-assumption of such liability for such contemplated result be implied as well as expressed? May not the implication of non-assumption arise from usage, the habits of dealing of the parties, the smallness of the consideration paid, or the general circumstances of the case?

Not only reasonableness, but the apparent judicial trend of our times is toward rejecting the *dictum* in *Hadley v. Baxendale*, and is toward the rule stated by the Court of Common Pleas in the case of *British Columbia & Vancouver's Island Spar Co. v. Nettleship* and by the Supreme Court of the United States in *Globe Refining Co. v. Landa Cotton Oil Co.*, which makes the case depend upon the answer to the question, "Was liability for this element of damage assumed by this defendant?" or "Was this interest, for damage to which the plaintiff is suing, protected by the contract?" or "Was the hazard of this element of damage one of the hazards against which the contract extends protection?"⁴⁰

If this kind of solution appears, at first glance, to be too loose and uncertain, comparison will indicate that just as certain and predictable actual results have been attained by the Supreme Court of the United States and by the other courts applying the more certain sounding solution of the *dictum* in *Hadley v. Baxendale*, that justice is more likely to be done, and that the decisions are less likely to bring strained and unreasonable results.

Consequential Damages for Breach of Common Carrier's Contract by Delay in Carrying Freight

Consequential damages for breach of a contract of a common carrier to carry freight involve a number of more or less difficult questions, of which some are common to all cases of consequential damages in contract and some are unlike any questions that can be raised in the simple case of breach of an ordinary contract.

The terms of common carriers' contracts are only in part the result of a *consensus* of the parties, for some of the terms are imposed upon the

⁴⁰ Writing soon after the decision of *Hadley v. Baxendale*, Mayne, in the first edition of his book on *Damages*, 1856, discusses the measure of damages in contract at length, and the case of *Hadley v. Baxendale* in particular, already seeing clearly the devious paths into which the *dictum* might lead. He says at 8: "The principles laid down in the above judgment, that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence, which is not the necessary result of a breach, can be supposed to have been so contemplated, unless it was communicated to the other party, are of course clearly just. But it may be asked with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be held answerable for them, and consented to undertake such a liability?"

parties directly by legislative action and others indirectly by such action through the Interstate Commerce Commission or a state commission. Some of the duties and liabilities of a common carrier are thus created without any regard to the carrier's assuming them willingly or by any specific terms of its contract. In some instances, undoubtedly the common carrier assents, if it may be said really to assent at all, to the contract as a whole, only because a legislative body or a commission has forced its assent.

Legislative imposition of contracts and of terms upon parties naturally may result in anomalous situations difficult to solve by means of common law principles. Arguments both for and against making large the duties and liabilities of the common carrier can be founded upon the fact that such carrier is engaged in a public calling and is regulated by government. It may be argued that, because the common carrier is under a duty to serve the public and is often in possession of a monopoly of the carrying business between two points, he should be rather severely held to liability for natural and probable damage as a result of a breach. On the other hand, it may well be argued that, inasmuch as the common carrier is forced to contract with any person, with certain terms prescribed by government, it is hardly fair or reasonable to say that the carrier has assumed liability for all consequential damage that is natural and probable, no matter how small the freight charge may be in proportion to the liability supposed to be assumed.

It may be argued, also, as has been held in some cases to be mentioned hereafter, that a common carrier ought to be held liable for losses which it does not know to be probable at the time of making the contract, but as to the probability of which it is apprised by the shipper or consignee after the making of the contract but before the delay which caused the loss for which action is brought; in answer to which most lawyers will undoubtedly say that the carrier did not so contract. Yet, as will be seen, this legalistic solution does not settle all of the difficulties of such a case.

It may be safely said that, in carriers' contracts as in all other contracts, there is clearly no liability for consequential results that are neither generally natural and probable nor specially so because of prior notice. Such losses are neither expressly nor impliedly included within the protection of the contract.

Some typical consequential losses seem to be recoverable in most if not all such cases, and other losses not so typical may be recovered for if the special circumstances are such as to indicate that they are protected by the contract. Certain, more or less standardized, consequential results, can always be included within the losses against which a contract of carriage impliedly gives protection. Such are losses incurred through the falling of the market price, during the delay, of goods shipped for resale, and natural deterioration in quality or shrinkage in quantity of the goods during the

delay. Consequential damage arising from loss, during the delay, of special use of the property being transported may be held recoverable if "within the contemplation of the parties," or, according to the other view, if the contract may fairly be said to protect against such loss.

Ordinarily, the measure of damages for delay in the carriage of freight is the difference between the market value of the goods at the time when they should have been delivered under the express or implied terms of the contract and their lesser value at the time when they were actually delivered.⁴¹ From this, of course, must be deducted unpaid freight charges and interest.

If the goods are of a perishable nature, such as fruits or vegetables, a natural and probable result of delay is deterioration in quality.⁴² In the case of live stock, one type of loss as a natural and probable result of delay is shrinkage in weight.⁴³

The really difficult cases are those in which there are consequential losses which were unlikely to have been anticipated by the parties as natural and probable in the absence of special notice to the carrier, and losses where, although notice was given to the carrier, reasonable men may honestly differ on the question whether the loss in question was one of the class of losses concerning the probability of which the shipper notified the carrier by giving the notice in question.

A dentist brought action against a carrier for delay in delivering his baggage, which contained dental instruments, and proved, over defendant's objection, that patients were waiting in his office, and that, as a result of the delay, he failed to have the opportunity to work for three hours and twenty minutes at six dollars per hour. No notice to the carrier that this loss might occur was averred or proved. It was held that no recovery could be allowed for such a loss.⁴⁴

Plaintiff, a theatrical performer, lost an engagement by reason of the delay of the defendant, a carrier, in delivering his theatrical equipment which had been delivered to defendant for shipment. Plaintiff did not prove

⁴¹ *Central Trust Co. v. Savannah & W. R. Co.*, 69 Fed. 683 (N. D. Ga. 1895); *Texas & P. Ry. v. Boaz* (Tex. Civ. App.) 22 S. W. (2d) 492 (1929); *Carstens Packing Co. v. Southern Pacific Co.*, 134 Ore. 53, 292 Pac. 89 (1930).

⁴² "The measure of damages in the ordinary case is the difference in the value of goods at the time and place they ought to have been delivered, and at the time of their actual delivery, less unpaid freight, with interest. The difference in value is to be determined according to the market value and not according to the contract price, where defendant had no notice of the special contract. But the price at which the goods are reasonably sold after arrival may be shown, as indicating their value then, even though to sell them to the best advantage it was necessary to send them to another market." 3 SEDGWICK, DAMAGES (9th ed. 1912) § 854.

⁴³ Where hogs are sold at a lower price after a delay in transit, the price at which they are sold is not conclusive evidence of their value at the time of the sale, although it is some evidence. *Ayres v. Chicago & N. W. Ry. Co.*, 75 Wis. 215, 43 N. W. 1122 (1889).

⁴⁴ *Adams Exp. Co. v. Williams*, 14 S. W. 40 (Ark. 1890); *Puffer v. American Ry. Exp. Co.*, 221 Mich. 426, 191 N. W. 27 (1922).

⁴⁵ *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537 (1894); *Kansas Pacific Ry. v. Reynolds*, 8 Kan. 623 (1871); *Sturgeon v. St. Louis, K. C. & N. Ry.*, 65 Mo. 569 (1877).

⁴⁶ *Milhous v. Atlantic Coast Line R. R.*, 75 S. C. 351, 55 S. E. 764 (1906).

that he had stated to defendant that he contemplated making the engagement and that it would be necessary to have his equipment at the destination on time, and so was not allowed such damages.⁴⁵

Plaintiff, a salesman, took with him on a selling trip, a trunk of samples. Action was brought to recover for loss of time, which resulted from delay of the defendant carrier in the delivery of this sample trunk. In denying recovery for such an element of damage, the court said: "The reason given by plaintiff's principal witness why unusual damage resulted from the delay was that he needed the samples in order to fulfill engagements already made to meet prospective customers, and that he could not sell goods in the absence of his samples. He did not, however, give defendant any notice of these special circumstances. All he did was to notify defendant's baggageman that he had a large sample trunk, which he wished checked. This certainly was not calculated to convey the intelligence that any special reason existed for expediting this trunk which would not apply to any trunk."⁴⁶

The usual holding is that, in order to make a carrier liable for damage of an unusual type, the plaintiff must have, *at or before the time of making the contract*, given notice of the probability of such damage in the event of breach by delay. An abundance of authority supports this view. According to the usual reasoning in cases of this kind, such notice given after the making of the contract does not make a new contract or change the rights of the parties in any way.⁴⁷ Courts taking this view treat the contract of a

⁴⁵ *Rives v. American Ry. Exp. Co.*, 227 App. Div. 375, 237 N. Y. Supp. 429 (1929). But compare the facts in *Weston v. Boston & M. R. Co.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569 (1906), in which it was known to the carrier that absence of the scenery and properties being carried would prevent a performance, and it was held that the loss of ordinary earnings from their use, less the amount of expenses saved by the failure to exhibit, was not a matter of special damage and could therefore be recovered without specially pleading it.

⁴⁶ *Katz v. Cleveland, C., C. & St. L. Ry.*, 46 Misc. 259, 91 N. Y. Supp. 720 (1905), approved in *Conheim v. Chicago, G. W. R. R.*, 104 Minn. 312, 116 N. W. 581, 17 L. R. A. (N. S.) 1091 (1908).

⁴⁷ In *Patterson v. Illinois Central R. R.*, 123 Ky. 783, 97 S. W. 426 (1906), an action to recover for damage arising from the fact that plaintiff was feeding cotton seed meal and hulls to cattle and was hindered in such feeding by the delay in carriage, the court said: "It will be observed that the damages which the plaintiff sought to recover are wholly special damages, growing out of the fact that he was feeding a lot of cattle on cotton seed meal and hulls, that the cattle would not eat other feed without loss, and that the delay in getting the cotton seed meal entailed upon him extra labor, expense, and loss in his cattle. This special loss was due to the peculiar circumstances of the plaintiff, and the rule is that, unless such special circumstances are brought home to the other contracting party at the time the contract is made, there can be no recovery of such damages because they cannot reasonably be supposed to have been in contemplation of both parties at the time they made the contract. Appellant's counsel concedes the general rule to be as stated, but it is insisted that after he gave notice on November 4th of the peculiar circumstances in which he was placed, and the defendant then agreed to trace the stuff and deliver it as soon as it could, it became liable for the special damages sustained after a reasonable time for the delivery, counted from the date of that notice. But it is not averred that any new contract was made between the parties on November 4th. No new consideration is averred, and, from the allegations of the petition, it cannot be inferred that a new contract was made then. If one party could by a subsequent notice make the other party liable for such special damages, then the rights of the parties would not be determined by the contract between them or by their situation at

carrier of freight, for this purpose, exactly as they would treat any other kind of contract. However, it has been held in a few cases that notice given to the carrier *subsequent to the making of the contract* may impose upon the carrier liability for losses occurring as a result of negligent delay after the giving of such notice.⁴⁸ We may well consider whether there is not

that time, but by the act of one of the parties alone. The rule that the notice should be given at the time the contract is entered into rests upon the ground that the person to whom the notice is given may have an opportunity to protect himself by the contract which he makes or by special precautions to avoid loss. A notice given afterwards by one party would afford the other party no such opportunity for self-protection. Accordingly it is held that a notice to the carrier subsequent to the contract and after the goods have been shipped will not make him liable for special damages in cases of this sort." The opinion cites *M. K. & T. Ry. v. Belcher*, 89 Tex. 428, 35 S. W. 6 (1896); *Crutcher v. Choctaw etc. R. R.*, 74 Ark. 358, 85 S. W. 770 (1905); and *Bradley v. Chicago, M. & St. P. R. R.*, 94 Wis. 44, 68 N. W. 410 (1896).

Notice must be given at the time, or before, the making of the contract, according to *Crutcher v. Choctaw etc. R. R.*, *supra*; *Illinois Central R. R. v. Johnson*, 116 Tenn. 624, 94 S. W. 600 (1906), following the rule of the vast majority of cases.

"The purpose of notice from the carrier's standpoint is to enable it to decline the shipment, if by reason of unusual conditions it cannot transport promptly, or to enable it to take measures to insure necessary dispatch, if it does undertake the carriage. This can be met only by notice at or before receiving the shipment, and to an agent in position to act in the premises, or one whose duty it is to receive such knowledge and cause others to act thereon. The agent who receives the shipment for transportation is the obvious and the generally proper channel of such notice. . . . The local agent of the defendant at the delivering station is not such an agent, according to the authority commonly had. He cannot control the shipment, nor the trains carrying it, until it reaches his station. A soliciting freight agent need not have such authority or duties. So the division superintendent's authority and duties are not evident from his title. But the allegation of the last amendment is express that each of these agents did have authority, and was under the duty, by virtue of his employment, to control the movement of this freight and expedite it. If this is true, notice to such an agent is sufficient." *Sibley*, District Judge, in *Pomona Products Co. v. Southern Ry.*, 294 Fed. 982 (N. D. Ga. 1924).

In a recent Iowa case, plaintiff sought to recover special damages for injury to corn that he was unable to pack because of delay in transporting certain carloads of cans. *Faville, J.*, said, "The general rule is that, in order that there may be a recovery for special damages of the character herein considered, notice to the carrier of the purpose for which the shipment is intended and the necessity of prompt shipment and delivery must be given before or at the time the shipment is accepted by the carrier." *Percy v. Chicago, Rock Island and Pacific Ry.*, 207 Iowa 889, 890, 223 N. W. 879 (1929).

On the question whether notice to the initial carrier in such a case affects the extent of the liability of the connecting carrier, in interstate commerce, under federal statutes, the following is pertinent:

"The contract made by the initial carrier . . . covers the transportation to destination. . . . And damages for unreasonable delay by a connecting carrier are within the liability of the initial carrier on its through contract, under Interstate Commerce Act, [U. S. Code Title 49] § 20, pars. 11 and 12, 49 U. S. C. A. § 20, pars. 11 and 12 (1929), gives the initial carrier an action over against the connecting carrier for defaults of the latter for which the initial carrier has had to answer. But the notice of special damages likely to occur on delay, which might charge the initial carrier with liability for the damage, is not an element of the through contract, such as will affect the connecting carrier, unless noted on the waybill or otherwise brought home to him." *Pomona Products Co. v. Southern Pacific Ry. Co.*, *supra*.

⁴⁸ Such subsequent notice was held to impose liability in *Bourland v. Choctaw etc. Ry.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111 note (1906), in which, after pointing out the fact that in no earlier case were there such facts, namely, that the contract to carry was fully performed at the time of the notice, and that property was at point of destination, and could have been delivered when notice was given, the court says: "All that remained to be done was to make delivery, and this it was then in the power of the carrier to do at once. It had no right to demand extra compensation for a transportation already performed, for making delivery; nor had it the right to refuse or delay delivery because of the conditions of which it then received notice. No extra or unusual preparations were necessary for delivery, or, if they were, the defendant was, at the time, in as good a position to make them

something to commend these decisions. If the average layman were asked whether he supposed that he could impose upon a carrier liability for special damage by giving, between the making of the contract and the negligent delay, notice of the probability of such damage through the delay, he would probably answer in the affirmative. A layman would think that he had a right to control the goods that he had shipped, that he had a right to make subsequent demand of reasonably good service of the carrier, and that he had the power to impose upon the carrier extra liability for special damage caused by unreasonable delay, merely by giving notice before such delay occurred. To the answer that he has paid no new or increased consideration upon his giving of notice, he might well reply that, under the rule that is in force in many states, he could have held the carrier liable for such special damage without any extra compensation if he had given notice to the carrier of the likelihood of such damage at or before the making of the contract. Can it be said that this minority view is definitely wrong? May it not be urged that the shipper or consignee, having a right to give such subsequent notice in order to further his own interests as bailor, ought to have a remedy for the negligent disregard of his notice? Whatever may be the common law on this phase of contracts in general, is it not just and equitable that the shipper, like promisees in certain other types of contract, shall have the power, by giving notice after the making of the contract, especially where negligent delay has begun or is reasonably in prospect, to make time of the essence of the contract for certain purposes, the purpose in this case being to make time of the essence in relation to damage resulting from any further or subsequent negligent delay? No attempt is made here to answer these questions; they are merely suggested for thought.

For the common carrier, on the other hand, it may be urged that rigid application of the *dicta* in *Hadley v. Baxendale*⁴⁹ will sometimes be too severe upon him; that he will be held liable, under such a rule, for any extreme consequences if he is merely given notice of their probability at or before the making of the contract; and that, under such a rule, he may be held liable for damage greatly in excess of the amount of the freight charge.

as it would have been had the notice been given when the contract was made. The simple fact is, that it held so much of plaintiff's property of which he desired, and was entitled to immediate possession, for a special purpose, and for lack of which defendant was then fully informed plaintiff was in danger of suffering the loss for which compensation is now sought, which loss would have been prevented by mere delivery of the property. In such a case, knowledge of these facts, when the contract for transportation was made, appears to us to be unessential. None of the reasons exists for which such notice has been required in other cases. The plaintiff's loss did not arise from delay in transportation, nor from any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to deliver the property, due to the faithlessness of defendant's agent, at a time when the probable consequences thereof were fully disclosed. There would, in our opinion, be manifest injustice in requiring the plaintiff, rather than the defendant, to bear the loss arising from this fault of the agent."

Subsequent notice of special need of shipment as feed for cattle is given effect in *Conn v. Texas & N. O. Ry.*, 14 S. W. (2d) 1004 (Tex. Civ. App. 1929).

⁴⁹ *Supra* note 1.

Obviously, the application of such a rule may result in a common carrier being held for a risk that he would never have willingly assumed.

In contracts of common carriers, as in other contracts, it would seem extreme to say that notice of any probable damage, even at or before the making of the contract, must always result in liability for such damage if it occurs. Besides, there is a seemingly cogent reason for proceeding with great care in holding a common carrier liable for damage merely because the carrier has received notice, at or before the making of the contract, that such damage is probable in the event of breach. The common carrier is compelled by law to render the service that he contracts to do. His contract is not entirely the result of the carrier's willing assent. It is in part the result of the volition of government. Is it fair to make greater the possible liability of a common carrier on a contract merely because certain notice has been given, although no higher freight rate has been paid? This difficulty has been noticed a number of times.⁵⁰

Have cases of consequential damages for delay by a carrier usually been given a reasonable solution? Do the decisions give attention to all the factors that ought to be considered? Is it possible, with the rule of damages still continuing to be a common-law matter, to give reasonably just, adequate, and moderately predictable results in these cases?

It would seem that any reasonable disposition of such cases must take into account the following: the practical needs, in business operation, of both shippers and carriers; the justice or injustice and practicability or impracticability of giving effect to mere notice by the shipper, given at or

⁵⁰ "When one of two contracting parties stands in such a relation as compels him to render the service for which he contracts, as for instance in that of a common carrier, it might be unfair to infer, from his undertaking to do the service with knowledge of the special circumstances and without a protest that he assented to any unusual obligation. Upon this question we express no opinion." *Dictum* in *Loneragan v. Waldo*, 179 Mass. 135, 60 N. E. 479 (1901).

"Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and carry them as directed to the place of delivery, and there deliver them. But now suppose that an intimation is made to the railway company, . . . not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract and will lose so many pounds if they cannot fulfill it, what is then the position of the company? . . . If, then, they are bound to receive, and do so without more, what is the effect of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. Of course they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned." Kelly, C. B., in *Horne v. Midland Ry.*, *supra* note 3, at 136.

See also MAYNE, DAMAGES (7th ed. 1903) 42, Note (1930) 78 U. OF PA. L. REV. 1015.

before the making of a contract or between the making of the contract and the negligent delay, to increase the extent of liability; and the desirability of allowing recovery in any case, for consequential damage that is entirely out of proportion to the consideration paid or agreed to be paid by the shipper. The allowance of heavy damages in proportion to the freight rate, if it occurs in a great number of cases, must ultimately result in higher freight rates. There is, therefore, probably no economic advantage to shippers in general in having a rule that is too severe upon the common carrier. The present law on this subject naturally partakes of the confusion incident to a very uncertain blending of statutory and common law. Perhaps the only solution lies in more complete legislation in the field of common carriers.