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Reflections on the Principles of Remoteness in Contract in Comparative Law

Katy Barnett[1]

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Abstract

This paper traces the history of remoteness in contract law, namely the legal formants (in Rodolfo Sacco's terms) constraining the availability of contract damages in various legal systems. Our journey takes us through different times, continents and cultures, from the eighteenth century to the twenty–first century, across the law of France, United States, England and Wales, India and Australia, among other jurisdictions. While it might seem that civilian and common law traditions have very different morphological legal forms, once a closer historical, cultural, and anthropological gaze is turned upon the legal formants involved, it can be seen that remoteness discloses a shared concern which may be common to many human societies and cultures. In other words, as a matter of social experience, humans who enter into transactions generally realise that it is impossible to know the future, or to know what all outcomes of the transaction will be. Consequently, it is recognised that it would be unfair and unjust to hold a defendant liable for all outcomes, and as our journey will show, legal systems seek guidance from other legal systems in their efforts to deal with this problem.

Keywords Contract law · Contract damages · Remoteness · Comparative Law · Legal history · Colonialism · Intercultural law · Legal geography · Intercultural law

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✉ Katy Barnett
k.barnett@unimelb.edu.au

[1] Melbourne Law School, University of Melbourne, Melbourne, Australia

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1 Introduction

The late Rodolfo Sacco postulated that it was helpful to think of the legal rules in comparative law as 'legal formants' [1–3]. In other words, when a comparative lawyer considers legal rules, whether one is considering common law or civilian law, it is not simply enough to look at what the statute or case law says, but to look more deeply at the historical, cultural, and anthropological context:

> …even the jurist who seeks a single legal rule…recognizes implicitly that the living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges—elements that he keeps separate in his own thinking. …[W]e will call them, borrowing from phonetics, the "legal formants." [1, p.22].

Sacco applies this analysis to several legal areas: sources in law, agreement in contract law, the objective element in tort law, and the transfer of moveable property [2]. In this paper in honour of Sacco, it is my intention to use a 'Sacco-style' analysis on a formant of private law of particular interest to me: the concept of 'remoteness' as a limitation on the availability of contract damages. Although Sacco may have seen 'formants' as static rather than dynamic, I will use the term 'formant' to mean a dynamic concept which overlaps with the category 'normative/legal model' or 'schema'. My intention is to highlight the *dynamic* rather than *static* potential of the idea of 'formant', even if this does not precisely correspond to the more static version of 'formant' that Sacco proffered in his early works on this topic.

Civilian and common law traditions, of course, have very different morphological legal forms. Civilian law relies first on the wording of the specific Civil code [1, p.33]. Conversely, common law is traditionally derived from case-based and judge-made law, with an overlay of statute. As Sacco demonstrates, however, Civilian and common law traditions are not as different as they may appear [1, pp.21–23]. This paper will provide a signal instance of the way in which the two are intertwined and borrow from each other. My approach in this paper focuses on comparative law, rather than on socio-political or philosophy of history issues. The disciplinary methodology employed considers the evolution of positive legal experience and its anthropological-legal implications. It is not intended to be a critical re-reading of the path to modernity, but rather an intercultural consideration of comparative law, through different times and places.

It is first necessary to explain why it might be necessary to have a limitation upon liability at all. As Charles Mitchell has observed, "some losses can have multiple causes, and some wrongs can have ripple effects and far-reaching consequences" [4, p.327]. Principles of remoteness seek to delineate when a defendant should no longer liable to compensate for loss which he caused to the plaintiff, particularly when the loss was an unusual or distant consequence of the wrong, or when the loss was more closely linked to an intervening event.

As we will see, the idea of placing a fair limitation on liability for contract damages has a long history. This paper is, in a sense, an archaeological dig to

uncover the origins and trace it through to the formant now adopted in French Civil law and in common law jurisdictions, which sees 'contemplation of the parties' as a principled limit on liability. The germ of this arose in the sixteenth century, with the writings of the French jurist Carolus Molinaeus (Charles Dumoulin).

An intercultural analysis of legal phenomenology is inherently retrospective, precisely because of the importance of the past as a signifier of authority in legal thinking. Our journey will take us from the Third Century BCE to the current day, and through jurisdictions as various as Ancient Rome, Ancient Greece, France, England, the United States, Australia, and India. Once a closer historical, cultural and anthropological gaze is turned upon the legal formants involved, it can be seen that the various legal systems disclose a shared concern which may be common to many human societies and cultures. That concern is that humans who enter into transactions generally realise that it is impossible to know the future, or to know what all outcomes of the transaction will be. Sometimes outcomes can be entirely unexpected, and not anticipated by the parties (or more particularly, by the defendant). It is recognised that it would be unfair and unjust to hold a defendant liable for all outcomes in every instance. As our journey will show, legal systems seek guidance from others in their efforts to find a solution to this problem, and sometimes formants are transplanted successfully to different legal systems and places, even though they have been untethered from their original moral foundations and beginnings.

Our journey begins with the Roman law of compensation for breach of contract, which was then later incorporated into the European *ius commune*.

2 Legal Foundations of Compensation: Roman Law

It is sometimes argued that capitalism and a mercantile sensibility were not present in Europe until the eighteenth and nineteenth centuries [5, 6]. However, the intensely mercantile aspects of Roman society—which included mass-production of consumer goods [7, pp. 394–397]—indicate that market interests were a driving force in Roman society, even absent an Industrial Revolution [8]. So too does the extensive Roman law regarding contracting, including the rules regarding compensation for breach. Roman lawyers seem to have been focused upon what the law actually was in a given situation, hence the extensive literature preserved to the modern day [9, p.1].

As Reinhard Zimmermann has outlined, pecuniary compensation for breach of contract underwent several evolutions in Roman law [10, pp.824–9]. There was not so much a Roman law of contract, as a Roman law of *contracts*: the rules varied according to how the contract was formed and what the subject matter of the contract was, among other things [11, para.9.2]. For some actions, a formula was used. However, in other actions, an *id quod interest* began to be awarded, namely a sum reflecting the plaintiff's interest in the thing. 'Interest' here denotes what was of consequence to the plaintiff or mattered to him. Generally, as Zimmermann notes, in

cases of contractual non-performance, the value of the object was a convenient starting point, but loss of profits could also be claimed [10, pp.325–7].

Under the *actio empti* (the action allowing a buyer in a contract of sale to recover losses for breach from the seller) consequential loss was recoverable, but as both Zimmermann and du Plessis note, there were attempts to limit this [10, pp.831–2; 11, para.9.1.3.6]. Thus, under the *actio empti* it was said by the jurist Paulus:

> When the seller is responsible for nondelivery of an object, every benefit to the buyer is taken into account provided that it stands in close connection with this matter. If he could have completed a deal and made a profit from wine, this should not be reckoned in, no more than if he buys wheat and his household suffers from starvation because it was not delivered; he receives the price of the grain, not the price of slaves killed by starvation… [12, Paul, *Edict*, book 33, para.19.1.21.3].[1]
>
> *Cum per venditorem steterit, quo minus rem tradat, omnis utilitas emptoris in aestimationem venit, quae modo circa ipsam rem consistit: neque enim si potuit ex vino puta negotiari et lucrum facere, id aestimandum est, non magis quam si triticum emerit et ob eam rem, quod non sit traditum, familia eius fame laboraverit: nam pretium tritici, non servorum fame necatorum consequitur…* [13, Paulus, *Edict*, book 33, para.19.1.21.3]

However, it is impossible to say whether there was a definite rule of remoteness, even in that particular category of contract, because the texts conflict [10, p.831; 11, para.9.3.1.6]. Ulpian seemed to suggest that the rule operated differently where the seller has knowledge:

> Julian, in the fifteenth book of his [Digest,] distinguishes between the knowing and unknowing seller with regard to condemnation in an action on purchase. He says that if he acted unknowingly in selling a diseased herd or an unsound timber, then in an action on purchase he will be held responsible for the difference from the smaller amount I would have paid had I known of this. But if he knew but kept silent and so deceived the buyer, he will be held responsible to the buyer for all losses he sustained due to this sale [12, Ulpian, Edict, book 32, para.19.1.13.pr].
>
> *Iulianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto: ait enim, qui pecus morbosum aut tignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id ita esse scissem: si vero sciens reticuit et emptorem decepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morbosi pecoris perierunt,*

[1] I provide an English translation first, but also provide a version in the original language below, because of the possibility of concepts being 'lost in translation', a danger to which Sacco himself averts.

> *quod interfuit idonea venisse erit praestandum* [13, Ulpian, Edict, book 32, para.19.1.13.pr].

By the sixth century, in the time of Emperor Justinian, the variety of rules for different contracts led to confusion, and the formulae were replaced by the lex Sancimus [14]. Justinian ordered that, when the amount or the nature of the property was certain, as in the case of sales, leases, and all other contracts, the damages were not to exceed double the value of the property. In other instances, however, where the value seemed to be 'uncertain', the judges were allowed to ascertain the actual amount of the loss, and grant damages reflecting the actual loss:

> As an infinite number of doubts with reference to damages arose among the ancients, it seems best to Us, as far as is possible, to reduce this prolixity into more narrow limits.
>
> Hence We order that, whenever the amount or the nature of the property is certain, as in the case of sales, leases, and all other contracts, the damages shall not exceed double the value of the property. In other instances, however, where the value seems to be uncertain, the judges having jurisdiction shall carefully ascertain the actual amount of the loss, and damages to that amount shall be granted, and it shall not be reduced by any machinations and immoderate perversions of values leading to inextricable confusion, lest, when the calculation is indefinitely reduced, it may become impossible of application; as We know that it is in conformity with Nature that those penalties alone should be exacted which can be imposed with a proper degree of moderation, or are definitely prescribed by the laws [15, para.7.47.1].
>
> *Cum pro eo quod interest dubitationes antiquae in infinitum productae sunt, melius nobis visum est huiusmodi prolixitatem prout possibile est in angustum coartare.*
>
> *Sancimus itaque in omnibus casibus, qui certam habent quantitatem vel naturam, veluti in venditionibus et locationibus et omnibus contractibus, quod hoc interest dupli quantitatem minime excedere: in aliis autem casibus, qui incerti esse videntur, iudices, qui causas dirimendas suscipiunt, per suam subtilitatem requirere, ut, quod re vera inducitur damnum, hoc reddatur et non ex quibusdam machinationibus et immodicis perversionibus in circuitus inextricabiles redigatur, ne, dum in infinitum computatio reducitur, pro sua impossibilitate cadat, cum scimus esse naturae congruum eas tantummodo poenas exigi, quae cum competenti moderatione proferuntur vel a legibus certo fine conclusae statuuntur* [16, para.7.47.1].

The reasoning behind these limitations seems to have been a desire for greater certainty and coherence in the law, as well as a sense that moderation required some certain limit upon liability. The appeal to 'conformity with Nature' suggests that some basic human instinct or natural propensity underlies the limitation, but the normative aspect of what makes this just and fair is not explored in the law itself,

which, as we will see, left it open to others to infer moral explanations behind the limitation.

Justinian's Code formed the core of the *ius commune* in the twelfth and thirteenth centuries in European law, although canon law, and the Christian lens through which jurists interpreted the Code, fundamentally shifted the way in which the Code was interpreted.

As Zimmermann has explained, European jurists were forced to wrestle with the lex Sancimus until the nineteenth century, particularly with regard to the distinction between cases where the amount or nature of the property was certain, and cases where the value appeared to be uncertain [10, pp.828–29]. This struggle must be kept in mind when considering how French law developed.

However, before we turn to French law, we must consider the moral principles which contributed to the development of limitations upon damages. While Roman lawyers acknowledged that the reason for *ius* was to administer *justitia* [17, Ulpian, *Institutes, book 1,* para.1.1–1.1.1], from the sources left to us, they did not tend to engage in deep philosophical discussions about what justice meant morally [9, p.1]. Cicero was an important exception—he justified *ius* on the basis of Stoic philosophy—with *ius a naturae ductum* (rights deriving from nature) existing as an emanation of reason aligned with the natural order of things [18, Vol II, Ch.22, para.65].

By comparison with earlier pagan Roman commentators, later Christian commentators were far more concerned to identify the moral basis of justice in the law, but because Roman lawyers tended not to discuss this in detail, they turned to Greek philosophy to provide that content. Hence, we turn to Ancient Greece, and the works of Aristotle.

3 Moral Foundations: Commutative Justice

Aristotle's concern as a political philosopher was to provide a theory of law which supported a virtuous existence and promoted the 'perfect community', in accordance with 'natural justice' (set by nature, and immutable) and 'conventional justice' (set by communities, and subject to change) [19, p.4].

In *The Nicomachean Ethics*, Aristotle further distinguished between two forms of special justice [20, Book V, Ch.2, pg.1130b]. One the one hand, distributive justice involves the sharing of property between persons according to their deserts, and requires a *geometrical* proportion – that is, a person gets property or wealth according to their 'just deserts' [20, Book V, Ch.3, pp.1131a, 1131b]. On the other hand, commutative justice, the justice which rectifies transactions between persons, requires an *arithmetical* proportion. In other words, a person who takes from another is required as a matter of justice to restore the loss or the value of the loss to the person who has been wronged [20, Book V, Ch.4, pp.1131b, 1132a, paras.2–4]. Aristotle said of commutative justice:

> For it makes no difference whether a good man has defrauded a bad man or a bad one a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only at the nature of the damage, treating the parties as

> equal, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other has sustained damage.
>
> *οὐθὲν γὰρ διαφέρει, εἰ ἐπιεικὴς φαῦλον ἀπεστέρησεν ἢ φαῦλος ἐπιεικῆ, οὐδ' εἰ ἐμοίχευσεν ἐπιεικὴς ἢ φαῦλος· ἀλλὰ πρὸς τοῦ βλάβους τὴν διαφορὰν μόνον βλέπει ὁ νόμος, καὶ χρῆται ὡς ἴσοις, εἰ ὁ μὲν ἀδικεῖ ὁ δ' ἀδικεῖται, καὶ εἰ ἔβλαψεν ὁ δὲ βέβλαπται. ὥστε τὸ ἄδικον τοῦτο ἄνισον ὂν ἰσάζειν πειρᾶται ὁ δικαστής· καὶ γὰρ ὅταν ὁ μὲν πληγῇ ὁ δὲ πατάξῃ, ἢ καὶ κτείνῃ ὁ δ' ἀποθάνῃ, διῄρηται τὸ πάθος καὶ ἡ πρᾶξις εἰς ἄνισα· ἀλλὰ πειρᾶται τῇ ζημίᾳ ἰσάζειν, ἀφαιρῶν τὸ κέρδος* [20, Book V, Ch.4, pp.1132a, para.3].

There is debate concerning the precise meaning of the words used by Aristotle, as the exegetic literature on the topic demonstrates [21, pp.82–6; 22, pp.192–5; 23, pp.136–47; 24; 25, pp.133–52; 26, pp.133–52; 27, pp.153–7]. Importantly, Aristotle praised the virtue of the liberal person, who disposed of his money wisely, giving to the right people, the right amounts, at the right time [20, Book V, Ch 5, pp.1119b–1120a, para.1]. Finally, Aristotle also saw promise-keeping as virtuous and an aspect of a truthful man [19, Book IV, Ch.7, pp.1127a–1127b].

Aristotle's distinction between commutative justice and distributive justice does not seem to have influenced Roman law or affected the Roman conception of remedies, [28, pp.32–33; 29, pp.148–9] although, as noted above, Roman law had a firm concept of pecuniary compensation for wrongdoing.

Aristotle's notion of commutative justice entered European law and thought via the Scholastics. St Thomas Aquinas was inspired by Aristotle's search for principles of justice to promote the common good. However, as a devout Christian, Aquinas wished to show that the Christian God was the font from which all just laws flowed, but also to establish that 'natural law' was consistent with reason. It does not follow that Aquinas was not interested in the positive law and its operation; in fact, as Finnis notes, Aquinas developed the distinction between 'natural' and 'positive' law [30, p.195–200, 31, p.10]. He has also noted that Aquinas was intensely interested in positive of law, precisely because of how it can sometimes reflect both immorality and human fallibility:

> …Aquinas asserts and illustrates positive law's variability and relativity to time, place and polity, its admixture of human error and immorality, its radical dependence on human creativity, its concern with what its subjects do rather than their motive for doing it. [30, p.195]

Among other things, Aquinas sought to identify the moral principles which made positive law workable, consistent with reason and Christian morality, and his discussion of the principles governing remoteness should be understood in this vein. Again, Aquinas saw promising-keeping and truth as central to why contracts were binding upon parties [32, vol.II-II, q.110, a.3, ad.5]. He went further than Aristotle, and used Aristotle's ideas to develop a framework for when promises would be binding, and why: because the will and reason of the promisor have been exercised to make an agreement [28, pp. 11–14].

In his *Summa Theologiae*, Aquinas adopted Aristotle's distinction between distributive and commutative justice. He said, of commutative justice:

> On the other hand in commutations something is paid to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of that which belonged to the other. The result of this will be equality according to the *arithmetical mean* which is gauged according to equal excess in quantity.
>
> *Sed in commutationibus redditur aliquid alicui singulari personae propter rem eius quae accepta est, ut maxime patet in emptione et venditione, in quibus primo invenitur ratio commutationis. Et ideo oportet adaequare rem rei, ut quanto iste plus habet quam suum sit de eo quod est alterius, tantundem restituat ei cuius est. Et sic fit aequalitas secundum arithmeticam medietatem, quae attenditur secundum parem quantitatis excessum, sicut quinque est medium inter sex et quatuor, in unitate enim excedit et exceditur* [32, Vol.II, q.61, a.2].

A voluntary transfer required communicative justice, and therefore a response of equality [28, pp. 13–14], with like being replaced with like, whereas gifts were an example of 'liberality', and did not necessary require a response in the same way [28, p. 14]. The concept of 'liberality' is explained further below.

The Justinian Code had stipulated that if a seller of land received less than half the fair price, then the seller was entitled either to rescind the sale, or to obtain the difference between the true value and the price paid [15, para.4.44.2]. The remedy for that difference in value in medieval times under this provision of the *ius commune* was known as the *laesio enormis*, and medieval jurists had expanded its availability to buyers as well as sellers, and to a larger group of contracts [33, p.470].

Although the Romans had not analysed their law in this way, Aquinas considered that Aristotelian commutative justice must provide the moral underpinning of this remedy: if a transfer was for less than half the value, either the thing must be given back, or fair value for the thing they transferred should be paid [32, Vol.II, q.77, a.1, ad.1]. He also contrasted commutative justice with 'liberality': sometimes, someone gives something with the expectation of receiving nothing in return, which explained why positive law developed by humans did not always provide a remedy for these situations. Therefore, he sought to give a moral context to the positive law, and to rationalise it as just and fair.

The Late Scholastics, continuing the same exercise as Aquinas, developed his ideas further, and imbued a moral value to promise keeping, as well as distinguishing between one-sided promises and mutual promises:

> The late scholastics analysed the binding force of contracts in terms of the Aristotelian and Thomistic virtues of promise-keeping, commutative justice, and liberality. The Romans had not analysed the problem that way. Indeed, they had scarcely analysed it at all. Gaius had simply observed that different contracts are formed in different ways: by consent, by delivery, by writing, and

> by words. Nevertheless, the late scholastics read references to promise-keeping, commutative justice, and liberality into particular Roman texts.
>
> They read texts that mentioned *pollicitatio* or *pactus* to refer to promise-keeping. As mentioned earlier, by a *pollicitatio*, a person undertook to support public works or to do something for the city in gratitude for an honour he had received. One Roman text observed that a *pollicitatio* was the consent of one party only, as distinguished from a *pactus* or agreement which was the consent of both. Another text said that a *pactus* was the consent of two or more parties to one thing. Lessius and Molina concluded that a promise was a *pollicitatio*, and a promise accepted by the other party was a pact or agreement [33, pp.71–72].

Thus, the signifier '*pollicitatio*', which, in its original pagan context, had signified the practice of doing something for one's city after an honour was conferred [34, pp.52–56], was interpreted by the late Scholastics to mean something quite different to its original signified meaning. Again, like Aristotle and Aquinas, the late Scholastics saw consent as central to why contracts were binding [28, pp. 12–15].

In the seventeenth century, the Dutch humanist legal scholar Hugo Grotius (Huig de Groot) was inspired by the works of the late Scholastics in his work [35, II, XVII, para.II.i.2]. Grotius's ideas were developed after the Reformation, and Grotius himself was a Protestant [11, p.378, p.381]. Europe at this time was wracked by religious wars, including the Thirty Years' War between Catholic and Protestant nations (although the French sided with the Protestants) from 1618 to 1648, and the Eighty Years' War between the Dutch and the Spanish also raged from around 1566 to 1648. The French Wars of Religion ended in 1598, when 15-year-old Grotius also visited Paris as part of a Dutch diplomatic mission, where he was presented to Henri IV. Later Grotius was forced to flee Holland to exile in France, and dedicated *De Jure Belli* to Louis XIII. This led him to be concerned by the way in which justice went by the wayside when war raged, and hence he sought to give a clear account of what justice entailed, according to natural principles and reason, but importantly, he sought to divorce these principles from notions of divine revelation [33, pp.130–31]. Nonetheless, his writings indicate that he believed that—because humans had been given natural reason by God—laws based on reason were indirectly infused with a divine nature [36, pp.797–803]. Ultimately, the Enlightenment mission to divorce morality from culture and religion may have been futile [37, pp.29–39].

In his work on contract law, Grotius used the work of the late Scholastics to distinguish between gratuitous contracts where a promisor enriched the other party at his own expense, and onerous contracts where a promisor exchanged his own performance for one of equivalent value [35, II, XII, pp.1–7]. Other Northern natural law jurists, including Samuel Pufendorf and Jean Barbeyrac, used similar conceptions of contract [33, p.4]. Pufendorf was the great populariser of the idea that consent was the animating idea behind contract:

> Since promises and pacts regularly limit our limit our liberty and lay upon us some burden in that we must now of necessity do something, the performance or omission of which lay before entirely within our own decision, no

> more pertinent reason can be advanced, whereby a man can be prevented from complaining hereafter of having to carry such a burden that he agreed to it of his own accord, and sought on his own judgement what he had full power to refuse [38, para.3.6.1]

Eventually, the influence of the moral debates of the late Scholastics upon legal conceptions of contract was no longer explicit in written works. While the eighteenth-century German jurist Christian Wolff, for example, adopted Grotius's and Pufendorf's conception of contract, he did not discuss whether promises were binding as a matter of fidelity or as a matter of justice [33, pp.75–76; 39, iii, §361]. German law reflected a generally positivist shift in the eighteenth and nineteenth centuries, with a focus on 'philosophy of law' as a science rather than 'natural law', although rationalistic natural law still persisted into the mid-nineteenth century [40, p.106].

It has been convincingly argued that the drafters of the French Code Civil drew heavily on French scholars such as Pothier, who had drawn in turn upon Grotius and the Late Scholastics for the legal formants that they used, and hence the shape of the codified law in France reflects this [33; 10, pp.829–33]. It is to French law that we now turn.

4 Legal and Moral Foundations are Entwined: French Law

Above, I have discussed how the legal foundations of damages for breach of contract in the *ius commune* derive from Roman law, and how the lex Sancimus distinguished between cases when the amount or the nature of the property was certain, and cases where the value seemed to be "uncertain". Among those who struggled with this distinction were the French, who used a mix of the *ius commune* and customary law (with strong regional variations).

In the sixteenth century, the French jurist Molinaeus (Charles Dumoulin) first argued that the distinction in the lex Sancimus depended on whether a loss was 'foreseeable' [10, pp.829; 41, pp.1469–70, para.4]. Molinaeus sought to strip concepts back to their original foundations, including the Church. Reflecting the religious conflict and confusion during this time, Molinaeus converted from Catholicism, to Calvinism, to Lutheranism, back to Calvinism, and then back to Catholicism on his deathbed [42, p.97]. He also wished to return the *ius commune* to its original foundations, and made many radical suggestions for the reform of French law [42, pp.107–108]. He contributed to the "secularisation" of French law, suggesting that jurists and temporal authorities should determine commercial and private law, not theologians or spiritual authorities, and argued that the *ius commune* was rooted in French custom, not Roman law [42, p.112–113]. However, he additionally argued that the canon law doctrine that all agreements were binding as a result of mutual consent should be applied to civil law as well [42, p.112]. This position on mutual consent in contract feeds into his efforts to rationalise the lex Sancimus, where Molinaeus argued that the rules with regard to certain objects in contracts only made sense if the limits were imposed on the basis of what was known or perceptible at the time of the contract:

> For as the entire reasoning of the law dislikes lack of limits, perplexing circuitous questions, and the infinite trifles of what is at stake, so the particular reason for the limitation in cases where the property is certain is because, probably, it was not foreseen nor thought of taking on a greater burden, or a danger beyond what the main interest [of the contract] is. This reason is also in uncertain cases so far as it is foreseen. From then until now, the same restraint must be maintained in the equity and spirit of the law.[2]
>
> *Ut enim ratio decidendi totius legis est odium immensitatis, et perplexi circuitus questionum, et tricarum infinitaru eius quod interest, ita particularis ratio limitationis in casibus certis est, quia verisimiliter non fuit praevisum nec cogitatum de suscipiendo maiori damno, eul periculo ultra rem principale, quae sit res ipsa principalis. Haec autem ratio quandoque; est in casibus incertius quadantenus reperitur. Unde tunc eatenus in illis eadem moderatio servanda est ex aequitate et mente huius legis.* [43, para.60].

Molinaeus argued that it was equitable and fair to limit damages for breach of contract in this manner, because otherwise the distinction in the lex Sancimus would be otiose or inconsistent [43, para.58]. His concern was to find a moral basis for an otherwise apparently arbitrary rule; the ability to predict what was the likely outcome of breach, based on the knowledge of the parties and the nature of the contracted-for benefit, was a rationalisation he thought accorded with the natural spirit of the law, the importance of consent in contract, and the need for some kind of restraint on liability.

In the eighteenth century, Robert Joseph Pothier, another French jurist, took Molinaeus' ideas and uncoupled them from the lex Sancimus [10, p.829]. He said that the lex Sancimus had no authority in French law, except insofar as the principles provided an indication of a limitation on damages based on "la raison et l'équité naturelle" [reason and natural justice] [44, Part I, Ch.II, Art.3, para.164]. Gordley notes, however, that while scholars such as Pothier drew on late Scholastic doctrines, these doctrines were by that point, entirely untethered from their Aristotelian and Thomistic roots [28, pp.161–64], again, reflecting an increasing tendency to prioritise reason as the animating principle behind the law.

Pothier's conception proved extremely influential in the development of remoteness rules in France. He said:

> In general 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*. [damages because of the very object (of the obligation)] [45, para.161].

[2] There is no English translation so this translation is the author's.

> *Ordinairement, les parties son censées n'avoir prévu que les dommages & intérêts, que le créancier par l'inexécution de l'obligation, pourrait souffrir par rapport à la chose même qui en a été l'object, & non ceux que l'inexécution de l'obligation lui a occasionné d'ailleurs dans ses autres biens; c'est pourquoi dans ces case, le débiteur n'est pas tenu de ceux-ci, mais seulement de ceux soufferts par rapport à la chose qui a fait l'object de l'obligation,* damni & interesse, propter ipsam rem non habitam [44, para.161].

In other words, the parties to a contract should only be liable for those damages which are in their contemplation, and not incidental costs arising from the breach. The importance of the precise object of the agreement remains relevant, as in the lex Sancimus.

Pothier illustrates his principle using the example of the sale of a horse. On the one hand, he says, if I sell a person a horse which I am obliged to deliver by a certain time, and I fail to deliver it on time, I am obliged to pay the value of a like horse. If the value of horses has gone up in that time, it is my bad luck: the horse was the object of the contract, and it was in my contemplation that this loss might be suffered, given that the value of horses fluctuates. On the other hand, if I sell a churchman a horse, and because I fail to deliver it in time, he does not arrive to his benefice in time to get his living, I should not be liable for the loss of the living, for this was not in contemplation at the time of the contract. The situation would be different, Pothier continues, if there was an express clause in the contract regarding the necessity to arrive at the benefice in time, otherwise the churchman would lose his living [44, para.162].

Much is made in a subsequent discussion, regarding the hypothetical supply of wood to prop up a building, of what a particular contractor should know in the course of his business, and what risk he has undertaken according to the terms of the contract [44, para.163]. Pothier says that this approach is taken because of the consensual and voluntary nature of contract itself:

> The principle upon which this decision is founded, is that the obligations which arise from contracts can only be formed by the consent and intention of the parties. Now the debtor in subjecting himself to the damages and interests which might arise from the non-performance of his obligation, is only understood as intending to oblige himself, as far as the sum to which he might reasonably expect that the damages and interests would amount at the highest: then, when these damages and interests happen to amount to an excessive sum, of which the debtor could never have any expectation, they ought to be reduced and moderated to the sum to which it could reasonably be expected that they might amount at the highest, the debtor not being understood to have given any consent for binding himself further [45, para.164].
>
> *Le principe sur lequel cette décision est fondée, est que les obligations qui naissant des contrats, ne peuvent se former que par consentement & la volonté des parties, ou le débiteur en s'obligeant aux dommages & intérêts qui résulteroiant de l'inexécution de son obligation, est censé n'avoir entendu ni voulu s'obliger que jusqu'à la somme à laquelle il a pû vraisemblablement prévoir,*

> *que pourraient monter au plus taut lesdits dommages & intérêts, & non au-delà; donc lorsque ces dommages & intérêts se trouvent monter à une somme excessive, à laquelle le débiteur n'a pû jamais penser qu'ils pourroient monter, ils doivent être réduits & modérés à la somme à laquelle on pouvoit raisonnablement penser, qu'ils pourroient monter au plus haut, le débiteur étant censé n'avoir pas consenti à s'obliger à davantage* [44, para.164].

Finally, Pothier said the rule was different where a person committed fraud; in that instance, the breaching party was liable for all injury which flowed from the breach, specifically mentioning the example of the seller of a cow with a contagious distemper [44, para.166]. This was an attempt to rationalise the different rules applying to remoteness in the *actio empti* (the action allowing a buyer in a contract of sale to recover losses for breach from the seller) as stated by Paulus and Ulpian in the Digest [10, pp.831–32]. In other words, you can only voluntarily agree to undertake risks of which you are aware, and to hold otherwise is unfair, particularly given the voluntary and forward-looking nature of contract.

Pothier's conception of remoteness in contract damages was used in the drafting of the 1804 French Code Civil [46]. It is worth discussing the history behind the Code Civil briefly, which was enacted by Napoléon after the French Revolution. During the French Revolution there was a move to make statute the only source of law, as expressing the general will of the people, and interpretation by judges was seen as illegitimate [47, pp.137–138]. Troper has argued that the Revolution blurred the distinction between natural and positive law:

> …[S]tatutory law was defined by article 6 of the Declaration of the Rights of Man and the Citizen as the expression of the general will. This document itself, as the title tells, is not an act of will but a declaration of the natural rights of men in society. This does not mean that statutes *ought* to be the expression of the general will but that they are presumed to express that will and those who express the will and those who express the will are presumed to be representatives of the sovereign. … The legislative process is not viewed as a confrontation of opinions but as a search for the general will, and it is a search for the truth. …
>
> …
>
> Since statutes are the expression of the general will, they are not the supreme but the only source of law [47, p.137].

With the animating power of law placed firmly in the hands of the people and the legislature, it mattered very much what the law actually said and whether it was a valid reflection of their will. The attitude permeated the enactment of the Code Civil itself, and the way in which French courts subsequently implemented it. There was an avoidance of any notion that judges were 'interpreting' the law [47, pp.137–140].

Art 1149 of the 1804 Code Civil stated that a plaintiff was entitled to damages "de la perte qu'il a faite et du gain dont il a été privé" [for the loss he has suffered and the gain of which he has been deprived] subject to certain exceptions.

The exceptions to Art 1149 were outlined in Arts 1150 and 1151. Article 1150 stated that the defendant would only be liable for damages which were or could have been contemplated at the time of making of the contract, unless the defendant was fraudulent:

> The debtor is only bound to pay the damages and interest which were foreseen, or which might have been foreseen at the time of [making] the contract, when it is not in consequence of his fraud that the obligation has not been executed.
>
> *Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée.*

Pothier's influence upon the formulation can clearly be seen with the phrase, "qui ont été prévus ou qu'on a pu prévoir lors du contrat", and in the mention of "dol" or fraud.

Article 1151 continued that the damages must only include "que ce qui est une suite immédiate et directe de l'inexécution de la convention" [that which is an immediate and direct consequence of the breach of the agreement] even if there is fault.

While it might appear that Pothier's work and the Code Civil reflect a notion of "Will Theory" (i.e. that the parties must agree to the liability imposed upon them) Gordley argues that this was an *ex post facto* justification placed on these rules in the nineteenth century [33, p.161–64]. In fact scholars such as Pothier and Domat lifted the legal formant of contemplation of the parties from earlier scholars, who had given it a complex moral context, but that moral context was stripped from the formant. Some other justification was necessary, given that the formant was untethered from its natural law moral justification. Gordley and Jiang argue that French jurists of the nineteenth century, such as Gounot, realised that the rules were missing moral content, and reflecting the spirit of the nineteenth century, came to rationalise these rules according to "Will Theory" [48, p.730].

As Zimmermann has outlined, the German position with regard to damages is embodied in the *Differenztheorie*: namely that the plaintiff is entitled to the difference between the plaintiff's position in fact, and as it would have been but for the breach [10, p.824]. The German Civil Code or *Bürgerliches Gesetzbuch* (BGB) starts from a position where the the defendant must make restoration to the plaintiff for a breach of contract, and only if restoration is impossible or insufficient will he be liable for damages [49, §249(1), §251(1)]. With regard to loss of profits, the BGB simply states in §252:

> The damage to be compensated also comprises the profits lost. Those profits are considered lost that in the normal course of events or in the special cir-

> cumstances, particularly due to the measures and precautions taken, could be expected to be attained as a matter of likelihood.
>
> *Der zu ersetzende Schaden umfasst auch den entgangenen Gewinn. Als entgangen gilt der Gewinn, welcher nach dem gewöhnlichen Lauf der Dinge oder nach den besonderen Umständen, insbesondere nach den getroffenen Anstalten und Vorkehrungen, mit Wahrscheinlichkeit erwartet werden konnte.*

In a similar way, the Italian Codice Civile states in Art 1225:

> If the non-performance or delay does not depend on the debtor's willful misconduct, compensation is limited to the damage that could have been foreseen at the time in which the obligation arose.[3]
>
> *Se l'inadempimento o il ritardo non dipende da dolo del debitore, il risarcimento e' limitato al danno che poteva prevedersi nel tempo in cui e' sorta l'obbligazione* [50].

In German and Italian contract law, 'adequate causation' has been used as a limiting criterion: in other words, a breaching party is not liable for losses which are not a normal or natural consequence of the breach. This has been criticised as not providing a principled limitation on liability [41, p.1469, para.3].

The sections in the 1804 French Code Civil have been largely reproduced in the 2016 French Code Civil [51], with the main difference being that under the new Art 1231–3 (the equivalent of Art 1150), damages will not be confined to those losses in the contemplation of the parties in the case of "gross or fraudulent breaches" [52].

A curious set of events led to Pothier's ideas making their way into the heart of the common law, and they were incorporated into judge-made law in the English case of *Hadley v Baxendale*. It is this strange (but remarkably successful) transplant which will be considered next.

5 Adoption by English Common Law and the Rise of Will Theory

Although contract is commonly thought to be one of the two pillars of the common law, along with tort, the concept of contract *qua* contract is a relatively recent one in the common law, with the doctrine only coalescing as such in the eighteenth and nineteenth centuries [53, Ch.1, 54, pp.12–29]. The constraints of the common law pleading system and the bifurcation of courts into common law and Chancery courts meant the principles were not clearly developed for some time. Hence, Sir John Baker has observed that "the English law of contract has not evolved linearly from a single starting-point. Its history has been affected by evidential problems, jurisdictional shifts, and the extension of trespass actions to remedy the deficiencies of the *praecipe* writs" [55, p.338].

[3] Again, this translation is the author's. Any errors are her own.

Because damages were awarded by juries in the common law, the principles for their award were unclear, although it has been argued that from the sixteenth century onwards, plaintiffs were compensated for the value of the promised performance under debt or *assumpsit* [56]. Both Gordley and Swain note that the late eighteenth century treatise writer, Sir William Blackstone [57], wrote only a few pages on contract, and in what he wrote, he drew on the works of natural lawyers and civilians [26, p.136, 52, pp.32–36]. Prominent textbooks of the early nineteenth century contained only limited discussions of contract damages [58, Ch.VII, pp.336–46; 59, Ch.VII, 758–71], or no discussion at all [60, 61].

There was clearly a need for settled principle to constrain liability for damages for breach of contract in common law jurisdictions. Bruce Kercher has illustrated this with an early Australian case [62], *Girard v Biddulph* [63], which took place twenty years before *Hadley v Baxendale*. In an odd pre-figuring of *Hadley v Baxendale*, the case also involved a mill. The plaintiff, Captain Biddulph, was the owner of a steam-powered flour mill in Cockle Bay in Sydney, and sued the defendant manufacturer, Mr Girard, for the loss of profits incurred because the steam engine had not been completed on time. By trial, the engine was still undelivered [63]. The contract had a liquidated damages clause stating that damages for certain breaches were capped at £25. The plaintiff claimed £2000, representing consequential loss of profits. At this time, in the common law, damages were still a matter for the jury. The jury found a verdict for the plaintiff of £250, and the defendant sought to have the jury's verdict set aside. A contemporary newspaper report indicates that Captain Biddulph assaulted Mr Girard for his failure to provide the engine on time. This matter was also tried, and Captain Biddulph was obliged to pay damages of £25 to Mr Girard for horse-whipping him and lying about it [64].

Three judges of the New South Wales Supreme Court held that while the liquidated damages clause did not apply, the jury's verdict was excessive, because the real losses as at the date of trial could not yet have totalled £250. However, they stated new principles for the jury, saying that consequential profits were recoverable. Forbes CJ said, in a judgment with which Dowling J and Burton J apparently agreed:

> 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 [63].

When the case was retried, the jury awarded the plaintiff £83 (for the cost of putting the engine into working order and the consequential loss of profits).

As Kercher notes, this case is fascinating, as early Australian judges did not have access to many law texts [62], and it seems that the Australian courts came to a pragmatic approach *independently* of any debates on remoteness in contract law damages. While it might be argued that this case was different to *Hadley v Baxendale*, because the mill owner recovered the consequential loss of profit, it is also

worth noting the different context of the transaction, which did not involve a carrier, but a manufacturer of machinery. In this regard, the conclusion of the New South Wales Supreme Court (that a manufacturer of machinery should be liable for ordinary losses of profit suffered by a factory owner) could be said to anticipate the much later English case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [65], where the launderers and dyers were compensated for ordinary loss of profits incurred by the failure of a manufacturer to deliver a boiler, but not for unusually lucrative follow-on contracts.

On the other hand, as Kercher argues:

> …Forbes…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 [62, p.134].

Given that there was a need for a limiting principle (at the very least, to provide guidance to juries) common law judges were eager to find a coherent doctrine. The fact that there was previously no settled rule meant that whatever was transplanted would flourish, as long as it it fitted with the general direction contract was taking. The common law treatise writers and judges found the solution in Pothier.

However, while common law treatise writers looked at civilian law and natural law accounts of contract, they did not borrow other natural law concepts, such as the doctrine that contracts of exchange require equality, or the notion that contracts could be classified into types, each with a set of natural obligations to which a party to that type of contract was bound. Gordley notes that the late Scholastics had conceived of contract as consensual, and as reflecting the voluntary wills of the parties, but had also discussed matters such as the virtues of promise-keeping, liberality, and commutative justice. By the nineteenth century, consent was signified by the idea of will alone: a contract was binding because the parties said that it should be so [33, p.146].

There were several steps which led to the acceptance of Pothier's ideas in the common law of England and Wales (and subsequently in Australia too). Firstly, in

1806, Pothier's *Treatise on the Law of Obligations* was translated into English [45], and avidly consumed by English lawyers [66, p.351, p.399]. Secondly, the American legal scholar Theodore Sedgwick was explicitly inspired by Pothier's works in his 1847 *Treatise on the Measure of Damages* [67, pp.64–67], using some of the same examples as Pothier himself used. There was also a growing acceptance of Will Theory as the moral basis for contract, with which Pothier's formant was consistent. Indeed, AWB Simpson said that in nineteenth century, the common law of contract regarded the will of the parties "as a doctrinal *grundnorm*, from which all other rules are derived" [68, pp.250–51]. The spirit of the age was one where self-interest and commercial dealings were paramount, as the Industrial Revolution led to a desire for certain contractual principles [65]. Certainly, Williston says:

> It was a consequence of the emphasis laid on the ego and the individual will that the formation of a contract should seem impossible unless the wills of the parties concurred. Accordingly we find at the end of the eighteenth century, and the beginning of the nineteenth century, the prevalent idea that there must be a "meeting of minds" (a new phrase) in order to form a contract; that is, mental assent as distinguished from an expression of mutual assent was required [69, p.368].

He linked the rise in freedom of contract to developments in politics and economics [69, p.366]. On the other hand, legal historians have argued that the emphasis on social and political forces is overstated. For example, Swain notes there was a revolution in contract law in the early nineteenth century in England, but that this was 'the end product of a long process of change rather than the beginning of a new one' [54, p.173].

In 1854 in *Hadley v Baxendale* [70], the Court of Exchequer formulated the common law test of remoteness to limit liability in contract. Baxendale may not have been hopeful: he had been involved in a similar case involving most of the same judges, and had been required to pay for consequential losses [71].

It is clear that the Court of Exchequer in *Hadley v Baxendale* was inspired by Sedgwick's writings on Pothier, as Sedgwick and Pothier were discussed extensively by counsel in argument, with Parke B showing particular interest in the discussion [70, pp.345–54; pp.147–50]. As Florian Faust has demonstrated with his thorough history of the case, Pothier's writings were already known among Anglo-American judges and writers [72, p.43]. Moreover, it seems that Baxendale's counsel, Sir James Shaw Willes, was a skilled comparative lawyer [73, p.257–58].

The dispute in *Hadley v Baxendale* arose when the crankshaft of the steam engine in the plaintiff's flour mill broke. The defendant carrier contracted to deliver the broken crankshaft from Gloucester to Greenwich, at a cost of £2 4 *s.*, where it would be used to make a cast for a replacement crankshaft. The delivery of the broken crankshaft was delayed, and the plaintiff received the new crankshaft several days after the promised date of delivery. The plaintiff's flour mill was idle during this time, and he suffered a substantial loss of profits. At first instance, the jury awarded the plaintiff damages (which included loss of profits) in the sum of £50. The defendant appealed to the Court of Exchequer and argued that he did not know that the delayed delivery of the crankshaft would result in the loss of profits. In this instance,

it was said that the loss of profits was a special circumstance which had not been raised with the defendant at the time when he accepted the contract of carriage, and accordingly, he was not liable for the loss of profits arising from the late delivery.

As noted above, measurement of damages was generally a question for the jury, and in fact, Alderson B's remarks derive from his instructions to the jury. Baron Alderson outlined the two "limbs" of *Hadley v Baxendale*, which required the loss to be either natural and usual, or, if the loss involved special circumstances, for those circumstances to be communicated to the defendant at the time of making the contract [70, pp.355–56; p.151]. In modern English law, the remoteness rule has sometimes been compressed to a single test, namely whether the loss in the contemplation of the parties, having regard to the information known to them at the time of making the contract [74, p.384].

Baron Alderson's discussion of the policy reasons behind the distinction between naturally arising losses and "special circumstances" should be set out, as they provide some clue as to the link:

> 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... But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred, and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract [70, p.355; p.151].

In other words, if the loss was an ordinary one, the defendant will be liable. However, if the defendant might be subject to unusual losses as a result of a breach of contract, it is up to the plaintiff to raise those unusual losses *at the time of making the contract* so that the defendant can make a choice as to how to deal with the risk to which they are exposed (charge a higher rate, include an exclusion clause etc.). The influence of Pothier's work (via Sedgwick) can very clearly be seen in the courts' formulation. That being said, the English courts did not import Pothier's notion that there should be a different rule for fraudulent breaches.

Richard Danzig argues that the decision was a product of the English Industrial Revolution; just as production was becoming standardised and mechanised, so too were contract damages [73].

At the same time, in the nineteenth century, there was a general drive to codify laws, following the example of the 1804 French Code Civil. The purpose of such Codes was to state the law in simple terms so that a lay person could understand the principles governing their legal obligations. Codification swept across Continental Europe, with countries including Austria [75], Italy [76], Spain [77], Germany [49], and Switzerland [78] passing Civil Codes between 1811 and 1907.

Although the English political philosopher and legal positivist Jeremy Bentham argued that codification was preferable, because the law should be easily stated, able to be justified, and knowable by the public [79], this idea did not find favour in England. Civilian style-codes were not adopted in most common law jurisdictions (except in territories which were French-influenced, such as Louisiana or Quebec). Nonetheless there were several attempts to introduce Codes in the United States. In 1862, for example, a Draft New York Civil Code was proposed, including a proposed §1840, which attempted to codify the principles of *Hadley v Baxendale* [80].

In the end, only some British colonies of the nineteenth century ended up with "codified" laws. First the Colonial government codified laws for its Indian colonies [81], and then its Malayan colonies (with the Indian code being largely transplanted wholesale, with some changes for local measurements and currencies) [82, later replaced by 83, 84], with Malaysia receiving a "double transplant" [85, p. 404]. The codification thus undertaken was not equivalent to a Civilian codification. The codes more resemble a hybrid between a Civilian Code, common law legislation, and a US Restatement.

It is to the influence of Indian codification upon the development of remoteness rules in the common law that we now turn.

6 The Indian Connection

First it is necessary to set out a little of the history of the British colonisation of India and surrounds. Colonisation began in earnest in the eighteenth to nineteenth centuries, when the East India Company took control of "Presidency" towns: Madras, Bombay (Mumbai) and Calcutta (Kolkata). From 1757 to 1858, these portions of India came under Company rule, and British control of India began to expand. The Company was empowered to apply English law in the trading territories controlled by it, but only English law as it stood before 1726 [86, pp. 373–79]. British courts in Presidency Towns initially took into account the personal law of the persons involved in contracts. The religion or ethnic background of the defendant was supposed to determine which law was applied (Muslim, Hindu or British). At first, the British tried to compile a collection of Hindu laws governing disputes (*dharmashastra*) and hence in 1776, the East India Company privately published *A Code of Gentoo Laws, or, Ordinations of the Pundits* [87]. However, the eleven *pandits* consulted by Warren Hastings for the compilation of these laws did not accurately describe Hindu law, and favoured their own caste (Brahmin) in devising the rules [88, p. 106]. Codification continued to be an attractive option, and in 1778, Sir William Jones, a judge in Bengal, wrote to Lord Cornwallis, the Governor General and Commander in Chief of India, that there was a need for a codified version of Hindu and Muslim law "after the model of Justinian's inestimable Pandects" [89, p.93]. In fact, by the beginning of the nineteenth century, the British realised that the local laws applied in India varied according to locality, size and organisation of village or settlement, traditions, the caste composition of the area (where relevant), religious composition and a host of other factors [90]. The divide between local

custom applied in the villages and the English-derived law applied in the courts persisted into at least the twentieth century, although sometimes custom developed in the shadow of the colonial law [90].

Ultimately, in practice, the British courts in the Presidency Towns often simply applied the English law of contract [91, pp.180–89]. In the rural areas outside the towns (the *mofussil*) the British courts were empowered to use "justice, equity and good conscience" and thus the law applied was more ad hoc and likely to reflect the religions of the persons involved [91, pp.189–98], although over time, the breadth of the notion of "justice, equity and good conscience" allowed colonial judges to override personal law, and substitute British legal principles for local law [86, p.393].

After the Indian Rebellion in 1857 against East India Company rule, the British 'Raj' took over the governance of India and substantial parts of South Asia. After many stops and starts, the Indian Contract Act 1872 was passed. It did not attempt to draw on local Indian legal or religious customs, and instead, transplanted common law English contractual principles into India. Swain has considered how the Indian codifiers were influenced by the work of Pothier, as well as (to a lesser degree) by David Dudley Field's Draft New York Civil Code of 1862 [92]. Of course, *Hadley v Baxendale* itself was pivotal to the codification of the rule on contract damages, even though at the time of Indian codification, Niranjan has noted the case was still relatively controversial [93, p.198]. Indeed in 1873, the American editors of *Smith's Leading Cases* described it as "a merely arbitrary rule, laid down in our courts for the first time" [94, p.492]. Despite the fact that it had not yet become fully settled law in its home jurisdiction or in other common law jurisdictions, the rule in *Hadley v Baxendale* represented a good 'fit' for the general approach of the Indian Contract Act, which generally reflected a Will Theory approach.

Accordingly, the first paragraph of s 73 of the Indian Contract Act 1872 states:

> When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

It is easy to see the influence of *Hadley v Baxendale* upon the drafting of this paragraph: "naturally arose in the usual course of things" and "which the parties knew, when they made the contract, to be likely to result from the breach of it," are clearly taken from Baron Alderson's judgment. The rule in *Hadley v Baxendale* is further reiterated by the second paragraph to s 73, "Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach."

Section 73 is also accompanied by eighteen illustrations ((a) to (r)) explaining how contract damages are to be calculated in various circumstances. Again the influence of *Hadley v Baxendale* is writ large. Illustration (i) is clearly based upon a variation of the facts of *Hadley v Baxendale*:

> *A* delivers to *B*, a common carrier, a machine, to be conveyed without delay, to *A's* mill, informing *B* that this mill is stopped for want of machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

In fact, the illustration also anticipates the result of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [65], where the non-breaching party was compensated for expected loss of profit, but not for unusually lucrative follow-on contracts.

Illustration (p) is also based upon a variation of the facts of *Hadley v Baxendale*, involving a delay in delivery of manufacturing materials rather than a common carrier:

> *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B's* mode of conducting his business. *A* breaks the promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by closing of the mill.

I have argued elsewhere that because British lawyers in India used *Hadley v Baxendale* as a basis for their codification, this fed back into English law, with *Hadley v Baxendale* becoming an established part of the English common law [95]. In other words, by drawing up the rule for use by another colony, the drafters became convinced of the efficacy of it, even though the United Kingdom itself never proceeded with codification.

Sir Frederick Pollock an eminent British judge, treatise author and jurist, had an interest in the Indian Contract Act 1872, and his first edition of *Principles of Contract*, published in 1876, notes specifically on its cover page that it contains references to the Indian Contract Act 1872 [96]. Later, in 1905, Sir Fredrick Pollock and Sir Dinshaw Fardunji Mulla co-authored the first treatise on the Indian Contract Act 1872 [97]. Moreover, a prominent early contract damages case in the Privy Council arose in India [98]. Therefore it seems clear that the developments in the Indian Contract Act 1872 had a perhaps hitherto unrealised influence on the development of the contract law of England and Wales, and hence upon other common law jurisdictions such as my home jurisdiction of Australia.

Foreign legal transplants are notorious for not necessarily flourishing in foreign jurisdictions, or for growing in unexpected ways [85]. For the moment, however, s 73 of the Indian Contract Act and its progeny continue to operate effectively right up to the present day in India, Pakistan, Bangladesh, and Malaysia. Interestingly, in instruments designed to harmonise contract law, such as the United National Convention on Contracts for the International Sale of Goods [99], the foreseeability test has also been adopted [41, pp.1470–71, para.5].

7 Contemplation of the Parties: A Thing of the Past?

What then, is the animating principle behind our current common law rules? In some ways, I feel that we are too close to tell with any clarity. I have argued elsewhere that, in a common law context, the concerns reflected in these rules are primarily those of *interpersonal justice*, including whether the loss was predictable (in which case the defendant will be more likely to be liable), the extent of the defendant's control over events (the greater the defendant's control over the, the more likely the defendant is to be liable), and whether the defendant would be subject to an unreasonable burden (if so, the defendant is less likely to be liable) [100]. Interestingly, in considering remoteness in these terms, we are reminded of the focus of the Scholastics: contract law's focus on interpersonal justice and what amount is necessary to fairly compensate the plaintiff fits with the notion of commutative justice as the animating principle behind compensation for breach of contract [101].

Although, as noted, the 2016 French Civil Code has retained contemplation of the parties as an essential element of entitlement to damages for breach of contract, there has been the suggestion by the English courts that the rule in *Hadley v Baxendale* reflects outdated notions, and that it is time for a new principle. This approach reached its apogee in the recent House of Lords case, *Transfield Shipping Inc v Mercator Shipping (The Achilleas)* [102]. In *The Achilleas*, Lord Hoffmann (supported by Lord Hope and possibly Lord Walker) advanced an "assumption of responsibility" test, apparently intended to replace the remoteness test enunciated in *Hadley v Baxendale*.

Lord Hoffmann suggested that the *Hadley v Baxendale* two-limbed test could be reduced down to one single test: looking at the intentions of the parties in an objective manner, did the defendant *assume responsibility* for the risk? The reason given was in part that this would better reflect the voluntary nature of contracting, and that the parties to the contract did not just accept the primary obligations under the contract, but also agreed to the secondary obligations of remedies. While the loss in question was a 'first limb' loss in *Hadley v Baxendale* terms [cf 103, pp.88–97], Lord Hoffmann (with whom Lord Hope and Lord Walker agreed) held that in the context of industry practice in that particular industry (the shipping industry), the breaching party could not have assumed responsibility for the loss of a follow-on charter caused by the late return of a ship. Lord Rodger and Lady Hale (with whom Lord Walker also agreed) applied *Hadley v Baxendale* and held that while the kind of loss was foreseeable, the precise extent of it was not foreseeable. Lord Rodger's speech has been criticised on the basis that it is the only the *kind* of loss which must be foreseeable, not the extent [104, p.409; 105, p.123]. Baroness Hale expressed doubts as to whether the charterer's liability should be limited, but said that if it was, she preferred Lord Rodger's reasons [102, para.93]. Lord Walker's speech is unclear; among other things, he expressed simultaneous agreement with Lord Hoffmann, Lord Hope and Lord Rodger [102, para.87]. For this reason, it is unclear whether Lord Hoffmann and Lord Hope's speeches formed the ratio of the decision [106, p.6; 107, pp.46–7; 108, para.29–147].

Zimmermann has noted that the 'scope of liability approach' fits with the existing way in which German law approaches limitation of liability in contract [41, pp.1471–72, para.8]. He observes that Molinaeus considered the example of a carpenter who sold a box for the purpose of transportation of fruit. If the purchaser then used the box to transport wine, and the box leaked, the carpenter would not be liable because 'periculum tacite non suscepit' [he did not accept the undisclosed risk] [43, para.60]. Zimmermann continues:

> We are dealing here with a question of allocating the liability risk. How that risk has to be allocated does not, however, necessarily depend upon what one of the parties could reasonably foresee but on what the parties have, or can be taken to have, agreed upon in their contract. It is a matter of interpreting the contract and of determining what interest the contractual duty that has been infringed was designed to protect. The carpenter, in the example just mentioned, cannot reasonably be taken to have accepted the risk that the box was unsuitable as a wine barrel in view of the purpose for which it had been sold [41, p.1472, para.8].

Despite the intention of at least some members of the House of Lords in *The Achilleas* to replace the *Hadley v Baxendale* test with the 'assumption of responsibility' test, in subsequent cases, courts have generally held that *Hadley v Baxendale* is still the main operative test but that *The Achilleas* acts as a "gloss" on the test [109, para.17; 110, para.71; 111, para.48; 112, para.84; 113, para. 17; 114, para.24], to be applied in "relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations" [115, para.40]. Certainly, recently in *Attorney General of the Virgin Islands v Global Water Associates Ltd*, Lord Hodge, delivering a judgment for the Privy Council, treated *The Achilleas* 'assumption of responsibility' test as only relevant in unusual circumstances which were not present in that case [116, para.26, paras. 28–29].

As for other common law jurisdictions, the Singaporean Court of Appeal has explicitly rejected *The Achilleas* [117, para.140, 118, paras.25–46], while the Indian Supreme Court has referred to it with apparent approval [119, para.26]. In my home jurisdiction of Australia, it has mostly been ignored or treated as a gloss. In *Evans & Associates v European Bank Ltd*, Campbell JA of the New South Wales Court of Appeal treated *The Achilleas* as a gloss on *Hadley v Baxendale* [120, para.58], but on appeal, overturning the approach of the Court of Appeal [121], the High Court simply affirmed *Hadley v Baxendale*, and did not rule or comment on *The Achilleas*.

Academic responses have been mixed, with some academics hailing the judgment's focus on whether the defendant voluntarily assumed the risk [122 103, pp.88–97; 123, p.413; 124, p.45, 125, 126], and others arguing that remoteness rules in contract are better seen as "gap-filling" rules which apply when the parties did not turn their minds to the question of liability or allocation of risk [127–131]. My own sympathies lie generally in the "gap-filling" direction, simply because I am doubtful of the extent to which parties necessarily think of the remedies to which they are agreeing, unless they are well-advised and powerful commercial parties who are

familiar with the particular market, in which case a voluntary assumption of a risk approach seems more apposite.

In any event, claims that the rule in *Hadley v Baxendale* has been replaced seem over-stated: at the most, *The Achilleas* seems to operate as a gloss on English law.

8 In Conclusion: Back to Sacco

I am sometimes asked by students why I often describe the law of other countries when teaching the law of my own country. Sacco said, "Only through comparison do we become aware of certain features of whatever we are studying. … The primary and essential aim of comparative law as a science, then, is better knowledge of legal rules and institutions" [1, p.5]. Although he went on to say modestly that this was "neither far fetched nor new" [1, p.6], his statement remains both wise and important. By looking at the way other legal systems operate, we learn more about our own law, and understand the justifications for that law, and the ways in which our laws may carry the faint imprint of earlier formants, now mostly dissolved.

Sacco urged us not to look only at the law which is written or stated by judges, but also at the historical, cultural and anthropological aspects of legal formants. By looking at the underlying history of the rules in remoteness, we have seen that the legal notion of fair limits on damages for breach of contract has Roman origins—even if those limitations were not well-defined at that time—but the moral and cultural aspects stem from the idea that justice requires the defendant to provide reparation for loss, and no more than that.

Given the fact that the 'contemplation of the parties' test has been adopted in widely different cultures, with different religions, and at different times, it may be that the rule recognises a general human experience which transcends cultural boundaries, despite different cultures and the difficulties of semantics and varying meanings of concepts in different cultures [132]. This is one reason why formants must be dynamic: as Ricca says, when different legal and social cultures interact, the concepts we use must be re-semanticised and made consistent with their generative gist [132, pp.321–22]. There is, in this regard, a difference between subjective responsibility for one's actions and knowledge of the relevant legal principles in a particular culture [133].

Generally, however, as a matter of social experience, humans who enter into transactions realise that it is impossible to know the future, or to know what all outcomes of the transaction will be. The 'contemplation of the parties' test, while not adopted by all legal systems, has shown a remarkable staying power and ability to survive, and is rooted in an ideal of contract as a voluntary undertaking.

Sacco also argued that 'mute law'—namely, the moral and normative ideals underlying legal principles—preceded the development of the law [3]. In this paper, while I adopt Sacco's idea of legal formants—law as embedded in the deeper cultural and historical practices—I query whether Sacco's 'mute law' must always be prior to the development of legal principles. In this instance, we can see that a legal principle developed first (namely, when contracts are breached, a defendant must

pay for the loss) and then a moral and normative conception arose that there should be fair limits to that loss. The so-called 'mute law' was transformed into a legal principle well *after* the notion of damages for breach of contract had arisen as a legal formant, to fill gaps in the principle, and to ensure fairness. Therefore, I argue that the operation of 'mute law' is more dynamic than Sacco realised: sometimes the law can develop, a gap can become evident, and general moral or pragmatic principles accepted by society can become incorporated into the law *qua* law, just as 'contemplation of the parties' was incorporated.

The journey above also illustrates that the formant of 'remoteness' is *dynamic*, and relatedly, *intersubjective*: it reflects the social experiences of those from many different cultures in many different times. It has thus allowed for intercultural legal relations, which, as Mario Ricca has noted, can be difficult to achieve [133].

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