

2017

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### Recommended Citation

Victor P. Goldberg, *A Note on Victoria Laundry*, COLUMBIA LAW & ECONOMICS WORKING PAPER NO. 577 (2017).  
Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/2073](https://scholarship.law.columbia.edu/faculty_scholarship/2073)

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## A Note On *Victoria Laundry*

Victor P. Goldberg

For almost a century, the courts, relying on *Hadley v Baxendale*, restricted recovery for consequential damages to those damages on which the promisor had tacitly agreed. That changed abruptly in 1949 with Asquith, LJ's opinion in *Victoria Laundry v Newman*.<sup>1</sup> After that decision, the second limb of *Hadley* was liberalized; the defendant would be liable for those losses if it had reason to know of the plaintiff's possible loss—if the loss was “on the cards.”<sup>2</sup>

The law-pre *Victoria Laundry* was summarized in the 11<sup>th</sup> edition of Mayne's *Treatise on Contract Damages* (1946):

**Is mere knowledge or communication sufficient to impose liability?**

Can the fact of such consequences being known or communicated to the other party be sufficient, unless he was expressly or by implication told that he would be held answerable for them, and consented to undertake such a liability? In all probability, if the carrier, in *Hadley v. Baxendale*, had been told that any delay in delivering the shaft would make him liable to pay the whole profits of the mill, he would have required an additional reward before facing such a responsibility. Every one who breaks a contract must pay for the natural consequences of the breach, and in most cases the law defines those consequences. Can the other party, by acquainting him with further consequences which the law would not have implied, enlarge his responsibility to the full extent of those consequences, without a contract to that effect? It is usually in the power of the defendant to refuse such responsibility, but ought not the onus of making a contract rather to lie on the party who seeks to extend the liability of another, than upon him who merely seeks to restrain his own within its original limits?<sup>3</sup>

In the 12<sup>th</sup> edition the rule was “modernized”: “The incorporation of new material since the last edition in 1946 would ... have required some basic reorganization, since the leading case on contract damages, *Hadley v. Baxendale*, has now been restated for modern conditions by the Court of Appeal in *Victoria Laundry v. Newman*.”<sup>4</sup>

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<sup>1</sup> *Victoria Laundry (Windsor) LD. v. Newman Industries LD.; Coulson & Co. LD* (Third Parties). 2 KB 528 (1949).

<sup>2</sup> At 540. In *Koufos*, the House of Lords rejected the “on the cards” standard, substituting other probabilistic language—“more likely than not,” “etc”. the tacit agreement standard was resurrected in *Achilleas*, although it has not been enthusiastically embraced. See \_\_\_\_\_. For an argument in favor of Lord Hoffman's decision in *The Achilleas*, See Victor Goldberg, \_\_\_\_.

<sup>3</sup> Mayne's *Treatise on Damages* (ed. W. G. Earengy) 11<sup>th</sup> ed., 1946, at 28-29.

<sup>4</sup> Mayne and McGregor on *Damages* (ed. Harvey McGregor), 12<sup>th</sup> ed., vii (1961).

Asquith LJ noted a discrepancy between the facts in *Hadley* as stated by the headnote writer and Baron Alderson's opinion. The headnote, which asserted that the defendant's clerk had been told that the mill was stopped and that the shaft had to be delivered immediately, was, he said, "definitely misleading."<sup>5</sup> Baron Alderson had not mentioned anything about a possible mill stoppage, concluding "we find that the only circumstances here communicated by the plaintiffs to the defendants at the time of the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of the mill."<sup>6</sup>

Was the headnote a reporter's error? Almost certainly not.<sup>7</sup> *Hadley* was discussed in the 1856 edition (two years after the decision) of Smith's *A Selection of leading cases on various branches of the law; with notes*.<sup>8</sup> The co-authors were James Shaw Willes and Sir Henry Singer Keating (counsel of Baxendale and Hadley respectively). The communication to the clerk was noted: "Upon the trial before Crompton, J., it appeared that the plaintiffs having discovered the fracture sent their servant to the office of the defendants, when he told the clerk that the mill was stopped and the shaft must be sent immediately."<sup>9</sup> In a subsequent decision, the trial judge, Crompton J, said "The curious part of the case is that there was a most distinct notification to the carrier of the consequences that would follow the non-delivery of the shaft, and yet the Court held that those consequences could not be taken into consideration."<sup>10</sup>

So, the headnote was not misleading,<sup>11</sup> but Asquith LJ nevertheless claims to have been misled. His claim has in turn misled others. Thus, in the 12<sup>th</sup> edition of Mayne and MacGregor the statement regarding the headnote was removed: "The text, which in the last edition was based on this headnote, has therefore been changed accordingly."<sup>12</sup> The earlier reference was to this statement: "On making the contract, the defendant's clerk

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<sup>5</sup> At 537.

<sup>6</sup> At \_\_\_\_.

<sup>7</sup> "Indeed, the headnote states that the Hadleys expressly told Perrett that the mill had stopped. In *Victoria Laundry*, Asquith LJ said that the headnote must be wrong but this may be doubted." Venkatesan Niranjini, *The Contract Remoteness Rule: Exclusion, Not Assumption of Responsibility*, ch. 10, 187, 198-99, in *Defences in Contract* (ed. Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith) Bloomsbury Publishing, Feb 9, 2017.

<sup>8</sup> Cite.

<sup>9</sup> At 431.

<sup>10</sup> *Simons v. Patchett* (1857) 26 LJQB 195 (during argument at 197). Noted in David Pugsley, *The Facts of Hadley v Baxendale*, *New Law Journal*, April 22, 1976, at 420.

<sup>11</sup> Pugsley claims that the clerk was informed on the day preceding formation of the contract and that information given the day before the contract formation was not relevant. He concludes therefore that the headnote was misleading. (At 421)

<sup>12</sup> p. 114, n.42.

was informed that the mill was stopped, and that the shaft must be sent immediately.”<sup>13</sup>

Why did the headnote matter? Indeed, why did Asquith LJ even bother to mention it? After all, the headnote, correct or not, had no precedential value. My claim is that he raised the headnote issue in order to liberalize *Hadley*. After noting that the headnote was misleading, he continued: “If the Court of Exchequer had accepted these facts as established, the court must, one would suppose, have decided the case the other way round; must, that is, have held the damage claimed was recoverable under the second rule.”<sup>14</sup>

Must it? Baron Alderson could have accepted the fact as true, but irrelevant. Not all communications would have triggered liability for lost profits—there must be some threshold below which the communication would be regarded as insignificant. A dozen years after *Hadley*, Willes, who was now a judge, confronted that question in *British Columbia Saw Mill Co Ltd v Nettleship*.<sup>15</sup>

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 conclusion that the mere fact of knowledge cannot increase the 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.<sup>16</sup>

The *Nettleship* tacit assumption interpretation was, as noted above,<sup>17</sup> the rule when *Victoria Laundry* was decided. Even if the headnote were correct, Asquith’s conclusion that the case would have to be decided the other way around was wrong. But he then proceeded to act as if he had been right and held that if the defendant knew, or had reason to know, of the plaintiff’s potential loss, then it would be responsible for that loss. Even with his lower knowledge threshold, he acknowledged that the relevant date for the breacher’s knowledge (actual or implied) was at or before the time of the breach the moment that the contract was executed. He said, “It is important to inquire what information the defendants possessed at the time the contract was made as to such matters as the time at which, and the purpose for which, the plaintiffs required the boiler.”<sup>18</sup>

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<sup>13</sup> 11<sup>th</sup> edition, page 10.

<sup>14</sup> At 537.

<sup>15</sup> *British Columbia Saw Mill Co Ltd v Nettleship*, (1867-68) L.R. 3 C.P. 499, (1868).

<sup>16</sup> At 508-9.

<sup>17</sup> See Note 3.

<sup>18</sup> At 533. “Where actual knowledge is required to impose liability upon the defendant for particular losses, he must have that knowledge at the time of entering into the contract: knowledge after this time, although before breach, is not enough. This is clear from Asquith LJ’s proposition in *Victoria Laundry v. Newman* and is obviously correct.” Mayne & McGregor, 12<sup>th</sup> ed. at 122-123.

Given the facts, he could not, have awarded lost profits to the plaintiff in *Victoria Laundry*. His solution was simple. Alter the facts.

The uncontested facts are simple. Some time in early 1946, Victoria Laundry agreed to purchase from Newman a secondhand boiler for £ 2150. Because the boiler had been damaged while being readied for shipment, there was a five-month delay. The laundry sued for lost profits for the five-month delay under two heads. First, it argued that it intended to expand the existing business; damages claimed for that delay were £16 per week. Second, it asserted that it could have had highly lucrative contracts for dying with the Ministry of Supply for which it claimed a loss of £262 per week.

Readers of Asquith's opinion are familiar with his finding that the plaintiff had conveyed sufficient information by the date the contract was concluded (April 26) to recover its lost profits for the first claim, but not for the second.

[O]n April 26, in the concluding letter of the series by which the contract was made: "We are most anxious that this (that is, the boiler) should be put into use in the shortest possible "space of time." Hence, up to and at the very moment when a concluded contract emerged, the plaintiffs were pressing on the defendant the need for expedition, and the last letter was a plain intimation that the boiler was wanted for immediate use.<sup>19</sup>

Whether the information available on April 26 was sufficient to justify holding the defendant liable for the lost profits could be contested. Under the prior interpretation of *Hadley*, probably not. Newman might have been aware of the potential losses, but had not accepted legal responsibility for the losses. Most commentators, however, have accepted Asquith's conclusion that the information was sufficient. None, as far as I am aware, have questioned whether April 26 was the relevant date. The trial judge was quite clear that the contract had been formed two months earlier:

On Feb. 20, the defendants enclosed their official acknowledgment of the order and asked for payment of 50 per cent. of the purchase price. On April 26, 1946, is the first intimation that the plaintiffs make of any particular urgency in the matter. They enclose their cheque for 50 percent of the purchase price and they continue: "We are most anxious that this be put into use in the shortest possible space of time and we shall be pleased if you can arrange to have it dismantled and ready for our transport by Friday. May 3." Later the plaintiff company sent another letter to the effect that the boiler was very urgently required.<sup>20</sup>

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It is admitted on behalf of the defendants that the defendants knew that the

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<sup>19</sup> At 533-34.

<sup>20</sup> At 807

plaintiffs were launderers and dyers, that they were carrying on a business as such at Windsor, that they required the boiler for use in their business, and that the contract was made on that basis. The defendants knew nothing more than those facts. They knew that the plaintiffs required this boiler for use in some way in their business—how, they were not told. In what way it was to be installed and what its function was to be, was never imparted to them. At the very highest, the only information that was ever given to them was *after the actual formation of the contract, when they were told that it was urgently required.*<sup>21</sup>

Asquith LJ did not claim that the trial court erred in stating that the contract was formed on February 20. He just ignored that finding and concluded that the contract was not formed until April 26.

Ironically, Asquith LJ begins his opinion expressing concern about the factual basis of *Hadley*, hinting that perhaps Baron Alderson had misrepresented the facts by ignoring the conversation between Hadley's agent and Baxendale's clerk. He concludes the opinion by misrepresenting the facts in his case (as determined at trial). His interpretation in the former case allowed him to relax the standard for awarding consequential damages and his misdating the contract formation allowed him to take advantage of that relaxed standard in *Victoria Laundry*.

A puzzle remains. Why, given that Asquith LJ was obviously wrong about the "misleading headnote," and why, given that his claim that the defendant *must* be liable if it had knowledge was a *non sequitur*, was his opinion so eagerly embraced? And why, in the almost seventy years since the decision, has no one called him on his misdating the date of contract formation? Was the watering down of *Hadley* "on the cards" and *Victoria Laundry* just a convenient vehicle?

The enthusiastic embrace of the decision is in marked contrast to the grudging acceptance sixty years later of *The Achilleas* which focused on the intentions of the parties. In the eighteenth edition of McGregor on Damages, published shortly after the decision, he wrote: "What Lord Hoffmann and Lord Hope propose is full of difficulty, uncertainty and impracticality. How are we to tell what subjectively the contracting parties were thinking about assumption of responsibility?"<sup>22</sup> He continued: "What is clear is that Lord Hoffmann and Lord Hope cannot on their own impose an entirely new idea upon the law of contract damages. Accordingly, it is only proper to proceed in what follows in the text on the basis that today the law of remoteness in contract damages remains as it has stood unchallenged for the century and a half since the first exposition in *Hadley v. Baxendale*."<sup>23</sup> This is a most peculiar sentiment since it was *Victoria*

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<sup>21</sup> At 808 (emphasis added)

<sup>22</sup> At 6-171.

<sup>23</sup> At 6-174. In the next edition (2014) he was a bit less harsh: "[T]he assumption of responsibility test appears to be here to stay with us, at least for the time being, because in the five years that have passed since 'The Achilleas' was decided this new test has been examined and adhered to not only in a number of first instance cases but also in the

*Laundry*, not *The Achilleas* that deviated from the *Hadley* standard.

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Court of Appeal.” (At 8-172) Nonetheless, he continued: “Thus in the five years since *The Achilleas* was decided there appear to have been no cases, either at first instance or at Court of Appeal level, in which damages have been cut down, or cut out, by the application of the assumption of responsibility test. In light of this, it is to be hoped that the time of courts will no longer be taken up, indeed wasted, by defendants bringing forward the new test in unsuitable cases.” (At 8-177)