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What is the True Principle in Transfield v Mercator? Does that Principle apply to the Indian Law?

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ABSTRACT

The House of Lords decision on the Achilleas has sparked much debate, prompting a re-examination of Hadley v Baxendale . Typically, the Hadley v Baxendale rule is expressed in terms of foreseeability or remoteness. The thumb rule as stated in terms of two limbs was further refined by other cases such as Heron II. Before the Achilleas, the Hadley v Baxendale doctrine had been liberalized by widening the scope of foreseeability. However, a lot of subjective interpretations may occur as a result of this case, resulting in uncertainty. The primary point of contention is whether it creates new tests or only assists existing Hadley tests, with the new version as enunciated by Achilleas being used only in specific circumstances. Although we can not equate the presumption of responsibility with knowledge as defined by Section 73 of the Indian Contracts Act, 1972. Furthermore, it does not provide a new criterion for the remoteness of the damage, making it only applicable in restricted circumstances.

The Indian position concerning the standard laid in the Achilleas case is not explicitly part of the law of land. The inclination towards the Hadley standard is apparent with help of various cases as discussed in the paper. Nevertheless, the achilleas rule is applied in certain circumstances, which is often the case of subjective interpretation. Given the contract law provisions and illustrations, the codification of the Hadley rule is reflective in the statute. Moreover, despite the lack of a conclusive conclusion, the judgment shows that the Hadley rule is preferred.

I. INTRODUCTION

Hadley v Baxendale[2] (two limbs) is the thumb rule for determining the remoteness of damage. Over time, additional initiatives emerged with the support of other instances for establishing the rule of compensation for loss or damage caused by the breach of contract. Despite this, in the case of Achilleas[3], a new principle emerged as a sort of explanation. The presumption of

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[2] Hadley & Anor v Baxendale & Ors, (1854) EWHC J70
[3] Transfield Shipping Inc v Mercator Shipping Inc, (2008) UKHL 48

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responsibility test has become a heated topic among legal experts and academics. The main area of disagreement is whether it produces new tests or just aids current Hadley tests and the new version is only utilized in exceptional instances.

This paper is divided into two sections. The first half of the dialogue focused on the ***complexities of the Achilleas case in the context of the assumption of responsibility concept***. The second section examines ***the Indian stance in light of the remoteness of the damage*** and the implications of assuming responsibility. The controversial nature of Achilleas rationale, as well as the Thumb rule (Hadley v Baxendale) in light of Indian contract law, are some crucial elements explored in this term paper.

II. TRANSFEILD V MERCATOR

(A) Pre Achilleas[4] Position: Hadley Rule

The two main rules on 'remoteness of damage in contract' were established in 1854 **(*Hadley v. Baxendale*)** and 1969 ***(Heron II)***.[5] The thumb rule is Hadley, which provides us with two limbs for assessing compensation for loss or damage caused by the breach of contract. Where two parties have entered into a contract, and one of them has breached it, the damages that the other party shall receive in respect of such breach of contract shall be such as may be permitted:

First limb: fairly and reasonably be considered as either arising naturally, i.e., in the ordinary course of things, from the breach of contract itself

In other words, if the defendant is only responsible for damages that were reasonably expected at the time the contract was entered into, the parties' reasonable expectations at the time the contract was entered into are safeguarded.

Second limb: such as may reasonably be assumed to have been in both parties' minds at the time they made the contract as a likely outcome of the breach.

The traditional methodology has been used to estimate damage in all situations, and it has been the only formula (Hadley rule) until recently.

Additionally, In the case of ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd***[6], which address the difference between natural (considered not too remote) and extraordinary losses (considered too remote). The defendants, in this case, entered into a contract with the claimant to supply him with a boiler. The defendants were aware that the boiler would be needed

[4] *Supra* note 2.
[5] Czarnikov (C) Ltd v Koufus , (1969) 1 AC 350 (HL)
[6] (1949) 2 KB 52

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immediately by the claimant's company, but it was delivered late, and the claimants claimed the profit lost as a result of the late delivery. Furthermore, it states that the outcome in Hadley would have been different if the significance and immediate need were communicated to the other party.

Later in ***Heron II***[7], the claimant used the defendant's vessel to transport sugar to sell it in the market. The voyage was supposed to take twenty days, but owing to a detour from the planned itinerary, it took nine days longer. The defendants were unaware of the claimant's intentions, although they were aware that there was a "market for sugar" at the destination. The plaintiffs were found to be entitled to compensation for their lost profits and loss was considered as not too remote. The relevant criteria, according to the House of Lords, is to determine if the loss is a reasonable possibility of loss test:

The kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from the breach… the words ***'not unlikely'****… denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.'*[8]

In the **SAAMCO case,** the criterion or test for "remoteness of damages" was changed: a loss, such as the one suffered by the lender in this instance, may not be recoverable even if it was predictable and ordinary. Instead of using the more nebulous logic of a break in the chain of causality between the breach and the loss, the House of Lords chose to explain such instances using an agreement-centred approach of an impliedly limited acceptance of responsibility and said that both limbs of the Hadley rule can be approached this way.

(B) Rationale Provided in the Case of Achilleas

The rationale of Achilleas[9] was ambiguous to some extent and unable to provide concrete reasoning concerning remoteness of damage. Despite the fact that all members of the House of Lords agreed to the appeal, there were disparities in their rationale. Furthermore, this complex reasoning exacerbates the problem with the rule's application:

1. Assumption of responsibility for the type of loss

(Lord Hoffmann and Lord Hope)

According to Lord Hoffmann, "one must determine whether the damage for which compensation is sought is of a type and extent of loss for which the contract-breaker might

[7] *Supra* note 4
[8] *Id.*
[9] *Supra* note 2

properly be assumed to have accepted responsibility." Even though all members of the House of Lords agreed to hear the appeal, there were different rationales for the agreement. Nonetheless, Heron II and Hadley v Baxendale would be considered genesis. And states that only in exceptional instances would the assumption of responsibility test be used.

According to Lord Hoffmann's reasoning, even though the loss is consistent with the very first limb of Hadley v Baxendale, it may still be judged too remote if it can be shown on the evidence that the party in breach did not incur the risk of enduring such a loss.

2. Reasonable contemplation of the parties of the type of loss

(*Lord Rodger and Baroness Hale)*

Lord Rodger's concept is similar to that enshrined in the Victoria Laundry case, in which the claimant was constricted to the ordinary loss of profits of a laundry business that had been left idle and was unable to recover the loss of profit as a result of a highly profitable government dyeing contract. Lord Rodger also stated that the position of the damage might have been different if the owners had informed the charterer of the existence of a forward charter, allowing the charterers to understand the consequences of failing to redeliver the vessel in time to allow the owners to redeliver it under that new charter formed afterwards. He does not talk about the assumption of responsibility test, rather he focuses on the extreme volatility of the market is equal to the unusual loss of fixtures, hence too remote.

In addition, Baroness Hale indicated her persistent scepticism and allowed the appeal on a narrower ground. She elected to grant the appeal on Lord Rodger's narrower basis, leaving the larger concerns to be decided in future instances.

3. Nature and goal of the transaction in business

(Lord walker)

He recognized that the Hadley v Baxendale rule, as a single concept, corresponds to the fact that, even under the first limb, the defendant frequently requires some specific information. The level of knowledge assumed is determined by the nature of the contracting parties' business connections, transactions and ancillary matters related thereto. The problem arises when he supports both reasoning (as provided by Lord Hoffman & Lord Hope). If read closely, both are divergent on various points, and it is unlikely he accepts both rationales. Nevertheless, he accepted the appeal.

(C) Ambiguous Ratio

The decision is based on two concepts: the type of loss and the degree of likelihood, and it

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allows for a substantial amount of variation. As a result, a particular ratio of the case is difficult to ascertain. A similar observation is provided by Jim Leighton that[10]

given that these leading speeches give contradictory results of principle (as the recoverability of loss of profit on a follow-on fixture is either a question of law or a question of fact), it is disappointing to note that an analysis of who agreed with whom and on what ground does not appear to provide the clear (thus definitive) majority decision one would hope for on such a critical and previously undecided issue.

Due to ambiguity created by the judgment, there are two views. The first one, the Achilleas case, is likely to be limited in scope or to its circumstances, and may not have the same impact in reality and does not create an altogether new test. The other perspective is it formulates a new test as the assumption of responsibility can not be equated to knowledge as in Hadley rules.

Although Andrew Burrows brings in another consideration with regard creation of a new test is, it may be regarded as relevant to consider the aim of the breached obligation. However, more diligence is required for imposing responsibility for loss that is within the reasonable apprehension of the parties may not necessarily be equitable. A taxi driver is a well-worn hypothetical instance. [11] The dilemma created by this is the means by which courts and legal advisers decide whether the defendant has adopted responsibility for the sort of loss in question if the issue is whether the defendant has adopted duty. It is not rare for a contract breaker to be held accountable for losses that he or she can not quantify, forecast, or control, as pointed out by David McLauchlan and Andrew Burrows.[12]

Prima facie, it is apparent that the notion of remoteness rule is based on fairness and not on interpretation, which is necessary to do so in order to develop an understanding of the factors to be considered in determining whether and when deviations from the core rule of liability for types of loss that are within the scope of reasonable contemplation should be made. It can be seen as a deviation from the interpretation rule. However, according to Andrew Burrows, this seems foreign to the English method of contract law.[13]

[10] Jim Leighton, '*Transfield v Mercator - The "Achilleas*" (May. 20, 2021, 9:29 PM),https://archive.onlinedmc .co.uk/transfield_v_mercator_-_the_achilleas.htm.
[11] Andrew Robertson,'*The limits of interpretation in the Law of contract*', 47 Vic. Univ. Wellingt. Law Rev. (2016), https://ojs.victoria.ac.nz/vuwlr/article/view/4801/4264.
[12] 1 ANDREW BURROWS, 'A RESTATEMENT OF ENGLISH LAW OF CONTRACT' (2016); MCLAUCHLAN,"REMOTENESS RE-INVENTED?' (2011)1(1) Vic. Univ. Wellingt. Law Rev. (2011).
[13] *Id.*

(D) Ramifications-Post Achilleas

The cases decided after Achilleas show a preference for the thumb rule over the assumption of responsibility advocated by Transfield v Mercator. The trajectory of cases in terms of application of the principle of remoteness can be seen as follows:

In **Sylvia Shipping Co Ltd Progress Bulk Carriers Ltd**[14], Achilleas was found to be inapplicable, and the requirements for applying Achilleas were not satisfied. The arbitrators, on the other hand, approved a loss equal to the loss from the sub charter minus the profit from the other sub charter that was utilized.

In yet another case***, ASM Shipping Ltd of India v TMI Ltd of England***,[15] Achilleas was found to be inapplicable, and the conditions for using Achilleas were not satisfied.

Another crucial case signifying achilleas not applicable in **Classic Maritime v Lion**[16], where Cooke J observed that he would be very shocked if the Achilleas created a novel test for the recoverability of damages for breach of contract, and Flaux J was "wholly unconvinced" that they had done so, hence no new test.[17]

Super shield Ltd v. Siemens Building Technologies FE Ltd[18] Provides Hadley v Baxendale is a standard requirement, but it has been misinterpreted on the basis that it reflects the expectation to be ascribed to the parties in the ordinary case, the party who infringes contract should ordinarily be liable to the other party for injuries incurred as a result of his contravention at the time of making the contract. Additionally, the typical methodology would not reflect the reasonable expectation or intention to be attributed to the parties after evaluating the contract and the commercial background. Finally, even if the loss was not within the scope of the responsibility, it can not be considered excessively remote if the contract was properly analyzed against its commercial backdrop.

While Lord Hoffmann's modified remoteness concept is now the law in England, a majority of UK judgments have found that the new test of assumption of responsibility has no bearing on the law of implicit agreements. Lord Hoffmann's reorientation of the concept, it will be asserted, should undergo thorough inspection in order to establish its value.

[14] (2010) EWHC 542 (Comm)
[15] (2005) EWHC 2238 (Comm).
[16] (2009) EWHC 1142 (Comm).
[17] *Id.*
[18] (2010) EWCA Civ 7.

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The orientation of the above-mentioned case provides us with the ramifications of controversial judgment.[19] Before the Sylvia Shipping case, it was widely assumed that the ruling established an extra need to show "first limb" loss. However, after the Achilleas case, a claimant arguably had to show both principles as provided in Hadley v Baxendale.

Due to uncertainty, which affects the practical aspect as well, which requires parties to carefully assess the extent to which their contract exempts them from liability for certain sorts of losses. **This ultimately requires more express clarification on risk allocation**. Therefore, this case does not produce a new test and only applicable to certain situations. It is customary, for example, for parties to seek to limit their liability for loss of profit. Exclusion of liability provisions is unclear if responsibility is excluded for both profits arising in the usual course of things (first limb) and profit originating as a consequence of special circumstances within the parties' knowledge (second limb), which is a typical drafting mistake (second limb - consequential loss).[20]

Another crucial facet, Lord Hoffman for propounding the principle of assumption of responsibility is due to the nature of loss: Unquantifiable and uncontrollable, which was rebutted by Andrew Burrows as these elements are widely apparent in almost all cases.

The recent case of Privy Council's ruling in the ***Attorney General of the Virgin Islands v. Global Water Associates Ltd*** [21]: The case reinforces the law of lost profit damages and remoteness of damages even further. The decision, in particular, crystallizes the threshold of contemplation of parties to be objectively established that either both or at least the defendant "reasonably considered as a substantial possibility" which is emanating from the contract violation.[22]

III. INDIAN POSITION IN CONTEXT OF REMOTENESS OF DAMAGE ESPECIALLY ASSUMPTION OF RESPONSIBILITY

(A) Indian Position with Help of Case Laws

The Indian position on contractual damages is similar to that of common law. The goal of awarding contractual damages is to put the party who has been harmed by a breach of contract in the same position as if the contract had been fulfilled by paying damages or compensating

[19] *Supra* note 1.
[20] Rahul Prakash Deodhar, '*Common Law Developments on Remoteness of Damages - Post Achilleas Perspective'* (2012), https://papers.ssrn.com/abstract=2082987.
[21] **(2020)UKPC 18**
[22] HasitB.Seth, '*Lost profit damage:A paradise(not yet) lost'* (2021), https://www.scconline.com/blog/post/2021/03/04/lost-profit-damages-a-paradise-not-yet-lost.

for losses. In India, there has been virtually little progress in the area of damage law. The courts have avoided a lengthy consideration of the criteria that determine the amount of damages awarded in the event of a contract violation.

The court clarified that the defendant was responsible for all damages that were "natural and proximate consequences" of the contract or were in the minds of the parties when they signed it. According to this judgment, "in the parties' contemplation" refers to the losses that a reasonable person in the defendant's position would have recognized as likely to occur in the case of a contract violation.[23]

In ***Ghaziabad Development Authority*** **v.** ***Union of India***[24]**,** The court appears to prioritize the aspect of causation, which are directness or indirectness, over and above the criterion of reasonable foreseeability in assessing the amount of damages to be paid. Furthermore, it has been decided that damages should be restricted to those losses that are directly related to a contract's breach.

The Supreme Court's ruling demonstrates the ubiquitous influence of this legal ambiguity in India. In ***Pannalal Jankidas*** **v.** ***Mohanlal*** [25] , Where the majority of the bench in this decision held the appellants liable because they had failed to insure the products, and that it was as a result of that failure that the plaintiffs were unable to recover full damages. However, in the dissenting opinion, it was put forward that the norm of remoteness to be read in combination with the concept of restitutio in integrum. He claimed that the damages would not have occurred "directly or naturally" as a result of the breach of contract. The only reason the respondents were able to receive any compensation was due to the existence of the ordinance's scheme, and the damage suffered as a result of it was too remote or indirect.

In a recent case, the party seeking compensation must show that the violation resulted in a loss of expected profit. It's critical to establish a causal link between the breach and the loss. The breach should be a significant cause of loss. The remoteness of harm must also be evaluated by determining whether the loss was within the parties' reasonable expectations. There is no remuneration for lousy bargaining.[26]Hence, Kanchan not entitled to damages for expected loss towards anticipated losses.

The test for determining whether a particular loss was within the parties' reasonable expectations is not widely accepted in India. As a result, it is clear that some choices strive to

[23] State Of Kerala v K. Bhaskaran AIR 1985 Ker 49
[24] AIR 2000 SC 2003
[25] 1951 AIR 144
26 Kanchan Udyog Ltd. V United Spirits Ltd (2017) 8 SCC 237

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implement Hadley v. Baxendale's rule strictly, even if other choices conflate "direct consequences" with "natural consequences" and produce wrong results. It used a more objective criterion to determine what losses may be assigned as a natural result of the contract violation.

The growth of the law of damages in India has been fairly restricted in terms of the amount of damages payable. The courts have accepted the Hadley v. Baxendale rule as a default rule or thumb rule, disregarding the parties' objectives. As a result, the current position in India clearly varies from the situation under common law following the Transfield decision.

(B) Whether Knowledge is Equal to the Assumption Of Responsibility?

The test of assumption of responsibility has two differing views: First, it requires the incorporation of knowledge. Others do not equate knowledge with the assumption of responsibility. As in every case where knowledge is presumed, it does not mean responsibility can be assumed as well. The responsibility can be reflected by the implications of terms in the contract. It is not reflective of knowledge. While undertaking a contract, we knew the risk, but there is a different facet concerning the allocation of risk.

The position as enunciated in S.73 of the contracts act read with illustration is the codification of the Hadley rule. Some of the illustrations which provide a clear picture of the Indian position:

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his 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.

The fact situation is similar to Mercator, but the knowledge was there at the time of contracting. Hence, provided rent loss and compensation to the parties.

(ii) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price, B, afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

The given situation in the illustration is also similar to Achilleas, with the only difference being the profit.

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The Codification of the Hadley rule is reflective, rather than an admission of responsibility, in light of the contract law provision and illustration. Although there is no definitive answer, there is evidence that the Hadley rule is preferred.

IV. CONCLUSION

Unlike the assumption of presumption of responsibility, the most practical approach is to employ the objective standards laid out in Hadley v. Baxendale to evaluate the parties' contractual duties. One way to reduce subjectivity proposed by the Achilleas decision is to incorporate precise responsibilities that may be expressed explicitly in a contract rather than taking the matter to court for interpretation, which complicates the situation further. Achilleas genuine principle is the assumption of responsibility, which results in the establishment of a new category of rules in terms of knowledge that is distinct from assumed responsibility. However, we cannot treat the principle of achilleas as a separate rule for the sake of convenience, as it would result in a chaotic scenario.

The established criterion for determining accountability is ambiguous and troublesome. To prevent difficulties, clear provisions can be specified in the contract for the sake of ease, which involves the use of the assumption of responsibility in particular circumstances. It must be considered as an exception rather than a rule.

Various judgments show a preference for the Hadley rule when it comes to the enforcement of the rules in the Indian setting (In part II). Furthermore, the instances dealing with complexities, such as Achilleas rule, reveal a spirit of avoidance. In order to apply the correct principle, we must also analyse the repercussions of adopting the assumption of responsibility.

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