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Remoteness: New Problems with the Old Test

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I INTRODUCTION

It is my view that the application of the test of contractual remoteness is really a determination (through the usual process of contextual interpretation) of the scope of the responsibility impliedly undertaken by the promisor, and that no other explanation makes sense of the law either descriptively or as a justification.[1] Further, and importantly for the present piece, mainstream opinion accepts at least a watered down version of this thesis, ie that foreseeability may not always be sufficient for recoverability and implied assumption of risk has at least some role to play in the remoteness test.[2]

Given support for the agreement-centred view of remoteness in recent cases,[3] now is a good opportunity for us to put our heads round a few of the doors opened by the implied assumption of risk theory of remoteness and see the problems that await us within.

The first problem arises in concurrent liability cases. The implied assumption of responsibility might, in some circumstances, not only

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1 A Kramer, 'An Agreement-centred Approach to Remoteness and Contract Damages' in N Cohen and E McKendrick, *Comparative Remedies for Breach of Contract* (Oxford, Hart Publishing, 2005) 249. Of course, this is an attempted resurrection of the old theory often associated with the decision in *British Columbia and Vancouver's Island Spar, Lumber, and Saw-Mill Co v Nettleship* (1868) LR 3 CP 499 (CCP).

2 For example, GH Treitel observes in *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988) 158 that 'the defendant's liability in contract should be limited at least to some extent by the risks that he may be supposed to have agreed to undertake'.

3 See the comments of Clarke J in *Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas')* [2006] EWHC 3030 (Comm) [64]–[65] aff'd [2007] EWCA Civ 901 and Beazley JA in *Stuart Pty Limited v Condor Commercial Insulation Pty Limited* [2006] NSWCA 334, paras 53–61.

govern the recovery of damages for breach of contract but also displace (through the sovereignty of the parties' agreement) the tortious rules of remoteness that would apply to a concurrent tort. It is well known that tortious liability can be affected by exclusion clauses or notices by the defendant and by assumptions of risk (*volenti non fit iniuria*) by the claimant, and the implied allocation of risk in the contract can sometimes be a source of such exclusions or assumptions. This chapter concludes that, at least when the matter to which the tortious obligation relates is also central to the contract, the (stricter) contractual remoteness test should apply even to the tort.

Behind the next door is the difficult case of *H Parsons (Livestock) v Uttley Ingham & Co*,[4] and all the questions of concurrent liability and of remoteness in relation to physical damage that it raises. The conclusion reached here is that, for a variety of reasons, physical damage and personal injury are less likely to be too remote in contract (ie more likely to be within the scope of responsibility impliedly assumed by the promisor) than economic losses.

The question of the remoteness test applicable to the *Hedley Byrne*[5] assumption of responsibility negligence liability is easier. It is largely agreed that such liability, like contractual liability, is based upon an assumption of responsibility, and so the contract test should apply to *Hedley Byrne* cases not because there is a concurrent contractual action (if there is), but because *Hedley Byrne* liability is agreement-centred and so the reasons justifying the *Hadley v Baxendale*[6] test in contract cases are also applicable to *Hedley Byrne* cases.

Finally, the assumption of responsibility basis of remoteness has a perhaps surprising consequence: in some cases where there is an assumption of responsibility subsequent to the formation of the contract, such as by way of variation or perhaps on continuation of a long-term contract that is terminable at will, the contractual remoteness test should be applied as at this later date.

II CONCURRENT LIABILITY IN CONTRACT AND TORT

It has been clear since *Henderson v Merrett Syndicates Ltd*[7] that the agreement of the parties is sovereign and so tortious obligations will be excluded where that is the intention of the parties, but that such an intention will not be lightly inferred and in its absence a person has a free choice between contractual and tortious causes of action.

[4] [1978] QB 791 (CA).
[5] *Hedley Byrne v Heller* [1964] AC 465 (HL).
[6] (1854) 156 ER 145, 9 Exch 351.
[7] [1995] 2 AC 145 (HL).

The rules of remoteness, alongside those of limitation, contribution and service out of the jurisdiction, give rise to one of the 'practical issues' identified by Lord Goff in *Henderson* that might lead a claimant to choose between contractual and tortious causes of action since, as Lord Goff observed, the rules of remoteness 'are less restricted in tort than they are in contract'.[8] At the risk of recapping the familiar, the contractual remoteness test is more restrictive to the claimant than the tortious (especially negligence) remoteness test in the following three ways:[9] (i) the contractual test takes account of what was foreseen at the time of contracting,[10] whereas the tort test is applied to what was foreseen at the later time of the commission of the tort; (ii) under the contractual test losses are recoverable if foreseeable as not unlikely to occur (*The Heron II, Koufos v C Czarnikow Ltd*[11]), whereas the tortious test gives recovery of losses that are merely foreseeable as sufficiently possible that a reasonable man would take steps to avoid them (*The Wagon Mound (No 2)*[12])[13]; and (iii) implied assumption of risk (inferred from the relationship, price, etc) has an effect on contractual but not tortious recovery (save where there are contractual exclusion clauses or notices, or where the *SAAMCO*[14] scope of duty principle applies).[15]

However, if remoteness is about the implied assumption and allocation of risk, then it is about what was agreed between the contractual parties. Consequently, in cases of concurrent contractual and tortious liability, a further question arises after that in *Henderson* has been answered. Even if there can be found in the contract no implied or express intention to exclude a concurrent tortious obligation, it may be that the contractual assumption and allocation of the risk of harmful outcomes should

[8] *Ibid*, 185.

[9] See further the table in D Harris, D Campbell and R Halson, *Remedies in Contract & Tort* (London, Butterworths, 2nd edn, 2002) 331–3.

[10] Perhaps subject to the comments towards the end of this chapter on variation and terminable-at-will long-term contract cases.

[11] [1969] 1 AC 350 (HL).

[12] *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1967] 1 AC 617 (PC).

[13] If one adopts a fully agreement-centred approach, the ink spilled on discussing the difference between 'foreseeable as possible' for tort and 'foreseeable as not unlikely' for contract is wasted ink. The 'not unlikely' label is little more than a useful rule of thumb, and does not replace the underlying (fairly complicated) investigation of what risks the promisor can be understood to have impliedly undertaken. See further Kramer, above n 1.

[14] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL).

[15] There are, however, dicta showing an intuitive resistance to any difference between contractual and tortious remoteness tests, see especially Scarman LJ in *Parsons v Uttley Ingham*, above n 4, 806 and Lord Cooke in *Johnson v Gore Wood* [2002] 2 AC 1 (HL) 46. There are also explicit judicial denials of any differences between the two tests: *Asamera Oil Corpn v Sea Oil & General Corp* [1979] 1 SCR 633 (SCC) 673; *Kienzle v Stringer* (1981) 130 DLR (3d) 272 (Ont CA) 276; *Canlin Ltd v Thiokol Fibres Canada Ltd* (1983) 40 OR (2d) 687 (Ont SC) 694; *BDC Ltd v Hofstrand Farms Ltd* [1986] 1 SCR 228 (SCC); *Abitibi-Price Inc v Westinghouse Canada Inc* (1988) 73 Nfld & PEIR 271 (Nfld SC) 306–8. It seems likely that, in making these comments, some of these judges had in mind only the level of foreseeability, not the timing of the foreseeability.

nevertheless exclude or modify the remoteness rules ordinarily applicable in tort. In other words, should the contractual remoteness test sometimes be applied even to the cause of action in tort? As a matter of logic, if a primary contractual duty can sometimes comprise an implied exclusion of a tortious obligation, cannot a secondary contractual allocation of the risks of harm carry with it the coin of which the two sides are an implied exclusion of liability by the promisor and an implied assumption of responsibility (often labelled in tort discussions '*volenti non fit iniuria*', 'no injury to the willing') by the promisee?[16] In such cases, to permit the ordinary tort remoteness test to apply would be (adapting Lord Goff's words in *Henderson*) to

> permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the [relevant loss] that would constitute the tort.[17]

As we shall see, for the contract test to prevail, there would need to be not only an implied agreement as to the allocation of risk (which exists in every contract if one adheres to an agreement-centred view of remoteness) but also a further implied agreement that the allocation of risk in the contract is the last word on the matter and should therefore exclude any alternative tortious determinations of risk (tantamount to a waiver of tortious rights by the promisee).

III CONCURRENT LIABILITY AND TORTS OF MAKING THINGS WORSE

Starting with what I will call 'the torts of making things worse' (which contrast with the *Hedley Byrne* duty of care that arises following an assumption of responsibility, which is really 'a tort of not making things better'), it is then necessary to ask when the tortious test should be displaced by the contract test and its implied exclusion/assumption of the risks of particular harms.

To do so, we should start with a real case. The issue arose in *Woodman v Rasmussen*[18] and divided the Queensland Court of Appeal. A planing machine in three boxes was damaged by the carelessness of the defendant common carrier when one of the boxes fell off the truck on its way to the mill where it was to be used for saw-milling, causing a loss of profits. This

16 Tilbury and Carter, principally in the context of a discussion of contributory negligence, agree that the incidents of the contractual rules should take precedence where the contract provides, expressly or impliedly, that it or they should do so: M Tilbury and JW Carter, 'Converging Liabilities and Security of Contract: Contributory Negligence in Australian Law' (2000) 16 *Journal of Contract Law* 78, 90.

17 See n 7, 191.

18 [1953] St R Qd 202 (Qd CA).

gave rise to an action both in contract (as the common carrier liability was treated for these purposes) and in the tort of negligence.[19]

The Court found that the loss had not been proven. However, obiter, Macrossan CJ held that the contractual remoteness test was applicable, and so remoteness was a further reason for the claimant's failure to recover the loss of profits because:

> Assuming that the damage arose from special circumstances beyond the reasonable prevision of the parties which had not been communicated to the appellants and the risk of which they are not to be taken to have agreed to bear under the contract, it would, I think, be unjust and contrary to authority that they should be held liable to the other contracting parties to any greater extent if the latter sued in tort and not on the breach of contract. [20]

Phip J, on the other hand, held that the tortious test of remoteness applied and so the loss of profits would (if proven) have been recoverable, because:

> if I sue [the carrier] for negligent damage I need not rely upon the contract . . . at all. The contrary view involves that there is an implied term in every contract made with a common carrier that when he is sued in any form of action for negligent damage he is not liable for loss of profits. On the modern doctrine of implication of terms in a contract no such term could be implied . . .
>
> I hold that a common carrier who negligently damages the chattel carried is in no better case than is an ordinary carrier or a stranger who commits the tort of negligent damage.[21]

If the common carriage element is disregarded, the view of Macrossan CJ seems preferable in principle, since the fragility of the equipment and potential losses arising from its damage are the very things that will have been factored into the price and will have been in the parties' mind at the time of contracting. At that point in time, the risks of losses such as these will have been impliedly allocated: those risks notified to the carrier or foreseeable as fairly likely by him are assumed, and others are excluded. To the extent that it differs, this allocation of risk should prevail over the default rule of bare foreseeability that applies in tort. Phip J is right that a paid carrier would therefore be in a better position than a stranger, but this is proper because the carrier was invited to carry the goods and did so only because of the fee he received and therefore as part of a calculated commercial enterprise, and his arrangement with the sender (fixed at the

[19] Blom also posits a variation of the facts, by which the courier had been told after contracting but before driving away with a package of the loss of profits that would result from its loss: J Blom, 'Fictions and Frictions on the Interface Between Contract and Tort' in PT Burns and SJ Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence: The Paisley Papers* (The Continuing Legal Education Society of British Columbia, 1991) 157. In Blom's example, timing, rather than the degree of foreseeability, is the factor to give the choice between the two tests significance.

[20] See, above n 18, 211.

[21] See, above n 18, 214. The third judge, Townley J, expressed no view.

time of contracting) should be honoured. In contrast, a third-party's involvement with the goods would be an unbidden interference.

However, common carriage is not ordinary contracting, and can involve less freedom to contract and to set the price on the part of the carrier than ordinary contracting does.[22] In addition, if the carrier is a professional it may well price and insure generally, rather than negotiating price and insurance for each carriage, and therefore the scope of risk impliedly assumed may be greater (because more general) than otherwise and may be little different from the tort test.[23]

A slightly more difficult carrier case was *The Arpad*,[24] in which the plaintiffs sued their carriers in both contract and conversion for short delivery of a shipment of wheat. Despite there being no market to buy replacement goods, the profits lost from abortion of an on-sale were held by the majority to be too remote to be recovered in the action for breach of contract, and irrecoverable in conversion because

> where the wrong complained of may be stated either in tort or in contract, the same rules as to damages must be applied.[25]

Nevertheless, this point was not considered in any detail and, as Michael Tilbury observes,

> This result is now explicable by reference to the date of the case: it reflects the pre-eminence of contract law and predates the modern understanding of the implications of concurrent liability.[26]

Further, the ratio decidendi of the case has been taken to be that the measure of damages for conversion is the same (in these relevant respects) as the contract measure, whether or not there is a concurrent contract.[27] This need not stop us asking ourselves whether, had the test for remoteness in conversion been more generous than it was by this case held to be, we think the contract test should have limited the plaintiff's recovery. The answer is surely yes, since the lost profits are exactly the sort of thing that the contractors would have had in mind as relevant to the price and as worth communicating.

The same problem as arose in the carrier cases also arose in the telegraph cases in which American public service telegraph companies owed (often statutory) duties of care as well as contractual duties. The

22 See Kramer, above n 1, 269.
23 See Kramer, above n 1, 263 and 270–1.
24 [1934] P 189 (CA).
25 Greer LJ, *ibid*, 219. See also the comments of Maugham LJ, *ibid*, 234.
26 MJ Tilbury, 'Two Models of Concurrent Tort/Contract Liability and Their Application to Remoteness and the Measure of Damages' in J Berryman, *Remedies: Issues and Perspectives* (Toronto, Carswell, 1991) 437.
27 See H McGregor, *McGregor on Damages* (London, Sweet & Maxwell, 17th edn, 2003) para 19-009.

courts applied the contractual remoteness test. For example, Cardozo CJ held in *Kerr SS Co v Radio Corp of America*[28] that, although

> the action is one in tort for the breach of a duty owing from a public service corporation . . . the contract . . . defines and circumscribes the duty . . . A different question would be here if the plaintiff were seeking reparation for a wrong unrelated to the contract, as, eg, for a refusal to accept a message or for an insistence upon the payment of discriminatory rates.[29]

This seems right (disregarding the possibility that, again, the telegraph companies were common carriers, as some are) because, as Cardozo CJ observed, the wrong is 'related' to the contract, and therefore arises out of risks that could have been assumed to have been in the parties' minds when the price and insurance were set and when the special risks were notified. The contractual allocation of risk therefore 'circumscribes' the tortious duty.

Over 50 years later, Posner J in the US Seventh Circuit Court of Appeals decision of *Evra Corp v Swiss Bank Corp*,[30] citing Cardozo CJ in *Kerr v Radio Corp*, went further. The case concerned a negligent failure of a bank in losing a telex that sought to wire $27,000 from a charterer to a shipowner, which failure led to the shipowner being able to cancel the charterparty, which had been agreed at much lower rates than prevailed at the time of cancellation. The damages claimed exceeded $2m. Posner J applied the contract test of remoteness even though there was no concurrent contract. He agreed that

> On the one hand, it seems odd that the absence of a contract would enlarge rather than limit the extent of liability.

He did so because, he said, the animating principle of *Hadley* was applicable: '[t]his case is much the same, though it arises in a tort rather than a contract setting'.[31] Typically for Judge Posner, he formulated that animating principle in terms of economic efficiency:

> the costs of the untoward consequence of a course of dealing should be borne by that party who was able to avert the consequence at least cost and failed to do so.[32]

[28] 245 NY 284 (1927), 157 NE 140.

[29] Earlier cases also applying the contract test include *Western Union Telegraph Co v Green* 153 Tenn 59 (1926), 281 SW 778 and 153 Tenn 522, 284 SW 898; *Western Union Telegraph Co v Hall* 287 F 297 (1923); *Western Union Telegraph Co v Hogue* 79 Ark 33 (1906), 94 SW 924; *Kennon v Western Union Telegraph Co* 126 NC 232 (1900), 35 SE 468; and *Murdock v Boston & AR Co* 133 Mass 15 (1882).

[30] 673 F 2d 951(1982), available at http://www.projectposner.org/case/1982/673F2d951 (accessed 27 June 2007).

[31] In the later decision of *Jack Rardin v T & D Machine Handling Inc* 890 F 2d 24 (1989) (7th Cir), Posner said of his decision in *Evra* that 'We held that the principle of *Hadley v Baxendale* is not limited to cases in which there is privity of contact between the plaintiff and the defendant'.

[32] See, above n 30, 957.

He also linked the result with the tortious standard of care, explaining that if the defendant has not been told of the possible consequences of loss it does not know how much care to take (how much insurance to buy and what failsafe features to install in its telex rooms).[33]

Although Posner J was concerned with efficiency, his decision makes sense on other grounds. On the thesis set out in this chapter, there does not necessarily have to be a coexisting contract for the contract test to be appropriate. It is perfectly possible to have an implied exclusion of liability or *volenti non fit iniuria* assumption of risk without a contract in any situation in which there is a pre-existing relationship and/or opportunity to communicate with a potential tortfeasor prior to the tort. As Andrew Burrows observes:

> Admittedly the scope for the defendant to deal with that information is more restricted than where there is a contractual relationship: in particular there is no price to modify. But the defendant can exclude or limit its tortious liability (eg for negligent advice) by a non-contractual disclaimer.[34]

Thus Joost Blom suggests that the question we should be asking is whether there is a 'bargainable relationship' which provides an opportunity to raise an improbable but foreseeable loss with the other party before a wrong had been done. Rather than distinguishing between contract and tort claims in determining which remoteness test should apply, he says, it might be better to ask whether the claim is 'contract-related . . . (breach of contract, negligence or conversion)' or 'non-contract related . . . (negligence or conversion not arising out of any contractual relationship)'.[35]

However, the fact that a pre-existing relationship affords the opportunity for one party to exclude the risk of a foreseeable consequence and the other to assume it does not mean that the parties have availed themselves of the opportunity, just as the existence of a contractual obligation does not without more mean that the parties have intended to exclude any tortious obligation (under the *Henderson v Merrett* principle). Put another way, the mere opportunity to give notice of a special risk does not necessarily imply an agreement as to the allocation of that risk. Thus, although Blom and Burrows appear to argue that the contract test should apply whenever there is a pre-existing relationship and therefore the opportunity to convey information about a special risk and to then

[33] Stevens makes a similar point, observing that a harm is less foreseeable if one is not told about any risk of it occurring in circumstances where one would expect to be told: R Stevens, *Torts and Rights* (Oxford University Press, 2007) 207.

[34] A Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd edn, 2004) 92 and 'Limitations on Compensation' in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (Oxford University Press, 2003) 36.

[35] J Blom, 'Remedies in Tort and Contract: Where is the Difference?' in Berryman, above n 26, 413.

bargain about that risk,[36] this cannot be justified by an agreement-centred approach to remoteness (although it may be justified if fairness or efficiency are the basis of one's theory of remoteness).

The test for when the contract test should be applied that was being suggested during the earlier discussion of the carriage and telegraph cases turned on the centrality of the loss (and the means of its being caused) to the matters that were governed and priced by the contract.[37] Accordingly, Tilbury suggests that it will only be in exceptional cases that contractual rules should be applied to limit the effect of tortious rules (and gives the possible example of carrier liability).[38]

One case that seems to fail this test is *Murano v Bank of Montreal*,[39] in which a bank committed trespass and/or conversion by taking possession of a customer's properties through a receiver. The bank's contract with its customer would have provided a defence because it gave the bank the right to impose a receiver, but that defence was unavailable because the right depended upon the bank giving reasonable notice, which it had not done. The Ontario Court of Appeal ignored the contractual test of remoteness and, as the tort was an intentional tort, applied no test of remoteness (at least as far as foreseeability is concerned) and the customer's loss of profits was held to be recoverable.[40] Here the customer's possible loss of profits from putting in a receiver were not central to the contract, albeit that they were very closely linked to one part of that contract, viz the right to put in a receiver. That right was not, however, a core term with regard to which the price and insurance would have been set at the time of contracting.

Imagine a temporary worker employed for a week to enter data, whose very serious pollen allergy is discovered after a day. Without that knowledge, the employer would not foresee that leaving flowers on the employee's desk would cause any harm, and so would not be in breach of his tortious duty of care or contractual duties. With that knowledge, the employer's breach of duty is clear. If the employer does leave flowers on the employee's desk, can the employer then evade liability by arguing that at the time of contracting the employer did not contemplate that such a

[36] Blom, *ibid*, 413; Burrows (2004), above n 34, 92; Burrows (2003), above n 34, 36. See also W Bishop, 'The Contract–Tort Boundary and the Economics of Insurance' (1983) 12 *Journal of Legal Studies* 241, 259 and 261; P Cane, *Tort Law and Economic Interests*, (Oxford, Clarendon Press 2nd edn, 1996) 145 and 477; J Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' [1996] *CLJ* 488, 504; J Swanton, 'Concurrent Liability in Tort and Contract: the Problem of Defining the Limits' (1996) 10 *Journal of Contract Law* 21,43; E Peel, 'Review of Andrew Burrows, *Understanding the Law of Obligations*' (1999) 115 *LQR* 335, 338.

[37] Cartwright puts it in not entirely dissimilar terms when he says that the contract remoteness test should apply to tort claims where the 'basis and content of the contract and tort duties are identical' and the 'sources of the obligations are . . . coincident': *ibid*, 504.

[38] Tilbury, above n 26, 439.

[39] (1998) 163 DLR (4th) 21 (Ont CA). The first instance decision of which is discussed below at the text to n 91.

[40] *Ibid*, para 45 (Morden ACJO).

serious harm could arise in this way and would have paid the employee less or taken out greater insurance against the harm? The answer is no. First, the safety of the employee is probably not sufficiently central that it can be said that the tortious test was impliedly excluded (or, to use Stevens's terminology, 'cut back'[41]) by the contractual test. Secondly, to complicate matters, it is likely that the contractual assumption of responsibility would encompass the harm anyway because the scope of such assumption would be broad in personal injury matters (for reasons given later in this chapter) and such harm would be the sort of thing that an employer would have insurance against as a possible occurrence at work, even though this particular harm was not foreseeable.

However, if a motorcycle courier was engaged by me to bring my post from work to my home, and upon arrival I warned him of my pollen allergy and he nevertheless brought a package containing flowers (and labelled as such) up to me, then the tortious test should apply uninhibited. Even though the contract covers bringing packages to me, there is probably no breach of contract committed and, more importantly, damage to me was not contemplated when the deal was done (any more than the price of a haircut takes account of the possibility of my hairdresser reversing over my foot in the car park).

The relationship governed by the contract may have provided the opportunity for the tort, and at the inception of the relationship there may have been an opportunity to agree special terms and exchange information regarding anything and everything, but that cannot be enough.[42]

IV PARSONS V UTTLEY INGHAM, CONCURRENT LIABILITY AND PHYSICAL DAMAGE

The most fertile ground for discussing contractual remoteness in cases of concurrent tortious liability for 'making things worse' was laid by the famous Court of Appeal decision in *H Parsons (Livestock) v Uttley Ingham and Co*. The plaintiff pig-farmers bought from the defendant manufacturers and suppliers, for £280 including carriage, a large metal hopper to store the pignuts on which the plaintiffs fed their pigs (a 'fine herd', according to Lord Denning MR). The 28-foot hopper was, per the order terms, to have a ventilated top, but the ventilator had been tied shut to stop it rattling during the journey and the defendant's delivery man forgot to open it upon installation. The pignuts stored in the hopper went mouldy. (Swanwick J found as a fact that this was foreseeable as a not unlikely consequence of leaving the ventilator closed.) However, the plaintiff fed

41 Stevens, above n 33.

42 As Cooke observes in support of the *Polemis* decision: R Cooke, 'Remoteness of Damages and Judicial Discretion' (1978) 37 *CLJ* 288, 289.

them to the pigs knowing the nuts to be mouldy but accepting conventional wisdom that mouldy nuts do not injure pigs. (Swanwick J found as a fact that it was not at the time of contracting reasonably foreseeable as not unlikely that the feeding of mouldy pignuts would cause illness to pigs.[43]) Conventional wisdom was wrong and 254 pigs of the herd of around 700 died of *E coli*. The value of the pigs was around £10,000 and there was a claim for loss of profits of at least that amount again.

Lord Denning MR said that the relevant breach of contract was probably the negligent assembly of the hopper rather than the breaches of Sale of Goods Act warranties.[44] His view was that, in any event, in physical damage cases the tort test of remoteness should apply.[45] He relied in particular on the apparent unfairness of a purchaser of faulty goods suing in contract being in a worse position than if he were suing the manufacturer or supplier in the tort of negligence, or a visitor being in a worse position if suing an occupier in contract than in tort.[46] He therefore found the defendant liable for the value of the pigs but not for the loss of profits they would have fetched.

Scarman LJ, with whom Orr LJ agreed, disagreed with Lord Denning on the matter of the correct test, applying the contract test but holding (in reliance upon somewhat manipulated comments of the trial judge Swanwick J) that it was reasonably foreseeable as not unlikely that a hopper unfit for storing pig nuts would lead to illness of some kind in the pigs, or their death. His rejection of Lord Denning's views was, however, made less forceful than it might otherwise have been because he agreed[47] with Lord Denning that the test in contract and tort should be the same. The three judges were, therefore, agreed that the appeal should be dismissed and that only damages for loss of the pigs, rather than loss of the profit that could have been made from the pigs, was recoverable.

This decision raises several important issues. The first relates to contractual remoteness. Is the contract test more relaxed in cases of physical damage than economic loss cases, as Lord Denning suggests? How should it be applied in these circumstances? The second question relates to concurrent liability. Although the action was brought only in contract, it could have been brought in the tort of negligence because there

43 Scarman LJ thought, obiter, that he might have found differently if he were the first instance judge, but did not allow the appeal on this point.

44 [1978] QB 791 (CA) 800. Scarman LJ disagreed at 809.

45 *Ibid*, 803–4.

46 He also relied at 804 upon the apparent unfairness of a gratuitous recipient of medical services being in a better position when suing in tort than the patient who has paid for his services and sues in contract. As far as failing to improve the position of the patient rather than making things worse, this is dealt with below, where it is suggested that the contract test should apply because the duty of care in tort arises out of a contract-like assumption of responsibility in a pre-existing relationship.

47 *Ibid*, 806.

was a breach of a duty of care and the hopper caused physical harm.[48] If a tort claim had been brought, should the contractual remoteness test have applied to such a claim as well?

Taking the first question first, how does the contact test operate in the circumstances of *Parsons*? If the same standard of foreseeability were applied then one would expect the loss of profits, as well as the value of the pigs, to be recoverable. As Hugh Collins observes, the loss of profits is so closely tied to the illness or death of the pigs that if (as the Court found) the latter was foreseeable, the former must also have been.[49] There must, therefore, be more at work than simply a test of foreseeability.

The answer must be, as Collins observes, that the loss of profits was outside the scope of responsibility implicitly assumed by the manufacturers of the hopper.[50] This seems right since, although the defendants were sheet-metal workers specialising in the manufacture of bulk food storage hoppers and automatic feeding systems, with comparable knowledge of the risks of bad food to that of food compounders (as Scarman LJ held[51]), this does not mean that they would have any ideas about the profits made by pig-farmers from their pigs. Consequently, given that the defendants could not realistically have allowed for the risk of paying for such loss of profits in their price and insurance, the parties might have therefore assumed that such a risk was outside that assumed by the defendants under the contract. Of course, the claimant also knew more about the value of the pigs themselves, but the defendant nevertheless could not without more assume that the value of the pigs was allocated to the claimant as in that case the defendant would have by far the better of the bargain, being left with no significant liability at all.

Indeed, it is generally the case that physical damage or personal injury will be more likely than losses of profits to be within the liability assumed

[48] Presumably the claim was brought in contract to avoid a reduction in damages for contributory negligence (although we know now that there can be such a reduction in cases of a contractual duty of care concurrent with a tortious duty). As a further aside, despite Lord Denning saying that there was no issue of causation, it would seem to me arguable that the actions of the plaintiffs in knowingly feeding mouldy nuts to pigs broke the chain of causation (given that it was *ex hypothesi* foreseeable that the mouldy nuts might harm the pigs).

[49] H Collins, *The Law of Contract* (London, LexisNexis Butterworths, 4th edn, 2003) 513.

[50] Stevens gives a different explanation, namely that damages for the death of the pigs are substitutive damages for interference with a property right and therefore not subject to the rules of remoteness: Stevens, above n 33, 152–8 and 208. See also T Weir, 'Volume XI Torts, Chapter 12 Complex Liabilities' in *The International Encyclopedia of Comparative Law* (Tübingen, Mohr, 1976) 11; HLA Hart and A Honoré, *Causation in the Law* (Oxford University Press, 2nd edn, 1985) 314; Cooke, above n 42, 299. But see AM Tettenborn, D Wilby and D Bennett, *The Law of Damages* (London, Butterworths, 2003) para 6.57, who argue that consequential losses should be subject to the *Wagon Mound* test but direct damage should be subject to the *Heron II* test in contract cases.

[51] [1978] QB 791 (CA) 808, although this may in fact point in favour of liability if an approach based purely on foreseeability were applied, since although a pig-farmer would assume that mouldy nuts would not harm pigs, a lay person ignorant as to pig-farming may well assume that mouldy nuts would be not unlikely to harm pigs.

by the supplier.[52] Purchasers can be assumed by suppliers to be less willing to assume the risk of these harms (which are generally considered to be more significant and less matters of mere balance sheet valuation), even if they are unlikely.[53] Further, suppliers can be assumed by purchasers to be less likely (as compared with purchasers) to be able to assess the value of losses of profits than physical losses, and so to factor them into the price or to take out insurance against them, and so less willing to assume the risk of these harms. However, even if the contract test is more relaxed in physical damage cases, and so is closer to or the same as the tort test in terms of the foreseeability required, the timing of the two would still differ (such that information conveyed to the defendant after contracting but before the breach would be irrelevant to the application of the contractual remoteness test but relevant to the tort test).

As for the second question, as to whether the contract test should govern any tortious action, the answer at first sight is in the affirmative, for the reasons discussed earlier in this chapter. Clearly the risk of damage to pigs is one of the central features of a contract for supply of a hopper to hold pig-food. However, the above conclusions as to remoteness in concurrent liability situations may require modification in product liability cases. Manufacturers and suppliers know that their products may cause damage to third parties and not only the person to whom they supplied them. They price and insure accordingly. Further, it is well known by them and by (at least some) consumers that there is a tortious action for damage and injury against all suppliers and manufacturers. It may be that in such cases the parties cannot be taken to have intended to exclude concurrent tortious duties. As Katherine Swinton observes (in slightly different terms),

> it is arguable that if it is fair to impose liability in tort on the defendant, it must be fair to impose liability in contract on those engaged in similar activities, if they have not chosen to allocate the risks expressly. There is no real surprise to the defendant in imposing such liability.[54]

The present approach of the courts is certainly to apply the contractual test to the contract claim and the tortious test to the tortious claim (see, for example, *Vacwell Engineering Co Ltd v BDH Chemicals Ltd*[55]). Further, and whether or not this is correct and whether or not the tortious test is excluded, this provides additional support for the conclusion above that the contractual assumption of responsibility will often be broader in cases of

[52] Kramer, above n 1, 263. See also F Dawson, 'Reflections on Certain Aspects of the Law of Damages for Breach of Contract' (1995) 9 *Journal of Contract Law* 20, 45–7.

[53] Indeed, in consumer contracts any express limitation of liability for negligently caused personal injury or property damage would be subject to challenge under the Unfair Contract Terms Act 1977. This should also apply to such limitations impliedly agreed by the parties.

[54] K Swinton, 'Foreseeability: Where Should the Award of Contract Damages Cease?' in BJ Reiter and J Swan, *Studies in Contract Law* (Toronto, Butterworths, 1980) 89.

[55] [1971] 1 QB 88 (QB).

personal injury and physical damage (and therefore more like the tortious test) than in cases of economic loss.

There is a possible further justification for a more relaxed contractual test in warranty cases. It is logical to think that the strict nature of the relevant duty should have some effect on the contractual remoteness test. A strict duty that a product will be fit for a known purpose (storing pig-nuts) might well indicate an assumption of responsibility for unlikely or even unforeseeable but directly caused results. Swanwick J in *Parsons* held that the *Hadley* test did not apply to warranties and a mere proximate cause test applied. This approach to seller's warranties, at least as regards personal injury and property damage, can be found in the United States in the Uniform Commercial Code at section 2.715(2)(a).[56] However, this approach was rejected by all of the Court of Appeal in *Parsons*, although Lord Denning MR applied the tort test from *The Wagon Mound*, which is intermediate between the contract test and the proximate cause test.[57]

The one thing that does not shed much light on *Parsons* or any case is the assertion that a defendant, to be liable, must be able at the time of contracting to contemplate only the type or kind of loss and not the actual loss suffered. This was what the majority relied upon, and is often thought of as the major contribution of the case to the law.[58] Of course, it is right that only the type of loss must be foreseeable, but the level of generality with which a 'type' can be drawn depends upon all the things upon which the assumption of responsibility depends. In other words, a type that is recoverable can be circumscribed and distinguished from a type that is unrecoverable only by identifying what factors are significant from the point of view of the scope of risk, for example, because they indicate an order of risk that has not been priced or insured for.[59]

V HEDLEY BYRNE NEGLIGENCE

The debate about concurrent liability arises more often, and is also easier, in the context of situations such as that in *Henderson*, of a contractual duty concurrent with a tortious duty of care where the latter arose out of an assumption of responsibility (through the principle from *Hedley Byrne*).

One of the crucial features of the *Hedley Byrne* duty (including liability for misstatements, services and omissions), as contrasted with other

[56] Comment 4 to which explains that this is the 'usual rule as to breach of warranty'.

[57] See further, eg *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 (CA), which makes it clear that the full *Hadley v Baxendale/ Heron II* test applies to breach of warranty claims.

[58] See eg Burrows (2003), above n 36, 34.

[59] Kramer, above n 1, 274.

tortious duties, relates to what goes on inside the claimant's head. All tortious duties, once they have been recognised by the courts, may be said to give rise to reasonable reliance upon the skill or honesty, etc of those owing the duties (in driving a car, publishing information, etc). However, it is only in the case of breach of a *Hedley Byrne* duty of care that reasonable reliance upon that skill is necessary for loss to be caused at all. Driving a car into someone causes them harm even if their back was turned: in that sense the harm is direct. However, making a statement, omitting to act or failing to make things better can only cause loss if the victim is in fact relying upon the truth of the statement, the commission of the act or the actor's making things better: in that sense the harm is indirect.[60] One cannot cause harm in such cases to people whose back is (metaphorically) turned. Only by relying does the claimant open herself up to loss.

Put like this, one might say that the claimant is the author of her own misfortune by relying on the defendant rather than relying upon herself or those she has contracted with (that is, paid) to act. The law takes the same view, except where there are special circumstances that make it reasonable to nevertheless rely upon the defendant, for example, because the defendant has expressly or impliedly intimated that the claimant could rely, or the defendant has taken control of a situation, or the defendant has a public or other obligation towards the claimant. Whilst this may not amount to a contractual promise, the crucial features of the *Hedley Byrne* duty (as compared with other torts) are that, as in the case of contracts: (i) the claimant (or group of claimants) and the defendant are in a specific relationship of some sort that predates the occurrence of the loss (in contrast with the usual position, where there is no relationship between the tortfeasor and the claimant other than through their shared membership of a society); and (ii) the claimant decides to rely upon the defendant's skill.

Because of this pre-existing relationship, and the conscious decision by the claimant to rely upon the defendant, it is inappropriate to nevertheless hold the defendant liable for all losses foreseeable at the time of the careless action or inaction. The defendant is not (in breaching the *Hedley Byrne* duty of care) invading the claimant's life, or interfering with the claimant's interests, unbidden and by surprise, through the careless action or inaction, and therefore liable for (most of) what follows. Rather, the claimant is able to avoid all loss and avoid all invasion of his life and interests by not relying upon the defendant. There is thus no infliction of harm, but rather a justified delegation of responsibility (that is, a reliance) by the claimant. The scope of the duty of the defendant is fixed at the point of the forming of the relationship and the delegation (at which point,

60 See further A Kramer, 'Proximity as Principles: Directness, Community Norms and the Tort of Negligence' (2003) 11 *Tort Law Review* 70.

as with contracts, the claimant has an opportunity to tell the defendant about particular susceptibilities and the reason why he is relying upon the defendant) and not at the (often) later date of the carelessness. Accordingly, the scope of the duty is fixed by reference to the scope of the justified delegation or reliance.

As John Cartwright has observed:

> If it is right in the law of contract to draw the line for recoverable damage at the genuinely foreseeable consequences of the breach for the reason that the defendant has agreed to undertake a liability within the scope of that risk, then it ought to be equally right to draw a similar line in those tort cases where the existence of the duty of care depends on a similar notion of a risk assumed voluntarily by the defendant . . .
>
> In those cases where the duty arises only because the courts characterise the situation as one of an assumption of responsibility on the model of contract, the extent of the defendant's duty (and consequent liability) is limited by reference to a relatively high level of foreseeabilty, in similar fashion to the contract test of remoteness set out in *The Heron II*. [61]

Stevens agrees. His view is that in most (but not all) cases of *Hedley Byrne* negligence and gratuitous bailment both the tortious/bailment action and the contractual action are based upon failure to keep the promise to take care, and in such cases remoteness should be tested at the time of and by reference to the voluntary undertaking or assumption of responsibility, since the scope of liability for breach depends upon the construction of that undertaking or assumption.[62]

However, the case law on this is less than conclusive. In *Brickhill v Cooke*,[63] an engineer who carelessly prepared a survey of a house for the plaintiffs was held liable for the AUS$1,500 that the plaintiffs had paid to a builder who they had contracted to do certain work that was discontinued once the carelessness of the engineer had been revealed. The Court of Appeal of New South Wales found that, although it may not be recoverable in contract, to which must be applied the *Heron II* test of remoteness, it was recoverable under the concurrent tortious duty of care and the tortious remoteness test of reasonable foreseeability which 'is much less demanding than in contract'. Further, in the *Cadoks* case, discussed below[64], the client property purchaser recovered damages in negligence against a solicitor for the lost opportunity of making profits on

[61] J Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' [1996] *CLJ* 488, 502 and 505.

[62] Stevens, above n 33, 203 and 207. It should be noted that for Stevens this mainly affects the time of the test, since in his view there should be no difference in the degree of foreseeability required by the contract and tort tests.

[63] [1984] 3 NSWLR 396 (NSW CA).

[64] Text to n 95.

the delayed on-sale, despite such profits being too remote under the *Heron II* test of contractual remoteness.

Faintly pointing in the opposite direction to *Brickhill* is the decision in *BDC Ltd v Hofstrand Farms Ltd*.[65] In that case the majority of the Supreme Court of Canada (Wilson J being silent on the point), obiter and without much argument or discussion, applied the contractual test of remoteness to a case in which (it was assumed for the purposes of that part of the judgment) a courier had assumed responsibility to a third party for economic loss arising from late delivery of the package (see Estey J at paragraph 27). As the terms of the contract between the third party and a fourth party, which gave rise to a right of the fourth party to terminate if the Crown grant contained in the package was not registered by a certain date, were unusual, the loss would only have been recoverable had the terms of that contract (and so the likelihood of a loss if delivery was delayed) been communicated under the second limb of *Hadley v Baxendale*. The Court did not say whether or not the loss would have been recoverable under the tort test. Given that there was no *Hedley Byrne* duty of care found, not to mention that the issue received no analysis, this is not strong authority for the proposition that the contractual remoteness test should apply to *Hedley Byrne* cases: the contract test is inapt for the same reasons that no duty was found, that is, the courier had no relationship with the plaintiff such as would give an opportunity to communicate the risk or to limit the duty assumed and therefore justify the application of the contract test.[66]

Further, in a concurrent contract and *Hedley Byrne* case, *Brown v KMR Services Ltd*[67], the Court of Appeal applied the contract test and found that the losses resulting from the Lloyds members' agents' negligence were too remote. There was no discussion of the tort test or the issue. Burrows argues that nevertheless the decision is authority for the proposition (which he supports) that

> where the parties are in a contractual relationship, the . . . contract test applies even where the claim is being brought in tort because of the equal opportunity that the claimant has had to inform the other party of unusual risks.[68]

Certainly this seems logical for the reasons given above. Where there is a contract, it might be said that the contractual duty (and the scope of liability for consequences of breach of those duties) delimits the tortious duty (see the discussion below in relation to other torts). However, the better view is that in *Hedley Byrne* cases the scope of the tortious duty is

[65] [1986] 1 SCR 228 (SCC).
[66] See further Blom, above n 35, 413–14.
[67] [1995] 4 All ER 598 (CA).
[68] Burrows (2004), above n 36, 94 and Burrows (2003), above n 36, 36. Stevens also cites this case for the same proposition: Stevens, above n 33, 208.

fixed at the time of and by reference to its assumption (by the application of the *Caparo v Dickman*,[69] *SAAMCO* and *volenti* principles), irrespective of whether there is a concurrent contractual obligation.[70]

If this is right, remoteness is no longer a relevant factor in a claimant's decision whether to sue in contract or in *Hedley Byrne* negligence. That still leaves limitation, contribution and service out of the jurisdiction on Lord Goff's list of 'adventitious' rules of law[71] that make shopping for a cause of action a matter of practical importance, although the Law Commission of England and Wales would harmonise the rules of limitation if it had its way.[72] As regards *Hedley Byrne* duties, the difference between the English system and the French system of *non cumul* (contract liability only) looks less stark than it once did.

VI ASSUMPTIONS OF RESPONSIBILITY AFTER CONTRACT FORMATION

Putting concurrent liability and related issues to one side, we turn now to a further problem area in the rules of remoteness in contract, that of the time for determining what was in the parties' possible contemplation and therefore what is or is not too remote. It is well established that the time of contracting is the relevant time for these purposes, the orthodox justification being the promisor's opportunity to protect herself at the time of contracting, but not subsequently. This was clearly explained by Hobson CJ in the Kentucky Court of Appeal decision in *Patterson v Illinois Cent R Co*[73], a case in which a shipper was notified of the urgency of the delivery of cattle feed only after the contract had been made:

> If one party could by a subsequent notice make the other party liable for such special damages, then the rights of the parties would not be determined by the contract between them or by their situation at that time, but by the act of one of the parties alone. The rule that notice should be given at the time the contract is entered into rests upon the ground that the person to whom the notice is given may have an opportunity to protect himself by the contract which he makes or by special precautions to avoid loss. A notice given afterwards by one party would afford no such opportunity for self-protection.[74]

[69] [1990] 2 AC 605 (HL).

[70] Although it may be that there can be further assumptions of responsibility under the *Hedley Byrne* principle after the commencement of the relationship, in similar although perhaps wider situations than are discussed in the latter part of this chapter in relation to relationship contracts. See further Cartwright, above n 36, 503.

[71] *Henderson*, above n 7, 186.

[72] Law Commission, 'Limitation of Actions' (Law Com No 270, 2001).

[73] 97 SW 423 (1906).

[74] Or, as Lord Hope put it more recently in the House of Lords decision in *Jackson v Royal Bank of Scotland* [2005] UKHL 3, [2005] 1 WLR 377 (HL)[36]: 'The parties have the

A fortiori, the time of contracting rule is the correct time if one holds the view (in pure or watered down form) that remoteness is actually about the implied assumption of risk by the promisor.[75] This is one rule, at least, about which few doubts have expressed, and as to which there has been little comment.[76] The only significant exceptions are Sir Robin Cooke, who advocates a discretionary approach to remoteness which takes into account the foreseeability of loss both at the date of contracting and immediately before the breach,[77] and Samek, who argues that the date of breach should be used when the breach was wilful.[78]

Patterson must therefore be right. So is the decision in *Kollmann v Watts*,[79] in which the Supreme Court of Victoria allowed an appeal because the purchaser of a business did not know at the time of contracting, although he did know before breach, that the seller needed the money promptly to buy a house and might therefore have to borrow money at a high rate of interest if the purchaser of the business was late in making payment.

opportunity to limit their liability in damages when they are making their contract. They have the opportunity at that stage to draw attention to any special circumstances outside the ordinary course of things which they ought to have in contemplation when entering into the contract.'

75 And even if one's view is that the remoteness rule is really founded upon and justified by the promotion of economic efficiency, the time of contracting is, again, probably the proper time: I Ayres and R Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87; JM Perloff, 'Breach of Contract and the Foreseeability Doctrine of *Hadley v Baxendale*' (1981) 10 *Journal of Legal Studies* 39; LA Bebchuk and S Shavell, 'Information and the Scope of Liability for Breach of Contract: The Rule of *Hadley v Baxendale*' (1991) 7 *Journal of Law, Economics and Organization* 284. However, for the contrary view see in particular CA Goetz and RE Scott, 'The Mitigation Principle: Toward a General Theory of Contractual Obligation' (1983) 69 *Virginia Law Review* 967, 1014, who argue that liability should include needs unknown to the promisee but of which the promisor should have known before the time for performance, and MA Eisenberg, 'The Emergence of Dynamic Contract Law' (2000) 88 *California Law Review* 1743, 1772–7, who criticises the current 'time of contract formation' rule as being 'static', preferring the 'dynamic' proximate cause rule which looks to the circumstances existing at the time of breach, and argues that the current rule encourages the breaching party to ignore relevant costs and benefits merely because he was not aware of them at the time of contracting, and therefore to profit from making an inefficient breach and paying damages limited by the current remoteness rule.

76 Although, for an early suggestion that the rule may be wrong, see the comments of Bramwell B in *Gee v Lancashire and Yorkshire Railway Company* (1860) 6 H & N 211, 218: 'I am not sure that another qualification might not be added which would be in favour of the plaintiffs in this case, viz that in the course of performance of the contract one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say: "If, after that notice, you persist in breaking the contract I shall claim the damages which will result from the breach".' See also the decision in *Stanish v Polish Roman Catholic Union of America* 484 F 2d 713 (1973), where the date of breach was applied in a contract case, and see the discussion by Treitel, above n 2, 160–1.

77 Cooke, above n 42, 298.

78 RA Samek, 'The Relevant Time of Foreseeability of Damage in Contract' (1964) 38 *Australian Law Journal* 125. JM Perillo, 'Volume 11: Damages' in *Corbin on Contracts* (Lexis Nexis, 2005) seems to agree.

79 [1963] VR 396, discussed by Samek, *ibid*.

Similarly, the reasoning (although not the decision) of the Court of Appeal in *100 Old Broad Street v Sidley*[80] was probably wrong. In that case a surveyor negligently advised a developer that the neighbours' rights to light would not give them rights to an injunction against the proposed development. Glidewell J for the Court of Appeal stated that:

> That, however, leaves open the question, what was the relevant time—in other words at what date must the particular loss have been reasonably foreseeable? We have not been referred to any authority which deals with this question. In my opinion, the answer to the question is clearly, when the cause of action arose. In this case, that is when the defendants' contract of retainer was breached, and in tort when the damage to the plaintiffs was caused ie when they expended the fees which were wasted . . . Mr Fernyhough [QC for the Defendant] accepts that this is correct . . .

His Lordship then applied the date of breach to the question of what was foreseeable, finding the losses to have been in the parties' contemplation at that date. It is noteworthy that this was all obiter because no damages were awarded in the end (damages for wasted expenditure had not been properly pleaded or proven, and the rectification works for which damages were claimed had not been and would not be undertaken). It was probably also obiter for a further reason, since it seems likely that the date would have made no difference (since a surveyor would probably contemplate at the time of being retained that if he negligently advised as to rights to light it was not unlikely that the project would have to be abandoned upon discovery of the mistake). Nevertheless, it is interesting that the Court and counsel accepted the date of breach of contract as the correct date. No doubt they were influenced by the concurrent action in negligence (with the relevant foreseeability date being the date of loss), and by the fact that the contract was an ongoing retainer (more about both of these below). Yet, for the reasons given above, it seems unfair and legally incorrect to take the date of breach as the relevant date for applying the remoteness test.

However, as the following sections seek to demonstrate, there are situations in which a later date for the assessment of remoteness may be justifiable.[81]

[80] [1999] All ER (D) 432 (CA).

[81] It is noteworthy that the developments suggested here are all but impossible where there is a codified rule of remoteness specifying, for example, that foreseeability must be assessed 'at the time of the conclusion of the contract', as the CISG does. See further the discussion of that provision by F Ferrari, '*Hadley v Baxendale* v Foreseeablity under Article 74 CISG', this volume.

VII VARIATIONS OF CONTRACT

The first wrinkle in the time of contracting rule comes with contractual variation. In *Spang Industries Inc Ft Pitt Bridge Div v Aetna C & S Co*[82] a bespoke steel supplier entered into a contract in September 1969 with the date of supply to be agreed. At the time of contracting the supplier understood from the specifications that the work on the construction project was expected to end in December 1971 and therefore that it would have to supply the steel in 1971. The work went quickly and in November 1969 the delivery date was agreed as being June 1970. Delivery was delayed until September 1970, causing various costs because of the difficulties of pouring steel in the colder months. Circuit Judge Mulligan stated that:

> It would be a strained and unpalatable interpretation of *Hadley v Baxendale* to now hold that, although the parties left to further agreement the time for delivery, the supplier could reasonably rely upon a 1971 delivery date rather than one the parties later fixed . . . We conclude that, when the parties enter into a contract which, by its terms, provides that the time of performance is to be fixed at a later date, the knowledge of the consequences of a failure to perform is to be imputed to the defaulting party as of the time the parties agreed upon the date of performance. This comports, in our view, with both the logic and spirit of *Hadley v Baxendale*.[83]

This is strange. The same result should have been reached on the basis that at the time of contracting it was in the parties' contemplation that the date of delivery subsequently agreed *might* be mid-1970 and that if delivery was late (in whichever year) it was not unlikely that there would be steel-pouring costs. The risks and rewards of the parties were fixed at the time of contracting and it seems unfair if something unforeseeable at that date were later recoverable merely because of the deferred fixing of time for delivery, that deferral being agreed in the original contract. The fixing of the time was not, in this case, a variation of the contract.

In *Roanoke Hospital Association v Doyle & Russell Inc*[84] a construction completion date had been fixed in the original contract. Change orders were agreed with the builders and the customer then claimed that the builders had failed to complete by the due date. The court concluded that the change orders did not amount to 'a meeting of the minds upon an amendment altering the completion date first fixed in the contract', and so the date of contracting was applied as the correct date for assessing what damages were recoverable and what damages were too remote. However, Justice Poff stated obiter that

[82] 512 F 2d 365 (1975) (2nd Cir).
[83] *Ibid*, 369.
[84] 214 SE 2d 155(1975) (Virg SC) 160–1.

> When the breach alleged is an unexcused delay in completion, if the completion date has been altered by consensual amendment, contemplation is to be determined as of the date of amendment.

Corbin on Contracts cites the *Roanoke Hospital Association* case for the proposition that '[w]hen the contract has been modified by mutual assent, foreseeability is to be determined as of the date of amendment'.[85] This makes a lot of sense. Where there has been an actual amendment or variation to a contract (rather than merely the fixing of a date that was left open at the date of contracting) there is much to recommend the idea that the remoteness test should be applied at that date, at least with regard to the obligations that were varied (a qualification correctly added by Justice Poff), since there was a renewed assumption of responsibility at that time. If the promisor had felt that she was now aware of further risks of loss arising out of the varied obligation of which she had not been aware at the time of formation, then she might renegotiate the price or other matters as a condition for giving her agreement to the variation. In the circumstances, as in the case of formation, this opportunity to renegotiate the obligations might well give rise to an implied assumption of further risk with regard to the varied obligation.

It is less clear that such a principle can be applied to situations in which there is no renegotiation but there is the opportunity for such renegotiation.

VIII LONG-TERM CONTRACTS

Long-term contracts will often include agreed variations to the work to be provided or the price to be paid for it, and that may give rise to a delaying of the relevant date for assessing remoteness to the date of variation, in accordance with the principle identified in the previous section.

However, it may be that in such contracts which are not single transactions for a single price but rather are relationship contracts (banker and customer, solicitor and client, employer and employee, etc), the date of contracting may not be the best date as of which to apply the remoteness test even where there has not been a variation.

Before briefly discussing why this might be so, it is worth looking at the only three decisions that I could find that tested this hypothesis. All three are first instance decisions: *Malyon v Lawrence, Messer & Co* (1968) in the English High Court, *Murano v Bank of Montreal* (1995) in the Ontario Court of Justice and *Cadoks Pty Ltd v Wallace Westley & Vigar Pty Ltd* (2000) in the Supreme Court of Victoria.

[85] Perillo, above n 78, para 56.3.

In *Malyon v Lawrence, Messer & Co*[86] a solicitor was engaged to prosecute a civil claim arising out of a car crash. After the solicitor had been retained, and to the solicitor's knowledge, the client developed and was diagnosed with severe anxiety, which adversely affected the client's business (and its profitability) and was unlikely to abate until the claim against the negligent driver had been settled. However, the solicitor's negligent breach of contract by delaying pursuit of the client's claim led to the claim becoming time-barred.

The plaintiff recovered £1,250 of contract damages to compensate for his anxiety even though the defendant solicitor only learned of the plaintiff's condition after being engaged. Brabin J (at 550–1) rejected the contention that the only relevant time for assessing contemplation was 'the moment when the plaintiff, as it were, walked into the defendants' office', focusing on the continuing nature of the solicitor's obligation while his retainer operates and the likelihood that circumstances will supervene which require action after the date of commencement of the retainer. This appears to have been the ratio of the case, since at the date when it was decided it was thought that there could be no concurrent duty of care in tort.[87] Further, while in some cases, such as *Heywood v Wellers*,[88] severe anxiety may be foreseeable at the time of contracting, it appears from what Brabin J indicated that in *Malyon* the anxiety was too remote as at the date of the commencement of the retainer. As Jonathan Hill observes, the decision seems to be fair, but is not easy to reconcile with the authorities on remoteness.[89]

The appeal decision in *Murano v Bank of Montreal* was discussed above.[90] It will be remembered that a bank, in breach of its contract with its customer, failed to give reasonable notice before putting the customer into receivership. It was clearly foreseeable at the time of retaining the bank that the receivership would destroy the client's business.

Although the issue we are interested in was not live in the case, since the losses were foreseeable at the time of the inception of the banking relationship and further there were concurrent tortious causes of action in trespass/conversion, Adams J made some interesting observations in giving the first instance judgment.[91] He explained (at paragraph 153) that the timing of the remoteness rule in contract applies because:

> Parties to contracts voluntarily assume risk in return for negotiated consideration. Risk is therefore judged by the parties at the outset of their relationship. To assess the foreseeability of loss at some later point in time, such as the date

[86] [1968] 2 Lloyd's Rep 539 (QB).
[87] Following *Groom v Crocker* [1939] 1 KB 194 (CA), referred to in *Malyon* at 550.
[88] [1976] QB 446 (CA).
[89] J Hill, 'Litigation and Negligence: A Comparative Study' (1986) 6 *OJLS* 183, 210.
[90] Text to n 39.
[91] (1995) 20 BLR (2d) 61 (Ont CJ, Adams J), (1998) 163 DLR (4th) 21 (Ont CA).

> of breach, carries with it the potential for changing the risks voluntarily assumed, ie the bargain.

But he then observed that:

> this case severely tests the reasonableness of this ancient rule because of the 'at will' nature of the contractual relationships. Where a party can demand full payment of a loan at will, that party can assess daily whether to break off its contractual relationship. In the case of a demand loan, it can do so without breaching its contract provided it gives reasonable notice. In that particular context, it seems strange to be thrown back to the original date of contract for the purposes of foreseeability. In fact, confining loss assessment to the formation of a long standing 'at will' banking relationship seems artificial and may be inconsistent with the general trend of authority harmonizing rules in tort and contract. Indeed, in this case, judging the foreseeability of loss in light of the Bank's knowledge closer to the date of breach is not likely to upset contractual intentions given the expectations of the parties at the date of contract formation that the plaintiffs' changing conditions would be closely monitored.[92]

He later observed that:[93]

> in an 'at will' banking relationship of this type I see no unfairness in also assessing foreseeability in contract near the date of breach. The Bank sought and received regular updates on Murano's situation. Such monitoring was expected by the parties on contracting. The Bank could have extricated itself at any time by giving reasonable notice.[94]

In *Cadoks Pty Ltd v Wallace Westley & Vigar Pty Ltd*,[95] a solicitor was engaged to conduct the purchase of a farm. Three years after the solicitor was engaged, the purchaser made it clear that he intended to sell on the property he was buying, for a profit. Due to the negligence of the solicitor, the completion was delayed by another year and the market fell, reducing the profits that the purchaser eventually made from the on-sale.

The plaintiff was refused contract damages for lost profits from the resale of the property because the discussion between the parties as to the purchaser's intention to sell the property on after it had been bought, 'which might well be said to show special circumstances, took place long after the time when the contract [with the solicitor defendant] was made'.[96] At the date of commencement of the retainer, the loss was too remote under the *Heron II* test. It should be noted, however, that this decision was obiter because the loss was held to be recoverable in the tort

[92] *Ibid*, para 160.

[93] The Court of Appeal in *Murano*, although dismissing the appeal as far as these heads of losses were concerned, took the view that the primary cause of action was in the tort of trespass or conversion, as is discussed above at the text to n 39. The Court did not comment on Adams J's dicta.

[94] *Ibid*, para 193.

[95] [2000] VSC 167 (Vic SC, Ashley J).

[96] *Ibid*, para 205.

of negligence, since the loss was not too remote under the tortious test of reasonable foreseeability at the time of the negligence.[97]

Notably, Hobson CJ in the *Patterson* decision above[98] observed that no new contract was made at the time that the special information about the urgency of delivery of the cattle feed was communicated to the carrier. We have already seen that in cases of a variation of contracts the correct date for application of the remoteness test should be the date of the variation (at least with regard to the varied obligation). In the same vein, in relationship cases it might be said that, in essence, a new contract is formed at each and every point in any continuing and terminable relationship contract, at least as regards the parts of duties that are terminable (that is, not obligations for which the time for performance has come about or which could otherwise not be avoided by termination of the relationship). As Adams J observed in *Murano*, in cases of relationships terminable (and therefore renegotiable) at will (such as those with periodic payment or payment as and when work is done), the basic justification for the remoteness rules in contract does not point to the 'time of contracting' rule.[99] In such cases the remoteness test should be applied at all relevant times before breach up until the last moment at which the defendant could have terminated (without paying damages) the contractual obligation that was breached. *Malyon* seems right and *Cadoks* wrong.[100]

However, the remoteness test will not necessarily operate in exactly the same way at the later times as it would at the time of contracting. At the time of contracting it is usually reasonable to infer an assumption of risk from the failure of the claimant to exclude liability for not unlikely losses. This is probably also true (albeit to a lesser extent) of variations, at least with regard to the varied obligation. But this inference will be weaker still at later stages where, although there is a theoretical opportunity for termination and renegotiation, there was no actual reconsideration or renegotiation of the obligations. Further, at the time of contracting there is a mutual assumption of obligations, and it is only really on the rare occasions on which the price is vastly disproportionate to the risk that one

[97] See further above at the text to n 64.

[98] See n 73.

[99] Cf Cartwright's discussion of the liability of a solicitor in the tort of negligence, above n 36, 503. Note also that, under the Unfair Terms in Consumer Contracts Regulations 1999 sch 1(j) and sch 2(b), clauses giving the power to one party to unilaterally vary interest rates and charges are not considered unfair where the customer is free to dissolve the contract immediately (presumably since the failure to do so signals a sort of freely given consent).

[100] In *100 Old Broad Street v Sidley*, above n 80, and accompanying text, we saw that the time of breach was applied as the relevant time for the remoteness test in a surveyor's negligence case. Although a surveyor might be said to have an ongoing relationship with his client, Glidewell J was probably still wrong, because the action related to an obligation to advise that was undertaken at the outset of the retainer and could not have been terminated at will (although the retainer could have been terminated later so as to refuse to perform further services or undertake obligations that had not yet arisen).

might not infer an assumption of risk for foresight of a not unlikely possible loss. At the later stage, however, there is less incentive for assumption of risk, since the defendant is getting nothing in return (and, indeed, if the assumption of extra risk were instead assumption of an extra obligation, we might say that there was no consideration for the variation of contract). Foreseeability of the risk of a (new) loss, even when a party could have left the relationship, should not necessarily give rise to an inference of assumption of risk, and to adopt the contrary point of view would in some ways be analogous to treating silence as acceptance of a contractual offer.

So we are left with some uncertainty as to when the date of the assessment of remoteness should be put off past the date of contracting in terminable at will relationship contracts. However, this problem rarely arises in practice, principally because, even more than in other cases, in long-term contracts the parties' assumptions of risk will usually be broadly defined for the very reason that the contract is a long-term contract and the parties can be assumed to understand that things will change throughout the life of the contract, and the price and insurance will accordingly be calculated generally and with an eye on the long term[101] (although this is even more likely where the contract is not terminable and the parties are locked into their original deal for the full term). An employee cannot complain because his carelessness led to the loss of a deal or type of profit that was not even a twinkle in anyone's eye at the time he took the job, because it is understood that the deals and opportunities of his employer are likely to develop over time and his wage is not fixed according to a specific transaction.[102]

IX CONCLUSION

If one takes seriously the idea that the contractual remoteness rule is at least partly about assumption of risk, then various results obtain.

First there is the question of concurrent liability. If an agreement-centred view of contract remoteness is accepted, then the contractual private ordering that includes the allocation of risks of harm that the

101 See further Kramer, above n 1, 263 and 270–1.

102 A further difficulty with regard to timing is raised in cases of duties of care. Should the implied allocation of risk at the time of contracting or assuming a *Hedley Byrne* duty of care colour the evaluation of whether the contractual or *Hedley Byrne* duty of care has been broken, or should a risk learned of after contracting or assuming the *Hedley Byrne* duty (such as the fragility of goods being carried) be taken into account in determining whether the defendant fell below the standard of the reasonable man? Although a finding of breach that took into account the defendant's failure to avoid the remote (because learned of too late) risk would not lead to recovery of damages for that harm (as they are excluded by remoteness), it may lead to damages for other harms suffered where, absent the new risk, there would have been no breach found at all.

promisee might suffer should sometimes displace the default ordering that exists under the concurrent tortious obligation (where the existence of the contract has not excluded the tortious obligation altogether). This displacement should occur whenever the tortious obligation covers a matter that is central to the contract and to the risks allocated in it (especially when the matter may have had an impact on the price paid for the promise), as in such a situation it can be inferred that the promisor intended to exclude any concurrent tortious liability for other risks he has not assumed, and the promisee intended to accept responsibility for such other risks.

However, this (and the much-disputed differences between contract and tort remoteness) are likely to have little application in practice. One of the main reasons is revealed by the discussion of *Parsons v Uttley Ingham*, namely that most of the losses that are recoverable in both contract and tort (excluding under a *Hedley Byrne* assumption of responsibility) are physical, and in the majority of cases it will be easier to imply an assumption of risk for physical harm and personal injury than for economic loss. In other words, in physical harm and personal injury the contract test will be so close to the tort test (in terms of how foreseeable a loss must be to be recoverable) as to be difficult to distinguish. This conclusion is of some importance in modifying the general understanding of how the contractual remoteness test applies because it shows that, in effect (although not in reasoning), Lord Denning was right in *Parsons*.

Hedley Byrne liability is different, however, not because it covers economic loss, but because it arises from a voluntary assumption of responsibility and the contractual remoteness test should therefore apply for the same reasons it applies to contracts (and whether or not there is a concurrent contract)—because the contractual test determines the scope of responsibility allocated by the parties. This removes one of the advantages of the *Hedley Byrne* cause of action as against the contractual cause of action, and so will affect the choice made by claimants in concurrent liability cases.

For most contracts the fixing of the deal (the price and other obligations) at formation will also fix the scope of responsibility, but an agreement-centred approach to remoteness allows for the possibility that sometimes the scope of responsibility will be adjusted at a later date. The clearest example is that of a variation of the contract, but the discussion above shows that in some cases of long-term contracts that are terminable at will the mere persistence of the contract without termination might indicate a continuing assumption of responsibility. In those circumstances, the correct date for assessing which losses were foreseeable would be much later than the date of inception of the relationship and the contract underlying it. This too will rarely be determinative in practice, because in long-term contracts the scope of responsibility is likely to be broadly

defined and therefore encompass subsequent unforeseen changes, but the very idea of adjusting the sacred date of contracting when assessing remoteness is significant to our understanding of remoteness.

It thus seems that the new problems, while not requiring us to rewrite the old rule of *Hadley v Baxendale*, do reveal the need for re-examination of old certainties in small and not so small ways. Indeed, the clamour caused by some of these problems may yet threaten the tranquil world of quiet (but always reasonable) contemplation.