

Consequential and Incidental Damages

Contract damages are subject to limits. One of those limits is the doctrine of foreseeability – contract damages must be foreseeable to the promisor, either because they are the damages one might expect in the ordinary course of events, or because the promisor had reason to know of special circumstances faced by the promisee which would lead to unusual but expected damages resulting from breach. The following cases provide tools to help clarify those categories.

We start with a venerable English case, *Hadley v. Baxendale*, that merits a bit of introduction. English reports from the 19th century differ from U.S. case reports. Often, the report starts with a brief summary by the reporter. If a case was reported by several different reporters, those summaries could differ significantly. The report will then usually summarize the argument of counsel for the parties. Sometimes that argument will be interrupted by questions from one or more judges. The report will then provide a summary of the oral ruling of the court from the bench. So it is with *Hadley*. The case provides a factual summary and arguments from counsel before providing the opinion. We have highlighted those parts of the case report so you can identify them.

Hadley v. Baxendale

9 Ex. 341, 156 Eng. Rep. 145 (Ch. 1854)

[Reporter's summary] At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of 2£. 4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some

neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with 25£. damages beyond the amount paid into Court.

Whateley, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection.

Keating and Dowdeswell (Feb. 1) shewed cause. [Plaintiff's counsel] The plaintiffs are entitled to the amount awarded by the jury as damages. These damages are not too remote, for they are not only the natural and necessary consequence of the defendants' default, but they are the only loss which the plaintiffs have actually sustained. The principle upon which damages are assessed is founded upon that of rendering compensation to the injured party. The important subject is ably treated in Sedgwick on the Measure of Damages. And this particular branch of it is discussed in the third chapter, where, after pointing out the distinction between the civil and the French law, he says (page 64), "It is sometimes said, in regard to contracts, that the defendant shall be held liable for those damages only which both parties may fairly be supposed to have at the time contemplated as likely to result from the nature of the agreement, and this appears to be the rule adopted by the writers upon the civil law." In a subsequent passage he says, "In cases of fraud the civil law made a broad distinction" (page 66); and he adds, that "in such cases the debtor was liable for all consequences." It is difficult, however, to see what the ground of such principle is, and how the ingredient of fraud can affect the question. For instance, if the defendants had maliciously and fraudulently kept the shaft, it is not easy to see why they should have been liable for these damages, if they are not to be held so where the delay is occasioned by their negligence only. In speaking of the rule respecting the breach of a contract to transport goods to a particular place, and in actions brought on agreements for the sale and delivery of chattels, the learned author lays it down, that, "In the former case, the difference in value between the price at the point where the goods are and the place where they were to be delivered, is taken as the measure of damages, which, in fact, amounts to an allowance of profits; and in the latter case, a similar result is had by the application of the rule, which gives the vendee the benefit of the rise of the market price" (page 80). The several cases, English as well as American, are there collected and reviewed. If that rule is to be adopted, there was ample evidence in the present case of the defendants' knowledge of such a state of things as would necessarily result in the damage the plaintiffs

suffered through the defendants' default. The authorities are in the plaintiffs' favour upon the general ground.

In *Black v. Baxendale* (1 Exch. 410), by reason of the defendant's omission to deliver the goods within a reasonable time at Belford, the plaintiff's agent, who had been sent there to meet the goods, was put to certain additional expenses, and this Court held that such expenses might be given by the jury as damages. ... There was ample evidence that the defendants knew the purpose for which this shaft was sent, and that the result of its nondelivery in due time would be the stoppage of the mill; for the defendants' agent, at their place of business, was told that the mill was then stopped, that the shaft must be delivered immediately, and that if a special entry was necessary to hasten its delivery, such an entry should be made. The defendants must, therefore, be held to have contemplated at the time what in fact did follow, as the necessary and natural result of their wrongful act.

Whateley, Willes, and Phipson, in support of the rule (Feb. 2) [Defendant's counsel]. It has been contended, on the part of the plaintiffs, that the damages found by the jury are a matter fit for their consideration; but still the question remains, in what way ought the jury to have been directed? It has been also urged, that, in awarding damages, the law gives compensation to the injured individual. But it is clear that complete compensation is not to be awarded; for instance, the non-payment of a bill of exchange might lead to the utter ruin of the holder, and yet such damage could not be considered as necessarily resulting from the breach of contract, so as to entitle the party aggrieved to recover in respect of it. Take the case of the breach of a contract to supply a rick-cloth, whereby and in consequence of bad weather the hay, being unprotected, is spoiled, that damage could not be recoverable.

Where the contracting party is shewn to be acquainted with all the consequences that must of necessity follow from a breach on his part of the contract, it may be reasonable to say that he takes the risk of such consequences. If, as between vendor and vendee, this species of liability has no existence, a fortiori, the carrier is not to be bur[d]ened with it. In cases of personal injury to passengers, the damage to which the sufferer has been held entitled is the direct and immediate consequence of the wrongful act.

The judgment of the Court was now delivered by ALDERSON, B. [The court's holding]

We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is. Indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. ***

“There are certain establishing rules”, this Court says, in *Alder v. Keighley* (15 M. & W. 117), “according to which the jury ought to find”. And the Court, in that case, adds: “and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken.”

Now we think the proper rule is such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.... For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury, that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Notes and Questions

1. The rule from *Hadley* can be synthesized as follows. Damages should be such as may fairly and reasonably be considered either
 - a. Arising naturally, *i.e.*,
 - i. Would normally arise from this type of breach, or
 - ii. Which the parties would both reasonably expect to arise from this type of breach,
 - b. Or, if the promisee communicated special circumstances putting the promisor on notice of the consequences of the breach, then the promisor would be liable for the amount of injury flowing from the breach under the special circumstances as communicated.
2. The Restatement (Second) of Contracts § 351(1) states that “[d]amages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.” It then divides foreseeable results into those foreseeable “in the ordinary course of events,” *id.* § 351(2)(a), and those “as a result of special circumstances” that “the party in breach had reason to know.” *Id.* § 351(2)(b).
3. The reporter of *Hadley* summarizes the facts as though the mill owners put the shipper on notice of the special circumstance, *i.e.*, the mill would be shut down until the shaft returned, so time was of the essence. The opinion reaches the opposite conclusion. Do you think one or the other more likely correct? How might a modern firm handle the question of shipping goods under special circumstances where time is truly of the essence?
4. Imagine the following: Basie is a professional nature photographer. He plans to climb the Himalayas. He hopes to break it big by taking photographs during the trip and selling them to a top nature magazine like National Geographic. Basie notifies Peterson, the clerk at the local camera store, about the trip, and how he hopes the equipment he has purchased to take photos is up to the task. The camera equipment fails at the start of the climb, and Basie brings home no photographs. Is the firm that employs Peterson on notice of Basie’s special circumstances? Should that firm cover

Basie's lost profits if he can prove his profits from selling photographs from the trip would have been \$5,000?

Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd

1 All ER 997 (K.B. 1949)

ASQUITH LJ delivered the judgment of the court:

The breach of contract consisted in the delivery of a boiler sold by the defendants to the plaintiffs some twenty odd weeks after the time fixed by the contract for delivery. The short point is whether, in addition to the £110 awarded, the plaintiffs were entitled to claim in respect of loss of profits which they say they would have made if the boiler had been delivered punctually.

Seeing that the issue is as to the measure of recoverable damages and the application of the rules in *Hadley v. Baxendale*, it is important to inquire what information the defendants possessed at the time when the contract was made as to such matters as the time at which, and the purpose for which, the plaintiffs required the boiler. The defendants knew before and at the time of the contract that the plaintiffs were laundrymen and dyers and required the boiler for purposes of their business as such. They also knew that the plaintiffs wanted the boiler for immediate use. On the latter point the correspondence is important. The contract was concluded by, and is contained in, a series of letters. In the earliest phases of the correspondence – that is, in letters of 31 January and 1 February 1946 – (which letters, as appears from their terms, followed a telephone call on the earlier date) the defendants undertook to make the earliest possible arrangements for the dismantling and removal of the boiler. The natural inference from this is that in the telephone conversation referred to the plaintiffs had conveyed to the defendants that they required the boiler urgently. Again, on 7 February the plaintiffs write to the defendants: “We should appreciate your letting us know how quickly your people can dismantle it,” and finally, on 26 April in the concluding letter of the series by which the contract was made: “We are most anxious that this” (that is, the boiler) “should be put into use” – we call attention to this expression – “in the shortest possible space of time.” Hence, up to and at the very moment when a concluded contract emerged, the plaintiffs were pressing on the defendants the need for expedition, and the last letter was a plain intimation that the boiler was wanted for immediate use.... It has, indeed, been argued strenuously that, for all [defendants] knew, it might have been wanted as a “spare” or “stand-by,” provided in advance to replace an existing boiler, when, perhaps some time hence, the latter should wear out, but such an intention to reserve it for future use seems quite

inconsistent with the intention expressed in the letter of 26 April to “put it into use in the shortest possible space of time.” In this connection, certain admissions made in the course of the hearing are of vital importance. The defendants formally admitted...:

“At the date of the contract hereinafter mentioned the defendants well knew as the fact was that the plaintiffs were launderers and dyers carrying on business at Windsor and required the said boiler for use in their said business and the said contract was made upon the basis that the said boiler was required for the said purpose.”

On 5 June the plaintiffs, having heard that the boiler was ready, sent a lorry to Harpenden to take delivery. Mr Lennard, a director of the plaintiff company, preceded the lorry in a car. He discovered on arrival that four days earlier the contractors employed by the defendants to dismantle the boiler had allowed it to fall on its side, receiving damage. Mr Lennard declined to take delivery of the damaged boiler in its existing condition and insisted that the damage must be made good. He was, we think, justified in this attitude, since no similar article could be bought in the market. After a long wrangle, the defendants agreed to perform the necessary repairs, and, after further delay through the difficulty of finding a contractor who was free and able to perform them, completed the repairs by 28 October. Delivery was taken by the plaintiffs on 8 November and the boiler was erected and working by early December. The plaintiffs claim, as part – the disputed part – of the damages, loss of the profits they would have earned if the machine had been delivered in early June instead of November. Evidence was led for the plaintiffs with the object of establishing that, if the boiler had been punctually delivered, then, during the twenty odd weeks between then and the time of actual delivery (1) they could have taken on a very large number of new customers in the course of their laundry business, the demand for laundry services at that time being insatiable – they did, in fact, take on extra staff in the expectation of its delivery – and (2) that they could and would have accepted a number of highly lucrative dyeing contracts for the Ministry of Supply....

[The trial judge declined to hear plaintiffs’ “voluminous” evidence on lost profits.] He took the view that the loss of profit claimed was due to special circumstances, and, therefore, recoverable, if at all, only under the second rule in *Hadley v. Baxendale*, and not recoverable in the present case because such special circumstances were not at the time of the contract communicated to the defendants.... The authorities on recovery of loss of profits as a head of damage are not easy to reconcile. At one end of the scale stand cases where there has been non-delivery or delayed delivery of what is on the face of it obviously a profit-earning chattel, for instance, a merchant or passenger ship ... or some essential part of such a ship, for instance, a propeller.... In such cases loss of profit has rarely been refused. A second and

intermediate class of case in which loss of profit has often been awarded is where ordinary mercantile goods have been sold to a merchant with knowledge by the vendor that the purchaser wanted them for re-sale, at all events, where there was no market in which the purchaser could buy similar goods against the contract on the seller's default. At the other end of the scale are cases where the defendant is not a vendor of the goods, but a carrier: see, for instance, *Hadley v. Baxendale*.... In such cases the courts have been slow to allow loss of profit as an item of damage. This was not, it would seem, because a different principle applies in such cases, but because the application of the same principle leads to different results. A carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods or about other "special circumstances" which may cause exceptional loss if due delivery is withheld.

[The court considered *Hadley v. Baxendale*] Familiar though it is, we should first recall the memorable sentence of Alderson B (9 Exch 354) in which the main principles laid down in this case are enshrined:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The limb of this sentence prefaced by "either" embodies the so-called "first" rule; that prefaced by "or" the "second." In considering the meaning and application of these rules it is essential to bear clearly in mind the facts on which *Hadley v Baxendale* proceeded. The headnote is definitely misleading in so far as it says that the defendants' clerk, who attended at the office, was told that the mill was stopped and that the shaft must be delivered immediately. The same allegation figures in the statement of facts which are said (*ibid*, 344) to have "appeared" at the trial before Crompton J. If the Court of Exchequer had accepted these facts as established, the court must, one would suppose, have decided the case the other way round—must, that is, have held the damage claimed was recoverable under the second rule, but it is reasonably plain from the judgment of Alderson B, that the court rejected this evidence, for he says (*ibid*, 355):

"... we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be

carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill.”

It is on this basis of fact that he proceeds to ask:

“... how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person?”

What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above? We think they include the following: (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so.... (2): In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach. (4) For this purpose, knowledge “possessed” is of two kinds—one imputed, the other actual. Everyone, as a reasonable person, is taken to know the “ordinary course of things” and consequently what loss is liable to result from a breach in that ordinary course. This is the subject-matter of the “first rule” in *Hadley v Baxendale*, but to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the “ordinary course of things” of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the “second rule” so as to make additional loss also recoverable. (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result....

If these, indeed, are the principles applicable, what is the effect of their application to the facts of the present case? We have, at the beginning of this judgment, summarised the main relevant facts. The defendants were an engineering company supplying a boiler to a laundry. We reject the submission for the defendants that an engineering company knows no more than the plain man about boilers or the purposes to which they are commonly put by different classes of purchasers, including laundries. The defendant company were not, it is true, manufacturers of this boiler or dealers in boilers, but they gave a highly technical and comprehensive description

of this boiler to the plaintiffs by letter of 19 January 1946, and offered both to dismantle the boiler at Harpenden and to re-erect it on the plaintiffs' premises. Of the uses or purposes to which boilers are put, they would clearly know more than the uninstructed layman. Again, they knew they were supplying the boiler to a company carrying on the business of laundrymen and dyers, for use in that business. The obvious use of a boiler, in such a business, is surely to boil water for the purpose of washing or dyeing. A laundry might conceivably buy a boiler for some other purpose, for instance, to work radiators or warm bath water for the comfort of its employees or directors, or to use for research, or to exhibit in a museum. All these purposes are possible, but the first is the obvious purpose which, in the case of a laundry, leaps to the average eye. If the purpose then be to wash or dye, why does the company want to wash or dye, unless for purposes of business advantage, in which term we, for the purposes of the rest of this judgment, include maintenance or increase of profit or reduction of loss? We shall speak henceforward not of loss of profit, but of "loss of business." No commercial concern commonly purchases for the purposes of its business a very large and expensive structure like this—a boiler nineteen feet high and costing over £2,000—with any other motive, and no supplier, let alone an engineering company, which has promised delivery of such an article by a particular date with knowledge that it was to be put into use immediately on delivery, can reasonably contend that it could not foresee that loss of business (in the sense indicated above) would be liable to result to the purchaser from a long delay in the delivery thereof. The suggestion that, for all the supplier knew, the boiler might have been needed simply as a "stand-by," to be used in a possibly distant future, is gratuitous and was plainly negatived by the terms of the letter of 26 April 1946.

Reasonable persons in the shoes of the defendants must be taken to foresee, without any express intimation, that a laundry which, at a time when there was a famine of laundry facilities, was paying £2,000 odd for plant and intended at such a time to put such plant "into use" immediately, would be likely to suffer in pocket from five months' delay in delivery of the plant in question, whether they intended by means of it to extend their business, or merely to maintain it, or to reduce a loss; (c) the "circumstance" that the plaintiffs had the assured expectation of special contracts, which they could only fulfil by securing punctual delivery of the boiler.

[In rejecting a profit award, the trial judge] no doubt ... had in mind the particularly lucrative dyeing contracts to which the plaintiffs looked forward and which they mention in para 10 of the statement of claim. We agree that in order that the plaintiffs should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time of their agreement with the plaintiffs, of the prospect and terms of such contracts.

We also agree that they did not, in fact, know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected any more than in respect of laundering contracts to be reasonably expected.

Notes and Questions

1. What do you take to be the key differences between *Hadley* and *Victoria Laundry*? Are the cases distinguishable? Does the court in *Victoria Laundry* correctly or faithfully apply the rule from *Hadley*?
2. Imagine the following: Schneider was one month late delivering a dragline excavator, a piece of heavy equipment used in civil engineering and surface mining. McCaslin, the intended user of the dragline, sued for the fair rental value of the dragline during the period of delay. Is the cost incurred by McCaslin – rental of a replacement dragline – reasonably foreseeable to a shipper like Schneider? Under *Hadley*, must the harm be the most foreseeable of possible harms, or merely one of several potential harms, and a harm that was not so remote as to be unforeseeable to a reasonable person at the time of contracting?
3. Is the Scheider hypothetical in note 2 more like *Hadley*, or more like *Victoria Laundry*? The hypothetical is based on *Hector Martinez & Co. v. Southern Pacific Transp. Co.*, 606 F.2d 106 (5th Cir. 1979).

Simeone v. First Bank National Association

73 F.3d 184 (8th Cir. 1996)

ROSS, Circuit Judge.

Appellant, Frederick Simeone, sought damages against appellee First Bank National Association (First Bank) and others for breach of contract and fraud stemming from an agreement by First Bank to sell Simeone 1920–1930 era vintage Mercedes–Benz automobiles and parts which had been repossessed from a defaulting loan customer, Leland Gohlike. We affirm in part and reverse in part.

I.

The vehicles in question included a one-of-a-kind 1929 Mercedes Benz SS Roadster, two 1930 era Mercedes Benz Roadsters (of which a total of 114 were ever manufactured), and a 1928 Mercedes Benz SSK (one of only 39 ever manufactured), which had been owned by the son of Sir Arthur Conan-Doyle, the creator of Sherlock Holmes. Additionally, there were thousands of loose parts, including shock absorbers, fenders, seat cushions and wheels, which were no longer manufactured and which were themselves extraordinarily rare. One of the automobiles and some of the parts repossessed from Gohlike were allegedly owned by the Estate of Herman Quante (Quante Estate). While First Bank never acknowledged the Estate's claim of ownership, it nonetheless agreed to pay the Estate \$50,000 for its interest, if any.

On October 26, 1985, after receiving inquiries from several other potential purchasers, First Bank entered into an agreement to sell the repossessed automobiles and parts for \$400,000 to Simeone, a self-described collector of vintage automobiles. In the same agreement, Simeone agreed to purchase the Quante Estate car and parts for \$50,000. Simeone paid 10% of the contract price as a downpayment.

On November 4, 1985, the date set for the conveyance of title to Simeone, Leland Gohlike, the debtor, obtained a temporary restraining order (TRO) to prevent the sale of the collateral. Thereafter, First Bank refused Simeone's proffered tender of the balance of the purchase price. Prior to obtaining the TRO, Gohlike instituted a civil action against First Bank and its officers claiming a violation of due process and seeking \$13,000,000 in damages.

Sometime on or before November 4, 1985, First Bank entered into negotiations with Gohlike and James Torseth, Gohlike's neighbor, to sell the automobiles and parts to Torseth in exchange for Gohlike's dismissal of his suit against the bank and a purchase price slightly in excess of Simeone's. Believing that it no longer had an obligation to sell the property to Simeone because of a condition in the agreement, First Bank subsequently sold the cars and parts to SMB, Inc., a corporation created by Torseth for the purchase and resale of the automobiles and parts, and Gohlike dismissed his suit against First Bank. SMB, Inc. later sold all of the cars and parts for \$1,114,960, including \$470,000 that Simeone himself paid for the purchase of the 1929 Mercedes Benz SS Roadster.

First Bank returned Simeone's downpayment with interest and Simeone filed suit alleging breach of contract and fraud....

.... The trial was conducted from February 28, 1994, through March 8, 1994. At the close of the breach of contract phase of the trial, the district court ruled as a matter of law that the Bank's conduct did not constitute fraud. However, the court permitted the fraud claim to be tried to the jury to forestall the necessity for a later trial in the event the fraud dismissal was reversed on appeal. The jury awarded Simeone \$2,405,000 for breach of contract, including \$585,000 in compensatory damages, \$225,000 in incidental damages, and \$1,595,000 in consequential damages, plus prejudgment interest.¹ The jury also awarded \$1.00 on the court-dismissed fraud claim. The district court denied First Bank's motion for a new trial or, in the alternative, amendment of the judgment or remittitur pursuant to Fed.R.Civ.P. 59.

II.

In its challenge to the compensatory damages award, First Bank argues the district court erroneously allowed Simeone's experts to rely on the collector automobile market as the relevant market in appraising the fair market value of the vehicles and parts at the time of the breach. Instead, First Bank contends the relevant market was the market of "repossessed goods in bank foreclosure sales."

Minn.Stat. § 336.2–713(1) provides the proper measure of damages for a seller's breach of contract:*

[T]he difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages....

"Market price" "is the price for goods of the same kind and in the same branch of trade." Minn.Stat. § 336.2–713, UCC Comment 2. According to First Bank, the "branch of trade" in this case was the resale market of repossessed goods, not a collector automobile market. The Uniform Commercial Code, as adopted in Minnesota, permits opinion evidence as to the value of the goods in question:

Where the unavailability of a market price is caused by a scarcity of goods of the type involved ... [s]uch scarcity conditions ... indicate that the price has risen

¹ In its special verdict form the jury set the market price of Gohlike's cars and parts at the time of the breach at \$885,000 and the market price of the Quante Estate car and parts at the time of the breach at \$150,000.

* The state of Minnesota added Article 2 of the UCC to § 336.2 of its statutory code. Thus, UCC § 2-713 is Minn. Stat. § 336.2-713. Eds.

and under the section providing for liberal administration of remedies, opinion evidence as to the value of the goods would be admissible in the absence of a market price and a liberal construction of allowable consequential damages should also result.

Minn.Stat. § 336.2–713, UCC Comment 3 (emphasis added).

At trial, the evidence showed that the vehicles were rare, and in some cases unique, classic automobiles of historic significance. The disassembled parts, as well, were scarce commodities. At trial an expert in vintage automobiles valued the cars and parts at \$1,355,000 at the time of the breach. Based on the evidence presented at trial, the jury concluded that, at the time of the breach, the value of the property owned by First Bank was \$885,000 and the value of the property owned by the Quante Estate was \$150,000, or a total market value of \$1,035,000. The difference between this fair market value and the \$450,000 contract price is \$585,000, the amount of compensatory damages awarded.

The district court did not abuse its discretion in permitting the valuation of the automobiles and parts based on a collector's market. The evidence clearly supports the jury's determination and the award of compensatory damages is affirmed.

III.

First Bank next raises several challenges to the consequential damages assessed against it. The jury awarded \$1,595,000 in consequential damages, which was derived from expert testimony as to what the automobiles and parts were worth in late 1987, two years after the breach of contract, minus the market price of the property at the time of the breach. First Bank now argues the evidence is insufficient to establish the foreseeability requirement to support the \$1,595,000 consequential damages award.

Under Minnesota law, recoverable consequential damages include:

[A]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.

Minn.Stat. § 336.2–715(2)(a).

The focus is on what the seller had reason to know. Minn.Stat. § 336.2–715; UCC Comment 3.

According to First Bank, Simeone repeatedly stated prior to contract formation that he was not in the business of selling automobiles and parts and therefore First Bank neither knew nor had reason to know that Simeone intended to trade or resell the automobiles and parts at any profit, let alone a profit of \$1,595,000. First Bank contends the award of consequential damages erroneously treats the agreement as one for the purchase of goods for resale when that was clearly not the case.

The question of whether the buyer's consequential damages were foreseeable by the seller is one of fact to be determined by the trier of fact. *Franklin Mfg. Co. v. Union Pacific R.R.*, 248 N.W.2d 324, 326 (1976). First Bank asks that this court conclude as a matter of law that the consequential damages were not foreseeable. We decline to so hold. Mr. Garretson, commercial banking officer of First Bank and acting on behalf of the Bank during the relevant negotiations with Simeone, testified that he was aware that collectors may trade vehicles in order to enhance their collection. Further, Simeone testified he told First Bank's broker that he intended to use the cars and parts for trading or possible resale to obtain additional cars. Finally, Simeone contracted to purchase hundreds of automotive parts that the jury would reasonably presume would have to be either resold or assembled into something of increased value. The jury's determination that it was foreseeable that Simeone would seek to further his collection by engaging in sale or trade was not clearly erroneous.

IV.

... Because we are reviewing state court claims, the appropriate standard for review is that applied by Minnesota appellate courts. *Piekarski v. Home Owners Savings Bank*, 956 F.2d 1484, 1488 (8th Cir.1992), *cert. denied*, 506 U.S. 872 (1992). Thus, this court should uphold the trial court's denial of First Bank's new trial motion or motion for remittitur unless there has been a clear abuse of discretion. *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994).

Under Minnesota law, incidental damages resulting from a seller's breach are defined as:

[E]xpenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Minn.Stat. § 336.2–715(1). *See also Mattson v. Rochester Silo, Inc.*, 397 N.W.2d 909, 915 (Minn. Ct. App. 1987).

... Minnesota law also provides that “the buyer may ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of ... goods in substitution for those due from the seller.” Minn.Stat. § 336.2–712(1). The buyer may recover from the seller as “cover damages” “the difference between the cost of cover and the contract price together with any incidental or consequential damages.” Minn.Stat. § 336.2–712(2); *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 661 (Minn. 1978).

Here, the jury awarded Simeone \$225,000 in incidental damages. Simeone speculates that this amount represents his cost of cover in purchasing the 1929 SS Roadster (\$470,000 purchase price minus \$250,000 contract price, plus \$5,000 for dismissal of SMB, Inc. from a civil action). Appellee’s Brief at 31. However, the difference between the cost of cover and the contract price is not properly characterized as incidental damages. Rather, incidental damages are, among other things, the “charges,” “expenses” and “commissions” incurred in effecting cover. Minn.Stat. § 336.2–715(1). In contrast, the award of damages for the difference between Simeone’s purchase price of the Roadster and the contract price falls under Minn.Stat. § 336.2–712 as “cover” damages. The jury’s award of incidental damages in this case represents a double recovery to the extent that it compensates Simeone for the difference between the contract price and the price he actually paid for the Roadster. Simeone was compensated for the difference between the contract price and the purchase price through both the compensatory and consequential damages awards. Since there is no other evidence of incidental damages, the award of incidental damages must be reversed.

V.

First Bank argues it should not be held accountable for the failure to convey the vehicle that had been claimed by the Quante Estate, the Conan–Doyle car. We do not agree....

VI.

[After analysis, the court concludes that Simeone is entitled to prejudgment interest on the revised damages award. In some cases, a plaintiff in a contract case can get interest added to the amount of the judgment, and that happened here. Prejudgment interest is granted because it compensates the plaintiff for costs it would likely incur to raise funds denied by defendants’ wrongdoing.]

VII.

Based on the foregoing, the judgment of the district court is affirmed in part and reversed in part and remanded for further proceedings consistent with the views expressed in this opinion.

Notes and Questions

1. Attorneys for Hadley cite to an 1847 case, *Black v. Baxendale*, against the same shipper, where the question of consequential damages was reasonable for the jury to decide. The court in *Hadley* instead concludes that the jury should have been instructed not to consider consequential damages from the mill closure at all.
2. Unlike the court in *Hadley*, the court in *Simeone* concludes the question of consequential damages is a question of fact for the jury. Are juries best situated to determine whether damages were reasonably foreseeable to the breaching promisor? When might it be prudent for a court to keep the question of consequential damages out of the jury's purview?
3. The UCC follows to some extent the formulation of *Hadley*, but uses slightly different terms. Buyer's consequential damages fall into two sub-categories. UCC § 2-715(2)(a). First, losses resulting from *general requirements* are those likely to be in the contemplation of any seller situated like the seller in the dispute before the court. Second, losses resulting from *particular requirements* are, like the *special circumstances* in *Hadley*, those about which the buyer puts the seller on notice. Comment 3 to UCC § 2-715 indicates that particular needs must generally be made known to the seller, but general needs must rarely be made known, i.e., that the seller is on notice of general needs and thus consequential damages may be awarded.

Note the language from the end of § 2-715(2)(a). The buyer can recover consequential damages "which could not reasonably be prevented by cover or otherwise." A buyer can cover by buying replacement goods under § 2-712 or seek the difference between contract and market price under § 2-713, but if the consequential damages could have been prevented by cover (imagine Hadley could buy another mill shaft at the corner store), the buyer cannot secure consequential damages. Why were Simeone's consequential damages not the kind that could have been prevented by cover? Why didn't the court discuss the possibility of mitigation and cover?

4. The UCC defines buyer's incidental damages resulting from the seller's breach to include "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any

other reasonable expense incident to the delay or other breach.” UCC § 2-715(1).

The court concluded that Simeone provided no evidence of incidental damages, and thus the court overturned the award of incidental damages. What costs might Mr. Simeone have incurred while looking for replacement cars or parts for his collection that would qualify as incidental damages?

5. The UCC defines the *seller's* incidental damages to include “any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.” UCC § 2-710.

Consider *Neri v. Retail Marine*. Incidental damages in that case included \$674 for storage and upkeep on the boat Retail Marine eventually resold, along with finance charges and insurance costs. Those are the costs a seller might be expected to incur holding on to the boat in question longer than expected while it waits for another buyer.

6. The UCC does not provide for *seller's* consequential damages. That doesn’t mean it expressly excludes them, just that it doesn’t define them by statute. Perhaps sellers of goods are less likely to suffer consequential damages. Sellers who don’t move goods promised to a given buyer are typically out money, not goods, and it may be cheaper or easier for the seller to borrow money to meet the shortfall than for the seller to find substitute goods. *See, e.g.,* Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT’L L. & ECON. 415, 456 (1989). But courts have rejected such damages as impermissible in some cases. *See, e.g.,* *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 507-09 (E.D.N.Y. 1974) (dismissing claim for \$75,000 in banking penalty charges incurred when buyer failed to make payment as impermissible consequential damages for seller).

A revised Article 2 was approved by the UCC’s drafters in 2003 that would have expressly permitted a seller to recover consequential damages from merchants, but not consumers. No state legislature adopted it.