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Contractual Remoteness in England and Singapore Compared: Orthodoxy Preferable?

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This article compares the Singapore and English approaches towards remoteness of damages in contract law. Whereas English law has amalgamated the traditional Hadley v Baxendale test with the `assumption of responsibility' test established in The Achilleas, the Singapore courts have consistently rejected the latter test. It will be argued that the Singapore courts' application of the traditional test is preferable because it is more certain.

Introduction

In The Achilleas,¹ Lord Hoffmann held that contractual losses might be too remote (and hence irrecoverable) if the defendant did not assume responsibility for them, even if those losses were within the reasonable contemplation of the parties as not unlikely to occur as a result of breach.² Whether the defendant assumed responsibility is said to be a matter of interpreting the contract. Lord Hoffmann’s ‘assumption of responsibility’ test has been subject to different responses, as illustrated by two recent decisions from England and Singapore. In John Grimes Partnership Ltd v Gubbins,³ the English Court of Appeal affirmed the prevailing English approach after The Achilleas, which amalgamates the orthodox test for remoteness in Hadley v Baxendale⁴ and the ‘assumption of responsibility’ test, with the latter operating as an overriding test. In contrast, the Singapore Court of Appeal reaffirmed the applicability of the Hadley test in Out of the Box Pte Ltd v Wann Industries Pte Ltd,⁵ expressly rejecting the ‘assumption of responsibility’ test in the process. Through examining these two cases, this note makes the following points. First, the Hadley test, in the orthodox manner it has been applied in Singapore, is preferable to the English approach because it is more certain and avoids difficulties concerning when the ‘assumption of responsibility’ test applies. Second, the Hadley test, being an external rule used by the courts as a gap-filler, better deals with the situation where parties have said nothing regarding questions of remoteness. Before advancing these points, let us examine the approaches in England and Singapore, as exemplified by the two recent decisions from each respective jurisdiction.

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⁴ (1854) 9 Exch 341; (1854) 156 ER 145. The two-limb test for contractual remoteness set out in this case shall hereafter be known as the ‘Hadley test’.
The Approach in England

Cases decided since The Achilleas have resulted in refinement of the test to determine contractual remoteness in England. Such refinement is demonstrated by the recent English Court of Appeal case of John Grimes Partnership Ltd v Gubbins.\(^6\) In that case, the respondent engaged the appellant to design the road and drainage for a site that he had hoped to develop. The appellant did not complete the design until 15 months past the agreed completion date. When the appellant sued the respondent for outstanding fees, the respondent counterclaimed for damages in respect of a loss resulting from a reduction in market value of the residential units on the site, which he alleged came about because of the appellant’s delay. At trial, it was found that the appellant actually knew that there was risk of significant disadvantage to the respondent if the design was delayed. The appellant was a professional in the field and knew that the property market could fall over a prolonged period, bringing with it potentially serious financial consequences. Although the trial judge did not regard The Achilleas as having changed the law with regard to contractual remoteness, he explained — based on his understanding of Lord Hoffmann’s views in The Achilleas — that the Hadley test applied unless the commercial background to the contract showed that the Hadley test would not reflect the expectation or intention reasonably to be imputed to the parties. On the facts, the trial judge did not find anything in the commercial background that negated the outcome reached by the application of the Hadley test, that is, the appellant was responsible for the loss flowing from the property market decline because he actually knew of that type of loss suffered by the respondent owing to the delay in the design.

The English Court of Appeal dismissed the resulting appeal. Agreeing with the trial judge’s view of the applicable law, Sir David Keene, with whom Tomlinson and Laws LJJ agreed, thought that Lord Hoffmann did not intend to wholly depart from the Hadley test of remoteness. Instead, the ‘assumption of responsibility’ test was an overriding test: if it could be shown that a defendant had assumed responsibility for a particular type of loss, then that loss would not be too remote, even if the Hadley test yielded a different result.\(^7\) Since there was nothing in the background that contradicted the result reached by the Hadley test, the additional application of the ‘assumption of responsibility’ test was unnecessary. The trial judge’s application of the law was therefore correct. Sir David Keene also dismissed several other arguments made by the appellant: it was immaterial that the appellant had no control over the property market since there were cases where damages were awarded due to changes in market values; it did not matter that there were very few cases where a decline in the property market led to an actionable loss; and it was of no consequence that the scale of claimed damages was disproportionate to the sum paid by the respondent to the appellant for the latter’s services.

The approach in England can thus be seen as a two-stage approach. The first is the application of the Hadley test. Normally, the result reached by this first stage would apply, unless — and this is the second stage — the background

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\(^6\) [2013] EWCA Civ 37 (John Grimes Partnership).

\(^7\) [2013] EWCA Civ 37 at [20].
showed that that result is not reflective of a type of loss that the defendant had assumed responsibility for. This is in line with Toulson LJ’s view in *Supershield Ltd v Siemens Building Technologies FE Ltd* that the Hadley test has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, and would be departed from only if the background reflected otherwise. The broader implication is that Lord Hoffmann’s ‘assumption of responsibility’ test has not substantively changed the law relating to remoteness, but has only ‘rationalised’ it.

**The Approach in Singapore**

In recent times, the Singapore Court of Appeal has in three cases reaffirmed the applicability of the Hadley test in Singapore. The first case — decided shortly before *The Achilleas* — was *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*. The court in that case stated that there was a ‘strong rational basis’ based on first principles for the existence and retention of the Hadley test. *Robertson Quay* was followed by *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*, which was decided after *The Achilleas*, and presented the same court with an opportunity to consider Lord Hoffmann’s ‘assumption of responsibility’ test. It decided not to adopt it for several reasons. First, the court alluded to the difficulties of the ‘assumption of responsibility’ test itself:

1. the test was (arguably) not part of the ratio decidendi of *The Achilleas*;
2. the test suffered from various conceptual and theoretical difficulties by nullifying the role of remoteness as an external inhibitor of damages claimable; and
3. the test was uncertain in its application since it was difficult to ascertain accurately what contracting parties — who most likely contemplated performance and not breach — were assuming responsibility for in the event of breach.

Second, having pointed out the difficulties with the assumption of responsibility test, the court explained why the Hadley test ought to be
preferred (and hence retained), restating several of the reasons it previously gave in Robertson Quay. The court, however, retained assumption of responsibility as a concept to explain the orthodox test for remoteness as embodied in Hadley v Baxendale. To that extent, it expressly accepted Lord Hoffmann’s approach in The Achilleas insofar as the concept of assumption of responsibility is already incorporated or embodied in both limbs of the Hadley test.\(^{18}\)

The Singapore Court of Appeal most recently reaffirmed the applicability of the Hadley test in Out of the Box. In that case, the appellant company, OOTB, developed a new drink called ‘18 for Life’. It had high ambitions and channelled considerable resources to its marketing and advertising. However, it did not commit quite as much effort to its manufacture; in particular, it subcontracted that task to the respondent company, Wanin Industries, via a simple agreement that did not contemplate any particular quality or recipe. OOTB’s committed outlay pursuant to the contract, which encompassed an obligation to purchase ‘one trailer load of the drink’, was just S$12,360. As the court noted,\(^{19}\) there was certainly nothing in the scant agreement that gave Wanin Industries any indication of OOTB’s lofty ambitions for the drink.

Wanin Industries proved to be an unreliable manufacturer. A shipment of the drink was contaminated with insects and OOTB was forced to recall all of the stock. OOTB thereafter abandoned its marketing and advertising of the drink and commenced an action against Wanin Industries for breach of contract. OOTB’s damages were assessed by the Registrar to be in excess of S$650,000, comprising mainly of their now wasted marketing and advertising costs. On appeal to the Singapore High Court, the Registrar’s assessment was reduced as the court was not satisfied that OOTB had proved the quantum of those expenses.

OOTB’s further appeal was dismissed by the Singapore Court of Appeal on the basis that the claimed marketing and advertising costs were simply too remote. The court reaffirmed the applicability of the Hadley test in Singapore. In doing so, it drew a clear distinction between interpretation and remoteness. In its view, it is important to distinguish between cases that concern the interpretation of a contract to identify the specific nature of the obligation undertaken, and cases that are concerned with matters of remoteness.\(^{20}\) Having decided that the applicable test to determine remoteness was still the Hadley test, the court proceeded to make two useful points in relation to its application. The first is that there is ‘a substantial degree of fact sensitivity that is necessarily embedded within the analysis of whether the claimed damages are too remote’,\(^{21}\) agreeing with Robert Goff J’s analysis in The Pegase.\(^{22}\) In the court’s view, by focusing on the specific facts of each case, a court can avoid the uncertainty inherent in Lord Hoffmann’s approach in The Achilleas by adopting the conventional analysis in Hadley.\(^{23}\) The second point of application was the provision of an analytical framework for questions of

\(^{19}\) [2013] 2 SLR 363; [2013] SGCA 15 at [4].
\(^{20}\) [2013] 2 SLR 363; [2013] SGCA 15 at [29].
\(^{21}\) [2013] 2 SLR 363; [2013] SGCA 15 at [37].
\(^{22}\) [1981] 1 Lloyd’s Rep 175.
\(^{23}\) [2013] 2 SLR 363; [2013] SGCA 15 at [38].
remoteness, which emphasises the defendant’s knowledge and the circumstances in which that knowledge arose in the application of the Hadley test.\(^{24}\)

Applying its discussion of the law to the facts, the court found that OOTB’s aggressive (and unusual) marketing and advertising strategy in relation to the drink meant that it was exposed to risks different from the average beverage distributor. This, however, was not made known to Wanin Industries, which had contracted on the basis that it was to receive a mere $12,360 from OOTB. The value of the contract, while not limiting the damages claimable by OOTB, was a crucial factor considered by the court in deciding whether the loss was a type known by Wanin Industries. In view of the disproportion between the contract price and the expenses incurred, as well as the simple agreement concluded between the parties, the court found that Wanin Industries could not have known of OOTB’s marketing and advertising expenses and should not be held liable for OOTB’s losses in respect of them.

**The Approaches Compared**

*Hadley Test More Certain*

It is evident from the above discussion that, whereas the Singapore approach contemplates a pure application of the Hadley test, the English approach amalgamates the ‘assumption of responsibility’ test with the Hadley test. It is submitted that the Singapore approach is preferable for two reasons. First, the English cases after *The Achilleas*, typified by *John Grimes Partnership*, have not clarified just how the ‘assumption of responsibility’ test is to be applied in conjunction with the Hadley test. This generates uncertainty. Second, the ‘assumption of responsibility’ test adds nothing to the traditional Hadley test. Thus, the uncertainty generated by the unclear relationship between the Hadley test and the ‘assumption of responsibility’ test is an unnecessary one. It is best avoided by returning to a pure application of the Hadley test.

It is first submitted that there is continued uncertainty concerning the relationship between the Hadley test and the ‘assumption of responsibility’ test. One supposed purpose of the ‘assumption of responsibility’ test is its potential to override the conclusion reached via the Hadley test in ‘exceptional cases’. Thus, in *The Sylvia*, Hamblen J said that a departure from the Hadley test is warranted when its application leads ‘to an unquantifiable, unpredicted, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations’,\(^{25}\) such circumstances being present in ‘exceptional cases’. If the ‘assumption of responsibility’ test can be applied in such a manner as to override the Hadley test, then its relationship to the Hadley test would be clear. This, however, is not the case.

First, it is unclear just what circumstances will allow the ‘assumption of responsibility’ test to override the Hadley test. Take for example, the facts in *John Grimes Partnership*: in that case, the movement in the property market, while not sudden, was certainly unpredictable. Notwithstanding the

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\(^{24}\) [2013] 2 SLR 363; [2013] SGCA 15 at [47].

appellant’s knowledge that the respondent may suffer losses due to fluctuations in the property market (in satisfaction of the second limb of the Hadley test), the unpredictable movement of the property market should have triggered a consideration of the ‘assumption of responsibility’ test. This is because such unpredictable movement could have negated the conclusion reached under the Hadley test. If such an unpredictable movement does not trigger such consideration, it is hard to think of other circumstances that do. It therefore appears that courts are paying lip-service to the ‘assumption of responsibility’ test: it is difficult to think which circumstances will cause the ‘assumption of responsibility’ test to apply in addition to the Hadley test.

The second difficulty is that circumstances that potentially trigger the ‘assumption of responsibility’ test would already be considered under the Hadley test. In other words, it is unclear what additional facts not already dealt with by the Hadley test would trigger the ‘assumption of responsibility’ test. Take Hamblen J’s characterisation in The Sylvia of such facts as being ‘an unquantifiable, unpredictable, uncontrollable or disproportionate liability’: this would be considered under, and not pass, the Hadley test, as the defendant would not have known of the type of loss suffered. Similarly, ‘clear evidence that such a liability would be contrary to market understanding and expectations’ also means that there is neither imputed nor actual knowledge under the Hadley test. If these facts are already considered under the Hadley test, it is hard to see how the ‘assumption of responsibility’ test can add to that test using the same facts. To insist that the ‘assumption of responsibility’ test is an addendum to the Hadley test is therefore to introduce an uncertainty as to their precise relationship.

The uncertain relationship between the Hadley test and the ‘assumption of responsibility’ test is also reflected elsewhere. For example, Chitty on Contracts notes that it is ‘not wholly clear’ whether the ‘assumption of responsibility’ test is an aspect of the Hadley test or a separate rule. It is true, of course, that different members of the House of Lords in The Achilleas gave different indications as to the status of the ‘assumption of responsibility’ test. However, later cases have retreated from Lord Hoffmann’s broader remark that the ‘assumption of responsibility’ test must be applied when considering the remoteness of damages. These cases have instead insisted that The Achilleas did not change the law in relation to remoteness. However, if The Achilleas did not change the law, then why is there now a new ‘assumption of responsibility’ test to be applied in conjunction with the Hadley test? Indeed, whereas before there was no need to ask whether the parties had assumed responsibility for the type of loss, there is now, in exceptional cases, supposedly such a need. The English courts’ insistence that the law has not changed, while acknowledging the existence of a new addendum to the Hadley test, does little to clear up the uncertainty.

The truth is that the uncertainty generated by the English cases after The Achilleas is unnecessary because the ‘assumption of responsibility’ test adds nothing new to the Hadley test. First, a pure application of the Hadley test would reach the same outcome as the ‘assumption of responsibility’ test, whether the latter is applied independently or as an addendum to the Hadley test. This can be illustrated by the facts in The Achilleas. In that case, the common assumption in the trade that the liability of a charterer for late delivery of a ship was limited to the difference between the market rate and the charter rate for the period of the overrun could be analysed within the Hadley test. Since the charterer could not have known of the unusually volatile market conditions, it would only be liable for the commonly assumed loss that it knew of. There was no need to refer to any ‘assumption of responsibility’ test. The application of the ‘assumption of responsibility’ test to John Grimes Partnership would also not have altered the result in that case: the appellant’s knowledge of the loss the respondent potentially could have suffered due to the movement in the property market must mean that he is liable for such losses under the Hadley test. Similarly, in Out of the Box, the fact that the respondent did not know of the appellant’s unusually large outlay in marketing and advertising expenses would mean that he is not liable under the Hadley test. The ‘assumption of responsibility’ test adds nothing new to the outcome or analysis in these cases. The Hadley test is therefore well capable of functioning on its own, and The Achilleas — while supposedly changing the law — makes no difference to the outcome. The better approach might therefore be to apply the Hadley test without any ‘assumption of responsibility’ addendum.

**Hadley Test Better Explains Situation Where Parties Do Not Provide for Questions of Remoteness**

The Singapore approach — which envisages the Hadley test as an external test — also better deals with the situation where parties have not expressly provided for questions of remoteness. The ‘assumption of responsibility’ test, premised on an interpretation of the contract, operates internally (to the contract) and asks what the parties assumed responsibility for in such a situation. However, such an internal test stretches the ambit of ‘interpretation’ within remoteness too far. The Hadley test, on the other hand, being an external test, adequately acts as a gap-filler for situations where parties have not considered who should bear the type of loss in question.30

Indeed, a broader point arising from the comparison between the two approaches relates to the limited reach of ‘interpretation’ as an umbrella concept explaining most of contract law. The Singapore Court of Appeal in Out of the Box rejected Lord Hoffmann’s use of ‘interpretation’ as a technique to determine whether parties had assumed responsibility for a particular type of loss. This question has not been explicitly considered by the English courts after The Achilleas; this may be because the narrower reading of Lord Hoffmann’s approach avoids this issue. This avoidance could be an acknowledgement that any broader function of ‘interpretation’ could bring

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'interpretation' past its proper function within remoteness. There is, of course, a question of interpretation when applying the first limb of the Hadley test. As has been noted, an interpretation of the contract is relevant here to determine the relevant context so as to decide whether the type of loss is one that arises naturally in the usual course of things.\(^{31}\) However, the first limb is not applied by interpreting the contract.\(^{32}\) In other words, where there is no express agreement on the remoteness of damage, the Hadley test operates as an external test for the courts to decide, taking the relevant context into account, whether to hold the particular type of loss as not being too remote. It would be futile to search within the contract for any assumption of responsibility simply because the parties had made no provision in this regard. The danger of using ‘interpretation’ as a technique to ascertain whether parties had assumed responsibility for certain types of damages is to expose the judge to the dangers of an over-extensive judicial imputation of intention.\(^{33}\)

In contrast to the view expressed above that the Hadley test operates as an external rule is Coote's view that contractual obligations are assumed rather than imposed \textit{ab extra}, whether or not the law determines the obligations assumed.\(^{34}\) However, it is important to recognise that Coote does not go quite as far as Lord Hoffmann in \textit{The Achilleas} to suggest that the contract can always provide for the content of the obligations assumed. Indeed, what he suggests seems to be more general, that is, a party entering into a contract with another undertakes to fulfil his primary and secondary obligations to the other party. To that extent, there is, on a very broad level, an 'assumption of responsibility'.\(^{35}\) This assumption of responsibility, however, is present in every contract as a fundamental way of explaining the essence of a contract. Being uniform, it does not provide for the exact content which parties are assuming responsibility for.

The use of the Hadley test may also better distinguish between the concepts of interpretation and remoteness if remoteness is to be governed by an external test. The Singapore Court of Appeal in \textit{Out of the Box} alluded to this idea by referring to the hypothetical case of the taxi driver tasked to get his passenger to a particular destination by a certain time. The question in that hypothetical is whether the taxi driver should be made liable for the passenger's loss of profit that would have materialised had the driver not made it to the destination in time. The court noted that the hypothetical concerned the prior question of interpreting the contract to ascertain the obligations undertaken by the taxi driver.\(^{36}\) Thus, if the taxi driver knew that there was a time limit and the reason for that limit, and decided to charge a higher fare, then it might be concluded, as a matter of interpretation, that the driver had undertaken an

\(^{33}\) Although the court's reasoning in \textit{Out of the Box} did not really illustrate the distinction as it ultimately rested on an express term concerning the contract sum. Cf Brian Coote, 'Contract as Assumption and Remoteness of Damage' (2010) 26 JCL 211.
\(^{34}\) Brian Coote, 'Contract as Assumption and Remoteness of Damage' (2010) 26 JCL 211 at 212–3.
\(^{35}\) See \textit{The Heron II} [1966] 2 QB 695 at 730–1.
\(^{36}\) [2013] 2 SLR 363; [2013] SGCA 15 at [33].
obligation to reach the destination by a particular time. However, the
ascertainment of the taxi driver’s obligations under the contract did not, in
the court’s view, answer the separate question of whether he should be responsible
for the damages that resulted. That was to be determined by reference to the
rules on the remoteness of contractual damages.\textsuperscript{37} Accordingly, the court
thought that framing the issue of remoteness in terms of ‘assumption of
responsibility’ or ‘interpretation’ risks conflating the two separate questions of
ascertaining the parties’ obligations and the claimable damages.\textsuperscript{38}

The court’s treatment of the taxi driver hypothetical may, on a first reading,
be criticised for drawing too fine a distinction between interpretation and
remoteness. As alluded to above, context is important when applying the
\textit{Hadley} test, and that requires an interpretation of the contract.\textsuperscript{39} There is thus
a role for interpretation even in the realm of remoteness, even if one cannot
answer the remoteness question by a direct interpretation of the contract. To
be fair to the court, it did note that the obligations under the contract derived
from interpreting it \textit{may} ‘constitute a factor’\textsuperscript{40} which is to be considered when
deciding whether damages are too remote. This does acknowledge the indirect
role that interpretation has to play in the first limb of the \textit{Hadley} test.

The court’s distinction between interpretation and remoteness in the taxi
driver hypothetical also raises another issue. The parties’ obligations, derived
from interpreting the contract, only provide the relevant context for the
application of the first limb of the \textit{Hadley} test. This context can help discern
whether the type of loss is one that arises naturally in the context. However,
the content of those obligations cannot affect the result reached under the
second limb of the \textit{Hadley} test if it is shown that the defendant in fact knew
of the type of losses concerned. Under the traditional \textit{Hadley} test, the only
way the defendant with actual knowledge can escape liability is if he or she
has validly excluded or restricted his or her liability.\textsuperscript{41} If the desired answer to
the hypothetical is that the taxi driver should not be liable even if he or she
knew of the type of loss suffered, then that raises the question whether there
is an additional criterion to the \textit{Hadley} test, which focuses on knowledge (and
which is satisfied on the facts of the hypothetical).\textsuperscript{42} If the Singapore courts
desire to persist with the \textit{Hadley} test, then the answer could well be that the
parties’ obligations may reveal a limitation or exclusion of the defendant’s
liability which would otherwise subsist under the \textit{Hadley} test. This would
avoid any misunderstanding that the ‘assumption of responsibility’ test
somehow applies in conjunction with the \textit{Hadley} test, notwithstanding the
court’s quite explicit rejection of it. If this is correct, then it is submitted that
this approach still properly distinguishes between interpretation and
remoteness.

Ultimately, there is in the \textit{Hadley} test an \textit{external} rule of law that allows the
courts to fill in gaps in the contract without over-stretching the concept of

\textsuperscript{37} [2013] 2 SLR 363; [2013] SGCA 15 at [34].
\textsuperscript{38} [2013] 2 SLR 363; [2013] SGCA 15 at [36].
\textsuperscript{39} J W Carter, \textit{The Construction of Commercial Contracts}, Hart Publishing, Oxford and
\textsuperscript{40} [2013] 2 SLR 363; [2013] SGCA 15 at [36].
‘interpretation’ within the realm of remoteness. It may therefore be useful, as the Singapore Court of Appeal said in *Out of the Box*, to distinguish interpretation from the question of remoteness and to focus on the parties’ knowledge as the basis for liability in relation to the remoteness question. The interpretation question concerns the relevant context for the first limb of the *Hadley* test, and also whether the defendant had validly excluded or limited his liability.

**Conclusion**

The continued rejection of the ‘assumption of responsibility’ test in determining the remoteness of damages in contract in Singapore affords a useful contrast to the continued refinement in England. While the *Hadley* test is not without its problems, the application of a different approach (or an addendum to the existing test) should only be applied if it adds something new to the existing law. In this regard, the *Hadley* test is capable on its own of dealing with supposedly exceptional cases which the ‘assumption of responsibility’ test alone is able to resolve. In contrast, *John Grimes Partnership* shows a continued refinement within English law that may come to naught if, as argued above, the ‘assumption of responsibility’ test (or addendum) is almost never applied. Furthermore, if the ‘assumption of responsibility’ test adds nothing new — and, indeed, may have created confusion — then maybe the better approach is to prefer the orthodox *Hadley* test until a better approach can be formulated.45