THE RIGHT ANSWER TO THE WRONG QUESTION: *ATLANTIC POTATO DISTRIBUTORS LTD. V. MEERSSEMAN*

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> "We wish to conclude these reasons with one observation. Too often in litigation involving a breach of contract the parties focus on the issue of liability to the detriment of a sound legal analysis and assessment of the damages available at law. In this case the parties may be forgiven. The case started out as a claim for unpaid goods and for an amount that fell outside the Small Claims procedure. In future, however, trial judges should be wary of hastily drawn legal arguments surrounding the assessment of damages."[1]

I. INTRODUCTION

The New Brunswick Court of Appeal's advice is well-taken. In *Atlantic Potato Distributors v Meersseman*,[2] the Court considered the application of s. 50 of the *Sale of Goods Act*.[3] Section 50 provides for buyers' remedies for a breach of warranty,[4] and, in s. 50(2), the measure of damages: "the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."[5] Subsection 50(3) establishes a *prima facie*

[1] *Atlantic Potato Distributors Ltd. v Meersseman*, 2010 NBCA 50 at para 34 per Robertson and Green JJ.A., 321 DLR (4th) 680 [*Meersseman* CA], aff'g 2009 NBQB 133, 344 NBR (2d) 323 [*Meersseman* QB].

[2] *Meersseman* CA, *ibid*.

[3] RSNB 1973, c S-1 [*SGA*]. A version of the *SGA* is in force in every province (excluding Quebec) and territory in Canada, and each statute contains a provision substantially similar to s. 50 in the Act (*Sale of Goods Act*, RSBC 1996, c 410, s 56; *Sale of Goods Act*, RSA, c S-2, s 52; *The Sale of Goods Act*, RSS 1978, c S-1, s 52; *The Sale of Goods Act*, CCSM, c S10, s 54; *Sale of Goods Act*, RSO 1990, c S.1, s 51; *Sale of Goods Act*, RSNS 1989, c 408, s 54; *Sale of Goods Act*, RSNL 1990, c S-6, s 54; *Sale of Goods Act*, RSPEI 1988, c S-1, s 53; *Sale of Goods Act*, RSY 2002, c 198, s 50; *Sale of Goods Act*, RSNWT 1988, c S-2, s 62; *Sale of Goods Act*, RSNWT (Nu) 1988, c S-2, s 62). References in this paper are to the New Brunswick Act, except where otherwise indicated.

[4] Reduction of the price of the goods, or damages (*ibid*, s 50(1)).

[5] *Ibid*.

rule for determining the loss contemplated in s. 50(2) where the warranty at issue is a warranty of quality: "the loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."[6] This paper argues that the Court of Appeal failed to live up to its own strictures for trial judges, and took the wrong approach to assessing damages, by stretching the *prima facie* rule in subsection 50(3) beyond its proper application.

This approach did not lead the Court to arrive at the wrong result, so the paper is offered in the same spirit as the Court's own reasons on damages: respectfully, the Court "reached the right result for the wrong reasons."[7]

The paper comprises five parts. I begin by briefly reviewing the relevant provisions of the *SGA*. In the second part, I describe the facts in *Meersseman*, and the composition of the damages award at trial. In the third part, I summarize the Court of Appeal's reasoning on damages, and note certain surprising features of its argument which I will argue later stem from distortion of the *prima facie* rule. I go on in the fourth part to review the principles for assessment of damages that emerge from cases dealing with s. 50 and equivalent provisions in other Canadian[8] and English legislation;[9] since the provisions in those acts are substantially the same, they can guide the interpretation of the provisions in the Act although they may not have been binding on the Court of Appeal.[10] In the fifth part, I bring these

[6] *Ibid*.
[7] *Meersseman* CA, *supra* note 1 at para 1.
[8] See *supra* note 3.
[9] *Sale of Goods Act 1979* (UK), c 54.
[10] In fact the Court relies on cases interpreting equivalent provisions in the English legislation and the acts in other provinces, and commentary on the English legislation. See *supra* note 1 at paras 18, 29-31.

principles to bear in a critical appraisal of the Court of Appeal's decision, and suggest that the trial judge adopted the correct approach to assessing damages.

II. THE STATUTE

It is outside the scope of this paper to give a history of the *SGA*,[11] and only a small number of its provisions bear on problems with which I'm concerned. But some context will aid in following the thread of my argument. In this section, I'll outline the scope of the *SGA*'s application, the effect of the sections in the Act addressing conditions and warranties, and the range of remedies, including damages for breaches of conditions and warranties, available to buyers under the Act.

The Act applies to contracts for the sale of goods. The scope of that expression is set in s. 2(1): in order to be a contract of sale of goods, an agreement must provide for (1) a transfer of property (2) in goods (3) for consideration,[12] between a seller and a buyer. Goods are defined in the Act.[13] Since it only covers contracts of sale, the *SGA* does not apply to leases,[14] or to contracts that, although they involve the transfer of property in goods, are primarily contracts for services.[15]

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[11] For a concise account of the origins of the Act, its importation to Canada from England, and the legislation's subsequent career, see Roderick J Wood, "The Codification of Commercial Law in Canada" (2016) 97:2 Sask L Rev 179.

[12] *SGA*, *supra* note 3.

[13] *Ibid*, s 1(1).

[14] See *Helby v Matthews*, [1895] AC 471 at 475-78 (HL (Eng)), Herschell LC.

[15] See *ter Neuzen v Korn*, [1995] 3 SCR 674 at para 67, 127 DLR (4th) 577. Building contracts, for example (see *Re Royal Bank of Canada and Saskatchewan Telecommunications*, 20 DLR (4th) 415 at 416-19, [1985] 5 WWR 333 (Sask CA)).

A. REMEDIES

A range of remedies are available to a buyer for breach of a contract by the seller, depending upon the nature of the breach and other circumstances. For my purposes, the most relevant is the right, discussed above, to damages in the event of either a breach of warranty or a breach of a condition.[16] When a seller fails to deliver goods under a contract of sale, the buyer is also entitled to damages through s. 48(1),[17] capturing the loss "directly and naturally resulting, in the ordinary course" from non-delivery.[18] Subsection 48(3) establishes a *prima facie* rule for calculating damages that resembles the rule in s. 50(3), but is not identical to it.[19] Subsection 12(2) of the Act confers a right of rejection on buyers for breach of a condition (but not breach of a warranty).[20] The right of rejection is lost if the buyer accepts goods despite the breach of the condition.[21] When a buyer rejects goods because of a breach of a condition, they are entitled to damages for non-delivery.[22]

Finally, s. 51 of the Act preserves the further right of buyers and sellers to recover "special damages in any case where by law…special damages may be recoverable."[23] This

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[16] *SGA*, *supra* note 3, s 50(1).
[17] *Ibid*.
[18] *Ibid*, s 48(2).
[19] *Ibid* ("[w]here there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver").
[20] *Ibid*.
[21] *Ibid*, s 12(4). If a buyer loses the right to reject, they are compelled to treat the breach of condition as a breach of warranty, and may recover damages under s. 50(1). They may also choose to treat a breach of a condition as a breach of warranty (*ibid*, s 12(1)) and exercise a right to damages.
[22] See e.g. *Tower Equipment Rental Ltd. v Joint Venture Equipment Sales et al* (1975), 60 DLR (3d) 621 at 628, 9 OR (2d) 453 (HC).
[23] *SGA*, *supra* note 3.

provision has been taken to embrace the recovery of special or consequential damages under the second branch of the rule in *Hadley v. Baxendale*.[24] Section 50(2), on the other hand, is understood to be a statutory equivalent to the first branch of the rule.[25] The rule in *Hadley v Baxendale*, which has an important place in the Court of Appeal's reasoning, is discussed in more detail in Part IV., below.

B. CONDITIONS AND WARRANTIES

Along with conditions and warranties that may be agreed between the parties, the Act provides for implied conditions and warranties.[26] The condition in issue in *Meersseman* was implied through s. 15(a):

> [W]here the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply…there is an implied condition that the goods are reasonably fit for the purpose…[27]

The three conditions for implying a warranty under s. 15(a) are embedded in the language of the subsection: the buyer must make the purpose for which the goods are required known to the seller, the goods must supplied in the course of the seller's business, and the buyer

[24] (1854), 156 ER 145.
[25] See e.g. *H Parsons (Livestock) Ltd. v Uttley Ingham & Co. Ltd.*, [1978] QB 791 at 807, Scarman LJ (holding that the equivalent to section 50 in the Act in force in England was equivalent to the first branch of the rule). See also *Meersseman* CA, *supra* note 1 at para 26.
[26] *SGA*, *supra* note 3, ss 13-16.
[27] *Ibid*. *Meersseman* QB, *supra* note 1 at para 15.

must rely on the seller's skill or judgment.[28] With the statutory background in place, I proceed now to the facts in *Meersseman*, and the trial court's reasoning.

III. THE TRIAL DECISION

A. FACTS

The facts in *Meersseman* can be set out in brief compass. The plaintiff, Atlantic Potato Distributors Ltd. ("Atlantic"), was in the business of distributing seed potatoes.[29] The defendants, Leon and Robert Meersseman (the "Meerssemans"), father and son, were in the business of farming potatoes for sale to two recurring customers, W.D. Potato Ltd. ("W.D.") and Wiels.[30] Before 2005, W.D. Potato had been the Meerssemans' only customer, and had supplied them with seeds, but when Wiels became a customer, this arrangement ended and the Meerssemans began to buy their own seed.[31] On a recommendation from W.D., the Meerssemans bought Superior seed potatoes from Atlantic in 2005; they apparently harvested them without incident that year.[32] In 2006 they bought Superior seed potatoes, and later, Andover seed potatoes.[33] The circumstances of the second purchase are described in the trial judgment:

> Hanscombe [the president of Atlantic] called him back and Meersseman told him he needed Andover seed for his customer W.D. Hanscombe told him he thought he could get them. Hanscombe confirms that Meersseman called specifically with respect to

[28] See *Meersseman* QB, *ibid* at para 16.
[29] *Ibid* at para 1.
[30] *Ibid* at para 5.
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*.

> the Andovers (after having already ordered and received the Superiors). Meersseman told him that he had a contract for the Andovers and he needed that specific variety.[34]

Atlantic delivered the Andover seed potatoes, and the Meerssemans planted them.[35] Later it became apparent to the Meerssemans that there was something wrong, and when the Andover potatoes were harvested the yield was much smaller than the Meerssemans were anticipating.[36] The poor harvest of Andover potatoes was caused by defects in the seed potatoes supplied by Atlantic that were not apparent at the time when the seeds were planted.[37] The harvest of Superior potatoes, which were also supplied by Atlantic, was normal.[38]

When it began to be evident to the Meerssemans that the Andovers were not growing normally, they refused to pay Atlantic for the seed potatoes.[39] Atlantic brought an action for the withheld payment, and the Meerssemans claimed damages for a breach of warranty.[40]

B. BREACH OF WARRANTY AND DAMAGES

The Meerssemans did not contest their liability for the price of the seed potatoes.[41] Once Garnett J. concluded that defects in the seed potatoes caused the deficient harvest, the

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[34] *Ibid* at para 19.
[35] *Ibid* at para 6.
[36] *Ibid* at paras 2, 7.
[37] *Ibid* at paras 13, 6. It might be questioned whether, on the evidence, Justice Garnett ought to have found that the defects in the seed potatoes were latent at the time they were planted, since there seems to have been some indication when they were delivered that something was amiss (see *Meersseman* CA, *supra* note 1 at paras 14-16). But the Court of Appeal declined to disturb Garnett J.'s holding – made in the context of finding that there was reliance for the purposes of s. 15(a) – on this point (*ibid* at para 17).
[38] *Meersseman* QB, *ibid* at para 6.
[39] *Ibid* at para 5.
[40] *Ibid* at para 1.
[41] *Ibid*.

principal issues were (1) whether the conditions giving rise to a warranty for quality under s. 15(a) were established;[42] and (2) damages.

Garnett J. adopted the Meerssemans' calculation of damages, which was based on the following premises: (1) the total yield of Andovers was 79 hundredweight per acre;[43] (2) but for the defective potatoes, the yield would have been 365 hundredweight per acre;[44] (3) the Meerssemans cultivated Andovers on 25 acres;[45] (4) the market price for Andovers was $10.94 per hundredweight.[46]

Multiplying the actual yield per acre by the numbers of acres cultivated, and subtracting that figure from the expected yield per acre multiplied by the number of acres cultivated gives the shortfall attributable to the defective seed potatoes. The amount of the Meerssemans' loss is the shortfall multiplied by the market price: $78,221.00.[47]

Garnett J. grounded this finding in s. 50(2).[48] She apparently did not consider the *prima facie* rule. Atlantic argued that damages should account for production costs,[49] but Garnett J. held that "a more sophisticated calculation including the effect on insurance and

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[42] *Ibid* at paras 16-19. See the discussion of the conditions in Part I, above. And see *supra* note 38.
[43] *Ibid* at para 13.
[44] *Ibid*.
[45] *Ibid* at para 2.
[46] As the Court of Appeal points out, the market price is not spelled out in Garnett J.'s decision (*Meersseman* CA, *supra* note 1 at paras 22-23), but it can be inferred from the method of calculation described and the amount of damages.
[47] *Meersseman* QB, *supra* note 1 at paras 22-23. (365*25) - (79*25) = 9,125 - 1,975 = 7,150 (the total shortfall). 7,150*10.94 = 78,221 (the Meerssemans' loss). Since the Meerssemans were liable for the price of the potatoes, the actual award was $78,221 - $11,410.12 (the price of the potatoes), or $66,810.88.
[48] *Ibid* at para 21.
[49] That is, Atlantic argued that the costs saved because the harvest of potatoes was smaller should have been deducted from the damages awarded to the Meerssemans.

customer relations [and presumably also production costs] would result in a higher rather than a lower figure"[50] and declined to make an allowance for them.

IV. THE COURT OF APPEAL'S REASONING ON DAMAGES

Atlantic appealed the trial court decision on liability and the amount of damages.[51] On the latter point, they advanced an argument along the same lines as the one that Garnett J. rejected at trial, that is, that the damages award ought to have been subject to deductions for expenses that the Meerssemans saved because their harvest was smaller than it would have been but for the defective seed potatoes.[52] Only the Court's *reasoning* on damages concerns me here: although the Court of Appeal rejected the analysis leading to the damage award at trial, they did not take issue with the result.[53]

In the Court's view, Garnett J. erred in failing to apply the *prima facie* rule set down in s. 50(3) of the Act, and applying the presumption also disposed of Atlantic's argument for reducing the damages.[54]

Restated, Atlantic's argument went as follows: the claim put by the Meerssemans for the lost value of their potato harvest was, in effect, a claim for the revenue that they would have realized if they had had a full harvest. But if the Meerssemans were claiming their lost revenues, then they ought to be entitled only to their net revenues, the value of the potatoes less the costs associated with harvesting them and transporting the full harvest to market. If

[50] *Meersseman* QB, *supra* note 1 at para 22.
[51] *Meersseman* CA, *supra* note 1 at para 1.
[52] *Ibid* at paras 24-25.
[53] *Ibid* at para 20.
[54] *Ibid* at paras 26-28.

the breach of condition had not occurred, the Meerssemans would have had to incur those costs in order to obtain the market price. Awarding them the value of the full harvest without a deduction for the costs they would otherwise have incurred put them in a better position than they would have been in if the breach of condition had not occurred: they realized the value of the full harvest *and* saved costs. But the general principle in calculating damages is that "the buyer should be put in the same position had there been no breach of warranty."[55]

According to the Court, the fatal problem with this line of argument is that it presupposes that the Meerssemans were claiming for lost profits on their sub-sale of potatoes to W.D. But the Meerssemans were not seeking their lost profits. Instead, they were claiming damages under s. 50(2) – which the Court identified with the first branch of the rule in *Hadley v Baxendale*[56] – and more precisely, under the *prima facie* rule in s. 50(3).[57] To claim their lost profits, the Meerssemans would have been required to bring themselves under the second branch of the *Hadley v Baxendale* rule, which takes statutory form in s. 51.[58]

Since the Meerssemans were not claiming (and could not claim) their proceeds from the sub-sale (lost profits), it followed, in the Court's judgment, that the costs associated with the sale should also be excluded from the calculation of damages.[59] By the same token, there

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[55] *Ibid* at para 25. In other words, the buyer is entitled to his expectation interest in the fulfillment of the contract. For a seminal discussion of the expectation interest and other interests protected by damages for breach of contract, see LL Fuller & William R Perdue, Jr, "The Reliance Interest in Contract Damages: 1" (1936) 46 Yale LJ 52.

[56] *Meersseman* CA, *ibid* at para 27.

[57] *Ibid* at paras 26-27.

[58] *Ibid* at para 26. The Court thought that the Meerssemans could not have done so (*ibid* at paras 29-32). Though the issue is incidental to the main thrust of this paper's argument, the Court was probably wrong about this, in light of the trial court's findings of fact (see the text accompanying note 34).

[59] *Ibid* at para 33, citing *Slater v Hoyle & Smith Ltd.*, [1920] 2 KB 11 (CA (Eng)) [*Slater*].

had been no reason for Garnett J. to turn her mind to the effect Atlantic's breach might have had on "insurance and customer relations."[60]

Once the Court found that the costs that Atlantic had pointed to could not enter into the calculation of damages, the issue fell to be resolved by applying the *prima facie* rule: damages amounted to the "difference between [1] the value of the goods at the time of delivery to the buyer and [2] the value they would have had if they had answered to the warranty."[61] Although "strict" application of the *prima facie* would require comparing the value of the seed potatoes at the time they were delivered with their value if they had conformed to the warranty, "obviously this [made] no practical sense" in the circumstances.[62] The Court held that (1) the value of the goods was the value of the Meersseman's actual harvest of Andover potatoes, and (2) the value the goods would have had if they answered to the warranty was the value of the potatoes the Meerssemans would have harvested but for the defective seeds. The Meerssemans were entitled to the difference: damages in the same amount as trial court had found.[63]

Before I step back from *Meersseman* to consider general principles pertaining to the calculation of damages, notice the following four features of the Court's reasoning:

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[60] *Meersseman* QB, *supra* note 1 at para 22.
[61] *SGA*, *supra* note 3, s 50(3).
[62] *Meersseman* CA, *supra* note 1 at para 28. The Court does not make explicit why it would make no practical sense, but the reason isn't hard to guess. See *infra* notes 65-67 and the accompanying text.
[63] *Ibid*.

(1) In applying the *prima facie* rule, the Court proceeded on the basis that the seed potatoes that the Meerssemans planted and the potatoes that they harvested later were the same goods.[64]

(2) Although it purports to be assessing damages for a breach of a warranty[65] of quality, the problem with the (mature) potatoes at the time that the Court assessed damages was not that they didn't conform with a condition as to quality – just that there were too few of them. The calculation that the Court performed looks more like an assessment of damages for non-delivery under s. 48[66] than for breach of a warranty of fitness for purpose.

(3) If the trial court's finding – that the problem with the seed potatoes wasn't apparent when they were planted – is accepted,[67] then the Court of Appeal was right that applying the *prima facie* rule strictly, and comparing the value of the seed potatoes at the time they were delivered with the value they would have had if they complied with the condition as to quality would have worked an injustice on the Meerssemans. This is not merely because the seed potatoes had, at the time they were delivered, "a relatively modest value,"[68] as the Court of Appeal observes, but because if the problem with the potatoes wasn't detected or detectable, then the Meerssemans

[64] My aim in making this observation isn't to point up a metaphysical issue, just to indicate that the mature potatoes were clearly different, perhaps in important ways, from the seed potatoes that Atlantic delivered. Putting it another way, one might ask: Did Atlantic contract to deliver mature potatoes? It seems clear they did not.

[65] Actually a condition treated as a warranty.

[66] For *prima facie* rule under s. 48 see *supra* note 19.

[67] See *supra* note 37 and the accompanying text.

[68] *Meersseman* CA, *supra* note 1 at para 28.

didn't have any opportunity to purchase and plant replacement seed potatoes to mitigate their loss. If, on the other hand, the defects had been visible, then mitigation would have required them to buy replacement seed potatoes[69] and limited their damages to the cost of doing so, less the value of Atlantic's defective seed potatoes.

(4) The Court of Appeal's reasoning seems to be premised on the assumption that the only options open to it in assessing damages[70] were either to apply the *prima facie* rule or to assess consequential damages stemming from the sub-sale to W.D. under s. 51 and the second branch of the rule from *Hadley v. Baxendale*.[71]

V. PRINCIPLES FOR ASSESSING DAMAGES

With these points established, the moment is right to review the principles that guide courts in assessing damages for breach of contract, and for breaches of contract coming under s. 50 in particular. I will return to the Court of Appeal's decision in the next Part.

A. THE RULE IN *HADLEY V. BAXENDALE*

A survey of these principles should begin, on doctrinal and historical grounds, with *Hadley v. Baxendale*. It isn't necessary to state the facts of that case in any great detail in order to make the rule it sets forth intelligible, and in any event they will be familiar to many

[69] On the assumption that replacements were available, and that there would have been sufficient time to plant them.

[70] And the only options available to the Meerssemans in claiming damages

[71] *Meersseman* CA, *supra* note 1 ("we are confident that the Meerssemans would have argued that as they have not sued for lost profits under the second branch of the rule in *Hadley v. Baxendale*, as codified in s. 51 of the *Sale of Goods Act*, their claim *must be assessed under the* prima facie *rule set out in s. 50(3)*" at para 33 [emphasis added]).

readers. The plaintiff in the case operated a steam-powered mill. One of the critical parts of the steam engine driving the mill, a crank-shaft, was broken. Without the crank-shaft, the mill could not operate. The plaintiff engaged a courier, the defendant, to transport the broken crank-shaft to Greenwich to serve as the model for a new shaft being made there. The agreement between the plaintiff and the defendant stipulated that the crank-shaft would reach Greenwich within two days. In fact, a much longer period passed before the crank-shaft arrived in Greenwich. This delay led in turn to a delay of the resumption of the operation of the mill. In the interim, the plaintiffs lost income they would otherwise have earned.[72]

The plaintiffs claimed, among other amounts, this lost income.[73] This claim led to the formulation of the rule that bears the case's name:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive…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.[74]

The damages according to the usual course of things will ordinarily be limited to those "which would arise generally, and in the great multitude of cases not affected by special circumstances"[75] from a particular breach of contract. This is the first branch of the rule: it operates to exclude claims for damages flowing from special circumstances that are

[72] *Hadley v Baxendale*, *supra* note 24 at 146.
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid*.

unknown to the other party to a contract. On the other hand, if the special circumstances are communicated to the other party, so that the damages stemming from them are within reasonable contemplation, then the second branch of rule entitles the plaintiff to recover.

On the facts in *Hadley v. Baxendale*, the rule precluded damages for lost income because of the delayed delivery of the broken crank-shaft. The plaintiffs hadn't communicated that resuming their business depended on the prompt delivery of the crank-shaft,[76] and so lost income wasn't within the reasonable contemplation of the parties. The broken crank-shaft might have been a spare – or it might have been that other parts of the mill also required repair. And in either case, delayed delivery wouldn't have led to lost income.[77]

As the cases that followed *Hadley v. Baxendale* illustrate, however, the first branch of the rule doesn't altogether exclude claims for lost profits. For my purpose, *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.*[78] has two important features. First, the English Court of Appeal restated the rule from *Hadley v. Baxendale*: (1) damages for a breach of contract are limited to what is reasonably foreseeable as a result of the breach at the time the contract was entered into; (2) what is reasonably foreseeable depends on the knowledge of the parties; (3) the knowledge of the parties falls into two classes. (3a) Parties are presumed to know everything that a reasonable person does, and to anticipate damages that knowledge

[76] There is some ambiguity about this point. The headnote for the case indicates that the plaintiffs did convey this information to the defendant's clerk, but the decision is taken as though no communication to that effect transpired between the parties. See the discussion in *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.*, [1949] 2 KB 528 at 537 (CA (Eng)) [*Victoria Laundry*].

[77] *Hadley v Baxendale*, *supra* note 24 at 146.

[78] *Supra* note 76.

would enable them to foresee, and (3b) they may also actually know about special circumstances that would lead to unusual losses. (3a) corresponds to the first branch of the rule in *Hadley v. Baxendale*, and (3b) reflects the second branch.[79]

Second, the Court held that damages for lost profits (or loss of business) can be recovered under the first branch of the rule, if a reasonable person would know that the purpose of a contract was to earn a profit.[80] The Court was presented with two distinct claims for lost profits, the first for the ordinary income that the plaintiff could have earned if the defendant had fulfilled its obligations under the contract, and the second for income under a particular contract that the plaintiff was required to forgo because of the breach.[81] The plaintiff was permitted to recover under the first head, because a reasonable person would have foreseen this loss of income because of the breach of the contract. They were not permitted to recover the second amount, because the consequences of losing the particular contract were not reasonably foreseeable or communicated to the plaintiff.[82]

Victoria Laundry's effect was to recognize two classes of claim for lost profits. Only the second class of claim depended on the communication of special circumstances.[83] It follows that the Court of Appeal in *Meersseman* erred in principle by conflating claims for

[79] *Ibid* at 539.
[80] *Ibid* at 542-43.
[81] *Ibid* at 535.
[82] *Ibid* at 543.
[83] "[T]he learned trial judge appears to infer that because certain 'special circumstances' were, in his view, not 'drawn to the notice of' the defendants and therefore, in his view, the operation of the 'second rule' was excluded, ergo nothing in respect of loss of business can be recovered under the 'first rule.' This inference is, in our view, no more justified in the present case than it was in the case of *Cory v. Thames Ironworks Company*" (*ibid* at 542 [citations omitted]).

lost profits and claims for profits from particular sub-sales,[84] but not, of course, that the Meerssemans should have recovered lost profits under the first branch of the rule from *Hadley v. Baxendale*. That point depends on the facts and on the relationship between s. 50(2), which embodies the first branch of the rule,[85] and s. 50(3), which the Court of Appeal took itself to be applying.

B. THE RELATIONSHIP BETWEEN SS. 50(2) AND 50(3)

Subsection 50(2) provides that the measure of damages for breaches of conditions and warranties is the "loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."[86] Subsection 50(3) stipulates that this loss is "***prima facie*** the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty"[87] when a breach of a condition or warranty of quality is at stake. Two kinds of relationship might hold between these provisions: the *prima facie* rule could set up an evidentiary presumption, so that, in the absence of evidence to the contrary, the loss under s. 50(2) falls to be determined according

[84] See the text accompanying note 70.

[85] And in view of *Victoria Laundry*, presumably can sometimes accommodate claims for lost profits. There are also Canadian cases awarding lost profits under sections equivalent to s. 50(2) (see e.g. *Canlin Ltd. v Thiokol Fibres Canada Ltd.* (1983), 142 DLR (3d) 450, 40 OR (2d) 687 (CA) [*Canlin*]). I discuss the Canadian cases further in Parts IV. and V.

[86] *SGA*, *supra* note 3.

[87] *Ibid* [emphasis added].

to s. 50(3). Or the *prima facie* rule could be a substantive rule that applies unless the conditions[88] for displacing it are met.[89]

On the latter understanding of the *prima facie* rule, a court might be required to apply it even though the calculation of damages it contemplates either outstripped or fell short of the loss that would otherwise be held to result, in the ordinary course of events, directly and naturally from a breach of warranty. More concretely, a court could be compelled to award damages based on s. 50(3) even though awarding damages based on lost profits would better reflect a claimant's actual loss.

If this were the right conception of the relationship between ss. 50(2) and 50(3), it would raise a further question, about the conditions on which the *prima facie* rule can be displaced. But it seems reasonably clear that it is the wrong conception.

There are at least two good reasons to think so. First there is Canadian authority, though not authority binding on the Court of Appeal in *Meersseman*, directly on point and holding to that effect:

> Section 56(3) [50(3)] sets out the prima facie rule, the one to be applied in the absence of evidence to the contrary, but it does not purport to set out an exclusive rule. It is still necessary to determine what is the loss directly and naturally resulting in the ordinary course of events from the breach.[90]

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[88] Other than evidence that the loss directly and naturally resulting in the ordinary course is different from the result of applying the *prima facie* rule.

[89] There is a third *possible* relationship: the rule under s. 50(3) could be incapable of being displaced. Then a claimant would never be entitled to recover anything but the amount dictated by s. 50(3), unless they could make out a claim under s. 51, which reflects the second branch of rule from *Hadley v. Baxendale*. Some of the Court of Appeal's comments come close implying this view of the relationship (see *supra* note 72). But it seems reasonably clear that this cannot be right, just because the rule in s. 50(3) is a ***prima facie*** rule.

[90] *Drew v MacNeil*, 17 DLR (4th) 488 at 501, 1985 CanLII 762 (BCCA), Esson JA [*MacNeil*]. The Court in *MacNeil* was interpreting s. 56(3) of the *Sale of Goods Act* (RSBC 1979, c 340). The language of s. 56(3) is not identical

Second, the reasoning in cases where courts have awarded damages under sections equivalent to s. 50(2), but outside the scope of sections equivalent to s. 50(3), including damages for lost profits, isn't consistent with the view that s. 50(3) is a substantive rule of law imposing conditions that must be satisfied to displace the *prima facie* rule. In some of these cases, the courts ignore the equivalent to s. 50(3) in the statute they are applying. In others, they award damages under the *prima facie* rule and damages under other heads, including lost profits.[91]

If the arguments put forth in this section are persuasive, then they establish two principles: (1) damages for lost profits can be awarded under the first branch of the rule in *Hadley v. Baxendale*, and *a fortiori*, under section 50(2), where they are not attributable to a particular contract; and (2) no special conditions need to be satisfied in order to displace the *prima facie* rule. If lost profits, or a calculation on some other basis captures the loss directly and naturally resulting in the ordinary course of events from a breach of warranty better than the *prima facie* rule, then a court can adopt that method.

With these principles in hand, it's possible to answer two outstanding questions about *Meersseman*:

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to s. 50(3). It provides that the rule applies "in the absence of evidence to the contrary," not "*prima facie*." But the Court of Appeal held that the meaning of the former expression is the same as the meaning of latter (*ibid* at 500).

[91] I have not conducted an exhaustive survey of the cases. But the first category includes *Canlin* (*supra* note 85), *Lay's Transport Ltd. v. Meadow Lake Consumer's Co-Operative Association Limited, HM Trimble & Sons Ltd., Neu And A & N Trucking Ltd.* (20 Sask R 8, 1982 CanLII 2333 (QB) [*Lay's*]), and *Cowan Properties Inc. v. Bode Implements Ltd.* (2002 SKQB 364, 209 Sask R 28). The second is illustrated by *Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd.* (27 DLR (3d) 434, [1972] 4 WWR 420).

1. Should the Court of Appeal have applied the *prima facie* rule?

2. If not, what is the result of an alternative calculation of damages?

VI. THE RIGHT ANSWER TO THE WRONG QUESTION

A. SHOULD THE COURT OF APPEAL HAVE APPLIED THE *PRIMA FACIE* RULE?

Recall two of the significant features of the Court of Appeal's analysis identified in Part III., above. The Court's reasoning about the application of the *prima facie* rule proceeded from the premise that the seed potatoes that Atlantic contracted to supply and the mature potatoes that the Meerssemans later harvested were the same goods. There is some sense in which this is true. But the seed potatoes became potatoes that could be harvested only after they were planted, and months had elapsed, and the Meerssemans took whatever steps are ordinarily involved in the cultivation of potatoes. They are also in some sense different from the seed potatoes. Recall also that the damages that the Court calculated looked as much like damages for non-delivery as for a breach of a warranty of quality.[92]

Taken together, I think these points suggest that the facts didn't really fit the application of the *prima facie* rule. Now consider the following variation on the facts. Suppose that the Atlantic was a distributor of fertilizer, not seed potatoes. And suppose that they supplied defective fertilizer to the Meerssemans. The application of the fertilizer has the

[92] It doesn't follow from this that Court *should* have treated this as a case of non-delivery and applied the *prima facie* rule from s. 48(3). In the first place, it's clear that Atlantic did not contract to deliver mature potatoes. And in any case, applying the *prima facie* rule for non-delivery wouldn't solve what I submit is the real problem with the Court's reasoning, its failure to account for the costs the Meerssemans saved.

same result as planting defective seed potatoes: it leads to a much smaller yield of potatoes when the time comes for them to be harvested. The Meerssemans end up in the same position. They have fewer potatoes than they should, because of a breach of a warranty of quality attaching to goods that they purchased from Atlantic. It's clear that the *prima facie* measure of damages can't be applied.[93] A court assessing damages would be required to do so on some other basis, and loss of profits, under the first branch of the rule in *Hadley v. Baxendale*, suggests itself. But then the argument advanced by Atlantic about the costs that Meerssemans saved harvesting and transporting the potatoes seems to have more force.[94] These weren't the facts in the case, but it isn't obvious that the difference between the facts in the case and this scenario give a good principled reason for treating them differently.

B. THE RESULT OF A LOSS OF PROFITS CALCULATION

If this reasoning is right, and the Court should not have applied the *prima facie* rule, some other basis for assessing damages must be found. I've suggested a calculation of lost profits.[95]

[93] In fact, it could be applied and this would lead to recovery for the difference between the value of the fertilizer at the time it was delivered and the value it would have had if it had complied with the warranty. But that wouldn't fully compensate the Meerssemans, for the same reason that giving them the difference between the value of the seed potatoes when they were delivered and the value they would have at that time had if they had conformed to the warranty wouldn't fully compensate them. See the text accompanying notes 67-69.

[94] In the next section I argue that Atlantic's argument was correct. For the moment, all I'm claiming is that, as the applicability of the *prima facie* rule becomes more doubtful, Atlantic's position becomes more plausible.

[95] A calculation of lost profits under the first branch of the rule in *Hadley v. Baxendale* takes the case outside the scope of *Slater* (*supra* note 60), which deals with profits from a particular sub-sale.

It seems uncontroversial that loss of profits was a reasonably foreseeable consequence of Atlantic's breach of warranty.[96] Garnett J. found that Atlantic knew that the Meerssemans were in the business of growing and selling potatoes and that they intended to sell the potatoes grown from Atlantic's Andover seeds.[97] Since *ex hypothesi* the profits at issue in the calculation aren't those attributable to a particular contract, the market price for potatoes at the time of the harvest is a reasonable basis for a calculation of the gross revenue the Meerssemans would have earned.

This leads to the question of costs. Conceptually, a calculation of lost profits involves deducting costs from gross revenue. Some of these costs, those arising from cultivation of the potatoes up to the harvest, were actually incurred. But as Atlantic submitted, the Meerssemans avoided some costs because of the breach of warranty. All other things being equal, these costs would be deducted from the damages awarded to the Meerssemans for lost profits.[98] But there are two problems here, both of which the Court of Appeal identified. The first can be dispensed with quickly. The Court of Appeal declined to make any deduction for costs because it held that they had to be ascribed to particular sub-sales.[99] So far as the costs of harvesting the potatoes are concerned, this is, with respect, simply wrong. Those costs had to be incurred to sell the potatoes, irrespective of the terms of any contract with a sub-buyer. The costs of transporting the potatoes present more difficulty, but it's reasonable

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[96] See *Victoria Laundry*, *supra* note 76 at 542-43.

[97] *Meersseman* QB, *supra* note 1 at para 19.

[98] Ordinarily, *extra* costs arising from a breach of warranty are available as damages under subsections equivalent to s. 50(2); conversely, costs that would have been incurred in any case cannot be claimed as damages (see *Lay's*, *supra* note 91 at paras 43, 48, 54). Failing to deduct costs that were saved from a damages award would have the same effect as granting damages covering costs that were not attributable to a breach. And allowing recovery for extra costs without deducting saved costs would be unfair to defendants.

[99] *Meersseman* CA, *supra* note 1 at para 33.

to suppose that, no matter the terms of their contracts with buyers, the Meerssemans would likely have incurred some costs to transport the full harvest to market. The second problem emerges from this solution to the question of the costs of transporting the potatoes. It isn't clear from the evidence what the costs of harvesting, or transport would have been.[100] But if the *prima facie* rule can't be applied, then there also isn't a clear alternative to assessing the Meerssemans' lost profits.[101] Under the circumstances, the approach taken by Garnett J., setting off the Meerssemans' uncertain savings against further uncertain losses,[102] works, in my view, rough justice between the parties.

VII. CONCLUSION

As the forgoing will have suggested, one of the principal problems in *Meersseman* was gaps in the evidence. The Court of Appeal's approach to assessing damages papered over those gaps by resorting to the attractive but misleading simplicity of the *prima facie* rule under s. 50(3). And this led it to stretch the *prima facie* rule beyond its proper scope. Perhaps the best course the Court of Appeal could have taken was to send the case back to the trial court so that the missing evidence could be gathered. But it's easy to see why the Court would have balked at this, in view of the relatively small amount in issue, and what must already have been considerable costs for the parties. In the circumstances, the perfect would have been the enemy of the good.

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[100] *Ibid* at para 22.

[101] *Cf Canlin*, *supra* note 85 at 459.

[102] *Meersseman* QB, *supra* note 1 at para 22. Garnett J. considered "effects on insurance and customer relations." The latter, at least, could be available through s. 50(2) (see *Canlin*, *ibid*).

In the end, the Court arrived at the right result for the wrong reason. The differences between its reasoning, the trial judge's and my own had no impact on that result, but the extension of the Court of Appeal's analysis to other cases could easily lead to overcompensation. *Meersseman* attests to the value of the Court's advice: "be wary of hastily drawn legal arguments surrounding the assessment of damages."[103]

[103] *Meersseman* CA, *supra* note 1 at para 34.