St. John's Law Review

Volume 63
Issue 1 *Volume 63, Fall 1988, Number 1*

Article 6

April 2012

Recovery in Contract for Damage to Reputation: Redgrave v. Boston Symphony Orchestra, Inc.

Christopher J. Moore

RECOVERY IN CONTRACT FOR DAMAGE TO REPUTATION: *REDGRAVE v. BOSTON SYMPHONY ORCHESTRA, INC.*

Contract remedies are designed to encourage people to enter into contracts freely and without hesitation.[1] For that reason, contract remedies are more limited than tort remedies in that the breaching party in a contract action is not liable for all proximate results of the breach.[2] A significant limitation involves the recovery of consequential damages,[3] where the longstanding rule of *Hadley*

---

[1] *See* E. FARNSWORTH, CONTRACTS § 12.1, at 812 (1982). Professor Farnsworth recounts:

> Our system of contract remedies is not directed at *compulsion* of *promisors* to *prevent* breach; it is aimed, instead, at *relief* to *promisees* to *redress* breach. . . . The result may sometimes be to compel a promisor to keep his promise, but this is only the incidental effect of a system designed to serve other ends. Perhaps it is more consistent with free enterprise to promote the use of contract by encouraging promisees to rely on the promises of others instead of by compelling promisors to perform their promises. In any event, along with the celebrated freedom to make contracts goes a considerable freedom to break them as well.

Id.

[2] *See* RESTATEMENT (SECOND) OF CONTRACTS § 351 comment a (1979) [hereinafter RESTATEMENT OF CONTRACTS]; *see also* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903). "When a man makes a contract he incurs by force of the law a liability to damages . . . . But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured." *Id.* "For a tort, the defendant becomes liable for all proximate consequences, while for breach of contract he is liable only for consequences which were reasonably foreseeable at the time when it was entered into, as probable if the contract were broken." 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1344, at 227 (3d ed. 1968 & Supp. 1988). *Compare* RESTATEMENT OF CONTRACTS, *supra*, § 351 (foreseeability standard for contract damages) *with* RESTATEMENT (SECOND) OF TORTS § 435 (1965) [hereinafter RESTATEMENT OF TORTS] (lack of foreseeability does not bar tort liability). *See generally* 5 A. CORBIN, CORBIN ON CONTRACTS § 1008, at 78-82 n.10 (1964) (distinguishing between contract and tort liability); W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 655-56 (5th ed. 1984) (same); Note, *Damage Measurements for Bad Faith Breach of Contracts: An Economic Analysis*, 39 STAN. L. REV. 161, 164 (1986) (noting that requirements for contract recovery are more stringent than for tort recovery).

[3] *See* RESTATEMENT OF CONTRACTS, *supra* note 2, § 351 comment b. "The damages recoverable for loss that results other than in the ordinary course of events are sometimes called 'special' or 'consequential' damages." *Id.* at 137; *see* W. HIRSCH, LAW AND ECONOMICS—AN INTRODUCTORY ANALYSIS 107 (1979). "[T]he law of contracts generally denies recovery for consequential damages, unless the risk of consequential damages was specifically bargained for between the parties." *Id.* The consequences of the breach must be "proximate

v. Baxendale[4] serves to restrict the scope of consequential damages to injuries that were within the contemplation of both parties at the time of contract formation.[5] In the past, courts were particu-

---

and natural," yet "natural" in this context means "usual" or "foreseeable." *See* 11 S. WILLISTON, *supra* note 2, § 1344, at 226. For example, if a seller wrongfully fails to deliver goods, it would not be a "usual" consequence that the buyer was unable to use them for a secret, profitable purpose. *Id.* at 226-27; *see, e.g., Globe Ref. Co.*, 190 U.S. at 545; Gulf States Creosoting Co. v. Loving, 120 F.2d 195, 201 (4th Cir. 1941).

[4] 156 Eng. Rep. 145 (1854). In *Hadley*, a miller hired a carrier to deliver a cracked shaft to engineers so that a duplicate could be made. *Id.* at 146. The delivery was a few days late, and as a result the mill was closed longer than necessary, causing the miller to suffer a loss of profits. *Id.* The *Hadley* court held that the carrier was not liable for the lost profits of the miller resulting from the delay. *Id.* at 151. The court reasoned that although the delay caused the loss, the carrier did not bear the risk of such a loss since the risk was not within the contemplation of both parties at the time the contract was made. *Id.* "[T]he 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 the mill." *Id.*; *see also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.3, at 803 (1973) (commenting on *Hadley* case).

[5] *Hadley*, 156 Eng. Rep. at 151. In *Hadley*, the court pronounced the rule as follows:

> 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 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.

Id.

Prior to *Hadley*, it had been held that only "natural" damages—those arising from the usual course of things—could be recovered. *See* E. FARNSWORTH, *supra* note 1, § 12.14, at 874. However, the jury was allowed considerable freedom in determining the extent of the actual injury, and this freedom often resulted in disproportionately large verdicts. *See* 11 S. WILLISTON, *supra* note 2, § 1356, at 290. The *Hadley* guidelines arose amidst the confusion caused by the lack of any general principle directing juries on damages for breach. *See* E. FARNSWORTH, *supra* note 1, § 12.14, at 874. While "natural" damages were restricted to "usual" or "foreseeable" damages, the court allowed a new category of damages—when special circumstances are known to both parties, recovery may include damages which those circumstances make probable as well as those which would arise naturally. *See* 5 A. CORBIN, *supra* note 2, § 1014, at 96-100; 11 S. WILLISTON, *supra* note 2, § 1356 at 290-91; *see also* McCormick, *The Contemplation Rule as a Limitation upon Damages for Breach of Contract*, 19 MINN. L. REV. 497, 501-02 (1935) (special liability will not attach to breaching party if such party has neither notice nor knowledge of consequences).

Although the *Hadley* doctrine requires that both parties contemplate the injury, "no issue is ever raised as to whether the plaintiff did in fact have [the resulting damage] within his contemplation. The question always turns on whether the defendant had reason to foresee the injury." *See* 5 A. CORBIN, *supra* note 2, § 1008, at 73-74. Furthermore, the injury must have been within the contemplation of the breaching party at the time of contract formation. *Id.* If the breaching party acquires knowledge of potential consequences after the formation of the contract, but before the breach, no liability attaches to those losses. *Id.* at 73-76. Finally, the loss must be a foreseeable result of the breach, but the breach itself need not have been foreseen. *See* E. FARNSWORTH, *supra* note 1, § 12.14, at 876.

The *Hadley* principle, while occasionally criticized, has been applied universally in this country, *see, e.g., Globe Ref. Co.*, 190 U.S. at 544 (liability attaches only for consequences

larly skeptical of awarding consequential damages for lost profits and allowed recovery in relatively few cases.[6] In recent years, however, the judicial trend has been to make recovery of lost profits available in a wider variety of cases.[7] Notwithstanding this trend, in actions based upon breaches of employment contracts, damages for lost profits generally remain inaccessible to plaintiffs, especially where the nature of the injury is damage to reputation.[8] Recently,

---

reasonably expected at time contract made); *Gulf States Creosoting Co.*, 120 F.2d at 201 (breaching party liable for consequential damages if parties were aware of facts and circumstances, and could foresee injury when contract formed), and has found a place in some statutes, *see* McCormick, *supra*, at 503.

"The motivation for the [*Hadley*] rule seems to lie in the concept of bargained-for risk allocation." Carroll, *A Little Essay in Partial Defense of the Contract—Market Differential as a Remedy for Buyers*, 57 S. CAL. L. REV. 667, 688 (1984). This rule encourages parties to estimate the risks involved in a contract and to set the price accordingly. *See* Seaman v. United States Steel Corp., 166 N.J. Super. 467, 472, 400 A.2d 90, 93 (1979). The basic principle is to allow the parties the freedom to allocate the risk as they see fit. *See* 5 A. CORBIN, *supra* note 2, § 1014, at 97-100. Some commentators have criticized this reasoning because in many transactions one of the parties will have little or no opportunity to change the terms of the contract. *Id.* However, if the law allowed recovery of unforeseen damages regardless of whether the injured party informed the other parties to the contract, the law would be discouraging such disclosure since if a party disclosed unusual interests he wanted to protect, the other party could raise the price or exclude such damages explicitly. *Cf.* Comment, *Consequential Damages: The Loss of Goodwill*, 23 BAYLOR L. REV. 106, 113-15 (1971) (allowing recovery for loss of goodwill merely because such injury was foreseeable could result in enormous liability for breach of every sales contract). Moreover, there would be a strong incentive for parties not to breach even if it were efficient to do so. *See* Note, *supra* note 2, at 165. If a party realizes that a contract is no longer profitable, it would be undesirable to compel performance if the breaching party would lose more than the injured party would gain. E. FARNSWORTH, *supra* note 1, § 12.3, at 817.

[6] *See* H. HUNTER, MODERN LAW OF CONTRACTS ¶ 7.03[3][c] (1986). In England, the *Hadley* rule was later interpreted to require both knowledge and acceptance of the risk, and became known as a "tacit agreement" test. *Id.* This test was adopted by the United States Supreme Court in *Globe Refining Co.*, 190 U.S. at 544-46. The test was later rejected by most jurisdictions and has been explicitly rejected in the comments to the Uniform Commercial Code. U.C.C. § 2-715 comment 2 (1978); *see* E. FARNSWORTH, *supra* note 1, § 12.14, at 874.

[7] *See* E. FARNSWORTH, *supra* note 1, § 12.14, at 876. The modern trend has been towards relaxing the *Hadley* rule by phrasing it in terms of foreseeability. *See id.* In modern terms, harm will be foreseeable either because it is a natural consequence of the breach or because special circumstances bring the harm within the contemplation of the parties. RESTATEMENT OF CONTRACTS, *supra* note 2, § 351; *see* 5 A. CORBIN, *supra* note 2, § 1014, at 96-100; 11 S. WILLISTON, *supra* note 2, § 1356, at 290-91.

[8] *See* D. DOBBS, *supra* note 4, § 12.25, at 927. "Many jobs carry with them special opportunities of real value, for instance, the opportunity to learn a trade or to acquire or maintain a valuable reputation." *Id.* "An employee who is discharged in violation of his contract, especially if he is a professional or high level employee, may suffer a considerable damage to his reputation as a result of the wrongful discharge. . . . [H]owever, courts have denied recovery of these special damages in the absence of an independent tort . . . ." *Id.* § 12.3, at 806 (citations omitted).

however, in *Redgrave v. Boston Symphony Orchestra, Inc.*,[9] the United States Court of Appeals for the First Circuit awarded consequential damages in the form of lost profits resulting from a breach of contract, holding that loss of specific professional opportunities falls outside the general rule prohibiting recovery for damage to reputation in a contract action.[10]

In *Redgrave*, the Boston Symphony Orchestra ("BSO") entered into a contract with Vanessa Redgrave under which Redgrave was to narrate a series of performances of Stravinsky's *Oedipus Rex*.[11] Following announcement of the upcoming concerts, BSO received complaints and threats of violence from both subscribers and members of the general community who were outraged because of Redgrave's support of the Palestine Liberation Organization.[12] Shortly thereafter, BSO cancelled the series of performances and the contract with Redgrave.[13] At trial, Redgrave sought recovery of her lost performance fee and also asserted that "the publicity of BSO's cancellation caused producers and theatre operators, who otherwise would have engaged [her,] not to do so."[14] The jury decided in favor of Redgrave on both claims, find-

---

[9] 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 869 (1989).

[10] *Id.* at 894. A panel of the First Circuit originally agreed to award Redgrave damages for injury to her business reputation, but the opinion was withdrawn for reconsideration en banc. *Id.* at 890. After the en banc hearing, the opinion was reaffirmed with respect to the award of consequential damages but remanded for a reduction in the amount of such damages. *Id.*

[11] *Id.* at 890.

[12] *Id.* at 890-91.

[13] *Id.* Redgrave filed the following claims against BSO: 1) breach of contract requesting monetary damages, 2) breach of contract requesting specific performance, 3) tortious repudiation of contract requesting monetary damages, 4) tortious repudiation of contract requesting specific performance, 5) violations under 42 U.S.C. § 1986, and 6) violations under the Massachusetts Civil Rights Act ("MCRA"). *See* Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 232 (D. Mass. 1983) (mem. decision on defendant's motion to dismiss). Redgrave also filed four claims against the unidentified individuals who made the threats leading to the cancellation. *Id.* Upon BSO's motion, the district court dismissed four of the claims against BSO, allowing the claim for breach of contract requesting monetary damages and the claim under the MCRA to stand. *See id.* at 243.

On the claim for violations under the MCRA, in which Redgrave asserted that BSO interfered with federal and state rights to freedom of speech, the trial court entered a judgment for BSO. *See* Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1193 (D. Mass. 1985), *aff'd in part, vacated in part*, 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 869 (1989). The First Circuit certified two questions to the Supreme Judicial Court of Massachusetts, and based on the Supreme Judicial Court's answers and accompanying comments, the en banc court affirmed the district court finding. *Redgrave*, 855 F.2d at 912. BSO was not subject to MCRA liability. *Id.* at 902-03.

[14] *Redgrave*, 602 F. Supp. at 1195. BSO claimed that "the performances were cancelled

ing that in addition to the stipulated performance fee, Redgrave suffered $100,000 in injuries as a result of lost future professional opportunities.[15] The district court rejected BSO's contention that consequential damages should not have been awarded because of a lack of sufficient evidence.[16] However, judgment was entered for BSO on the ground that, under the circumstances of this case, there was a constitutional barrier to the award of consequential damages.[17] On appeal, the First Circuit reduced the consequential damages award to $12,000,[18] dismissed the constitutional defense,[19]

---

because of a concern for physical security and a decision that risks of disruption would impair the artistic integrity of the performances." *Id.* at 1191. BSO argued that no breach had occurred because the performances were cancelled pursuant to a clause contained in the contract excusing BSO's performance for reasons beyond its reasonable control. *See Redgrave*, 855 F.2d at 891.

[15] *See Redgrave*, 602 F. Supp. at 1195. The court awarded Redgrave $27,500 in actual damages, based on the performance fee ($31,000) minus traveling expenses. *Id.*

[16] *Id.* at 1195-96. BSO attacked the sufficiency of the evidence on two levels. First, it argued that there was insufficient evidence to find that the harm was within the contemplation of the parties. *Id.* Second, it contended that the evidence failed to establish any amount of damages with the requisite legal certainty. *Id.* The court found that BSO knew or should have known of Redgrave's publicly expressed political views and that armed with this knowledge, BSO should have foreseen harm to her professional career as a result of a cancellation by BSO. *Id.*

[17] *See Redgrave*, 855 F.2d at 891. The district court submitted the factual question to the jury before resolving this legal issue. *Id.* at 891 n.2. The thrust of the district court's decision on the constitutional issue was based on an analogy to the law of defamation. *See Redgrave*, 602 F. Supp. at 1197. The district court "made the threshold decision that state action would exist because it, as a court, would enter a judgment for such damages." *Redgrave*, 855 F.2d at 894; *see also* U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

The district court reasoned that "BSO's cancellation caused harm to Redgrave's career by . . . some form of communication by BSO to others. In other words, the only possible mechanism of harm . . . is the alleged influence of some statement made by BSO . . . ." *Redgrave*, 602 F. Supp. at 1197. The court noted that an "act can be a protected form of First Amendment activity." *Redgrave*, 855 F.2d at 894 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Buckley v. Valeo, 424 U.S. 1 (1976); Cohen v. California, 403 U.S. 15 (1971)). The court concluded that "[t]he presence of this communicative link invokes the analogy to the law of defamation." *Redgrave*, 602 F. Supp. at 1198. The district court also found that Redgrave "is a 'public figure' both because of her acknowledged recognition as an actress and because of her having voluntarily expressed her views openly on political issues of worldwide interest and concern." *Id.* at 1201. Once the court found that Redgrave was a "public figure" for the purposes of this action, it applied the actual malice standard delineated in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See Redgrave*, 602 F. Supp. at 1201. This standard requires the defamatory statement to be made with knowledge of the "falsity [of a statement of fact] or with reckless disregard for the truth." *Gertz*, 418 U.S. at 342.

[18] *See Redgrave*, 855 F.2d at 897. Redgrave sought to recover monetary damages allegedly incurred from the loss of a number of film and theatre offers; however, she failed to present sufficient evidence to support the jury award of $100,000. *Id.* at 896-900. After re-

vacated the judgment, and remanded for judgment on the verdict as so modified.[20]

Writing for the unanimous panel, Judge Coffin noted that Massachusetts follows the general rule that recovery of consequential damages for injury to reputation in contract actions is not permitted.[21] The court analyzed the leading Massachusetts cases, which hold that reputation damages are both unduly speculative and " 'not within the contemplation of the parties.' "[22] However, recognizing that a loss of specific professional opportunities is distinguishable from a general claim of damage to reputation,[23] the court stated that with sufficient evidence of loss, this type of claim would satisfy the *Hadley* rule as adopted in Massachusetts.[24]

---

viewing the evidence, the court limited recovery to $12,000—the value of a prospective contract for a role in *Heartbreak House* at the Circle in the Square theatre. *Id.* at 900. The court sustained the $12,000 in damages because one of the producers of *Heartbreak House*, Theodore Mann, had testified:

> "I was afraid . . . and those in my organization were afraid that this termination would have a negative effect on us if we hired her. And so we had conferences about this. We were also concerned about if there would be any physical disturbances to the performance. . . . And it was finally decided . . . that we would not hire [Redgrave] because of all the events that had happened, the cancellation by the Boston Symphony and the effects that we felt it would have on us by hiring her."

Id. at 899 (quoting Mann).

[19] *Id.* at 912. The First Circuit reasoned that since BSO never intended the cancellation to be a symbolic form of speech, it was not a form of expression protected under the first amendment. *Id.* at 894-95. In dicta, the court stated that:

> We are not convinced that the cancellation of a contract could ever receive First Amendment protection. Unlike engaging in an economic boycott, burning a draft card, or wearing an armband, cancelling a contract is not a traditional form of protest. We would be wary of adopting a principle that would allow a party wishing to breach its contract for economic objectives to hide behind First Amendment protections merely by stating that it has cancelled the contract in order to make a statement about the other party.

Id. at 894 n.4.

[20] *Id.* at 912.

[21] *Id.* at 891-93; *see* McCone v. New Eng. Tel. & Tel. Co., 393 Mass. 231, 234 n.8, 471 N.E.2d 47, 50 n.8 (1984) (damages for injury to reputation not recoverable in contract action).

[22] *Redgrave*, 855 F.2d at 893 (quoting Daley v. Town of W. Brookfield, 19 Mass. App. Ct. 1019, 1019 n.1, 476 N.E.2d 980, 980 n.1 (1985)).

[23] *See id.* at 893.

[24] *Id.* at 894. The *Hadley* rule was adopted in Massachusetts in John Hetherington & Sons v. William Firth Co., 210 Mass. 8, 21, 95 N.E. 961, 964 (1911). Under Massachusetts law, damages may be awarded for consequential harm if such harm followed as a natural consequence of the termination of the contract, the harm was within the contemplation of reasonable parties, and damages could be calculated by "rational methods upon a firm basis of facts." *Id.* Massachusetts law, in requiring that an injury should be reasonably within the

The First Circuit, by distinguishing between loss of specific professional opportunities and damage to plaintiff's general reputation, allowed recovery of lost profits resulting from the breach of an employment contract. The characterization of the claim accepted by the court arguably supported its finding that the damages awarded could be calculated " 'by rational methods upon a firm basis of facts.' "[25] It is submitted, however, that this characterization did not affect the nature of the claim, and thus, contrary to the accepted rule, the First Circuit awarded recovery for injury to reputation. This Comment will analyze the case law regarding recovery of consequential damages for injury to reputation, and suggest that the *Redgrave* court has created a new action in contract. It will further suggest that the First Circuit diluted the essential element of the *Hadley* rule—that consequential damages are limited to those reasonably presumed to be within the contemplation of the parties at the time of contract formation—to the extent of rendering the rule virtually meaningless.

CHARACTERIZING A CLAIM FOR LOST PROFITS

The *Redgrave* court refused to accept the defendant's characterization of the claim as one for damage to plaintiff's reputation and allowed recovery for loss of specific future professional opportunities.[26] Relying on a perceived distinction between loss of specific opportunities and damage to general reputation, the court avoided the general rule that damages for injury to reputation are not allowed in a contract action.[27] It is submitted that although a distinction can be drawn between the two concepts, the court's holding has obfuscated the issues and created a cause of action

---

contemplation of the parties, is consistent with that of most other jurisdictions. *See* 5 A. CORBIN, *supra* note 2, § 1009, at 77-78. One commentator has suggested returning to a strict reading of *Hadley* and requiring as a prerequisite to recovery that the injury be within the actual contemplation of the parties at the time of contract formation. *See* Comment, *supra* note 5, at 116.

[25] *Redgrave*, 855 F.2d at 896 (quoting *John Hetherington & Sons*, 210 Mass. at 21, 95 N.E. at 964).

[26] *See id.* at 892-93. The court acknowledged that "BSO characterizes this claim as one for damage to Redgrave's reputation." *Id.* at 892. BSO noted that "Redgrave contended that 'the cancellation, as communicated to other employers through the news media, harmed Vanessa Redgrave because it carried with it the message "that Vanessa Redgrave was unemployable," a claim for damage to Redgrave's reputation.' " *Id.* at 892 n.3. The court, however, characterized the claim as one for loss of specific professional opportunities. *Id.* at 892-93.

[27] *Id.*; *see supra* note 8 and accompanying text.

where none had existed before.

In reviewing the existing case law, the First Circuit found most courts in agreement with the general rule that injury to reputation is not recoverable as contract damages.[28] The court noted the underlying reasons for the rule, observing that this type of injury is usually remote, speculative, and not clearly ascertainable.[29] Applying this rationale, the court found that since the damages claimed by Redgrave were identifiable—specific movie and theatre performances—and thus ascertainable, the case did not fall within the general rule.[30]

Although loss of specific professional opportunities is evidence of injury, it is submitted that such evidence does not change the nature of the underlying claim. Under tort law, which does allow recovery for damage to reputation, the plaintiff may have to prove special damages, but this proof will not revive an action if the requisite intent is not present.[31] Similarly, under contract law, proof of specific damages is only relevant once an actionable claim is established. Thus, by allowing recovery for damage to reputation where specific damages are proven, it is submitted that the *Redgrave* court has created an action parallel to the tort action for defamation, and substituted proof of breach of an employment contract for the tort elements of intent and defamatory communication.

Although many cases do, in fact, observe that damage to reputation is unduly speculative, it is submitted that regardless of the

---

[28] *See, e.g.*, Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 446 (1st Cir.) (federal law prohibits awards for damage to reputation caused by termination of automobile franchise contract), *cert. denied*, 385 U.S. 919 (1966); Stancil v. Mergenthaler Linotype Co., 589 F. Supp. 78, 84-85 (D. Haw. 1984) (state law precludes recovery of damages for injury to reputation in action for breach of employment contract); O'Leary v. Sterling Extruder Corp., 533 F. Supp. 1205, 1209 (E.D. Wis. 1982) ("courts seem to be in general agreement that damages for injury to reputation are not properly awardable in a breach of contract suit"); Skagway City School Bd. v. Davis, 543 P.2d 218, 225-27 (Alaska 1975) (school superintendent could not recover for damage to reputation resulting from breach of employment contract); Tousley v. Atlantic City Ambassador Hotel Corp., 25 N.J. Misc. 88, 92, 50 A.2d 472, 474-75 (1947) (managing director of hotel cannot recover for damage to reputation resulting from breach of employment contract).

[29] *Redgrave*, 855 F.2d at 892; *see O'Leary*, 533 F. Supp. at 1210 (speculative) (citing Smith v. Beloit Corp., 40 Wis. 2d 550, 559, 162 N.W.2d 585, 589 (1968)); *Skagway City School Bd.*, 543 P.2d at 225 (unduly speculative); *Tousley*, 25 N.J. Misc. at 92, 50 A.2d at 474-75 (not clearly ascertainable) (citing Westwater v. Rector Warden & Vestry of Grace Church, 140 Cal. 339, 342, 73 P. 1055, 1056 (1903)).

[30] *See Redgrave*, 855 F.2d at 892-93.

[31] *See* RESTATEMENT OF TORTS, *supra* note 2, § 569.

ability to ascertain the injury, the general rule prohibits recovery for damage to reputation in a contract action. The leading authorities on contract law, including those cited by the *Redgrave* court, accept this rule, finding an exception only when an independent tort exists.[32] Breach of an employment contract, however, is not, in and of itself, a tort,[33] since the termination of an employment contract does not reflect adversely on the reputation of the injured party.[34] Therefore, it is suggested that by permitting such recovery, the court created a new exception to the general rule.

Hadley v. Baxendale: The Modern View

One reason for the traditional disallowance of damages for injury to reputation is that such damages are remote and not within the contemplation of the parties.[35] Thus, in order to recover consequential damages, Massachusetts requires that the damages be within the contemplation of "reasonable parties."[36] The *Redgrave* court, noting that the jury was given appropriate instructions as to the recoverable damages, was satisfied that its finding was supported by the evidence.[37] The requirement that consequential

---

[32] *See supra* note 8 and accompanying text. In each of the cases cited, the plaintiff's employment was wrongfully terminated, and the plaintiff was denied recovery for injuries that resulted from the negative light which the termination shed upon the plaintiff's professional reputation. *See supra* note 28. Some courts noted that neither the plaintiffs nor the courts themselves could find any authority to support awarding recovery for damage to reputation of any kind, while the defendants presented, both from case law and legal commentators, ample support for denying recovery. *See Volkswagen Interamericana*, 360 F.2d at 446; *Stancil*, 589 F. Supp. at 84; *O'Leary*, 533 F. Supp. at 1209.

[33] *See* Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 232, 237 (D. Mass. 1983). The district court could not find any "support for the contention that repudiation of a contract is as well a tort." *Id.* Under tort law, it is the defamatory communication made by the employer outside his conditional privilege that triggers liability, not the termination. *See* Restatement of Torts, *supra* note 2, § 595 comment i. The "former employer of a servant is conditionally privileged to make a defamatory communication about the character or conduct of the servant to a present or prospective employer." *Id.*

[34] *See* Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 446 (1st Cir.), *cert. denied*, 385 U.S. 919 (1966). The *Volkswagen Interamericana* court stated that the "[p]laintiff should not have been allowed to claim that the mere termination of his dealership was a personal reflection." *Id.*

[35] *Redgrave*, 855 F.2d at 893; *see* O'Leary v. Sterling Extruder Corp., 533 F. Supp. 1205, 1209-10 (E.D. Wis. 1982); Mastoras v. Chicago, M. & St. P. Ry., 217 F. 153, 154 (W.D. Wash. 1914); Skagway City School Bd. v. Davis, 543 P.2d 218, 225 (Alaska 1975); Daley v. Town of W. Brookfield, 19 Mass. App. Ct. 1019, 1019 n.1, 476 N.E.2d 980, 980 n.1 (1985); Tousley v. Atlantic City Ambassador Hotel Corp., 25 N.J. Misc. 88, 92, 50 A.2d 472, 474-75 (1947).

[36] *See* John Hetherington & Sons v. William Firth Co., 210 Mass. 8, 21, 95 N.E. 961, 964 (1911); *see also supra* note 24 (discussing Massachusetts law).

[37] *See Redgrave*, 855 F.2d at 896. The *Redgrave* court maintained that the jury was

damages be "within the reasonable contemplation of the parties" is a legal fiction, and actual subjective contemplation of the injury is not required and is rarely found.[38] When applying the facts of a given case to this criterion, courts should be mindful of the general principle that the law is to be applied consistently.[39] Thus, it is suggested that courts carefully examine the relevant case law of other jurisdictions before rendering their own conclusions.

English courts have held that actors entering performance contracts often contemplate injuries that individuals in other professions would not ordinarily consider.[40] Under the English rule, which has not been widely accepted in the United States,[41] damage

---

given "appropriate instructions" and noted that in response to special interrogatories the jury found that "the harm was a foreseeable consequence within the contemplation of the parties." *Id.* at 893. The court held that "as a matter of Massachusetts contract law," Redgrave had presented sufficient evidence to support the jury's finding. *Id.* at 894.

[38] *See* Survey, George Washington University v. Weintraub*: Implied Warranty of Habitability as a (Ceremonial?) Sword*, 33 CATH. U.L. REV. 1137, 1157-58 n.150 (1984). "The parties to the contract assume the risk of foreseeable damages not because they have agreed to do so, but because such risk is imposed by law." *Id.*

[39] *See* D. DOBBS, *supra* note 4, § 1.2, at 6. "Consistency and precedent in all parts of the law are desirable . . . ." *Id.* "[I]n many areas of substantive law there are additional reasons for a high degree of consistency and adherence to precedent, since people must often plan transactions in the light of known substantive rules." *Id.* One of the purposes of the *Hadley* rule has been to allow parties to plan their contracts with potential liabilities in sight. *See supra* note 5. It is submitted that unless the courts apply the concept of contemplation consistently, the rule will not effectively satisfy this purpose.

[40] *See* Note, *Loss of Publicity as an Element of Damages*, 17 VA. L. REV. 65, 68-69 (1930) (criticizing American rule and suggesting adoption of English rule); Comment, *The Loss of Publicity as an Element of Damages for Breach of Contract to Employ an Entertainer*, 27 U. MIAMI L. REV. 465, 479-80 (1973) (praising English rule and offering qualifications for jury to consider). One commentator questioned whether an actor's reputation is any more valuable then that of a gardener, as both persons rely to a certain extent upon their professional reputation to maintain gainful employment. Note, *supra*, at 68-69.

[41] *See* Comment, *supra* note 40, at 475. At least one court has expressly rejected the English rule. *See* Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208, 1210 (S.D.N.Y. 1970). The *Quinn* court, applying New York law, held that a talk show host could not recover damages for loss of either reputation or opportunity to perform. *Id.* Most courts, while not explicitly rejecting the rule, have not followed it. *See, e.g.*, Phillips v. Playboy Music, Inc., 424 F. Supp. 1148, 1154 (N.D. Miss. 1976) (record producers failed to offer sufficient proof of injury to their reputation or loss of goodwill); Westwater v. Rector Warden & Vestry of Grace Church, 140 Cal. 339, 342, 73 P. 1055, 1056 (1903) (injury to reputation of singer in choir is not compensable in wrongful discharge action); Amaducci v. Metropolitan Opera Ass'n, 33 App. Div. 2d 542, 543, 304 N.Y.S.2d 322, 323 (1st Dep't 1969) ("damages to the good name, character and reputation of [an orchestra conductor] are not recoverable in an action for wrongful discharge"). *But see* Colvig v. RKO Gen., Inc., 232 Cal. App. 2d 56, 69, 42 Cal. Rptr. 473, 481 (1965) (approved English rule, but found that complaint stated claim in tort).

California has allowed recovery for lost publicity, but only in cases in which the public-

to future reputation—for example, loss of publicity—is recoverable in an action for breach of an actor's performance contract.[42] However, the English courts stress that it is necessary to distinguish between the loss of opportunity to enhance future reputation—loss of publicity—and damage to existing reputation.[43] They specifically limit recovery "to damages for the loss, not for injury to reputation already acquired, but for loss of advertisement or publicity, which . . . would enhance the artiste's reputation in the future."[44] Courts base this distinction on the theory that the parties can reasonably foresee loss of publicity at contract formation but not damage to professional reputation.[45]

The rule adopted by the Uniform Commercial Code is similar to the *Hadley* rule.[46] Generally, however, when dealing with com-

---

ity was the subject of the contract. *See* Paramount Prods., Inc. v. Smith, 91 F.2d 863, 866-67 (9th Cir.), *cert. denied*, 302 U.S. 749 (1937) (allowed recovery of damages for breach of contract to provide screen credits); Lloyd v. R.K.O. Pictures, 136 Cal. App. 2d 638, 643, 289 P.2d 295, 299 (1955) (loss of publicity recoverable in action for breach of contract to provide screen credits and star billing).

[42] *See* Herbert Clayton & Jack Waller, Ltd. v. Oliver, 1930 App. Cas. 209, 220 (H.L.). The House of Lords approved the presumption that because of the nature of the acting profession, it is within the contemplation of the parties at contract formation that actors bargain for the publicity and exposure, as well as for the performance fee, and that this is a known aspect of the trade. *Id.* at 216-17; *see also* Tolnay v. Criterion Film Prods., [1936] 2 All E.R. 1625, 1626 (K.B.) (extending presumption of foreseeability to authors).

[43] *See* Withers v. General Theatre Corp., [1933] 2 K.B. 536, 547. When an actor has been deprived of the opportunity to appear, he may recover for the lost publicity, but not for damage to reputation that already existed. *Id.* On the other hand he cannot recover "for the loss that he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment." *Id.* at 545; *see also* Groom v. Crocker, [1939] 1 K.B. 194, 205-06 (C.A.) (under English law, claim for loss of reputation is proper subject of defamation action).

[44] *Tolnay*, [1936] 2 All E.R. at 1626.

[45] *See Withers*, [1933] 2 K.B. at 550-51.

[46] *See* 4 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-715:24 (3d ed. 1983). Neither rule requires actual contemplation of certain damages; the rules merely require that a reasonable person would be aware of the possibility of such harm at the time of contracting. *Id.* The pertinent section of the Uniform Commercial Code states:

> (2) Consequential damages resulting from the seller's breach include
>
> (a) any 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; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

U.C.C. § 2-715(2) (1978).

Unlike the *Hadley* rule, however, section 2-715(2)(b) does not specifically require that the parties have reason to know of the injury, provided it proximately results from the breach. 4 R. ANDERSON, *supra*, § 2-715:24. This difference is discussed in the case law of some jurisdictions. *See infra* notes 51-52 and accompanying text. Pennsylvania, on the other

mercial contracts, courts are more likely to find that the injury was within the contemplation of the parties and, therefore, award consequential damages for lost profits.[47] In analyzing these cases, courts must "distinguish between profits lost from inability to produce and those lost as a result of diminished business reputation."[48] Both grounds affect the injured party's ability to perform future contracts following the breach,[49] but lost profits resulting from inability to perform are generally allowed, whereas a split of authority exists as to whether lost profits resulting from loss of goodwill are recoverable in contract actions.[50] Some courts steadfastly refuse to permit a claim for loss of goodwill,[51] while other

---

hand, has held that the Uniform Commercial Code does not enlarge the law to allow recovery of damages for loss of goodwill. *See infra* note 51.

[47] *See* 4 R. ANDERSON, *supra* note 46, § 2-715:24.

[48] Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1238-39 (1987).

[49] *See generally* 4 R. ANDERSON, *supra* note 46, § 2-715:24 (loss of profit due to seller's breach making performance impossible is usually recoverable in contract action).

[50] *See* Special Project, *supra* note 48, at 1244-52; *see also* Comment, *Loss of Goodwill and Business Reputation as Recoverable Elements of Damages Under the Uniform Commercial Code § 2-715—The Pennsylvania Experience*, 75 DICK. L. REV. 63 *passim* (1970).

The first category of lost profits results from a buyer's inability to tender performance with respect to a collateral contract because of the seller's breach. Goodwill, on the other hand, is defined as:

> The favor which the management of a business wins from the public. The fixed and favorable consideration of customers arising from established and well-conducted business. The favorable consideration shown by the purchasing public to goods known to emanate from a particular source. Good will is an intangible asset. Something in business which gives reasonable expectancy of preference in [the] race of competition. The custom or patronage of any established trade or business; the benefit or advantage of having established a business and secured its patronage by the public.

BLACK'S LAW DICTIONARY 625 (5th ed. 1979) (citations omitted).

Under this analysis, it is submitted, since Redgrave was ready, willing, and able to perform but for the lack of offers, her claim is one for loss of goodwill and not merely for lost profits. It can be argued that by limiting Redgrave's recovery to one specific contract, the First Circuit attempted to transform the action from one analogous to loss of goodwill to one analogous to loss of profits.

[51] *See* Chrysler Corp. v. E. Shaviz & Sons, 536 F.2d 743, 746 (7th Cir. 1976) (after denying recovery of loss of goodwill under Pennsylvania law, court stated that Illinois courts would hold same way); Neville Chem. Co. v. Union Carbide Corp., 422 F.2d 1205, 1227-28 (3d Cir.) (followed Pennsylvania rule prohibiting recovery of goodwill while noting disapproval), *cert. denied*, 400 U.S. 826 (1970); ARGO Welded Prods. v. J.T. Ryersan Steel & Sons, 528 F. Supp. 583, 588 (E.D. Pa. 1981) ("Pennsylvania categorically denies recovery for loss of goodwill caused by customer dissatisfaction with a defective product"); Harry Rubin & Sons v. Consolidated Pipe Co. of Am., 396 Pa. 506, 512, 153 A.2d 472, 476 (1959) ("There is no indication that the Uniform Commercial Code was intended to enlarge the scope of a buyer's damages to include a loss of good will."); Michelin Tire Co. v. Schulz, 295 Pa. 140,

courts allow the claim but reject damages as unforeseeable and/or speculative.[52] The majority of cases that have actually awarded damages for loss of goodwill, moreover, can be grouped into two categories—borderline tort/contract claims[53] and breach of warranty claims.[54]

It is submitted that those jurisdictions holding that loss of publicity or goodwill may reasonably be considered to be within the contemplation of the parties represent the most liberal jurisdictions with respect to awarding lost profits. It is further submitted that examining the reasoning behind these extensions of liability demonstrates that, absent facts suggesting otherwise, damage to reputation, whether general or specific, should not be deemed to be within the contemplation of the parties. In allowing recovery for loss of publicity, the English courts impose a duty upon employers

---

143, 145 A. 67, 68 (1929) (disallowed recovery for defective tires). For criticism of the Pennsylvania view, see Comment, *supra* note 5, at 108; Comment, *supra* note 50, at 77-78.

[52] *See* Roundhouse v. Owens-Illinois, Inc., 604 F.2d 990, 995 (6th Cir. 1979) ("in some cases, the Ohio courts would allow a jury to consider lost goodwill in a breach of warranty action"); Hydraform Prods. Corp. v. American Steel & Aluminum Corp., 127 N.H. 187, 199, 498 A.2d 339, 346 (1985) ("As a general rule, loss in the value of a business as a going concern, or loss in the value of its good will, may be recovered as an element of consequential damages."); Salem Eng'g & Constr. Corp. v. Landonderry School Dist., 122 N.H. 379, 384, 445 A.2d 1091, 1094 (1982) ("consequential damages . . . awarded were not reasonably foreseeable at the time of the parties' contract").

[53] In borderline tort/contract cases, the courts are carving out exceptions to the general rule of consequential damages. *See* Note, *supra* note 2; Comment, Seaman's Direct Buying Service, Inc. v. Standard Oil Co.: *Tortious Breach of the Covenant of Good Faith and Fair Dealing in a Noninsurance Commercial Contract Case*, 71 IOWA L. REV. 893 (1986); Comment, *The Insurer's Exploding Bottle: Moving from Good Faith to Strict Liability in Third and First Party Actions*, 46 OHIO ST. L.J. 157 (1985).

On the first reported motion, the district court dismissed Redgrave's claims in tort. *See* Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 235-37 (D. Mass. 1983). While it is clear that BSO breached a contract, BSO made efforts to mitigate damages by not mentioning Redgrave's name or giving reasons for the cancellation in their press release. Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1191-93 (D. Mass. 1985), *aff'd in part, vacated in part*, 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 869 (1989). The jury rejected the contention that BSO cancelled the performances because of disagreements with Redgrave. *Id.* at 1191. BSO stated that its motivations were the safety of performers, the integrity of the performance, and a desire to maintain the economic support of its contributors. *Id.* Based on these facts, it is submitted that the district court was entirely correct when it dismissed Redgrave's claims in tort.

[54] *See, e.g.*, Consolidated Data Terminals v. Applied Digital Data Sys., 708 F.2d 385 (9th Cir. 1983) (shady computers); R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749 (10th Cir. 1975) (defective animal feed); Barrett Co. v. Panther Rubber Mfg. Co., 24 F.2d 329 (1st Cir. 1928) (defective materials); Delano Growers Coop. Winery v. Supreme Wine Co., 393 Mass. 666, 473 N.E.2d 1066 (1985) (spoiled wine); Stott v. Johnston, 36 Cal. 2d 864, 229 P.2d 348 (1951) (defective paint); Sol-O Lite Laminating Corp. v. Allen, 223 Or. 80, 353 P.2d 843 (1963) (defective vinyl).

to furnish entertainers with an opportunity to perform.[55] Similarly, in awarding damages for loss of goodwill, the American courts enforce either the seller's warranty in commercial contracts or the insurer's duty of good faith in insurance contracts.[56] The *Redgrave* court, on the other hand, rested its finding solely on the distinction between loss of a specific professional opportunity and loss of professional opportunities in general.[57]

CONCLUSION

This Comment has suggested that the *Redgrave* court, in dealing with facts distinguishable from a damage to reputation claim, has weakened two of the main barriers to recovery of consequential damages. It has been suggested that the court created a new cause of action, allowing recovery in contract for damage to reputation upon a showing of specific damages. Furthermore, it has been submitted that by awarding damages in this action, the First Circuit has imprudently expanded the accepted definition of foreseeability of consequential damages. In so doing, the court has awarded tort damages in a contract case, thereby blurring the distinction between tort and contract law.

Christopher J. Moore

---

[55] *See* Comment, *supra* note 40, at 467-71 (English courts have long recognized duty to provide entertainers opportunity to perform). Additionally, Redgrave's claim can be distinguished from a claim for loss of publicity since her career was damaged by the publicity surrounding the cancellation, rather than by the loss of publicity. *See supra* notes 42-43 and accompanying text.

[56] *See supra* notes 47-54 and accompanying text.

[57] *See supra* notes 21-27 and accompanying text.