A Short Commentary

Having attempted the hypothetical situations above, a short commentary is in order. It has dawned on us that, essentially, the approaches adopted by Lord Hoffman and Phang JA are in substance the same. Unlike Lord Denning MR, we are neither required to get out of our depth nor are we required to swim in this sea of semantic exercises to resolve this mess.

As noted in the analysis of the hypothetical situation of the cab driver, Lord Hoffman's main points of contention are:

1) Parties at the point in contracting had undertook *both primary and secondary obligations*;
2) The damages payable for a breach of contract is determined by secondary obligations;
3) It is *unreasonable for the cab driver to assume responsibility* for full loss as the metered fare is not proportionate to the liability (Full loss not part of secondary obligations); and
4) Therefore no liability for full loss

Whereas for the reasoning of Phang JA, the main points of contention are as such:

1) Applying Hadley 2, the cab driver would be liable;
2) However, it is *unreasonable for us to hold him liable*;
3) A cab driver's liability is *dependent upon the express and implied terms of the contract*; and
4) In most cases, these terms would protect the cab driver

While Phang JA in his judgment in MFM[1] made a valiant attempt to show that Lord Hoffman's approach is conceptually wrong and that such an assumption of responsibility is found within the test itself, one may question the actual reasoning adopted by the Court of Appeal. With utmost respect, we humbly submit that it is in fact a reiteration of Hoffman's approach and the approach taken in MFM is also conceptually wrong. We hope to explain why in the following paragraphs.

Reiteration of Lord Hoffman's approach

Referring to Baroness Hale's judgment in the *Achilleas*[2] at [92], the approach taken by Lord Hoffman would be:

Whether the parties must be taken to have had this type of loss within their contemplation when the contract was made, but also *whether they must be taken to have had liability for this type of loss within their contemplation then*.

We are of the opinion that the latter question ought to be asked first so as to really emphasize the reasoning of Lord Hoffman. As explained by the learned law lord in his article[3], one first has to look at the primary obligations as well as the secondary obligations to determine whether was responsibility assumed.

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[1] *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2010] SGCA 36
[2] *Transfield Shipping Inc v Mercator Shipping Inc* (2008])UKHL 48
[3] Lord Hoffman, "The Achilleas: Custom and practice or foreseeabiliity" (2010) 14 Edinburgh L Rev 47

Are primary and secondary obligations not related to express and implied terms? Such obligations are determined by the express and implied terms of the contract. Phang JA in bringing such terms into his argument would in fact be mirroring the approach of Lord Hoffman. As such, it is submitted that the judgment in MFM is in fact just a reiteration of Lord Hoffman's broader principle.

Wrong conceptually?

Although the approach in MFM, as shown above, is a reiteration of the broader principle of Hoffman, it is, again with utmost respect, conceptually wrong for his honour to integrate the concepts of terms into the rule of *Hadley* when considering remoteness of damage. Such obligations or terms ought to be considered prior to the question of remoteness of damage (as they are in fact separate concepts).

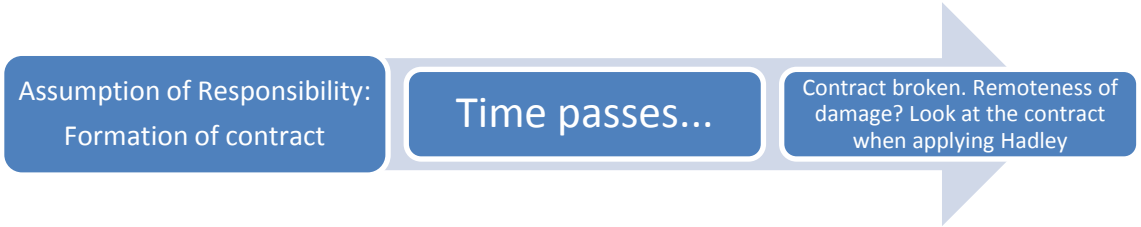
Note however, although separate in terms of concept, the obligations assumed by one party can be applied to determine the remoteness of loss. *The flaw in Phang JA's judgment is to argue that assumption of responsibility is already found in the limbs of Hadley*. More likely than not, the reason why it can be "found" within the limbs of *Hadley* is because the parties at the point in contracting had already undertaken their respective obligations. These obligations help in the finding of remoteness as obligations that are not assumed would naturally be considered too remote. This flaw in his argument was clearly observed when he used express and implied terms (which are formed at the point of contracting) to justify his conclusion. The assumption of responsibility is not found within the test but is derived from the terms of the contract! By claiming that it is already within the test, the learned judge had fudged up the concepts of terms and that of remoteness of damage. *The assumption of responsibility is not found in the rule in Hadley but rather in the terms of the contract which are then applied to the rule in Hadley to determine remoteness of damage.*

Conclusion

As such, the crucial question is as what Lord Hoffman stated at [15] of the *Achilleas*:

In other words, one must first decide whether the loss for which compensation is sought is of a 'kind' or 'type' for which the contract-breaker ought fairly to be taken to have accepted responsibility.

It makes little sense for the courts to claim that the assumption of responsibility is itself found in the limbs of *Hadley* when in fact such an assumption of responsibilities occurs at a much earlier stage when the contract was formed. The test of remoteness instead reflects this contract that was formed and the assumed responsibilities of the parties. *The assumption of responsibilities is not found within the test itself but is employed by the test*.



It is therefore submitted that Lord Hoffman's broader principle is conceptually correct as it differentiates between the concepts of obligations and remoteness of damage and it also reflects the idea of assumed responsibilities determining remoteness. Whereas, the approach taken in MFM is to be discouraged as it fuzzes up the two concepts mentioned above.