INTRODUCTION: TORT AND CONTRACT

Relationship between tort and contract:

• Principle aim of tort law is to provide compensation for someone injured by another’s invasion of an interest protected by law
• Contract concerns the enforcement of agreements and payment when interest in performance is unsatisfied
• Tort and contract have common ancestry in action on the case

• Law of tort recognises invasions and infringements of rights the law thinks are worthy of protection
• Collection of wrongs the law recognises
• But fairly disparate collection of things
• But contract is concerned with recognising and enforcing voluntary agreements between people
• Element of agreement is usually absent in cases of tort, whereas is essential in contract
• Contract is easier in that there is only ever one wrong – breach of contract
• In some cases, only the law of tort is relevant and vice versa
• E.g. *Donaghue v Stephenson* – no contract with manufacturer, tort only case
• Situations where law of tort and of contract overlap
• Can sue concurrently in both tort and contract
• E.g. cases of carriage – taxi, train etc

• But what’s the point of suing in both/either?
• In non-common law countries, they treat tort and contract damages as substantially the same, just different reason for damages
• But complex and distinct rules applying to damages in both
• Distinct important advantages and disadvantages by suing in one or the other

Differences between tort and contract:

• Tort duties owed to world, contracts only to other party
• Tort duties imposed by law, contracts determined by parties
• However tort duty to prevent purely economic loss owed to members of determined class, and erosion of privity means it is not only parties to bargain who may claim non-fulfilment
• Many contract terms implied, whereas obligations of tort generally only imposed on those who choose to undertake activity/enter relationship
• Contract seeks to protect single interest, whereas torts protects range of interests
• However contract also protects those who have relied on words/deeds – estoppel
• Contract law also provides compensation to injured party

• Growing recognition that in a number of circumstances concurrent duties may be owed in both tort and contract
• But distinctions remain
• Contract: intention of party irrelevant
• In most torts, conduct of party at fault is crucial
• In contract, plaintiff seeks to recover specific sum of money
• Damages claimed in tort are generally unliquified

Difference one: limitation periods
• For most civil type actions, is six years
• According to law of contract, action accrues when breach of contract happens
• According to law of tort (as damage gist of negligence), action accrues when damage occurs

Second difference:
• Difference in object/purpose of damage in tort and contract
• In tort, object is to place plaintiff in position if tort had not occurred (Marks v GIO Australia Holdings Ltd 1998 HC)
• In contract, object is to put plaintiff in position had the breach of contract not occurred (Robinson v Harman – approved Commonwealth of Australia v Amann Aviation 1991 HC)
• Important difference: in tort to put in position pre-tort, in contract to put in position as if contract had been performed (post-contract result vs pre-tort result)
• Contract is concerns with what gains were meant to happen, if the contract happened
• This can lead to a substantial difference in the amount awarded in damages
• But in tort, there are different grades of damages (main is compensatory damage) also aggravated, punitive/exemplary etc
• Neither of those two extra levels of damages are available in contract – compensatory damages only
• Thus perhaps suing in tort may allow a greater amount of damages
• Also differences in technical rules of applying rules of damages

Differences in rules of damages:
• In tort concepts of remoteness and causation
• Same principles in contract
• However remoteness is different – more stringent rule
• Damages in tort may be ruled out in contract due to more stringent rule of remoteness
• Koufos v C Czarnikow Ltd 1969 HOL: the test of remoteness in contract is narrower than applied in tort
• In situations where a breach of contract also involves the tort of negligence, the plaintiff will not be prejudiced by the choice of cause of action and can normally recover under the wider concept of remoteness even if the action is framed in contract

Contract and the law of obligations:
• Concurrent remedies may arise in tort and for breach of contract
• Equity continues to be a source of obligation in some cases where there is no contract
• Law also recognised concept of unjust enrichment, known as the law of restitution
• Consumer protection legislation is more extensive in Australia than in many other countries
• Decisions having particular impact on contract law, namely in the contexts of restitution and the trade practices legislation, now the *Competition and Consumer Act 2010*

The Australian Consumer Law:
• Refers to conduct and contracts of ‘persons’
• An unfair contract terms regime
• Consumer guarantees regime
• National product safety regime
• Provisions relating to lay-by agreements
• Provisions related to unsolicited consumer agreements
• Provisions re prohibited conduct, including misleading or deceptive conduct and unconscionable conduct

**Choice of law considerations:**
• If sue in tort, legal system used is the law of the location where the tort occurred
• However, in contract the legal system is the location where the contract was concluded
• Although can sue in both at same time, obviously cannot get double compensated
• Generally as plaintiff judge will give amount in either, and then choose which is more favourable and that is total damages

*H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd 1978 QB:*
• Whether the plaintiff frames the action in contract or tort, damages will be assessed on the more favourable test

**Contributory negligence:**
• The contributory negligence of the plaintiff is not a defence to a claim for breach of contract under common law
• But if the plaintiff’s own carelessness breaks the chain of causation between the breach and the loss or damage the plaintiff will fail
• *Lexmead (Basingstoke) Ltd v Lewis 1982 AC:* purchaser’s negligence in continuing to use defective good broke the chain of causation
• *Astley v Austrust Ltd 1999 HC:* apportionment legislation does not apply to claims in contract
• BUT the decision was reversed by an amendment to the apportionment legislation
• But *Astley* governments the matter in situations to which the apportionment legislation does not apply

Where legislation applicable – breach of concurrent duty:
• Apportionment legislation will be relevant to a claim for damages of breach of contract if the breach amounts to a ‘breach of contractual duty of care that is concurrent and co-extensive with the duty of care in tort’
• Plaintiff’s claim must be reduced ‘to such extent as the court thinks just and equitable’ having regard to the plaintiff’s ‘share in the responsibility for the damage’
• Three elements:
  1. The defendant has undertaken a contractual duty of care
  2. The defendant is also subject to a tortious duty of care
3. The contractual duty is concurrent and co-extensive with the tortious duty
   • As a general rule, where the defendant owes a contractual duty of care, a breach of that duty will give rise to a concurrent liability in tort and contract
   • Duty may be express
   • May also be implied under the general law of implied terms or by reason of statute

Cases of strict liability:
   • In cases of strict liability, a defendant who has exercised reasonable care may nevertheless be found to be in breach of contract
   • Remains true even if the plaintiff has been negligent
   • Only relevance of the negligence of the plaintiff is whether it breaks the chain of causation between breach and loss/damage

Where legislation not applicable:
   • In cases where the duties differ, the apportionment legislation will not apply to a claim for breach of contract
   • Common law applies
   • Court has no jurisdiction to apportion loss
   • Harper v Ashtons Circus Pty Ltd 1972 NSW: Where the contractual duty of care is not concurrent and co-extensive with the duty of care in tort, a plaintiff entitled to sue in both contract and tort may avoid apportionment by abandoning the claim in tort and electing to sue in contract
   • Common law position will also apply where the defendant’s breach does not involve the breach of a contractual duty of care
   • Apportionment legislation does not apply where an application of the legislation would defeat a defence arising under a contract

CAUSATION AND REMOTENESS OF DAMAGE IN CONTRACT

i) Loss
   • Onus is on plaintiff to prove loss
   • Two types of damages: nominal and substantial
   • For every breach of contract, get small nominal damage to recognise rights have been infringed
   • Substantial damages: substance to them, have somehow proved some kind of loss
   • Loss that is claimed generally must be the plaintiff’s loss, not someone else’s loss
   • Claim for damages in contract limited by rules of privity
   • But what happens if you contract but then it’s not actually your loss?
   • Can be weird cases where loss disappears into black hole, because mismatch between who has the contract and who suffers the loss
   • (Never happens in tort generally, because no restrictions of privity)

   • Factors: causation, remoteness, mitigation
   • Some similarity between concepts in contract and tort
   • But also important differences – both in rules themselves and how they work in the circumstances
Alfred McAlpine Constructions Ltd v Panatown Ltd [2000] 3 WLR 946

- Requirements of causation and remoteness in attributing plaintiff’s loss to the defendant
- Defendant should not be held responsible for every loss suffered and in some way associated
- Maintain liability within acceptable bounds
- Problem of legal black hole: if can only claim damages for loss suffered but the party who has contracted is not the one who has suffered the loss, who can claim?
- General rule: party can only recover for breach loss he actually sustained
- Issues: could Panatown recover substantial damages from McAlpine for breaches even though had no proprietary interest in the site?
- If so, whether the direct right of action by the site owners precluded Panatown from recovering substantial damages

ii) Causation of loss or damage

- Damage must have been caused by the defendant
- Connection between wrong and loss proved by applying test of causation
- Causation is a question of fact
- Refers to connection between breach and loss suffered
- Relevant question: whether the defendant’s breach was so connection with the loss that “as a matter of ordinary common sense and experience it should be regarded as the cause” (March v Stramare)
- Sufficient connection if plaintiff proves loss would not have been suffered but for breach
- But ‘but for’ test is unsatisfactory where there are multiple causes or the chain of causation is broken
- ‘But for’ test is better at negativing causation than proving causation
- Because so many events that must exist for loss to occur, must select between them
- Arbitrated by policy considerations: some things are merely background circumstances, while others are active influences
- May also be external events that break the causal connection
- Most effective to apply a common sense concept of causation
- Includes but for considerations, but also policy factors involved

Multiple causes:
- Where concurrent causes, sufficient that one is defendant’s breach
- Sufficient that “decisive or dominant cause”
- Object is to exclude cases where the contribution of the breach is minimal
- If loss caused by factors for which defendant not responsible, causation not satisfied

Breaks in the chain:
- If chain broken, plaintiff restricted to nominal sum
- Chain not necessarily broken by wrongful act of third party – e.g. where duty of defendant extends to prevention of wrong
- Monarch SS Co Ltd v Karlshamns Oljefabriker: orders of admiralty were foreseeable consequence of delay during the war, thus no break in chain
**Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd** (1938) HC

- Extent of breach: partial failure to perform
- Extent of the failure unascertained, thus difficult to make any estimation of damage suffered

**Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd** (1968) HC

- Plaintiff owns shop, gets D to install security door in shop
- Proven on facts door not fit for purpose
- Breach of implied term
- Thieves broke in and stole some stock
- Owner sued security firm and said thieves broke in because of breach of contract
- But very tricky causation case
- Thieves had already spent nearly an hour trying to break in, thus hard to prove had door been right the thieves still wouldn’t have been able to break in
- Unable to say whether the theft would have been avoided if the door had been installed in compliance with the contract
- Issue did the breach cause the loss of the stock?
- Minority judge: that was fatal, couldn’t conclusively prove causation, thus failed
- Majority: willing to bend ‘but for’ rules to apply a common sense causation approach
- Argued yes breach of contract, prima facie it appears the thieves broke in for that reason and breach contributed to loss, thus seems prima facie causation established
- If the defendant wants to negate causation, they can if they can prove facts
- Same problem that confronted P in proving but for confronted D in negativing causation
- But issue: was the act of the thieves an intervening act in busting the door and stealing the stuff?
- HC: yes you need to think about intervening acts, but when very purpose of contract is to prevent these acts, such acts cannot be said to be intervening (otherwise could never have remedies for breach in installing security devices)
- Duty was in fact a STRICT duty – strict promise by security company to install a door that would be reasonably secure (different from promise to use reasonable efforts to ensure secure door)
- Cannot be shown that if door fit no break in, but once breach of warranty established and break in was due to breach, the loss suffered is prima facie measure of damages for breach
- Work done did not constitute a reasonable deterrent
- Measure of damages for breach was value of goods stolen
- Loss suffered was reasonably foreseeable result

CLA s 5D:

- But now CLA s 5D
- For contracts:
  - What is the standard of contractual duty owed?
  - Is it a strict promise or a promise only to exercise reasonable care?
  - Must consider this FIRST to determine
  - If strict duty, still with the common law
• If loss arises from breach for failing to take reasonable care, now caught by section 5D CLA
• Must run through same series of elements as must do during a negligence claim
• Necessary condition, scope of liability, certain rules when can ignore etc
• First thing P needs to show is needs to prove necessary/factual causation

iii) Remoteness of damage

• Loss must not be too remote
• Establishing remoteness is a question of fact
• In contract, remoteness is much harder than in tort – stronger role
• In contract, all famous cases are remoteness cases, causation usually not problematic
• Idea: yes you can say that the wrong lead to a certain set of consequences including the loss, but at some point it becomes unreasonable to say that the wrongdoer should be responsible for everything that occurs as a result of the loss
• At some point need to impose a limit – not all consequences are predictable
• Proximity in time or distance not relevant
• Remoteness imposed by reference to parties’ expectations and what they would reasonably have expected to follow as a consequences of the wrong
• In tort, almost all involve someone being injured/or property damaged – natural factual nexis, need to be physically near someone to be injured by them etc
• In contract most cases are about economic loss only
• May be for this reason that rule of remoteness in contract is meant to be narrower/more stringent, as concerned with unbounded economic losses which could really add up
• Tort: negligence and equivalent torts, test is ‘was loss reasonably foreseeable?’
• In contract: adopt different test, two pronged
  ▪ 1. Arising naturally
  ▪ 2. Reasonably contemplated to occur as probable consequence of breach

a) Kind of loss to be compensated

*Hadley v Baxendale* (1854) UK:

• Hadley sends mill shaft off to be fixed, delay in getting back due to breach by B, lost profits for extra days where mill out of action
• Question: should a carrier be liable for failing to return an essential piece of business equipment which causes person to be liable for loss of profit?
• Allows recovery of loss:
  ▪ 1. Arising naturally, that is, according to the usual court of things from breach; or
  ▪ 2. Such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of breach
• In theory limbs are alternative
• First limb: general knowledge losses
• Second: special knowledge losses
• Damages should either be those arising naturally in the usual course of things or such as may reasonably be supposed to have been in the contemplation of both parties
• If special circumstances are communicated and known by both, damages are what would naturally result from the special circumstances communicated and known
• Where special circumstances unknown, defendant could only have had in contemplation the amount which would generally result
• Damages claimed must flow according to the usual course of things from the defendant’s breach
• First limb reflects a conventional measure of loss
• Expresses a criterion which relies on the assumption by contracting parties of a responsibility for particular types of loss, namely those arising in the usual course of things
• Second limb: degree of knowledge required and extent to which defendant must have agreed to accept the risk of the damage
• A plaintiff claiming damage which does not arise ‘in the usual course of things’ must rely on the knowledge actually possessed
• Court in this instance said was unusual loss, as usually would expect back up or mill operation even without that piece
• Mill owner had not told Baxendale about special circumstances of being essential to entire mill operation (if had said, could have had damages based on special knowledge)

• In order to rebut presumption implied by actual knowledge the defendant must show no acceptance of risk of liability e.g. by exclusion clause
• Or if price for performance is out of all proportion with risk implied

Robophone Facilities Ltd v Blank [1966] UK:
• Basis of defendant’s liability is implied undertaking to bear it
• Actual knowledge of special circumstances relevant as one of the factors
• Should have acquired knowledge from the plaintiff
• Should have been able to reasonably foresee enhanced loss was liable to result from breach
• Where defendant knows and does not disclaim liability, implied undertaking to bear extra loss
• Court will thus draw inference that defendant accepted liability if acquired necessary information from plaintiff and took no steps to disclaim it

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] KB:
• Sale of boiler, buyers told sellers intended to put to use asap
• Delivery delayed by 5 months – claimed loss of profits re lucrative contracts
• Profits on government contracts were 5 x more than usual
• Issue: whether the plaintiffs were entitled to claim in respect of business profits they would have made if boiler delivered on time
• Court reconceptualised remoteness
• Knowledge aspect and probability aspect
• Knowledge part – two sub-parts which match up to two limbs of Hadley
• One: general knowledge (i.e. ‘in the usual course of things’)

• Two: special knowledge which parties would only have if informed
• Stand in position of parties with relevant contract at time, and ask would a reasonable person have expected a breach to cause the type of loss being claimed?
• Preferable to make distinction on basis of loss that was reasonably contemplated
• Based on what contract-breaker knew at time of contract (no benefit of hindsight)
• Not necessary that defendant actually asked self what loss liable to result
• Sufficient that if had considered, as a reasonable person would have thought loss in question liable to result
• Enough could foresee likely to result as a ‘serious possibility’ or ‘real danger’
• Distinguished loses from “particularly lucrative dying contracts” as a different type of loss only recoverable if defendant had sufficient knowledge to make it reasonable to attribute acceptance of liability
• Held: entitled to some award for loss of profits but not specific amount as defendant had no knowledge of specific government contracts lost
• Plaintiffs about to recover general sum for loss of profits but not specific sum re lost dyeing contracts as defendant did not have knowledge of these

**Transfield Shipping Inc v Mercator Shipping Inc (‘The Achilleas’) [2009] AC:**
• Normal measure of damages would be difference between market rate and charter rate, but held that the loss which the plaintiffs claimed arise in the ‘usual course of things’ from the defendant’s breach
• However, decision reversed by HOL
• Lord Hoffman: must first decide whether loss is of a “kind” or “type” for which the contract-breaker ought fairly to be taken to have accepted responsibility
• i.e. what would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking
• Case shows difficulty in expressing the usual course of things in terms of probabilities
• Extent of liability founded upon particular interpretation of contract
• Contractual liability voluntarily undertaken
• Court must decide whether loss is of a ‘kind’ or ‘type’ for which the contract-breaker ought fairly to be taken to have accepted responsibility
• Reflects what would have been considered significant for risk undertaken

**Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSW:**
• Issue: whether loss was reasonably within contemplation of parties as probable result of the contract
• *Hadley v Baxendale* test operates differentially depending on whether claim is for loss of expected benefit or for a loss which flows from reliance by the party on the proper performance of the contract
• Critical question: whether in the ordinary course of things it would be expected that the owners would be likely to bring legal proceedings to have wrongs corrected, or whether having regard to the knowledge of both parties as to the relationship between neighbours, litigation was a probably result of breach
• Appellants aware that relations between neighbours were prickly
• Legal costs incurred by respondent in litigation with neighbours was within scope of liability arising from application of rule in *Hadley v Baxendale*
b) Foreseeability

_Koufos v Czarnikow Ltd_ [1969] AC:

- Charterparty of vessel for large quantity of sugar
- Charterers sugar merchants, intended to sell at destination
- In breach of contract, boat takes much longer, as a result market value has fallen
- Issue: could charterers obtain damages for fall in market?
- Did not know charterer intended to sell sugar – immediately rules out second limb or special knowledge case
- Was the possibility that they might sell the sugar at the destination enough to say that it was a sufficiently likely consequence ‘in the usual course of things’?
- Held defendants ought to have contemplated that the plaintiffs would suffer the loss in question
- Loss of profit claimed was not too remote to be recoverable in damages
- Established prima facie rule that a carrier is liable for lost profit as a natural result if the carrier knows the charterer intends to sell its cargo
- “Reasonably foreseeable” more appropriate to tort than contract
- “On the cards” too imprecise
- Lord Reid: ‘not unlikely’ to result – easily foreseeable
- Balance of Australian authority accepts Reid’s result
- Lord Morris: Liable to result – fairly and reasonably be considered as arising naturally
- Lord Pearce and Upjohn: serious possibility or real danger
- Consider what is within reasonable contemplation
- Indicates that fairly high degree of probability is required in contract; higher than in tort which imposes much wider liability

- NB high court has not authoritatively decided, but enough to say that loss ‘not unlikely’ or ‘likely’
- Contract standard above the tort standard, but can still be less than 50% probability

_H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd_ [1978] QB:

- U contracted to supply/install hopper to store pigfeed (chestnuts)
- Hopper not properly ventilated, breach of term that reasonably fit for purpose
- Pigs became ill and died from eating mouldy nuts
- P claimed damages for dead pigs, expenses for dealing with outbreak and lost sales
- Assessed under first limb of _Hadley_
- Trial judge held “no serious possibility” or “real danger” of mouldy nuts causing such serious degree of injury
- Scarman LJ HOL: test for remoteness should not differ between contract and tort
- Type of damage only relevant in determining whether the loss/injury was of a type the parties could reasonably be supposed to have in contemplation
- Suggested contract criterion of ‘serious possibility’ – question of fact requiring application of common sense
• Proper formulation: if it is within reasonable contemplation that pigs would develop some form of illness, doesn’t matter the extent/degree of the illness in order to recover
• Proper formulation: if a food container not properly ventilated, is it not unlikely that the food would become contaminated? And if farm animals ate contaminated food, is it not unlikely that they would fall ill or die? Obviously yes
• Concerned about **type of loss not its extent**
• Concerned with general way loss came about, not precise chain of events
• Once illness was foreseeable as a serious possibility, the degree suffered irrelevant
• Held defendant liable in respect of the pigs which died but not for profit lost on future sales

Denning (not actually the law):
• Whether the plaintiff frames the action in tort or contract, damages will be assessed on the more favourable test
• Breach of contract: consider whether consequences were of such a kind that a reasonable man would contemplate them as being of a very substantial degree of probability
• Tort: consequences of a kind that a reasonable man, would foresee them as being of a much lower degree of probability
• Distinction between claims for economic loss of profit consequent on breach and compensation for physical damage
• Loss of profit: strict *Koufos* test – only liable for the consequences if he ought reasonably have contemplated as a serious possibility or real danger
• Physical damage: defendant is liable for any loss or expense which he ought reasonably to have foreseen at the time of the breach as a possible consequence or slight possibility
• Where breach causes physical damage, test similar to that in tort

• However, there is a problem: *Koufos* and *Parsons* seem to contradict each other
• *Parsons*: concerned with type of loss, not degree or extent
• *Victoria Laundry*: issue was how big profits were, could not claim for extent of lost profits
• So how can we say that sometimes enough to see general consequence, extent doesn’t matter, but then Vic Laundry says actually no have to be aware of extent

• Issue of disproportion between cost of the contract and the amount that will be lost
• Depends on taking on the risk of things that might go wrong
• With ‘special knowledge’ idea courts have grappled with the idea of the extent to which parties have agreed to take on the risk
• Does there need to be something in the facts to show that they have accepted the proper risk?
• Some cases look at need for extra ingredient of assumption of risk – *Transfield*
• Issue arises where discrepancy between cost of contract and cost of loss is massive
MEASURE OF DAMAGES AND SUMS FIXED BY CONTRACT

A. MEASURE OF DAMAGES

• Method of assessing damages a matter for the court
• Plaintiff cannot claim an entitlement to elect between the bases of assessment
• Court may assess damages on more than one basis
• Plaintiff not entitled to recover amount which exceeds the loss
• Must show damage caused by loss and not too remote
• But also need to characterise the loss: what has actually been lost?
• Look at what the benefit was that the party expected to get from the contract
• So party can be placed in position had the contract been performed
  Difference between where a party should have been and where they are
• Where a party is actually better off because the other party has breached the contract, no damages

• Fundamental principle: damages are compensatory, should put plaintiff in position as if contract had gone ahead or had been properly performed
• Expectation damages – look at what hope to get
• Reliance damages – look at what thrown away because of breach
• Fundamental principle of damages acts as a cap on reliance damages
• Preference for reliance or expectation tends to be dictated by how the contract would have turned out
• Not profitable: reliance measure
• Profitable: expectation measure

i) Expectation damages

• To place the plaintiff in the same position as if the contract had been performed
• Protect the plaintiff’s expectation of receiving the defendant’s performance

Sale of goods:
• In a contract for the sale of goods, the expectation interest is often calculated by reference to the market price

Breach of Warranty:
• S 54 Sale of Goods Act
• 54(2) reproduces first limb of Hadley v Baxendale
• s 54(3): prima facie applicable measure of damages is difference between the value of the goods at the time of delivery and value would have received if goods met warranty
• Only if prima facie rule does not give satisfactory result does there need to be consideration of the first limb test
• S 54(1): applies to breach of term classified by construction as warranty

Delay in acceptance:
• S 40
• Buyer liable for any loss occasioned by refusal to accept
• Seller entitled to recover reasonable charge for care and custody of goods
Non-acceptance:
- S 52
- 52(2): Measure of damages is estimated loss directly and naturally resulting in ordinary course of things from buyer’s breach
- 52(3): prima facie measure where available market for goods – difference between contract price and market/current price
- Where no available market price, court must apply s 52(2)

Sale of Goods Act 1923 (NSW) s 52(3)
(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer’s breach of contract.
(3) Where 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 at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.

Late delivery:
- Prima facie rule is the difference between the market price of the goods at the time and place of actual delivery and the market price when the goods ought to have been delivered

Non-delivery:
- S 53(2): general rule that measure of damages is the estimated loss directly and naturally resulting in ordinary course of things
- S 53(3): prima facie measure where market available – difference between contract price and market price

Sale of Goods Act s 53(3)
(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller’s breach of contract.
(3) Where 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.

Available market concept:
- Circumstances, including time and place, are such that a purchaser can then and there buy other goods of the same quality – Francis v Lyon
- Requirement that the goods be of the same description

a) Date of assessment – usually at breach
- General rule in contract is that damages are assessed, on a once and for all basis, at the date of breach
- However there are exceptions to the general rule
- Effect of inflation may allow courts to treat choice of date as a matter of judgement