Damages in contract

**The standard for damages in contract is to put the plaintiff in the position they would have been in (so far as money can provide), had the contract been performed. (Robinson v Harman )**

**There are 4 basic elements a plaintiff must prove in order to gain damages in contract:**

- **The plaintiff has a cause of action in contract (namely a breach of contract)**
- **The defendants breach has in fact caused the damage the plaintiff seeks to remedy (Causation)**
- **The loss suffered by the plaintiff is not too remote (Argue under limb 1, that the loss was natural and direct of the breach of contract. Or if you cant prove this, show that the defendant knew of the special damages under the second limb)**
- **The plaintiff has not breached his or her duty to mitigate unnecessary loss. (This element shifts the onus of proof onto the defendant. The defendant must show that the plaintiff did not take all reasonable steps to mitigate loss). In this context breach of duty by the plaintiff does not lead to a separate cause of action. Like in tort, breach of this duty will lead to contributory negligence situation.**

  **Cause of action**
  (review contract law on breach of contract to prove specifics of contractual causes of action)

  Subject to damages clauses, there is a common law right to damages in all contracts in the event of a breach. However unlike Tort, contractual breaches entitle the plaintiff to nominal damages even if no actual damage was suffered by the plaintiff.

  Furthermore termination of the contract is usually not required for a plaintiff to claim damages. There are two exceptions. Anticipatory breach and claims for expect for expectation or loss of bargain damages.

  Mason CJ in **Sunbird Plaza v Maloney (**Defendant guaranteed Debtor's performance in purchase of home. Deposit paid on exchange. Debtor defaulted on sale. Vendor got specific performance and sued Gs for damages in breach of contract.)

  Loss of bargain damages are recoverable only if the contract is at an end. Once termination due to the defendants wrongful conduct is established the plaintiff is entitled to damages for loss of bargain. Termination is not an essential element in an action for loss of bargain damages except in the case of anticipatory breach by the preponderant opinion in Australia and in England is against his view.

**SO! In order to claim damages, the plaintiff should be ready and willing to perform their side of the contract. But where the plaintiff terminates the contract following anticipatory breach the plaintiff need only show that this intention existed prior to termination. (Foran v Wight** Mason CJ, Brennan, Deane, Dawson, Gaudron JJ

Contract for sale of land. Time was of the essence. Some days prior to the completion date, the vendors represented that they would not be able to complete on time. At that time the purchasers did not have enough finance to purchase the house. Neither party acted on completion date. Two days later purchasers purported to rescind the contract, and seek their deposit back.**)**

**Causation**

The plaintiff must show that the loss suffered was in fact caused by the defendants breach of contract. In other words 'but for the defendants breach, would the plaintiff have suffered the damage claimed?'

This approach is however problematic when there are multiple causes or intervening events. In these situations the courts refer to the chain of causation between the wrong complained of and the loss or damage incurred. (March v Stramare) As with tort, if there was a novus actus intervenes (ie intervening act) which broke the chain of causation between the defendants actions and the damage caused, then there will be no causation.

As was pointed out by McHugh JA in Alexander v Cambridge credit, the plaintiff need not show that the actions of the defendant were the exclusive cause of the damage, they need only show that the defendant contributed to the damage.

**Contributory negligence**

This is different from a severance of the chain in that the defendants actions are still causally relevant to the damage, but the plaintiffs actions contributed (to a lesser extent) to the damage.

As per the law reform Act of 1965 s(9), the liability of a defendant, and thus the damages are to be reduced if the plaintiff has contributed to their own damage. The actual reduction in damages to be received is to be determined by the courts.

**Remoteness**

Even if the court finds that the damage was caused by the defendants breach it must not be too remote.

**Hadley v Baxendale**

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 be considered either arising naturally ie. **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.**

**For example Blake and Jonathan make a contract for the sale of a car. Jonathan breaches the contract and Blake is so upset he cuts his dick off. As Blake cutting his dick off was never in contemplation of either of the parties as a consequence of breach contract then Jonathan is not liable.**

The test stated above has two limbs. The first limb is that the loss must have arisen naturally in the usual course of things as the probable result of the breach. This is often characterised as a direct loss. The resulting damage is presumed to have been within the contemplation of the parties. In this case the defendant is prima facie liable and the plaintiff does not need to adduce any evidence that the defendant was aware of the risk of damage. However in Australia it need only be shown that the defendant contemplated the losses suffered by the plaintiff, if the plaintiff did not foresee the damage caused by the defendant's breach .

The second limb is where the loss is of an unusual type, sometimes characterised as an indirect or special loss. Here, the plaintiff must prove that the defendant knew or ought to have known such a loss to be the probable result of the breach. This is consistent with the approach in Wenham v Ella where contemplation of possible damage need only be shown to be in the mind of the defendant rather than both the plaintiff and defendant.

**Even if you show that the damages arose under one of the aforementioned categories (naturally arising, or damages that were contemplated by the defendant) you still have to fit the category of damages you want into one of the following categories:**

**Expectation damages:**
(Commonwealth v Amann Aviation Pty Ltd)
Amann aviation contracted with the commonwealth to provide aerial surveillance of Australias coast. There was a delay in getting the planes together and the commonwealth terminated the contract. Amann sued for breach of contract and damages.

Mason CJ and Dawson JJ:

In the ordinary course of commercial dealings, a party supplying goods or services will enter a contract with a view to securing profit that is to say that a party will expect a certain margin of gain to be achieved in addition to the recouping of any expenses reasonably incurred by it in discharge of its contractual obligations. It is for this reason that expectation damages are often described as damages for loss of profits. Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred in the discharge of contractual obligations and any amount of gross receipts which would have exceeded those expenses. The second is expected profits.

**Reliance Damages**
**Mcrae v Commonwealth disposals commission** (Mcrae contracted with the commonwealth to salvage a ship off the coast. The ship did not exist. Mcrae sued for damages for the costs of setting up the salvage operation.)

Webb J:
Reliance Damages represent the plaintiffs actual costs or wasted expenditure as a result of relying on the defendants contractual promise.

**Duty to mitigate**

As noted by Viscount Haldane in **British Westinghouse Electric and Manufacturing co v Underground Electric railways**(Where WE supplied ventilation turbines to UER which were defective. :
"The duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."

What is meant by reasonable generally includes any steps that the plaintiff could take to mitigate the loss, even if these steps include acceptance of the defendants breach of contract. For example in Pazyu Ltd v Saunders there was a contract for the delivery of some silk. However the defendant held a mistaken belief that the plaintiff was unable to pay for the silk, repudiated the contract and offered a new contract where the defendant would be paid in cash. The plaintiff accepted the repudiation but refused the new contract. When the plaintiff sued in damages for the loss, the court held that the plaintiff could have taken the new contract thus mitigating the damage caused by the defendant.

**Cost of mitigation and inceases in loss**
An important qualifier in the above duty is that the plaintiff is not obliged to do what they cannot afford to do, especially when the financial difficulty in remedying the breach is as a result of the defendants breach. (New market corp v Kee vee Properties)

**Credit for benefits?**

If the defendants breach of contract causes the plaintiff to gain benefits, only available under the defendants breach, this reduces the defendants liability.

In British Westinghouse v Underground BW supplied turbines to U. Such turbines were not as efficient as what they were promised to be in the contract, thus constituting a breach. After finding such breach, U replaced the turbines with newer more efficient ones. When determining damages the house of lords held that because U had obtained a benefit (more efficient turbines) BW was entitled to a reduction in damages payable due to the increased efficiency and thus lower costs U sustained. Its important to note that BW would only have been liable for the loss suffered when using the BW turbines. (So cost of replacing them, cost of removing them etc)

**Anticipatory breach**

The duty to mitigate raises special issues when it comes to anticipatory breach. You know from contracts that anticipatory breach occurs when one party to the contract makes it known that they are not willing to perform their side of the contract before the date of performance. When this situation arises the innocent party must choose to either accept repudiation or affirm the contract, ignore the breach and hold the other party to the contract. Where one party chooses to affirm, there is no duty to mitigate loss because the time for performance of the contract has not yet arrived (therefore the plaintiff has not yet

suffered any loss, and thus has no duty to mitigate loss). This is qualified by the principle in White and carter v Macgregor:
It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages he ought not to be allowed to saddle the other party with an additional burden with no benefit himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.

However if the plaintiff chooses to accept the repudiation and terminate the contract, the duty to mitigate arises immediately. The plaintiff is still able to seek damages but the date for assessment of damages will be at the time for performance.

**Date of assessment**
Generally speaking the date of assessment for damages is the date when the cause of action arises. Therefore in contract, it is the temporal moment when the alleged breach of contract occurred. However this rule is not universal, it must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered… The general rule that damages are assessed as at the date of breach or when the cause of action arises has been applied in tort, but will not be applied in contract when it is necessary to do so in the interests of justice. (Johnson v Perez)

A good illustration of this is the case of Golden Strait v Nippon. In that case Golden strait contracted with Nippon for a boat from 1998 to 2005. The parties stated in their contract that either party would have a right to terminate in the event of war between the USA and Iraq. Nippon repudiated the contract in 2001, and Golden strait successfully sued for damages. Before a finding as to damages could be made the USA invaded Iraq (YEAHHHH MURICA'). On appeal Nippon argued that the date for assessment of damages should be from 2001-2003 because Nippon would have terminated the contract at the outbreak of war and thus Golden strait would not have suffered any damage for this.

Therefore the date of assessment is usually the date of breach, however if its more advantageous to the innocent party then the court will assign the date of assessment to the date most advantageous to the innocent party.

**The different types of damages:**
**-Nominal Damages**
**-Compensatory damages**
**-Expectation damages (Damages paid in order to compensate expenses accrued in expectation of the contract being performed, or)**
**-Loss of opportunity**
**-Mental stress/ physical injury damages**
**-Loss of reputation**