

2. DAMAGES IN CONTRACT

Assessing Damages in Contract

- a) Objective: compensation is to put plaintiff in the position they would be in had the contract been performed
- b) Limiting factors to the amount/kind of loss a plaintiff can recover:
 1. Causation
 2. Remoteness (difficult)
 3. Mitigation
- c) What measure of loss for part (a)? Particular rules apply in certain circumstances

Limiting Factors

i. Causation

General rule: defendant only liable where loss suffered by a plaintiff is substantially connected with the defendant's wrong

- **Test:** D's breach so connected with the P's loss that 'as a matter of ordinary common sense and experience, it should be regarded as a cause of it' – *March v Stramare*
- 'But for' test is a negating test, not sufficient
- If issue in contract is failure to exercise reasonable duty then look at this section, look at CLA s 5D

Luna Park v Tramways

- 8hrs a day of advertising promised, breach of contract established
- Unable to prove loss was caused by D's breach, thus nominal damages awarded

Reg Glass Pty Ltd v Rivers Locking System

- **Facts:** customer gets security door installed, implied term in contract that door is be reasonably fit for purpose (strict standard), burglars broke in and stole stock, takes 45 – 60 mins
- **Court:**
 - (1) Did delaying burglars by 45 – 60 mins constitute fit for purpose? No i.e. breach
 - (2) Causation: did the door cause the loss? i.e. would a good security door have prevented the loss? Plaintiff could not show causation, defendant could not negative causation
- Usually, plaintiff has onus to show causation **BUT** where loss appears to follow from breach, plaintiff allowed to make a *prima facie* case and onus lies on defendant
- Not a strict application of 'but for,' probably consistent with the current *March v Stramare* approach

ii. Remoteness

Even where there is causation, P's loss must not be too remote

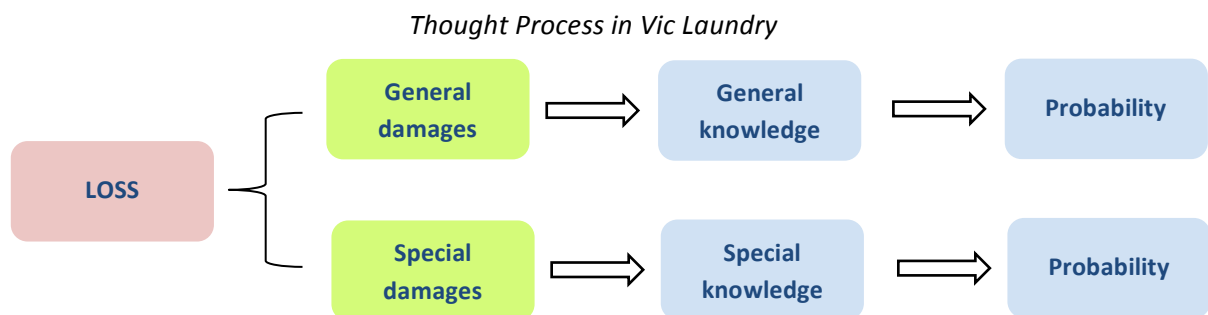
- **Test in *Hadley v Baxendale*** - plaintiff can recover for two types of loss:
 - Limb 1** *General damages*: loss that arises naturally, damages must flow 'according to the usual course of things' from D's breach
 - Limb 2** *Special damages*: loss that may be reasonably supposed to have been in contemplation of both (defaulting) parties at the time of contract, as the probable result of breach

Victoria Laundry v Newman

- **Facts**: sale of boiler to laundry company, company states boiler is to be put to use 'in the shortest possible time,' delivery delayed 5 months, clear breach of contract
- **Issue**: what are the damages? Company claims loss of profits including inability to bid for profitable gov't contracts, causation not an issue here
- Remoteness test:

- a) **Knowledge**: people assumed to know what happens ordinarily, **or** special knowledge above and beyond the ordinary
- b) **Probability**: given the knowledge element what was the relevant probability of the particular loss happening? Lord Asquith: was loss reasonably foreseeable? i.e. not unlikely, serious risk of danger etc.

- **Court**: only general loss covered by first limb damages awarded, loss of special profits not covered since defaulting party had no knowledge of gov't contracts
- Normally foreseeable loss is concerned with the *kind* of loss, but in contracts, there may be more categorising of loss e.g. special economic loss



Koufos v Czarnikow

- **Facts**: vessel chartered to carry sugar, vessel is late due to detour from agreed route, price of sugar dropped, P claims damages loss of profits at higher price
- **Court**: general damage claim, D knew that (a) the P was a sugar merchant, and (b) there was a market for sugar in Basrah
- Given this knowledge, general economic loss for such a breach is not unlikely (**higher standard than 'not far-fetched or fanciful' in tort**)

Parsons v Uttley

- **Facts**: livestock food container installed improperly, food goes mouldy, pigs eat food and die, plaintiff sues in contract i.e. food container unfit for purpose (also could have sued in tort, establish duty of care etc.), pigs falling ill arises naturally from faulty food storage,

- General damages claim, all fitter knew was that container was for pig food

Probability element

- **Trial judge:** no serious possibility or real danger that bad vent would cause mouldy nuts would in turn cause such degree of illness in pigs
- **Appeal:** Lord Scarman – appropriate question is: if the food storage is not fit for its purpose, would the fitter contemplate that it is likely that the animals would fall ill?
- Not concerned about the particular chain of events or the extent of loss, but the general consequence from the breach

iii. Mitigation

1. A plaintiff cannot recover for loss that reasonably he/she ought to have avoided; *Soholt*
 - Onus is on the defendant to show plaintiff failed to mitigate
2. Even where P's acts exacerbate the loss, P can recover for the increased loss as long as the acts are **reasonable**; *Bank of Portugal v Waterlow*
3. A plaintiff must account for any benefits they obtain as a result of the breach; *British Westinghouse case*

The Soholt

- **Facts:** defendant to sell vessel for 5 million pounds, defendants did not deliver on time so plaintiffs terminated contract, at this time vessel worth 5.5 million pounds
- Plaintiffs then offers to buy vessel for 4.75 million, sellers refused, plaintiff sues for 500K
- **Court:** plaintiff did not act reasonably to avoid loss
- In cases of reoffer by defendant, consider the conditions of reoffer (equal/less favourable?), friction between the parties; *Shindler v Northern Raincoat Co*

British Westinghouse Electric and Manufacturing Co v Underground Electric

- **Facts:** machines are less efficient than promised by the supplier, buyer resorts to buy new machines from another seller that are even more efficient
 - **Issue:** can U claim cost of new machines + extra cost of operation during the period of operating inefficient machines?
 - **Court:** according to principle (3) claim is ok but must deduct extra benefit of the more efficient new machines
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Measure of Loss

i. Expectation Damages

Firstly look at golden rule, i.e. putting plaintiff back into position that would result had the contract been performed:

- **Breach of warranty:** difference between market value of the good with the promised function, and the market value of the deficient product – *prima facie* rule
- Specific rules for non-delivery, non-acceptance of goods (course guide): where there is a market, damage is difference between market value and the contract price
 - **Non-delivery** – Sale of Goods Act 1923 (NSW) s 53(3)
 - **Non-acceptance** – Sale of Goods Act 1923 (NSW) s 52(3)

a) Date of Assessment

General rule: assess at date of breach unless it is a case of repudiation i.e. anticipatory breach – then assess at date of promised performance; *Hoffman v Cali*

- Rationale is that time of breach and promised performance is the same unless the breach is a repudiation

b) Difficulty in Assessing no bar to Recovery

- Court may award damages on another basis; *McRae v Cth*
- Damages for loss of chance are 'ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued' *Sellars v Adelaide Petroleum*

Howe v Teefy

- Racehorse owner leased horse to P, takes back horse in breach of contract, plaintiff sues for **loss of chance** of winning
- Court: despite horse being dodgy and unlikely to win, plaintiff may have made money on the side via betting etc.

ii. Reliance Damages

Reliance loss is usually only justified where:

1. There is no profit or it is impossible to ascertain; *McRae v Cth*
2. But it cannot put the plaintiff in a better position than that had the contract not been breached (see diagram in notes); *Cth v Amann*
3. Onus lies with D to prove that reliance should be capped at a certain amount; *Cth v Amann*

McRae v Cth

- **Facts:** M wins bid for oil-tanker off the coast, paid 285 pounds then incurred costs to locate and salvage the vessel, tanker does not exist, M sues Cth
- **Issue:** was this loss recoverable? Approaches: