REMEDIES CASE SUMMARY

DAMAGES IN CONTRACT

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Robinson v Harman (1848) 154 ER 363 at 365 by Parke B

The general rule as to damages in contract, is that stated in Robinson v Harman (1848) 154 ER 363 at 365 by Parke B:

... that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

This is referred to as the compensation principle.

ELEMENTS

1. **Cause of Action**: - the plaintiff has a cause of action in contract, namely, a breach of contract, and a loss of an acceptable kind,
2. **Causation**: - the defendant’s breach of contract has in fact injured or caused a loss to the plaintiff,
3. **Remoteness**: - the loss suffered by the plaintiff is not too remote.
4. There has been no failure to mitigate on the part of the plaintiff.

**ELEMENT 1: CAUSE OF ACTION**

In contracts there is only one cause of action: breach of contract. However, there are numerous ways to breach a contract. The breach itself allows the innocent party to claim nominal damages (O’Connor v SP Bray Ltd 1936), although they are only minimal.

For the plaintiff to receive full compensatory damages, actual loss must be proved (Erie County Natural Gas & Fuel Co Ltd v Samuel S Carroll 1911). In order to claim damages for the defendant’s breach the plaintiff should be ready and willing to perform their side of the contract (Foran v Wright 1989).

Termination of the contract is usually not required in order for the plaintiff to claim damages; however there are two exceptions; cases of anticipatory breach and claims for ‘expectation’ or ‘loss of bargain’ damages (Sunbird Plaza Ltd v Maloney 1988). Where the plaintiff terminates the contract following an anticipatory breach, the plaintiff need only show that this intention existed prior to termination (Foran v Wright 1989).

**ELEMENT 2: CAUSATION**

The plaintiff must show that the loss suffered was in fact caused by the defendant’s breach. It only has to be a major contributing cause, even though it’s not the only cause.

Causation is a question which "must be determined by applying common sense to the facts of each particular case" (March v Stramare (1991) 171 CLR 506) with the ‘but for’ test being used as the threshold criteria test (March v Stramare (1991) 171 CLR 506, 533; Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310, 358)

The ‘but for’ test should only be used as a guide and that the ultimate question was whether ‘as a matter of commonsense, the relevant act or omission was a cause’ of the loss (Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310 at 358 per McHugh and Mahoney JJ)

**Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310**

Facts: The appellant auditors (Alexander) breached a contractual duty to qualify their reports on the company’s 1971 accounts by noting serious deficiencies in the provisions for bad debts. The respondent argued that as a result of these omissions, the company’s perilous financial position was not fully
appreciated. The company continued to trade, making substantial losses and after three years went into liquidation. The issue was whether the damages were caused but for the breach?

**Held:** Appeal allowed (by majority) “to establish a causal connection between a breach of contract and the damage suffered, a plaintiff needs only to show that the breach was a cause of the loss.

**Held on appeal:** There was no causal connection between the breach and the financial loss. There were a number of factors which had contributed to the damage complained of by the company. The court had to ascertain whether the auditor’s actions contributed to the loss or damage. This could be determined by the application of the “but for” test. In this case the company’s loss was the result of a number of factors, including the decision to expand operations in a harsh economic climate.

(i) **‘But For’ Test:**
‘But for’ the D’s wrong, would the P have suffered the loss or damage complained of? – If loss/damage would have been suffered anyway/just the same, no award for damages beyond nominal damages can be made.

(ii) **‘Common Sense’ Test:**
Determined by applying common sense to the facts of each particular case.

The Court/Tribunal of fact must assess all the surrounding circumstances and make a value judgment as to the cause of the plaintiff’s loss.

**CONTRIBUTORY NEGLIGENCE**

Refers to some carelessness on the part of the P that contributes to the loss for which he or she seeks compensation in the form of damages.

*An act of the P* which amounts to contributory negligence can constitute an intervening act that breaks the chain of causation between the D’s breach and P’s loss.

**Lexmead Ltd v Lewis [1982] AC 225**

*Facts:* P purchased a towing hitch to connect his four-wheel drive to a trailer. After the P used the towing hitch to connect he noticed that it was broken but continued to use it. A serious accident occurred when the trailer became detached. The P claimed damages by arguing that the D supplier was in breach of contract because of a design defect in the towing hitch.

*Held:* House of Lords rejected this argument and decided that the P’s negligence, in continuing to use the towing hitch in the knowledge that it was unsafe, ‘broke the chain’ of causation between the defendant’s breach and the damage suffered.

**Not all acts by third parties or events will act to break the casual link**

**Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker [1949] AC 196**

The charterer of a ship breached the seaworthiness term and consequently the vessel was delayed in its journey. Due to the outbreak of World War Two, the charterer was ordered to dock at another port and to use some other method to get the goods to their destination. The House of Lords held that the casual link between the D’s breach and the P’s loss had not been broken by the outbreak of war. This was due to the fact that it was reasonable foreseeable when entering into the contract that any delay in the voyage might result in the loss or diversion of the ship due to war.

**But what if D’s breach is still casually relevant, despite the P’s contributory negligence?**

At common law an award of damages for breach of contract cannot be reduced for the contributory negligence of the party who is not in breach because it only applies to torts *(Astley v Austrust Limited (1999) 197 CLR 1)*.

**Astley v Austrust Ltd (1999) 197 CLR 1**

*Facts:* Solicitors failed to advise a client, Austrust, on their liability in dealings with third parties. The issues was whether contributory negligence on the part of Austrust would be a defence against damages.
Held: The High Court held that although Austrust was guilty of contributory negligence it was entitled to recover from the solicitors for the whole of the damage it suffered.

(The doctrine from Hawkins v Clayton and Astley v Austrust allows concurrent liability in tort and contract)

Law Reform (Miscellaneous Provisions) Act 1965: Under the Act contributory negligence will be available to reduce an award of damages for breach of contract in situations where the act or omission causing damage to the plaintiff "amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort: Sections 8 and 9 (Obvious examples are the obligations of professionals and tradespersons to carry out their work or provide their services with reasonable care and skill.)

INTERVENING EVENTS

1. An event may also break the chain of causation

Even if there is a causal connection between the breach of contract and loss suffered by the P, a subsequent intervening event, which contributes to the loss, may break the causal link (Monarch Steamship Co Ltd v Karlshams Oljefabriker 1949).

An intervening event is referred to as a ‘novus actus interveniens’ - it could be an act of the P, an extraneous event, or an act of a third party.

However, if the intervening act is reasonably foreseeable, it does not break the chain of causation (Monarch Steamship Co Ltd v Karlshams Oljefabriker 1949).

In order to establish a causal connection between a breach of contract and the damages suffered, the plaintiff only needs to show that the breach was a cause of the loss, it need not be the exclusive cause, it need only have ‘casually contributed to the loss’ (Alexander v Cambridge Credit Corp Ltd 1987).

Lexmead (Basingstoke) Ltd v Lewis

The purchaser of a coupling claimed damages from the suppliers and relied on the fact that the coupling – used to join his land rover to a trailer - had a design defect. The trailer became detached and a serious accident resulted, but the House of Lords found that the cause of the accident was really the purchaser’s negligence (P) in continuing to use the coupling for a considerable period after he had noticed that the handle, which operated the locking mechanism, was broken.

Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310

Where the economic downturn was found by McHugh J to break the chain of causation as it was so potent as to overwhelm the original wrong.

ELEMENT 3: REMOTENESS

Even if the court finds that the damage was caused by the defendant’s breach, it must not be too removed in law (Burns v MAN Automotive (Aust) Pty Ltd 1986).

Loss/damage must not be too remote. Remoteness is governed by the two limbs/rules in Hadley v Baxendale (1854) 156 ER 145 (9 Ex 341, 354 by Baron Alderson). The P can recover:

(i) First Limb

The first limb allows for damages that “may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself” (Hadley v Baxendale at 151). A P is entitled to damages arising naturally from the breach itself or those that are in the reasonable contemplation of the parties at the time of contracting.

In determining whether something arises naturally the court considers not only the actual knowledge of the party in breach but also imputed knowledge so that every person is taken to know what losses arise in the ordinary course (Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, 539-540).
Limb 1 is a test of ‘contemplation’, ‘on the cards’, ‘serious possibility’ or ‘not unlikely result (Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd 1998).

**Example where first limb of rule was not satisfied**

*Hadley v Baxendale* (1854) 156 ER 145

Facts: P who owned a flourmill contracted with the D to fix a machine component/part. Delivery by the D of the component was delayed which caused the mill to closed for longer than expected and profits were lost. Court held that the D was not liable for the lost profits. Hadley claimed damages for the loss of profits during the time the machinery was out of order.

Held: Hadley’s claim failed because he had not told Baxendale that the mill would be unable to operate without the machine. It was reasonable for Baxendale to assume that Hadley would have a spare component which could be used while the new one was being made. Hadley did nothing to correct this assumption.

Here, while the breach by the D was the actual cause of the lost profits of the P, it cannot be said that under ordinary circumstances such loss arises naturally from this type of breach. There is a multitude of reasons for a miller to send a crank shaft to a third party. The D had no way of knowing that their breach would cause a longer shutdown of the mill, resulting in lost profits.

Further, the P never communicated the special circumstances to D, nor did D know of the special circumstances.

**Example where first limb of rule was satisfied**

*Koufos v Czamikow Ltd* [1969] 1 AC 350

Facts: D agreed to carry sugar from Constanza to Basrah but deviated during the course of the voyage taking approx. 10 days longer than it should have.

Sugar prices fell on the Basrah market and the P suffered loss of profit by selling at a lower price than would have been obtained had the vessel not deviated. House of Lords held that the loss occurred in the usual course of things because the D knew that the Ps were sugar merchants & that there was a market for sugar at Basrah. So due to the knowledge of the D, they should have contemplated that failure to deliver on time could result in a decrease in value of goods & therefore, a loss of profit.

**Example where part of the loss was recovered under the first limb of rule, but the balance of the loss was too remote**

*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 540

Facts: The laundry ordered a boiler from the D. In breach of the contract the D delivered the boiler five months late. The Laundry sued for loss of normal business profits and loss of a lucrative dyeing contract for the government entered into in anticipation of the delivery of the boiler.

Held: P entitled to recover under the first limb normal business profits it would have earned from its usual work – losses arising ‘naturally’ from the breach.

However, the P could not recover lost profits from the dyeing contracts, since the D could not be expected to have foreseen the dyeing contracts, since they were outside the normal work of the Laundry.

For such a claim to succeed the P needed to show that the D knew of this potential extra loss & knew that such loss was likely to occur (*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* at 540).

**ii) Second Limb**

The second limb allows for damages “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” (*Hadley v Baxendale* at 151).

This limb is concerned with indirect losses or where damage is of an unusual type. The D must possess actual knowledge of the special circumstances which would flow from a breach.

Requires (a) actual knowledge by the D of the special profit that could be made and (b) the P must prove the D foresaw that increased loss was likely to occur following a breach.
The second limb of Hadley v Baxendale requires actual knowledge by the defendant of special circumstances such that the defendant ought, on an objective basis, appreciate the loss that will flow if there is a breach of contract (Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949]).

The test really only involves a single question; whether, on the information available to the defendant when the contract was made, a reasonable person in the defendant’s position would have had a loss of that kind within their contemplation as a likely consequence of the breach (C Czarnikow Lts v Koufos 1969).

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528

Facts: The laundry ordered a boiler from the defendant. The defendant promised to supply the boiler in June, but it was not delivered until November. The Laundry claimed normal profits lost as a result of the lack of the boiler and also for losses occasioned by inability to fulfil dyeing contracts, entered into in anticipation of the delivery of the boiler.

Held: The Laundry was entitled to recover normal profits it would have earned from its usual work. However, it could not recover lost profits from the dyeing contracts, since the defendant could not be expected to have foreseen the dyeing contracts, since they were outside the normal work of the Laundry.

Example where second limb of rule was satisfied
Panalpina International Transport Ltd v Densil Underwear Ltd [1981] 1 Lloyd’s Rep 187

Facts: P agreed to arrange for the carriage of D’s goods from London to Nigeria. The D made it clear that it was important that the goods arrive in Nigeria in time for the Christmas trade but there was no provision in the parties’ contract to that effect. The P delayed sending the goods & was held liable for the increased losses arising from the fact that the goods could not be sold at the higher prices prevailing during December.

ELEMENT 4: MITIGATION

The P has a duty to act reasonably in its own interest and to mitigate any loss and damage suffered as a result of the D’s actions: Shindler v Northern Raincoat Co Ltd [1960] 1 WLR 1038

Damages may be reduced either where there has been a failure by the plaintiff to take reasonable steps to reduce loss or where steps have been taken which have in fact reduced the loss.

Where the plaintiff does attempt reasonable mitigation and this increases the loss, that increased loss is recoverable as damages. Where reasonable steps at mitigation are taken, then irrespective of the success of those steps, the cost of discharging the ‘duty’ is recoverable as damages.

The plaintiff’s attempts to mitigate or minimize loss should be ‘reasonable’ (Unity Insurance Brokers Pty Ltd v Rocco Pezzan Pty Lyd 1998).

Credits for benefits
If the defendant’s breach enables the plaintiff to obtain benefits not otherwise available, the plaintiff’s gain reduces the defendant’s liability (British Westinghouse Electric & Manufacture Co Ltd v Underground Electric Railways Co Of London 1912).

Cost of mitigation and increasing the loss
The plaintiff can recover the cost of reasonable mitigation even if it increases the loss (Simonius Vischer & Co v Hold & Thompson 1979).

The plaintiff is not obliged to do what he cannot afford to do, especially where the financial difficulty is due to the defendant’s breach (Newmarket Corp Pty Ltd v Kee-vee Properties Pty Ltd 2003).

ANTICIPATORY BREACH

An anticipatory breach will amount to a repudiation or renunciation of its contractual obligations. It may be constituted by an 'inability to perform' the contract (Sunbird Plaza Ltd v Maloney 1988). Where there is an anticipatory breach, the innocent party has to choose between either affirming the contract or accepting the repudiation and terminating the contract.

Affirming allows the innocent party to ignore the anticipated breach and hold the other party to the contract. Here there is no duty to mitigate because the contract remains on foot until the time for performance arrives.
(Huppert v Stock Options of Australia Pty Ltd 1965). However, if the plaintiff accepts the repudiation and terminates the contract prior to the time for performance, a duty to mitigate arises immediately.

The choice between affirmation and accepting repudiation can have important consequences. First, the amount of damages may differ. Secondly, because affirmation does not place a ‘duty’ on the plaintiff to mitigate, the plaintiff need not consider offers of alternative performance or alternative contracts (Shindler v Northern Raincoat Co Ltd 1960).

There are two limitations to the principle that where a contract is affirmed there is no duty to mitigate: First, if the defendant’s cooperation is necessary in order for the plaintiff to perform the contract, then the defendant’s failure to cooperate will prevent the plaintiff from earning the contract price (White & Carter Ltd v McGregor 1962). Second, if a party has no interest, financial or otherwise, to enforce a stipulation, he cannot in general enforce it: if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it (White & Carter Ltd v McGregor 1962).

**DATE OF ASSESSMENT**
Generally, the date of assessment is the date of the breach. The Court may be flexible if the altering of this date would best protect the innocent party with the notion of placing the innocent party in the position they would have been in had the contract been performed: *Johnson v Perez* (1989) 166 CLR 351, 355-356, 367, 371, 380.

**ONCE AND FOR ALL RULE**
Traditionally, damages in contract are given on one lump sum occasion where defendant is completely discharged of liability.

There are 3 exceptions:

1. Installment contracts - Where contract calls for the payment of installments, each installment may constitute a separate cause of action.
2. Continuous contracts – Each breach of contract will give rise to separate cause of action.
3. Statute – When a series of payments is specified in an Act, for example monthly payments (such as in cases involving personal injury).

**HEADS OF DAMAGES**
A plaintiff may claim both expectation and reliance damages (Commonwealth v Amann Aviation Pty Ltd 1991).

(i) **Expectation Damages**
These are the most common form of damages for breach of contract and represent the loss of profit expected to be derived from the contract: *Prosperity Advisors Pty Ltd v Secure Enterprises 2012*.

In the ordinary course of commercial dealings a party supplying goods or services under the contract enters into it with a view to securing a profit. Hence, expectation damages are often described as damages for loss of profits.

However even if the contract would have turned out not to be profitable to the plaintiff, the plaintiff can still recover his or her loss by way of reliance damages provided the plaintiff would at least have recovered their expenditure: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

Facts: Amann and the Cth entered into a contract pursuant to which Amann would provide aerial coastal surveillance on Australia’s northern coast. However, the preparations for carrying out the contract took longer than expected, and Amann was unable to perform some of its contractual obligations. The Cth repudiated the contract and Amann terminated it. Amann claimed damages. At first instance the court awarded Amann $410,000, being the loss of profits. Amann appealed, claiming $6.6 million, being the cost of the preparations.

**Held by the High Court:** that Amann was entitled to the $6.6 million, and referred to two heads of damage:
Expectation damages being what A should have received had the contract been performed, and

Reliance damages, being the expenditure A reasonably incurred in reliance upon the contract.

(ii) Reliance Damages

These are the costs that the plaintiff has thrown away by relying upon the contract and often are the costs of preparing to perform the contract: McRae v Commonwealth Disposals Commission (1951) 84 CLR 377.

Subject to the principle of double recovery both reliance and expectation damages can be claimed.

As a general rule, damages may be recoverable solely on the basis of reliance loss where there is no way of quantifying the expectation loss or no profit will be made on the contract.

**Example where the court was unable to quantify the expectation loss** McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 The D sold to the P an oil tanker. The P spent 10 times the amount paid on the tanker fitting out a salvage expedition. P could not find the tanker & subsequently found that the tanker was never at that location. P was awarded damages for wasted expenditure. Court considered it would be impossible to place a value on what the D purported to sell, therefore making assessment of the expectation loss impossible. It was impossible to assess the expected benefit from a non-existing stranded oil tanker. This is because the Defendant did not contract to deliver a tanker of any particular size or condition etc.

However, the "mere difficulty in estimating damages did not relieve a tribunal of fact from the responsibility of assessing them as best it could." at 411

Instead, the court measured damages in reliance. This included all expenditure which the P incurred in reliance on the D’s promise that the tanker actually existed. The P was awarded reliance damages to compensate him for all his expenditure.

(iii) Mental Distress

Damages for breach of contract for pure mental distress are now recoverable in cases where the contract was one for the plaintiff’s enjoyment, relaxation or freedom from molestation: Baltic Shipping Co v Dillion (1993) 176 CLR 344.

OTHER HEADS OF DAMAGES

Injured feelings & loss of reputation
Addis v Gramophone Co Ltd [1909] AC 488
A majority in the House of Lords held that an employee could not recover damages for injured feelings, mental distress or damage to his/her reputation caused by the manner of the dismissal.

So that damages for breach of contract cannot include compensation for frustration, mental distress, injured feelings or annoyance occasioned by the breach. (Exception below)

Mental Distress

Damages for breach of contract for pure mental distress are now recoverable in cases where the contract was one for the plaintiff’s enjoyment, relaxation or freedom from molestation: Baltic Shipping Co v Dillion (1993) 176 CLR 344.

Baltic Shipping Co v Dillion (1993) 176 CLR 344
The P was a passenger on a cruise ship which sank on the 10th day of a 14-day cruise. She lost possessions & suffered physical injuries & emotional trauma as a result of the experience. The P was also distressed and disappointed because the holiday had ended in disaster.
The HC was asked to consider whether the P was entitled to damages for distress and disappointment. The general rule was that damages were not recoverable for hurt feelings. The HC recognized 3 exceptions to this:

1. Where the P has suffered personal injury;
2. Where the P has suffered actual physical discomfort & inconvenience; or
3. Where an object of the contract is the provision of pleasure and enjoyment or freedom from mental distress.

The HC accepted that this case fell within the third category concluding that damages for mental distress are recoverable where an object or term of the contract is either the provision of such things as entertainment, enjoyment or relaxation, or the prevention of such things as molestation, vexation or anxiety.

In Gates v The City Mutual Life Assurance Society Limited (1985) 160 CLR 1 at 11-12 Mason, Wilson and Dawson JJ explained the difference between expectation damages and reliance type damages in the context of explaining the difference between the measure of damages in contract and in tort. Their Honours said:

"In contract, damages are awarded with the object of placing the Plaintiff in the position in which he would have been had the contract been performed - he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the Plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss)."

*Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221*

**Facts:** Pursuant to an oral agreement, Pavey, a builder, had agreed to carry out renovations on a property owned by Paul. Paul had agreed to pay a reasonable price for the work & said the price to be calculated according to the current rates of payment in the building industry. Both parties were unaware that the contract was unenforceable pursuant to the Builders Licensing Act ‘71 (NSW) because it was not in writing.

When the work was completed, Paul moved into the house. She had already paid Pavey $36,000 but refused to pay the balance of $26,000 on the basis that it was not a reasonable amount for the work done. Pavey (builder) sued to recover the value of the work performed.

**Held:** The High Court recognised that a quantum meruit was available to recover a debt owing in circumstances where the law itself imposed or imputed an obligation or promise to make payment for a benefit accepted. As this action was not based on contractual principles, the builder was able to claim a quantum meruit even though the contract was unenforceable. Such claim is based on the concept of unjust enrichment.

A claim for quantum meruit depends upon the plaintiff proving that it had executed the work and that the defendant had accepted the benefit without paying the agreed price.

**DIFFICULTY IN ASSESSING DAMAGES**

*Howe v Teefy (1927) 27 SR (NSW) 301*

Howe, who leased a racehorse, claimed loss of prospective winnings and stable commissions after the owner of the horse, Teefy, took it away in breach of the lease agreement. Howe appealed against the low amount of damages awarded by the jury, claiming that the jury had no basis upon which to assess the loss. The Court of Appeal, however, rejected the appeal, stating that if the plaintiff’s loss is calculable in monetary terms, then the jury must attempt to arrive at a figure.

Causation is discussed in *Alexander v Cambridge Credit Corp*

The 'but for' test is a guide and not definitive or ultimate - common sense decides causation really. 
"...to establish a causal connection between a breach of contract and the damage which the plaintiff has suffered, he needs only to show that the breach was a cause of the loss. This is to be decided by the
application of common sense principles. In general, the application of the “but for” test will be sufficient to prove the necessary causal connection. But that test is only a guide. The ultimate question is whether, as a matter of commonsense, the relevant act or omission was a cause.”
DAMAGES IN TORT

DAMAGES IN TORT
Damages in tort are intended to place the P, so far as money can, in the position she/he would have occupied had the tort not been committed (Livingstone v Raywards).

Types of Damages
1. **Nominal**: Only awarded when (I) successful action but no other damages award is made, (ii) for torts that are actionable per se – not further discussed in this area of the course.
2. **Exemplary (punitive)**: Most frequently awarded in defamation actions, and will only be discussed in that context later.
3. **Compensatory**: The usual type. They can be:
   a) *Normal compensatory damages* – the vast majority of awards are based on the general principles of compensation
   b) *Aggravated* – to compensate for humiliation/insult – ie injury to dignity or feelings (not otherwise compensable).

ELEMENTS

1. The defendant has a tortious cause of action against the defendant;
2. The defendant's tort had in fact caused the plaintiff's loss;
3. The plaintiff's loss is not too remote, and
4. The plaintiff has not breached his duty to mitigate unnecessary loss

Both at common law (Todorovic v Waller 1981) and under the civil liability statutes (s 46), the plaintiff bears the burden of proving the first three elements with 'reasonable certainty' as opposed to 'absolute certainty'.

The defendant bears the burden of proving that the plaintiff has breached his duty to mitigate loss flowing from the defendant's wrong (Watts v Rake 1960).

ELEMENT 1: TORTIOUS CAUSE OF ACTION

A tort has occurred. For example:
- Deceit (fraud),
- Negligence,
- Defamation,
- Nuisance,
- Trespass,
- Passing off,
- Battery,
- Conspiracy.

For some of these (such as negligence) proof of injury or loss is a requirement of the cause of action, so the action will not accrue until damage occurs.

Establishing a tortious cause of action without proof of actual damage merely entitles the plaintiff to nominal damages (Wheeler v Riverside Coal Transport Co Pty Ltd 1964).

ELEMENT 2: CAUSATION
To obtain damages it must be prove on balance of probabilities that the loss was caused by the tort.

Standard of proof = balance of probability. If less than 50% chance of an event occurring, the law regards it as not happening: Malec v J C Hutton Pty Ltd (No 2) 1990

i. 'but for test'
ii. common sense test

Causation is a question which "must be determined by applying common sense to the facts of each particular case" (March v Stramare (1991) 171 CLR 506) with the 'but for' test being used as the threshold criteria test (March v Stramare (1991) 171 CLR 506, 533; Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310, 358)

The 'but for' test should only be used as a guide and that the ultimate question was whether 'as a matter of commonsense, the relevant act or omission was a cause' of the loss (Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310 at 358 per McHugh and Mahoney JJ)

HOWEVER, section 5D(1) CLA altered this principal, with the “but for” test being used for negligence cases.

March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506

Facts: Intoxicated P was injured when he drove into the rear of the D’s truck. The D had parked the truck, with its hazard lights on, in the middle of the road at night to load bins of farm produce. The trial judge found for the plaintiff but reduced his damages by 70 per cent to take into account his contributory negligence.

The question the High Court was required to answer was whether the ‘conduct of the defendant in parking a truck in the middle of the street was a legally operative cause of the damage suffered by the plaintiff’: at CLR 526; ALR 437 per McHugh J.

The High Court unanimously agreed with the trial judge and found that both the defendant’s parking of its truck in the middle of the road and the plaintiff’s intoxication were each a cause of the accident in which the plaintiff suffered his injuries or damage. Mason CJ, with whom Dean, Toohey and Gaudron JJ agreed, rejected the use of lengthy analysis of causation theory as not being useful in ascertaining or apportioning legal responsibility.

Instead, his Honour held that ‘at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage’: at CLR 509; ALR 425.

Their Honours also confirmed the continuing validity of the ‘but for’ test, but held that, in certain circumstances, the results yielded by that test must be ‘tempered by the making of value judgments and the infusion of policy considerations’: at CLR 516; ALR 431 per Mason CJ.

Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310

Facts: The appellant auditors (Alexander) breached a contractual duty to qualify their reports on the company’s 1971 accounts by noting serious deficiencies in the provisions for bad debts. The respondent argued that as a result of these omissions, the company’s perilous financial position was not fully appreciated. The company continued to trade, making substantial losses and after three years went into liquidation. The issue was whether the damages were caused but for the breach?

Held: Appeal allowed (by majority) “to establish a causal connection between a breach of contract and the damage suffered, a plaintiff needs only to show that the breach was a cause of the loss.

Held on appeal: There was no causal connection between the breach and the financial loss. There were a number of factors which had contributed to the damage complained of by the company. The court had to ascertain whether the auditor’s actions contributed to the loss or damage. This could be determined by the application of the “but for” test. In this case the company’s loss was the result of a
number of factors, including the decision to expand operations in a harsh economic climate.

**CAUSATION UNDER CLA**

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<th>5D General principles</th>
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<td>(1) A determination that negligence caused particular harm comprises the following elements:</td>
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<td>(a) that the negligence was a necessary condition of the occurrence of the harm (&quot;factual causation&quot;), and – ‘CAUSATION – BUT FOR TEST’</td>
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<td>(b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (&quot;scope of liability&quot;). – ‘REMOTENESS’</td>
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Section 5D requires the factual issue of causation to be treated as a separate question from whether there ought to be a liability. In applying section 5d(1)(a), the courts saw no difference between the ‘but for’ test and the necessary condition test (Adeels Palace Pty Ltd v Moubarak 2009).

The first two elements identified in s 5D(1) (factual causation) is determined by the but for test (Adeels Palace Pty Ltd v Moubarak 2009).

**INTERVENING EVENTS**

The defendant may escape liability if the chain of causation is broken by a later event which is seen as the real cause of the loss (March v E & M H Stramare Pty Ltd 1991). This must be determined using the ‘common sense’ test (Bennett v Minister of Community Welfare 1992).

Even though the original wrongful act may have been a necessary condition for the harm to occur, the subsequent event is seen as overtaking the causal connection. The subsequent event must arise independently of the original wrong; and must disturb the sequence of events that would have been anticipated.

The intervening cause must break the ‘chain of causation’ and be distinguished from 2 or more separate & independent causes of the one loss. Events which are reasonably foreseeable will not break the chain (Haber v Walker 1963).

**CONTRIBUTORY NEGLIGENCE**

The question of causation is between the plaintiff’s and the defendant’s negligence and their proportional causal responsibility for that loss.

**LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1965 - SECT 9**

Apportionment of liability in cases of contributory negligence

9 Apportionment of liability in cases of contributory negligence

(1) If a person (the "claimant") suffers damage as the result partly of the claimant’s failure to take reasonable care ("contributory negligence") and partly of the wrong of any other person:

(a) a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant, and

(b) the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

There are also statutory presumptions deeming contributory negligence such as intoxication by alcohol or drugs, or not wearing a seat belt or a safety helmet in a motor vehicle accident.