Tutorial 1: Causation and Remoteness of Damage in Contract

Question 1

1. Claudia runs a vineyard and winemaking business in the Hunter Valley, NSW. She enters into a contract with Jed for Jed to design and construct on-site a special apparatus for fermenting her grapes. Jed has experience in constructing such devices for winemakers in the region. It is a term of the contract that the device will be reasonably fit for its intended purpose, and Claudia explains her winemaking technique to Jed prior to contract. The date for completion of the apparatus is 1 March. This, Claudia expects, will coincide with the harvest of her grapes.

   Harvest occurs in early March as usual in the Hunter Valley, but Jed does not finish the apparatus until 31 March. Claudia has no other means of processing her grapes in the meantime, so about half of her crop rots and must be discarded. Jed has also been negligent in constructing the apparatus. The defective construction causes the wine to become contaminated by bacteria. It is widely known in the wine industry that contamination by this type of bacteria is a possibility if the apparatus is not constructed properly, but the contamination in this case is extraordinarily severe. The entire batch of wine is ruined and unsaleable. Claudia is particularly annoyed because she had a special arrangement with a wine club to sell her some of her wine at a 15% premium to its usual retail price.

   Advise Claudia on her right to damages for breach of contract.

Issue 1: Is there a contract?

- Here, there is a valid contract (per the facts)
- No apparent issues with contract formation
- NOTE: formation may be relevant where you learn about 'mutual mistake' – both parties perform their obligations in entirely different ways – such that there is no meeting of the minds

Issue 2: Is there an express or an implied term that is capable of being breached for these facts?

- Salient terms:
  - Express terms:
    1. "Fit for intended purpose"
    2. "Date of completion is 1 March"
  - Implied terms:
    3. Implied obligation to build this machine with due care and skill (implied from 'fit for intended purpose')

Issue 3: Identify the breaches

- Breach 1: Time stipulation has been breached
- Breach 2: Negligence – may breach the 'fit for intended purpose' term, or at least the implied obligation for due care

Issue 4: Identify the plaintiff's loss

- Loss 1 = discarded grapes due to late delivery → plaintiff is to decide how they formulate loss (***Clark v Macourt***); it can be formulated as 'physical damage' to grapes, OR as 'loss of profits' due to destroyed grapes

loss of income from not dancing) as "nervous breakdown" is likely not a 'recognised psychiatric illness'

- Loss of income from no dance partner
  - If claiming for the breach of the implied term through negligence → this claim is likely precluded by **s33** since 'not a recognised psychiatric illness'
  - If claiming for the breach of the express term → then there is likely a remoteness issue

Tutorial 3: Measure of Damage in Contract: Sums fixed by contract, including the law relating to penalties

Question 1

2. A charity organises a special fundraising event to be held in a large public entertainment centre in Sydney. Tickets are $100 each and the centre accommodates 2,000 people. The charity engages Bozo, an experienced clown and circus performer, to provide a full troupe of performers for two hours' entertainment on the evening. Bozo is to receive 30% of the total revenue derived from the ticket sales for the event; the sum is to be paid two days after the performance.

   Once the contract is signed, Bozo expends a significant sum ($35,000) in engaging other performers, acquiring costumes, materials etc and rehearsing for the event. Two weeks before the event is to be held, the CEO of the charity phones Bozo and tells him that ticket sales were not as strong as expected; the charity has to cancel their contract with him, to keep costs down. (You may assume that this is a repudiation of the contract). The CEO of the charity adds, spitefully, 'This is actually a good excuse to cancel your contract anyway – I thought your act was terrible'.

   Advise Bozo on his right to recover in the following *alternative* situations:

   (a) Bozo accepts that the contract is terminated, but he spends the next three months mired in self-doubt. The CEO of the charity, in a calmer frame of mind, phones Bozo again a few days later to attempt to negotiate a performance at a reduced commission. Bozo rejects the offer outright and the charity then cancels the fundraising event. Bozo also refuses an opportunity to earn $10,000 performing the same act at an interstate football final on the night the charity event was to be held.

   (b) Bozo refuses to accept that the contract is terminated and spends a further $5,000 preparing for performance. The charity continues with the event, but without arranging an alternative form of entertainment. On the night of the event Bozo and his circus troupe attempt to sneak into the centre but are stopped by security and prevented from performing.

1. Consider question 2 from last week's tutorial and advise Bozo on his right to recover in the following situation:

   As a distinct variation from paragraph (2)(a) or (b): Bozo accepts that the contract is terminated. A clause in the contract provides: 'Penalty to be paid to Bozo in event of cancellation of contract by charity: $50,000". Bozo wants to recover this sum.

   Advise Bozo. Would you answer differ if you learned that Bozo and the troupe had performed another concert on that night and earned $10,000?

From last week:

  - Breach by sub-letting for a month may be argued to be 'serious' (a trivial breach would be sub-letting for only one day or a few days – in comparison to 31 days) → thus giving rise to a common law right to terminate, and a right to claim loss of bargain damages of the 3-months rent
  - The students can seek to argue it was not a serious breach of the intermediate term (as only for one month – instead of like 3 months) → OR can argue it is a warranty (although this is unlikely to be accepted)

  - "Repudiation" – no repudiation, since they still performed, and paid the full rent → absent the breach, there is still no repudiation
  - SO – may not be able to recover loss of bargain damages AND may be in danger of unlawfully repudiating the contract, and may be liable for damages in breach itself

- **Conclusion**: If Jackson is able to establish that the tenants' conduct constituted a sufficiently serious breach of an intermediate term, he will have a common law right to terminate and consequently be entitled to recovering bargain damages.

Apply 3 rules of **mitigation**:

- Under the rules that a plaintiff must act reasonably to mitigate their loss → Jackson cannot recover loss that are reasonably avoidable, or loss that was avoided
  - The students (defendant) bear the onus of proving failure of mitigation (***TCN Channel 9***)
- The loss of 3-months rent was not an avoided loss (since he actually had no tenants offer to rent the property in those 3-months), and Jackson also did not incur any additional loss in any reasonable efforts to avoid loss.
- So, the question is whether the loss of rent for the three months before 1 December was a reasonably avoidable loss.
  - Although Jackson could argue that he took reasonable efforts to mitigate loss as he 'looked for a permanent tenant', it would be likely expected that Jackson would reasonably look to generate monetary benefit by seeking other tenants, whether it be short-term or long-term.
  - The students can argue that by just looking for a 'permanent' and 'long-term' tenant, without looking or advertising for 'short-term tenants' (such as via letting on airbandb.com or via short-term lease agreements), he did not act reasonably in mitigating loss → even if that was not his explicit preference
  - Jackson had clear knowledge about websites like airband.com being readily available to him, but he did not attempt to let the house on short-term agreements → This is contrary to the main purpose of lease contracts, which is for monetary benefit → and his difficulty in finding new tenants stems from his prejudice against the idea of short-term leasing → such that he failed to mitigate loss
- As per ***The Soholt***, an award of damages will be reduced to the extent which the loss ought reasonably to have been avoided. Hence, courts are likely to reduce damages to the extent which losses may have been reasonably mitigated through alternative types of leases to permanent tenants.
- ***British Westinghouse*** – what is reasonable steps?

honestly believe this – nothing prima facie on the facts → but can argue that she thought business could recover if a new owner took over whom could dedicate all time, but she had no market research – so she couldn't honestly believe it) → hence instead question whether:

II) Did Helen hold any reasonable grounds that Fred could improve → did she have reasonable grounds for the belief? → objectively on the facts we know, Helen had no market research to support this statement → hence Fred could prove misrepresentation of statement in this way
→ Counter-argument = she had operated in lawn-mowing for a long time (well established business) – so she knows that local market, and can have a reasonable sense about improved market conditions

b) INDUCES ENTRY → Was there any inducement by Helen for Fred to enter into this contract? (how could Helen discharge this?)
   - Fred calls Helen and asks about disparities between hers and his earnings → is evidence that can infer reliance → BUT, it must be evidence pre-contract (not post-contract) → so not strong evidence
   - Fred did not check → but an opportunity to verify the facts does not prevent proof of reliance: ***Redgrave v Hurd***
   - Requires an *intention* to induce the representee who then *relied* on the statement
     - Where there is a misstatement of a material fact, inducement will be presumed – subject to the representor showing that the representee did not rely on the statement: ***Holmes v Jones***
     - For the advertisement:
       - The critical moment, however, at which it must be true if there is not to be misrepresentation, is the moment when it is acted upon by the person to whom it is made.
       - In other words, if its falsity at the time it is acted upon be proved, it is immaterial that it was true when made; and from a practical point of view the result is better stated thus: if the person making a representation which is not immediately acted upon finds that the facts are changing, he must before the representation is acted upon, disclose that change to the person to whom he made such representation
     - An opportunity to verify the facts does not prevent proof of reliance: ***Redgrave v Hurd***
       - Because it's not 'but for' this scenario doesn't disprove causation
       - Nothing can be plainer ... on the authorities in equity than that the effect of false representations is not got rid of on the ground that the person to whom it was made has been guilty of negligence..."
       - NB: not the sole inducing but a mere factor of the inducement
   - whole point of these negotiations was for Helen to sell business to Fred
   - Presumption of inducement: "calculated to induce" (***Holmes v Jones; Redgrave v Hurd*** – Jessel LJ)→ burden shifts to Helen to disprove presumption
   - she knows business profits are not improving but actively argues it is doing well and will improve → thus actively calculated to induce Fred into contract.
     - ***Holmes v Jones*** – inspection of facts.
       - Helen can't discharge presumption

- Airspace = height reasonable height – potential use of the land (***LJP Investments v Howard Chia***)
- ***Bernstein v Skyviews*** → plaintiff unaware, but height much higher in that case [although awareness is not important] → since trespass is strict
- Height interfering with "ordinary use" – although it is reasonable height – it does not interfere with potential "ordinary use and enjoyment" of land
- No express/implied license to enter → but ***Anning*** said there was possibly an implied license to come into land to ask owners to film them

- Remedy
  - Nominal damages – trespass is actionable per se [Donna would argue there was no damage suffered by Muriel – so should only get nominal damages]
  - Substantial general damages – trespass is to protect exclusive possession rights (***Plenty v Dillon***) – so substantial damages to vindicate possession rights
    → In ***Plenty v Dillon*** – it was an intentional trespass, not an innocent mistaken trespass – so granted substantial damages
    → ***Lewis v ACT*** – false imprisonment – rejected "vindication damages" → but vindicating purpose can be fulfilled by substantial general damages
  - Injunction to prevent use of fruits of trespass (***Lincoln Hunt***) → but controversial per ***Smethurst*** since its too wide a basis – the conduct occurred after trespass, and injunction should only be used to prevent future trespass occurring
  - BUT, court has considered injunction for private and confidential information (***ABC v Lenah Game Meats; Smethurst***)

Barry v Donna

- Barry does not have title to sue because although he lives at this property, Muriel is the lessee of the property and hence Barry is a mere licensee
  - So no title to sue

Muriel v Donna

- Lease = exclusive control over land; Muriel holds possession and hence right to sue
- Direct interference with land = airspace which Muriel likely may have intended to exploit
  - Donna interfered by climbing on tree with branch 5m above Muriel's property
- Remedy:
  - Injunction preventing fruits of trespass (the photos) being sent out? → yes (particularly if Donna intended to publish in magazine)
  - Damages → distress, vindication of rights (general damages, aggravated damages, exemplary damages)

Part C

- Trespass and nuisance
  - Does **s72 *CLA*** debar a claim from being brought? – it was not flying at a reasonable height and air regulations
  - ASSUME air regulations – since not in scope of this course
  - "Reasonable height" – what is "low"
  - But it was daily flight at different times of the day - but **s72** debars just one flight (by reason of one flight)
  - Assume the height is reasonable
- Trespass
  - Direct = yes, since in airspace

  - Assumption of responsibility in a general or specific sense
  - Foreseeable class of plaintiffs – if no, then cannot have PEL claim for negligence
  - But, no specific test prescribed by ***Perre v Appand*** or ***Caltex v the Dredge***
- Refer to arguments in favour, then arguments against the duty of care IN EXAM
  - Evaluate all the factors – make the judgement on the more important factors

Part A

Grazier from northern NSW (Bob) who has bought the contaminated cattle (from Tim)?

- Cottonweed Ltd = negligent manufacturer
- Produce cotton seed that was contaminated and fed to Tim's cattle
- Tim sold these cattle to Bob
- After Bob bought the cattle, he realised they are defective and thus cannot sell them

- Tim is the one who suffered property damage (because his cattle were fed contaminated food) → he would have had a claim per ***Donoghue v Stevenson*** BUT because he sold all his cattle, he suffered no loss
- Bob has suffered P.E.L (pure economic loss)

To establish P.E.L

- Establish reasonable foreseeability (if you put contaminated cattle feed onto market, cattle would become contaminated)
- Salient features (***Caltex Refineries***)
- Control – Cottonweed were ones who decided to feed cotton husks to cows (analogous to ***Perre v Apand*** → Apand still sent out contaminated
- Reliance – brochures which had a representation from Cottonweed that their food is 100% safe
- No indeterminacy – there is an identified class of people (Cottonweed sends brochures out to beef producers across NSW)
- Thus, DOC established

Is this a case negligence involving PEL or a case of negligence involving property damage?

- It is PEL – Archie suffered PEL since did not own the property (cattle) at the time the cattle suffered the damage – and Harry has suffered consequential economic loss from the damage to cattle (property)

Reasonably foreseeable loss?

- Yes, pellet consumed by cattle, and sold onto other graziers, then if there is something wrong with the cattle, then they would suffer economic loss
- So foreseeable loss

Is Archie a foreseeable plaintiff, or foreseeable class of plaintiffs?

- Cottonweed did know about Archie as a foreseeable class of plaintiffs – since he was a grazier whom Cottonweed sent brochures to – and would likely suffer damage as a grazier who feeds the pellets to his own cattle
- Avoiding indeterminate liability – distinction between 1st line plaintiff, 2nd line plaintiff (kirby J, ***Perre v Apand***) → here, Cottonweed sent pellets to a supplier, who then

- Yes, their independent acts had caused the same damage – two different acts/omissions (negligent act by the subcontractor, and omission by the contractor)

- Was Wet Foundation wrong? → yes, since they were negligent
  → Analysis of breach, duty of care, causation for the subcontractor goes here
  → breach + causation not controversial – since this is negligence, apply the CLA (s5D on causation and s5P, 5O on breach)
  - Issue of causation – novus actus interveniens – since GSC continued using the field → also goes to contributory negligence in the apportionment

  → But, duty of care of subcontractor – requires foreseeable damage, vulnerability, assumption of responsibility, etc.
- So, Play Grass only liable for the proportion that is "just", based on its responsibility for the damage – i.e., relative culpability and causal impact
  - MUST assess the just proportion
- Must take out GSC's contributory negligence first before apportioning

Wet Foundation
- GSC claim against Wet Foundation is PEL
- Subcontractors generally not liable to owners – but assess salient features

Part B
- **Sports Bar** → claim for PEL as a third party against the contractor – but not an original owner of the property, and not a subsequent owner
  - No proprietary interest in the land (***Cattle v Stockton***) → but ***Caltex Oil*** extended this to allow for recovery of PEL without proprietary interest if D has the knowledge or the means of knowledge that P, individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss a consequence of his negligence, and owes P a duty to take care not to cause him such damage by his negligent act
  - Here, Play Grass had the knowledge that Sports Bar was the operator of the club facilities – and knew they would likely suffer damage upon negligent construction of grounds
  - But the barrier here is that there is no property damage
  - This was also a commercial building – so harder to claim PEL arising from defective buildings (***Bryan v Maloney*** recognises residential buildings, but ***Woolcock Streets Investments*** and ***Brookfield Multiplex*** did not extend to commercial buildings) → fails on the point of vulnerability
- Did not arise from property damage or personal injury – so generally, the bright-line rule debarring a claim would apply
- Duty of care:
  - Reasonably foreseeable – yes
  - Foreseeable plaintiff
  - Indeterminate liability
  - Vulnerability
  - Known reliance and assumption of responsibility (with the original owner)

Part C