Causation and Remoteness of Damage in Contract

Loss

- General principle that a plaintiff may only recover damages in respect of a loss which he himself has suffered
  - Exceptions include where a party expressly enters a contract as agent or trustee for another
- E.g. Panatown employed McAlpine to build a building on land owned by UIPL, and it was defective. Panatown suffered no loss as UIPL owns the defective building, which requires significant expenditure for its repair. Panatown seeks to recover from McAlpine the loss which UIPL suffered.
  - Concerned circumstances in which the employer in a contract may claim from the contractor on the ground of breach of contract damages in respect of a loss which has been suffered by a third party
    - Thus the loss becomes that of the employer instead of and in place of the third party
    - The promisee is deemed to have suffered the loss so that it is he and not the third party who is able to pursue the remedy in damages
  - In a commercial contract concerning goods where:
    - It is in the contemplation of the parties that the proprietary interest in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods;
    - An original party to the contract is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged; and
    - Is entitled to recover by way of damages for breach the actual loss sustained by those for whose benefit the contract is entered into
    - Such an exception won’t apply where the parties contemplate that one party will enter into separate contracts with the later owner
    - As part of the contractual arrangements entered into between Panatown and McAlpine there was a clear contemplation that separate contracts would be entered into by McAlpine, the contracts of the deed of duty of care and the collateral warranties
      - Thus they reflected the intentions of all parties engaged in the arrangements that the third party should have a direct cause of action to the exclusion of any substantial claim by the employer, and accordingly the exception shouldn’t apply; Alfred McAlpine v Panatown

Causation of Loss or Damage

- Damage must’ve been caused by the defendant
  - The plaintiff must suffer the loss or damage in respect of which compensation is sought because of the defendant’s breach
- Causation is a question of fact, not law, and it is sufficient if the plaintiff proves that the loss or damage would not have been suffered but for the defendant’s breach
  - This isn’t the exclusive test
  - The cases have broadened the concept so that, in both tort and contract, it’s generally sufficient that the breach was a cause of the loss
Measure of Damages

- The general rule at common law:
  - Where a party sustains a 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; *Ella v Wenham* and *Robinson v Harman*
  - Accepted and applied in Australia
    - Onus on proving damages sustained lies on a plaintiff
    - Amount of damages awarded will be commensurate with the plaintiff’s expectation, objectively determined, rather than subjectively ascertained
    - Plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation; *Commonwealth v Amann Aviation*, Mason and Dawson JJ
- The corollary of the general principle is that a plaintiff isn’t entitled, by the award of damages upon breach, to be placed in a superior position to that which he or she would’ve been in had the contract been performed; *Commonwealth v Amann Aviation*
- Mere difficulty in estimating damages doesn’t relieve a court from the responsibility of estimating them as best it can; *McRae v Commonwealth Disposals Commission*

Expectation Damages

- Presumption that the expectation interest’s applicable; *McRae v Commonwealth Disposals Commission*
- Attempt to place the plaintiff in the same situation, so far as money can do so, as if his rights had been observed; and
  - If in all the circumstances he had acted reasonably in an effort to mitigate his loss; *Koufos v C Czarnikow*
  - E.g. Clark purchased donor sperm samples from St George Fertility Centre and Macourt was also a party to this deed as the guarantor of the Centre’s obligations
    - Only 15% of the 3,513 samples were useable
    - Industry regulations would’ve only allowed Clark to use 2,500 and she successfully used 504
    - Thus Clark should receive the amount it would’ve costed to purchase the 1,996 samples
    - Her loss was to be measured by the value of what the Centre had promised to deliver but failed to do, and not by reference to what she outlaid as compared with what she received from the Centre
    - Looked to what sum was required to rectify the breach as at the date it occurred, not the diminution in value which had occurred to her business or the amounts spent in reliance on the promise; *Clark v Macourt*
    - *In the earlier appeal*, the NSWCA allowed Macourt’s appeal and reduced that amount to $215,000. Tobias J (Beazley and Barrett JJ agreeing), held that there was no evidence that Clark had yet paid anything for the samples, and that although she had suffered loss from not being able to use those samples, she mitigated that lost by using Xytex replacements, and recouping the extra costs associated with those replacements by including them in patient billing
- In a contract for the sale of goods, the expectation interest is often calculated by reference to market price; *Sale of Goods Act 1923* (NSW)
  - Damages for non-delivery:
    - 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; s 53(2)
    - Where there’s 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(s) when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver; s 53(3)
  - Damages for non-acceptance:
    - 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; s 52(2)
    - Where there’s 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(s) 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; s 52(3)
  - The general principle is applicable for delays:
➢ E.g. where there’s delay in arrival, the actual loss suffered prima facie can be measured by comparing the market price of the goods at the date when they should’ve arrived and the market price when they did arrive; Koufos
➢ Distinct from damages for delay in the payment of money

- Date of assessment:
  - General principle is usually stated to be that damages for loss of bargain are assessed by reference to the circumstances prevailing at the time of the breach
  - Measured by the difference between the market value and contract price at the contractual date for completion; Ella v Wenham
  - There’s an element of ambiguity as there are really two such dates: date of the anticipatory breach/repudiation and the date of failure to perform the contract; Hoffman v Cali
    - Date for assessing damages in cases of anticipatory breach
      - Promisee has the right to ignore an anticipatory breach and keep the contract open
      - Promisee may also accept the repudiation as putting an end to the contract and at once bring his action; and as such he’ll be entitled to such damages as would’ve arisen from the non-performance of the contract at the appointed time, subject to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss; Frost v Knight
      - Any special features that would displace this general rule? Any to displace the principle adopted in Ella v Wenham?
      - E.g. where no time was set for completion of the contract was stipulated, the date for assessment was the date when a reasonable time for completion of the project expired; Hoffman v Cali
  - In a sale of land or goods where the buyer terminates for actual breach, the measure of damages is the amount by which the market price exceeds the contract price on the date fixed for performance

- Difficulty in assessing damages is no reason to not do so
  - If a plaintiff has been deprived of something which has a monetary value, a jury isn’t relieved from the duty of assessing the loss merely because the calculation is a difficult one or because the circumstances don’t admit of the damages being assessed with certainty; Howe v Teefy

Reliance Damages

- Damages to compensate for wasted expenditure prior to the date of breach will sometimes be awarded
  - Whether plaintiff’s entitled to have its damages assessed on the basis of its expenditure rendered futile by the defendant’s repudiation
    - i.e., to be compensated for the expenses it had incurred in reliance on the contract and in equipping itself for the contract; Commonwealth v Amann Aviation
- Wasted expenditure can’t be claimed where, even if the breach of contract hadn’t occurred, the returns from the contract wouldn’t have been sufficient to recoup the expenditure
  - Onus of establishing such insufficiency is on the defaulting party
  - The value of the prospect of future extensions of the contract must be taken into account in assessing whether the returns from the contract would’ve been sufficient to recover expenditure; Commonwealth v Amann Aviation
- Full compensation for wasted expenditure wouldn’t be awarded if a plaintiff’s expenditure wouldn’t have been fully recouped had the contract been performed
  - A plaintiff is only entitled to damages for an amount equivalent to that which would’ve been earned had the contract been fully performed
  - Onus shifts to the party in breach to establish that the expenditure wouldn’t have been recouped even if the contract had been fully performed
  - If the onus isn’t discharged, a plaintiff’s entitlement to reliance damages remains intact; Commonwealth v Amann Aviation, Mason and Dawson JJ
- There must be some justification for departing from the expectation basis
  - E.g. where it isn’t possible for a plaintiff to demonstrate whether or to what extent the performance of a contract would’ve resulted in a profit for the plaintiff, it’ll be open to a plaintiff to seek to recoup expenses incurred
  - E.g. if the performance of a contract would’ve resulted in a plaintiff, while not making a profit, nevertheless recovering costs incurred in the course of performing contractual obligations, then that plaintiff is entitled to recover damages in an amount equal to those costs, as those costs would’ve been recovered had the contract been fully performed
  - E.g. client will be entitled to recover as damages expenditure wasted on account of negligent advice from a solicitor, less anything subsequently recovered and given reasonable acts of mitigation
Amount of wasted expenditure will be the appropriate measure of damages because, it having established that the client wouldn’t have entered into the contract if proper advice had been given, it isn’t sensible to speak of loss of profits; Commonwealth v Amann Aviation, Mason and Dawson JJ

- The manner in which a plaintiff frames his or her claim for damages will be dictated not so much by a choice of alternatives giving rise to an election, but simply according to whether the contract, if fully performed, would’ve been and could be shown to have been profitable (even if the actual amount of profit isn’t readily ascertainable)
  - If this can be demonstrated, a plaintiff’s expectation of a profit, objectively made out, will be protected by the award of damages
  - Otherwise, subject to it being demonstrated that a plaintiff wouldn’t even have recovered any or all of his or her reasonable expenses, a plaintiff’s objectively determined expectation of recoupment of expenses incurred will be protected by the award of damages
  - The plaintiff isn’t bound to elect whether it could pursue its claim for expenditure incurred or, in the alternative, its claim to recover for the loss of profits it would’ve earned had the contract been fully performed; Commonwealth v Amann Aviation, Mason and Dawson JJ

- E.g. plaintiffs were awarded damages assessed on a reliance loss basis when the Disposals Commission agreed to sell an oil tanker which didn’t exist and the plaintiffs wasted a lot of money fitting out an expedition and searching for the non-existent tanker
  - It’s impossible to place any value on what the Commission purported to sell
    - The Commission didn’t contract to deliver a tanker of any particular size or of any particular value or in any particular condition, nor did it contract to deliver any oil
    - Couldn’t assess damages on the basis of an ‘average-sized tanker’ plus an ‘estimated value of cargo of oil’, etc.
    - There was no market into which the buyers could go to mitigate their loss
    - While mere difficulty in estimating damages doesn’t preclude the responsibility to assess them, it doesn’t seem possible to say that ‘any assessable loss resulted’ from non-delivery as such
  - Distinct from loss of chance cases:
    - E.g. in Chaplin v Hicks, if the contract had been performed, the plaintiff would’ve had a real chance of winning the prize, and thus the chance was worth something (the broken promise is in effect to give the plaintiff a chance)
    - Can’t say that in this case, if the contract had been performed, the plaintiff would’ve had a chance of making a profit
    - Here the case concerns something which can’t be assessed and the element of chance lay in the nature of the thing contracted for itself
  - Distinct from a simple case of non-delivery:
    - If it was, the plaintiffs can’t establish that they’ve suffered any damage unless they can show that a tanker delivered in performance of the contract would’ve had some value
    - However, the contract alleged is one that there was a tanker in a particular place, and the breach is that there’s no tanker there, and the damages claimed are measured by expenditure incurred on the faith of the promise that there was a tanker in that place
    - Plaintiffs can make a prima facie case and say that this expense was incurred; it was incurred because of the promise; and the fact that there was no tanker made it certain that this expense would be wasted
    - The burden is now on the defendant to prove that, if there had been a tanker, the expense incurred would equally have been wasted (e.g. the tanker may have still been worthless or not susceptible of profitable salvage)
  - The plaintiffs were entitled to assume that there was a tanker in the locality given
    - Weren’t required to take steps to see whether there was such a tanker; as it assumes that they would be or ought to be in doubt as to the existence of the tanker; McRae v Commonwealth Disposals Commission

**Injured feelings**

- Key principles:
  1. Punitive damages, although sometimes awarded in tort to signify condemnation of the defendant’s conduct, aren’t awarded in contract
    - The manner of breach, e.g. harsh and humiliating dismissal, wasn’t a basis for increasing liability; Addis v Gramophone
  2. Damages are generally not awarded for non-pecuniary loss in the form of injured feelings, distress or disappointment
    - Technique is to draw a distinction between ordinary contracts concerned simply with the supply of land, goods or services, and contracts in which there’s an express or implied promise to provide enjoyment or entertainment
    - If the contract is of the latter type, damages may be awarded for non-pecuniary loss in the form of disappointment