

Parties
 Wish list (Analyse)
 Remedies Available
 Cause of action
 Causation
 Remoteness
 Mitigation
 Quantum
 Successful?
 Amount
 Contract "K" (CL damage)
 Torts (CL damage):
 Negligence
 Trespass to land / goods / person (PI)
 Passing off
 Deceit
 Misleading and Misrepresentation
 Equity (equitable damage):
 Specific Performance (SP)
 Statutory – ACL

Injunction
 Delivery Up
 Gain-Strip (Punishment)
 Account of Profits (AoP)
 Restitutions

LCA (Equitable compensation)
 Self-help: remove; abandon; contractual terms; self-defence

Coercive: Injunction; Delivery Up; SP; Rectification

K: SP (equitable damage); CL damages
 (if negligence stipulation): injunction (equitable damage); rectification
 (if vitiating (detriment) factor): rescission (restitution); nominal damage
 (when breach of K): ACL

Breach of IP right: injunction (interlocutory); Delivery Up; AoP; LCA
 (equitable damage as alternative)

Trespass: Injunction (equitable damage); Restitution; self-help; CL damage
 (even no damages, always nominal damage)

PI (neg): As if the torts not committed
PI (breach of K): As if the K has been properly performed

CONTRACT DAMAGES

K damage can be claimed without terminate K, except expectation loss.

1. A Cause of Action (P to prove)

If a K has been breach, P was automatically entitled for the nominal damage.
 To recover for more damage, P must prove and quantify the loss.

Parties to a K may include virtually any terms they wish in their contracts,
 including remedies for the breach of its provisions. However, certain clauses
 may be unenforceable either in equity, or in statute. (**Photo Productions v
 Securicor**)

Some terminology

- Nominal (talken amount) vs substantive (actual amount) damages
- Special (provable amount) vs general damages
- Liquidated (estimable, can't improve) vs unliquidated damages
- Punitive (punishment) / exemplary (可效仿的) damages (not claimable)
- Void (empty) vs voidable (cancellable) contracts
- Rescission (cancellation) & restitution (return)

2. Causation in K (P to prove)

'But for' test

Reg Glass v Rivers Locking System: RLS contracted to supply and fit
 security door. Thieves broke in with simple technic. RG thought that
 security door should be more difficult to break than other doors – HELD:
 Contract breached – **implied term that door reasonably goods at
 stopping theft. But for the breach** (the poor-quality door), **loss would not
 have occurred.**

Contributory Negligence

**Contri neg is irrelevant in a purely K based claim (Astley v Austrust
 Ltd).**

Break the chain in gross neg (Lexmead (Basingstoke) Ltd v Lewis): P
 bought a towing hitch from D to tow a trailer. After using it for a while he
 noticed it was broken, but continued to use it. Trailer detached and a
 serious accident occurred. P claimed damages for breach of contract
 because of a defect in the design of the tow hitch. HELD: P's negligence
 was a break in the chain.

Apportionments b/w defs (Hunt & Hunt Lawyers v Mitchell Morgan):

H&H argued they were concurrent wrongdoers with fraudulent party and
 should only be liable for proportionate amount. Court said the loss H&H
 caused is different from the fraudulent party. HELD: H&H only liable for
 small portion of the loss.

3. Remoteness in Contract (P to prove)

Two limbs (Hadley v Baxendale)

Case fact: Mill crankshaft taken for repairs. Deviation and delay by
 carriers. Millers claimed for lost work during delay of the test.

First limb – natural damage

- Purely objective test
- Would a reasonable person have considered it as a natural consequence
 (whether or not both parties themselves contemplated)

Second limb – special damage (apply when 1st limb not available)

- Can it reasonably be assumed to be within parties' actual knowledge /
 contemplation of special circumstances.
- Objective / Subjective elements in the test (**Hadley v Baxendale;**
Victoria Laundry v Newman Ind) Vic's fact: VL contracted to buy new
 boiler. 4 days before delivery by NI, it fell – 20-week delay. VL claimed
 £16 per week as normal expected profit from new boiler – succeeded
 under first limb.

Contemplation (in K) vs Foreseeability (in Torts)

Degree of foreseeability required for first limb?

Czarnikow v Koufos: 10 days deliver delay, and the sugar price dropped,
 loss £4000. Shipper admit their breach, and said they don't know buyer's
 intention to resell the sugar. HELD: the loss arose naturally, awarded £4k.

Mere knowledge not sufficient

Panalpina Intl Transport v Densil Underwearll: Can be expressed or
 implied undertaking.

Factors – What was D's actual knowledge (**Did D know the risk**); and
 – **Nature of the contract**, business people, price, extra
 consideration / payment.

4. Mitigation (Def to prove)

**P has duty to mitigate (British Westinghouse v Underground Electric
 Railways):** P should take all reasonable steps to mitigate loss. P debarred
 (was excluded) from claiming any part of the damage caused by P didn't
 take any step.

P must accept D's REASONABLE offer (Payzu v Saunders)

Case fact: Seller of the silk changed their mind and asked the vendor to pay
 by cash. P found another vendor and had to pay more.

NOTICE HERE: For compensate another car / item / vintage

5. Quantum (P to prove)

Put P into the position as if K performed properly. (Robinson v Harman)
'Once for all' rule – Lump sum

Date of breach & Measure by a replacement market value (Clark v

Macourt): Fact: Frozen sperm. Not only assess the damage at the date of
 breach, the event of **what happened later should also be taken into
 account.** Value of the loss prima facie, but should think further. Here, Clark
 recover the loss.

Johnson v Perez: The purchaser was supposed to buy by a certain date.
 But the purchaser didn't. So he breached K. Seller try to recover the money
 and gave purchaser extra time to pay. Eventually, bank closed the
 mortgage of the property and sold it at the market value at the time (less
 than K price). HoL used value at date specific performance lost as a
 remedy.

Golden Strait Co v Nippon Yusen Kubishka Kausha: Golden Victory
 chartered until 2005. In 2001, hirer repudiated and agreed to pay

damages. Before arbitrator assessed amount, Gulf War broke out in 2003. Hirer argued he would have exercised contractual right to terminate at that time.

No exemplary damage in K (**Butler v Fairclough**)

But if there is a concurrent claim in torts, court can award exemplary damages. E.g. deceit, inducement (cause) of breach of contract, interference with contract.

Non-economic loss

Historically, unquantifiable physical injury (mental distress, hurt feelings, loss of reputation, etc) NOT claimable under K (**Addis v Gramophone**): A was wrongfully dismissed without notice. Sued for damages including mental distress and loss of reputation – only got salary.

2 Exceptions:

Damage to reputation

Ruled out in **Addis v Gramophone**: HELD to be recoverable only in tort for defamation (scandal) (If you can prove defamation, that's claimable at tort. But if you claim for breach of K, you cannot claim damages for loss of reputation, if your employment is unfairly terminated)

Examined in **Flamingo Park v Dolly Dolly Creations** by F/rt: Textile Co breached exclusive agreement with FP to print design on fabric. FP sued for loss of reputation. HELD: Purpose of agreement was to protect reputation (once that breach, we can award damages)

Mental distress exception

Jarvis v Swan Tours: Winter holiday in Switzerland on basis of glossy brochure, but the reality was nothing like described in the brochure. The holiday was for the promotion of mental wellbeing. Because it caused mental distress, awarded £125 as damage.

Heywood v Wellers: Def's law clerk advised P to get injunction for £25, but took 10 months and £175 paid, another £460 due to P sue for mental distress. HELD: Awarded £175.

Baltic Shipping v Dillon: Cruise liner struck reef and sank off NZ. D suffered lost luggage and injuries. 2 wks holiday ended after 8 days. \$5000 damages for distress & loss of enjoyment awarded – mental wellbeing was a major object.

Main Heads of Damages

4 ways of calculating:

1. Expectation loss
2. Reliance damage
3. Restitution damage
4. Indemnity damage

Not separate heads of damage – different ways of achieving the purpose of compensation

1. Expectation loss (**Cth v Amann Aviation**)

MUST EXPLAIN: What P would have received if performed properly, including any profit element. Calculate by reference to difference in market value.

Market value might not be appropriate.

Cth v Amann Aviation - Aircraft with nowhere to go (Amann awarded tender for air surveillance for 3 years. Cth gave notice but did not follow procedure. Amann terminated and claimed damages. HELD: allowed damages based on wasted expenditure.)

2. Reliance damages (**McRae v Cth Disposal Commission; Cth v Amann**)

MUST: P's actual costs as a result of relying on D's K promise.

McRae v Cth Disposals Commission - The non-existent tanker (M successful in tender for salvage rights, but no tanker. HELD: awarded £3,000 reliance damage, and £285 refund of the tender fee.)

NO double recovery allowed (**Cth v Amann; TC Industrial Plant v Robert's Qld Pty Ltd**): P can elect which way to calculate a claim, and can recover in several different ways.

Court also won't fix a bad bargain – P will only be entitled to the agreed amounts.

3. Restitution damages (**Heywood v Wellers; McRae v Cth Disposals**)

Claim for unjust enrichment. Claim to get back what you've performed.

4. Indemnity damages (**Woolworths v Crotty**)

Woolworth v Crotty (K based): damages awarded where defective light bulb resulted in death – implied term; not in tort – no neg alleged or proven

Loss of Chance – generally treat it as a loss caused by the breach, and estimate amount the lost chance is worth

Chaplin v Hicks: select 50 to interview and award the 12 best ones. Mrs C was one of the 50, but not interview. HELD: **even the chance is less than 50%, it's still awardable.**

Howe v Teefy: Assessment of a chance (trainer lease famous racehorse for 3 years. The owner breached and took horse away after 4 months. HELD: a loss of chance and the **value of the chance could be estimated**)

Cth v Amann: P not generally entitled to damage for loss of benefit which D not obliged to provide. But court look at express and implied terms to determine what P had lost.

TORTS DAMAGES

2. Causation

To put P in the position as if the tort had not been committed (**Todorovic v Waller**)

Factual Causation – **'But for' test**

March v Stramare: 'common sense' approach together with the 'but for' test (S parked truck in the middle of the street, and M drove into it. The judge apportioned liability M-70%, S-30%.) **This approach is no longer relevant in neg claim but still available in other tort claim.**

Bennet v Min of Community Welfare: Arsenic poisoning (but for the doctor examine the patient, the patient would still die anyway, not satisfy the 'but for' test). HELD: Def needs to be the only cause of the loss.

In neg based tort, CLA gives 'necessary condition' test (s11 CLA)

s11(1) A decision that a breach of duty (duty or care in tort) caused particular harm comprises the following elements--

(a) the breach of duty was a necessary condition of the occurrence of the harm (**factual causation**);

(b) it is appropriate (policy factors) for the scope of the liability of the person in breach to extend to the harm so caused (**scope of liability**).

Adeels Palaca v Moubarak & Najem: A gunman in a restaurant.

Evidential Gap (**Fairchild v Glenhaven Funerals; Fitzgerald v Lane**)

If unable to prove which of multiple potential causes was the effective/actual cause, then P has difficulties with balance of probabilities test and exception applies.

Case fact:

Fairchild: P worked in several places and caught mesothelioma, but which employer? Only one of them could have caused the disease, because the first exposure is the cause, all the subsequent contact doesn't change or aggravate it. **Each materially contributed to the risk of harm.**

Fitzgerald: The pedestrian crossing (Pedestrian crossing street against green light, hit by two cars.

Concurrent Tortfeasors

A defendant can recover part of or the whole of the sum paid to the plaintiff from the other tortfeasors, if the defendant is one of (two or more) concurrent tortfeasors.

Hunt & Hunt Lawyers v Mitchell Morgan: H&H and the fraudulent party are concurrent wrongdoers, liable for proportionate amount.

Contributory Negligence (**Fitzgerald v Lane**)

Failure to warn (**Chappel v Hart**)

Case fact: The doctor failed to warn P about the risk after the throat operation

3. Remoteness

Scope of Liability

Polemis Test: Re Polemis & Furness

Reasonable foreseeable to P, not 'far-fetched and fanciful' (**Wagon Mound 1&2; Hughes v Lord Advocate**)

Wagon Mound 1: Charter negligently spilled oil at Morts Dock, Balmain. **Held**: the charter did not know, nor could reasonably have known, that the oil was capable of catching alight.

Wagon Mound 2: owner of ship sued for negligence and nuisance. **HELD**: foreseeability test applied to both negligence and nuisance, but, on evidence at trial, some risk of fire would have been presented in mind of reasonable engineer.