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Lecture 1: Damages – General Principles

Contract

Robinson v Harmon (1848) 154 ER 363, 365

Put them in the position as if the contract had been performed

"The rule of the common law is, that 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." (Parke B)

- "Expectation losses"

Tort

Livingston v Railyards Coal Co (1880) 5 App Cas 25, 39

Return them to their pre tort position

"where an injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation." (Lord Blackburn)

- "detrimental" or "reliance" losses

Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1:

- Cases can have both expectation and reliance losses, these principles overlap:
- *"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)." (Mason, Wilson and Dawson JJ)*
- *"Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation. **If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods in which he would have made a profit** then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation. This may well be so if the plaintiff can establish that he could and would have entered into the different contract and that it would have yielded*

the benefit claimed. ... That lost benefit is referable to opportunities foregone by reason of reliance on the misrepresentation. In this respect the measure of damages in tort begins to resemble the expectation element in the measure of damages in contract, save that it is for the plaintiff to establish that he could and would have entered into the different contract.” (Mason, Wilson and Dawson JJ)

Tort and Contract compared

- There is not one unified code of rules that applies to damages in tort and contract – Must still be considered separately
 - Rules change depending on what you’re suing for
 - Need to look at cause of action specifically

Commonwealth v Amann Aviation Pty Ltd (1992) 174 CLR 64

“While the general principle is the same in both contract and tort, the rules governing its application in the two areas may differ in some circumstances. Those differences are largely the result of historical considerations in that they reflect distinctions between causes of action rather than reasoned development or exegesis of the law ... They are of diminishing significance for most purposes ... Nonetheless, the stage has not been reached where they can be ignored ...” (Deane J)

Speculation and Reasonableness

- An award of damages is speculative at best and courts have to use the evidence in front of them to make a decision
- An award of damages is final

Lim Poh Choo v Camden and Islington Area Health Authority [1980] AC 174

*“The course of the litigation illustrates, with devastating clarity, the insuperable problems implicit in a system of compensation for personal injuries which (unless the parties agree otherwise) can yield only a lump sum assessed by the court at the time of judgment. Sooner or later, and too often later rather than sooner, if the parties do not settle, a court (once liability is admitted or proved) has to make an award of damages. The award, which covers past, present and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. **The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate.** Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering (in many cases the major part of the award) **will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low.**”* (Lord Scarman)

- Courts will not refuse damages because of uncertainty
- Courts will look at evidence available to calculate a sum that reasonably compensates for any loss caused by defendants wrong.

Section 5D – General principles

(2) In determining in an **exceptional case**, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

- Provides scope for the court to apply a lesser standard of causation as contemplated by *Bonnington Casting v Wardlaw* [1956] AC 613 and *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.
- Not yet tested in Australian law.

Remoteness

Remoteness is the normative aspect of a claim for damages:

- *Civil Liability Act*: “scope of liability” (s 5D(1)(b))

Remoteness limits the liability of the defendant to loss that is relevant/direct/proximate/foreseeable, even if it is clear that the defendant has caused much more extensive loss.

Reasonable foreseeability

Generally, the test of remoteness that applies in both contract in tort is “reasonable foreseeability”

The defendant will be liable for loss that was reasonably foreseeable as likely to occur:

- At the time the contract was formed;
- When the defendant breaches their duty of care or otherwise commits the tort.

However, the scope varies between contract and tort – *Koufos v Czarnikow*

Relevant tests:

Negligence	Reasonably foreseeable	Wagon Mound 1
Nuisance	Reasonably foreseeable	Wagon Mound 2
Trespass	Natural and probable consequences of actions	TCN Channel Nine v Anning
Contract	1. All reasonably foreseeable loss flowing ordinarily from the contract 2. Defendant is only liable for special circumstance of which they were aware	Two step test in: Hadley v Baxendale

Negligence / Nuisance – Reasonable foreseeability