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## Causation

For any claim for damages, the plaintiff must prove:

1. Loss or damage, and
2. The defendant's wrong **caused** the loss or damage

For negligence or nuisance

- Loss and damage is the gist of the action
- Establishing the cause of action will establish the right to damages

For contract or intentional torts

- Breach of contract, trespass etc. **do not require proof of loss** or damage to be actionable
  - o They are **actionable per se**
- Right to damages is a separate question from the cause of action
- Failure to demonstrate loss or damage caused by the wrong will result in an award of **nominal damages** only

Causation in fact

**'But for' test**

- This is the classic test of causation in both tort and contract
- Must ask; 'would P have suffered the loss irrespective of D's wrong?'
  - o If the answer is yes, then causation is **not proved** because the loss would have happened anyway
  - o If the answer is no, then a *prima facie* causation is **proved**
- ***Barnett v Chelsea & Kensington Hospital [1969]***
  - o Hospital negligently sent patient away
  - o Causation not proved because competent treatment would not have saved the patient

**Material cause: the D's wrong does not have to be:**

1. The **sole** cause of P's loss, nor
  2. **Sufficient** of itself to cause the harm
- When there are multiple causes of loss, the common law asks whether, as a matter of 'common sense', D's wrong was a **material cause** of the loss
  - A material cause = a **necessary condition for the loss**
  - ***March v E & MH Stramare (1991)***
    - o Vehicle accident the result of P's negligent driving and the D negligently parking a truck in the middle of the street
    - o D's negligence was a material cause of P's loss, so causation **established**

**Multiple sufficient causes**

- The but for test breaks down when **multiple sufficient** causes of P's loss occur: **casual overdetermination**
- For example; D1 and D2 shoot P simultaneously with a gun, each shot of itself would have killed P. D1 and D2 can argue that if they had not shot P, then P would have died anyway, therefore, factual causation not established
- Two types of casual overdetermination:
  - o **Duplicative** causation
  - o **Pre-emptive** causation

## Scope of liability

Even if D in fact caused P's loss, should D be liable? Was the loss caused **within D's scope of liability**?

Should D be held liable when:

- P's loss would have occurred anyway due to another sufficient cause?
  - o Common law: causation = common sense
  - o **CLA 5D(1)(b)**
- The loss caused was extraordinary or unforeseeable?
  - o Common law: remoteness
  - o **CLA 5D(1)(b)**
- D was not obliged to protect P from loss?
  - o Common law: scope of duty
  - o **CLA 5D(1)(b)**
- P partly caused the loss by their own negligence or failure to act reasonably?
  - o Common law: contributory negligence or mitigation
  - o **Law Reform (Miscellaneous Provisions) Act 1965 or CLA 5D(2)**
- The loss was partly caused by other wrongdoers?
  - o Common law: proportionate liability
  - o **Law Reform (Miscellaneous Provisions) Act 1965 or CLA pt. 4**

## Multiple causes

If multiple causes have caused P's loss, then the additional causes may:

- Reduce/eliminate
- Increase
- Have no effect

On D's liability

Each case is different, but the effect of other causes on D's liability depends on factors like whether:

- The other cause is a legal wrong (e.g. another tortfeasor)
- The other cause was independent or caused by the D's wrong

**Other causes may:**

- **Replicate** basic loss
  - o The loss caused by D – later events might have also caused this loss (casual overdetermination, duplicative/pre-emptive loss)
- Cause **additional** loss
  - o Loss inflicted by a later event which adds to the plaintiff's basic loss

**Overtaking cause: subsequent independent event**

- D may argue that an **overtaking cause** "breaks the chain of causation" between D's wrong and P's loss
- **DNM Mining Pty Ltd v Barwick [2004]**
  - o DNM negligently injured Barwick which caused him to lose the capacity to work in a mine
  - o Barwick found employment earning less on a farm
  - o Barwick was then injured in an unrelated car accident which would have caused him to lose the capacity to work in a mine
  - o Should DNM have to pay for lost capacity after the car accident?

## Personal injury at common law

### Guiding principles/introduction

Personal injury damages may be awarded to P for their loss caused by D's tort/breach of contract. At common law, personal injury consists of **physical injury** or **recognised psychiatric illness**, not mere transient emotional responses.

For tort; the principle of **restitution in integrum** will guide this assessment of damages and, therefore, aim to restore P to their pre-injury position (*Livingston*).

For contract; the rule of the common law is to place the party in the same position they would be in if the contract had been performed (*Robinson*).

Damages will be assessed from the **date of the incident**; <insert date> until the **date of assessment**; <insert date> (*Johnson*). All loss to be incurred after this date will be future loss.

1: Causation

2: Liability

### 3: Why CLA does not apply

As D's intentional act <state facts> was **committed with an intent to cause injury or death**, **Part 2 of the CLA will not apply** to this assessment of personal injury damages (s 3B(1)(a) CLA) (except for ss 15 and 18(1) for loss of domestic capacity, if applicable). This assessment will, therefore, be undertaken at common law.

### 4: Pecuniary loss

Compensation for P's pecuniary loss will be awarded for expenses **necessarily incurred** by P and **reasonable** for D to compensate (*Sharman*).

**Special damages** will be awarded for specific and identified expenses capable of exact calculation (*Paff; CSR v Eddy*).

**General damages** will be awarded for future potential losses (*Paff; CSR v Eddy*).

#### 4.1 Past

Medical expenses

- Medication, physiotherapy etc. is claimable as **injury-related medical expenses** (*Blundell v Musgrave*).
- Costs covered by **Medicare** are to be compensated and paid back to the Commonwealth (*Health and Other Services (Compensation) Act 1995 (Cth) s 8(1)*).
- Costs covered by **insurance** are not to be deducted from the assessment and are not to be considered mitigation for P's loss but will likely need to be repaid to the insurer (*National Insurance Co of NZ v Espagne*).

## Personal injury under CLA

### Guiding Principle/Introduction

Personal injury damages may be awarded to P for their loss caused by D's tort/breach of contract. At common law, personal injury consists of **physical injury** or **recognised psychiatric illness**, not mere transient emotional responses.

For tort; the principle of **restitution in integrum** will guide this assessment of damages and, therefore, aim to restore P to their pre-injury position (*Livingston*).

For **contract**; the rule of the common law is to place the party in the same position they would be in if the contract had been performed (*Robinson*).

Damages will be assessed from the **date of the incident**; <insert date> until the **date of assessment**; <insert date> (*Johnson*). All loss to be incurred after this date will be future loss.

Under the CLA, 'injury' includes pre-natal injury, impairment of a person's physical or mental condition, and disease (s 11 CLA).

#### 1: Causation

#### 2: Scope of liability

#### 3: Why the CLA applies

**Part 2 of the Civil Liability Act 2002 (NSW)** ('the Act') applies to all claims of personal injury, except those excluded by **section 3B**. One such exclusion is the liability of a defendant who commits an act 'with intent to cause injury or death'. **The Act, therefore, applies** to torts so long as the commission of the act did not intend to cause harm.

#### 4: Pecuniary Loss

Compensation for P's pecuniary loss will be awarded for expenses **necessarily incurred** by P and **reasonable** for D to compensate (*Sharman*).

**Special damages** will be awarded for specific and identified expenses capable of exact calculation (*Paff; CSR v Eddy*).

**General damages** will be awarded for future potential losses (*Paff; CSR v Eddy*).

##### 4.1 Past

###### Medical expenses

- Medication, physiotherapy etc. is claimable as **injury-related medical expenses** (*Blundell v Musgrave*).

## Property damage

### In contract

#### Introduction/guiding principles

In awarding damages for loss caused by a breach of contract, the rule of the common law is to place the party in the same position they would be in if the contract had been performed (*Robinson v Harmon* (1848) at 365 per Parke B).

Such an award of damages protects the plaintiff's expectation interests that arose from the creation of the contract (*Cth v Amann Aviation* (1992) person Mason CJ and Dawson J).

Damages will be assessed from the **date of the incident**; <insert date> until the **date of assessment**; <insert date> (*Johnson*). All loss to be incurred after this date will be future loss.

The onus is on the plaintiff to prove, on the balance of probabilities, that their expectations of the performance of the contract were likely attainable, and that objectively, damage has been sustained as a consequence of the breach (*Cth v Amann Aviation* (1992) person Mason CJ and Dawson J).

If D either;

- Fails to install/repair/build something according to the contract, or
- Damages property in the performance in the contract, then

A measure of loss is the cost of rectifying the poor workmanship/damage

#### 1: Causation

#### 2: Scope of liability

#### 3: Repair/rectification

P may choose to have their loss compensated for by having D **pay the cost** of putting the **property into the condition** it would have been in **if the contract had been performed**.

P will need to prove that the rectification was both **necessary** and **reasonable**, as a question of fact (*Bellgrove*). This test for reasonableness is quite wide, it will only be in exceptional cases where something won't be reasonable (*Tabcorp*). Questions of reasonableness arise when the cost of repair/rectification is too disproportionate to the contract price or to the benefit to the plaintiff in having the repair work done, or when P does not intend to or cannot repair the property.

If reasonableness is not satisfied, P will need to seek the second remedy of loss in value (below).

#### 4: Loss of value in the property

This remedy is utilised if P cannot satisfy the Court that the rectification is necessary or reasonable, for example *Pantalone v Alaouie*. It will provide damages for the **difference in value** between the value of the property had the contract been properly performed, and the actual value of the property after the breach.

## Breach of contract

### 1: Causation

### 2: Scope of liability

### 3: Guiding principles

In awarding damages for loss caused by a breach of contract, the rule of the common law is to **place the party in the same position they would be in if the contract had been performed** (*Robinson v Harmon* (1848) at 365 per Parke B).

Such an award of damages **protects the plaintiff's expectation interests** that arose from the creation of the contract (*Cth v Amann Aviation* (1992) per Mason CJ and Dawson J).

Damages will be assessed from the **date of the incident**; <insert date> until the **date of assessment**; <insert date> (*Johnson*). All loss to be incurred after this date will be future loss.

The **onus is on the plaintiff** to prove, on the **balance of probabilities**, that their expectations of the performance of the contract **were likely attainable**, and that objectively, **damage has been sustained** as a **consequence of the breach** (*Cth v Amann Aviation* (1992) per Mason CJ & Dawson J).

It is likely P will be able to prove such as ... <relevant facts>. Thus, P will be able to claim:

1. The net profits or the **net value of the bargain that they expected to receive** but have been lost because of D's breach (*Cth v Amann Aviation* (1992)).
2. As P will not be able to prove that they were going to get a profit from the execution of the contract, they **can claim for wasted expenditure** on their performance to allow them to be restored to their pre-contractual position (*McRae v Cth Disposals Commission* (1951))
3. For **loss of chance**, due to the lost opportunities to make a profit (*Chaplin v Hicks*)

### 4: Where the contract is for the sale of goods

As the contract was for the **sale of goods**, it is subject to the *Sale of Goods Act 1923 (NSW)*.

#### If seller refuses to deliver goods

*Rules assume that neither party has paid the price yet*

As D, the seller, has **refused to sell the deliver the goods**, damages are provided for under **section 53 SoGA**. The measure of the damages will be the **estimated loss that has directly and naturally resulted from the breach**. As there is a market for the goods in question (state the goods) the measure of damages is, *prima facie*, the **difference between the contract price and the market price** of the goods on the **day of the breach**.

The market price on the day of the breach will be used for the purpose of calculating damages due to **P's obligation to mitigate their loss** by selling the good as soon as possible after the breach (*Clark v Macourt* (2013)).

## Equity: specific performance for breach of contract

### 1: Maxims

Equitable remedies are **discretionary** and may apply where **damages are not adequate**. Before the court of equity will award an equitable remedy, a number of maxims must first be considered that underpin equitable concepts and principles (*Corin v Patton*).

#### *Clean hands*

A man **must come into a court of equity with clean hands** (*Dering*). Thus, if P has acted improperly, equity may choose to not grant relief.

It has to be **bad conduct relating to the transaction** or legal dispute, not just bad in general, for example if P has lied, acted unconscientiously or by way of abuse of process (*Krakowski*).

#### *One who seeks equity must do equity*

P is **obliged to fulfil their obligations** to D (*Chen*). P has to keep their side of the bargain as well, as you can only earn relief by doing equity.

#### *Laches*

Equity will **assist the diligent**, not the tardy. Equity to be pleaded in a reasonable time frame after the cause of action has arisen. If a long period of time has passed, it **may be unfair or unreasonable** to expect D to grant after all this time (*Fysh v Page*). D must **not be kept in suspense** of eventual action (*Lamshed*).

#### *Hardship*

D may argue that the relief will cause **undue hardship**. The Court will **balance** this potential hardship to D against the unfairness to P of denying them the equitable remedy. D must prove it will be **oppressive** to grant the remedy far outweighing the inconvenience to the plaintiff if it is not granted (*IGA v King*). Only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property (*Patel v Ali*).

### 2: Preconditions to relief

In awarding this remedy, equity exercises its **discretionary, auxiliary jurisdiction**. It will be ordered when **damages are inadequate** to compensate P.

More likely to get specific performance for the **sale of land**, as equity recognises each parcel of land is unique so P would be unable to get an exact replacement on the market (*Dougan*).

More likely to get specific performance for **unique or custom-made goods** as you are not likely to be able to replace it (*Dougan*).