

1. Is there a contract? – Has there been a **factual breach** of a term of the contract?
2. Identify the **loss** that has been suffered?
3. Has there been **causation**?

#### Statute

Is it a **CLA** case? Are we concerned with the nature of the party's performance (standard of care in performance? To exercise reasonable care and skill – contractual negligence case?)

- Applies to any claim for damages for harm resulting from negligence (even under contract) (**s 5A**)
- In determining negligence, the negligent act must be a necessary condition of the harm (factual causation) **5D**
  - To determine, consider subjectively what they would have done had they not been negligent (**3a**) – a statement about what they would have done is inadmissible (**3b**)

#### Common Law

- a. Would the loss have occurred 'but for' the action of the defendant? Need not be the cause but a cause. **March v Stramore** if this leads to absurd results use common sense (**Chappel v Hart**)
  - i. E.g. **Alexander v Cambridge Credit Corporation** – auditors overstating a company's assets in breach of contractual DOC, kept trading and going more in debt. Claim in damages – but for test satisfied.
- b. Consider the existence of a novus actus interveniens: reasonable foreseeability?

4. Are the damages claimed too **remote** to be within the scope of the defendant's liability?

#### Statute

**CLA s5D(1)(b)** – It is appropriate for the scope of the negligent person's liability to extend to the harm.

#### Common Law

- a. Not all loss is able to be compensated
 

#### **Hadley v Baxendale**

  - i. Damages arising naturally – according to the usual course of things. (General damages). What the parties are presumed to have known could occur as the result of the breach OR
    1. What you reasonably ought to have known at the time the contract was formed **Victoria Laundry v Newman Industries**
  - ii. Damages that were reasonably in the contemplation of both parties at the time they made the contract, as a probable result of the breach – parties knew or ought to have known. Special/actual knowledge (if there is any special or unusual loss if you advise other party increases chances or recovery).
    1. What you actually knew, and in consequence of that knowledge, the loss was supposed to be reasonable. **Victoria Laundry v Newman Industries**
    2. E.g. **Victoria Laundry v Newman Industries** – can only claim for loss of usual profit (first limb) however defendant would not have reasonably known about special contracts therefore unable to claim for that loss (second limb).
    3. **The Achilles** – HOL unsure if applies in Australia

- a. Loss of profits from the next charter is not within **Hadley v Baxendale** rules.
  - b. **Hoffman** – damages are the difference between the market and charter rate. Can't be liable for next contract because no knowledge or control of future work.
- b. Element of foreseeability
- i. Test for remoteness is more restrictive in contract than tort – higher degree of probability needed. The defendant must ought to have realised that the loss was 'not unlikely to result from the breach of contract' **Koufos v Czarndnikow**.
  - ii. Is the type of loss a likely result of the breach? Was it contemplated the type of consequence as a serious possibility **Parsons v Uttley Ingham**
    - 1. Pigs fed mouldy food – got e.coli and died. Ought to have reasonably foreseen if they were fed mouldy peanuts they would be ill – although extent far worse than foreseen – does not lessen liability. Liable for loss of pigs but not future profit.

5. **What damages** is the party entitled to? NB: Generally Expectation OR Reliance is awarded NOT both

Object of damages is to place the plaintiff in the position they would have been in had the contract been performed **Robinson v Harman**.

1. **Expectation** damages: place P in same position as if the contract had been performed.
  - a. The plaintiff's loss must be genuine, and the additional expenses incurred reasonable – **Gageler J Clark v Macourt**
  - b. Damages are assessed at the time of breach and is the difference in value of what was promised and what was received. **Clark v Macourt**
    - i. **Clark v Macourt** sperm facility case – unable to use sperm – damages should be calculated by the amount it would have cost at the time to replace the goods.
    - ii. Criticised judgment because the award of damages left P in a significantly better financial position than she would have been in, had the breach not occurred.
  - c. The value damages are to be assessed at the date of the breach. **Hoffman v Cali**
  - d. Just because there is difficulty in assessing damages is no reason not to do so **Howe v Teefy**
    - i. Borrowed a horse – owner randomly took back. Sued for loss of winnings. Just because tis made it difficult, doesn't mean not entitled to the damages – can be calculated off betting odds etc.
  - e. Damages are recoverable fro loss of chance of something valuable **Chaplin v Hicks**
  - f. **Sale of Goods Act NSW**
    - i. Non-delivery
      1. Damages is the direct and naturally arising course of events – measure is to be ascertained by difference between contract price and market price from when they ought to have been delivered. (s53)
    - ii. Non-acceptance
      1. Damages is the direct and naturally arising course of events – measure is to be ascertained by difference between contract price and market price from when they ought to have been accepted. (s52).
2. **Reliance** Damages: Damages to compensate for wasted expenditure prior to date of breach
  - a. **McRae v Commonwealth Disposals Commission**

- i. Where It is impossible to calculate the expectation award then you may turn to reliance damages (e.g. what if tanker did exist and it was worthless).
  - 1. Argued that giving them reliance damages assumes the contract would not have been a loss making one – but HCA said it is forth Cth to show that it would have been a loss making one.
  - 2. Here the Cth promised that the tanker did exist.

#### **b. Commonwealth v Amann Aviation**

- i. Proper expected benefit cannot be assessed because contract not likely to bring much expectation – however argued to consider the value of a contract renewal. Original contract would not cover expenditure in preparing for flights therefore reliance damages.

### **3. Restitution Damages:** Where the defendant makes a profit from the breach

- a. Little acceptance for this in Australia – principle of unjust enrichment unlikely to be a freestanding basis but can help explain existing causes of action – court didn't want to depart from compensatory only in **Hospitality Group v Australian Rugby Union**.
- b. Restitution is only used when other remedies are not available or are inadequate

#### **i. AG v Blake**

- 1. An exceptions case because Blake had harmed the public interest by selling a book disclosing defence force information. Ordinary remedies are inadequate.

#### **ii. Surrey County**

- 1. Built extra amount of homes than allowed – council claimed damages for these profits because they had not suffered a loss. Damages may include the profit that council had lost, but not to award to them the profit D had gained.

*Bargain damages see below.*

**BUT:**

### **1. Termination**

- a. A contract need not be terminated in order to claim damages
- b. When a party terminates the contract under a termination clause, it cannot then attempt to recover future monies in breach of a contract. **Shevill**
- c. Can only recover damages, if at time of termination, there existed a right to terminate at common law (not an express power to terminate). **Shevill**
  - i. If you elect to terminate through an express power – as long as there still existed a right to terminate at common law this is ok.
- d. Renters late in making payments – terminated lease under clause but then sued for future money would have gained if lease went until the end.

NB: Shevill not a great case – rise in anti-shevill clause that provide a term is essential and any breach will permit party to terminate and seek damages **Duffy Bros**

### **2. Injured Feelings**

Begin with common law, if there is no exception/entitlement made out, there is no need to apply CLA.