TORTS AND CONTRACTS II

TABLE OF CONTENTS

THE INTERSECTION OF TORT AND CONTRACT

CONCEPTUAL DISTINCTIONS

"The law of torts governs infringements of interests protected by the law independently of private agreement, whereas the law of contract governs expectations arising out of particular transactions between individual persons." (J H Baker, An Introduction to English Legal History, 2002, p 317).

Theoretical foundations and rationale for liability – purpose of contract vs purpose of tort?

- Tort is about imposition of duty, caught by tortious obligations (largely law based).
    - Intention = objective (reasonable person test).
    - Law of tort exists to protect **personal interests** against intentional wrongdoings or negligence.
- Contract is about enforcement of agreements (largely agreement based).
    - But there can be some overlap and some scope for contracts to act outside consent e.g. contractual obligations can be enforceable by law such as those under ACL.
    - Intention = objective (not about what you agreed to, but what a reasonable person should agree to) → causes problems.
    - Law of contracts exists to hold people to performance of promises and protecting economic interests → **performance interests**.
- Boundary between tort and contract is blurry – can have CL.
- **Legislation can override CL principles** e.g. applies to negligence claims under the CLA.
- **Limitation periods:** Actions in contract and negligence are both subject to a 6-year general limitation period, and a three-year limitation period in personal injury cases. Doesn't matter how you frame the action, if personal injury is involved, 3 year limitation still applies (doesn't matter if brought in tort or contract).
    - Time won't run when under legal incapacity (under age, unconscious, etc).
    - In respect of torts, namely negligence, time starts to run when loss/damage is suffered whereas in contract, time starts to run at date of breach. Only practically significant where concurrent liability operates and one claim may be barred, but usually not an issue.
- **Choice of law** rules are different in respect of tort and contract – in tort the relevant interest is lex loci delicti (law of the place where the tort was committed), starting point in contract is the question of what the parties intended the choice of law to be (often have a choice of law clause, consider where contract formed/intended performance).
- **Remedies** are different:
    - Damages in tort: compensatory, aggravated (unusually humiliating wrong) and exemplary (to punish wrongdoer and make example of them).
    - Damages in contract: compensatory, nominal (resistutio in integrum).

Concurrent liability in tort and contract

- You can have concurrent liability in tort and contract in Australian law – in respect of the same event/factual matrix/conduct, you may be able to maintain an action in both tort and contract.
- E.g. implied term to take reasonable care – need to establish a breach to pursue action in contract too.
- Most common in professional negligence cases – medical, solicitors, engineers, architects, etc.
- Rule against double recovery – can't plead the same action twice and recover both times (limited by anchor estoppel). Separate claims can succeed, but recovery can only occur once.

Contributory Negligence

- Tort: If established CN on part of complainant, was a complete defence to bar the claim. Now, it is a sliding scale and can have a partial reduction of damages.
- Contract: CN was no defence. Modified by statute and is now a defence but only in a situation where there is a tortious duty of care in the contract (concurrent and coextensive with a tortious duty of care).
- Not a defence to an action for breach of contract, per **Astley v Austrust (1999)**.

- Under **s8 and s9 of the Law Reform (Miscellaneous Provisions) Act 1965 (NSW)**, CN may apply to a claim for breach of a contractual duty of care that is concurrent and co-extensive with a tortious duty of care.

CAUSATION AND REMOTENESS OF DAMAGE IN CONTRACT

LOSS

Alfred McAlpine Construction Ltd v Panatown Ltd [2000]

- **Principle: In identifying the loss, compare the situation of the plaintiff prior to and after the breach of contract.**
- Building contractor, AMC, entered into a contract with the employer, P, for construction of an office block and car park on site owned by another company in the same group as employer.
- AMC entered into a duty of care with the owner of the site, which stipulated that where a lack of reasonable skill and care was found to have been shown by AMC, a remedy was available to the owner at a nominal amount.
- The deed was assignable to any successor in title. P was a successor.
- Serious defects were found. P sought damages against AMC for the delay and the defects (having already received a damages under the duty of care deed).
- AMC appealed and it was found: P was not entitled to recover substantial damages because there was already a duty of care between AMC and the third party (narrow ground) so P did not have their own right of action against AMC. They did not suffer a financial or substantial loss and owner had own right against M (broad ground).
    - Broad ground: **Lord Clye:** where A contracts with B to pay a sum of money to C and B fails to do so. The loss to A is in the necessity to find other funds to pay to C and provided that he is going to pay C, or indeed has done so, he should be able to recover the sum by way of damages for breach of contract from B.

Loss → satisfy causation (caused by D) → satisfy remoteness (not too remote)

Where a plaintiff claims to have suffered loss or damage by reason of the defendant's breach, the **onus of proving the extent of loss or damage rests on the plaintiff**: **Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938).**

CAUSATION

Causation: Damages must have been caused by the defendant (act/omission) - was the damage claimed by the plaintiff caused by the breach?

Tests for causation

But for test – would the harm have occurred but for the relevant act/omission?

- Starting point is here, but need to apply common sense, and can consider other tests → **always argue to common sense conclusion** (chain of causation limited by CS/inflexibility - **March v Stramare**).
- Issues occur where there are multiple concurrent causes (multiple D), novus actus interveniens, etc.
    - Also issues with judge's subjectivity when it comes to common sense.
- Limited by **reasonable foreseeability.**

Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd (1968)

- **Leading case for operation of but for test.**
- **Principle: Causation is a question of fact. Sufficient connection will be met where the plaintiff can show that 'but for' the breach, the loss would not have occurred**.
- *look at this case first as a supplement to but for – often don't need any more than this.
- A shopkeeper seeking to protect its premises against burglary engaged a company which carried on the business of providing burglar-proof protection to supply security installations including the supplying, fitting and hanging of a steel-sheeted back door fitted with a non-break-out locking system.
- Burglars broke into the shop in a comparatively short time.
- In an action by the shopkeeper against the supplier of the door, verdict and judgment were given for the shopkeeper.

- In installing the door as it did, there was no breach of express terms, but it was implied by CL that the business would provide a burglar-proof door with reasonable protection and this warranty has been broken since the door was not reasonably fit.
- Court found the warranty had been broken and the measure of damages was the value of the goods stolen.

Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938)

- Contract between Tramways and Luna park for advertisement across 53 boards on trams for 3 seasons for at least 8 hours a day. After 2 seasons, Luna Park alleged breach allowing them to terminate contract on claim that each and every board should have been displayed for those 8 hours.
- Tramways interpreted it would be complying if it was an average of 8 hours rather than exact. Tramways kept performing in the third season and Luna park contested and sued for payment of the third season and sought damages for breach of contract.
- Luna Park was unable to demonstrate and quantify the loss, so was unable to obtain damages for loss.
- Damages are awarded for breach of the contract if the following can be proven:
    - that the plaintiff has suffered loss;
    - that the loss was caused by the breach (causation);
    - that the loss was reasonably foreseeable; and
    - reasonable efforts were taken to mitigate / prevent the loss from occurring.
- **Key principles:**
    - Except in cases of anticipatory breach where termination is necessary, a plaintiff does not have to terminate a contract in order to claim damages
    - Damages awarded are only nominal in cases where the plaintiff can only prove breach of contract, i.e.the plaintiff proves no more than the defendant's breach.
    - **Test of essentiality:** whether it appears form the general nature of the contract as a whole or from some particular term or terms, that the promise is of such importance to the promise that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

CLA: **s5D of the Civil Liability Act 2002 (NSW)** sometimes applies in tortious or contracts claims (below) – question is if there is a **breach in obligation to exercise care and skill**.

REMOTENESS

Remoteness: must be some boundaries to liability, or a point where liability stops – notwithstanding that you might have caused loss, you ought not to be responsible as a matter of law due to limited scope.

In tort, apply **reasonable foreseeability** of type/kind of harm (could you foresee the harm might occur?) or **eggshell skull rule** (take them as you find them and liable for all loss/consequences).

In contract, law in remoteness in contract generally under **Hadley v Baxendale (1854):**

- The plaintiffs were millers and mealmen (dealers in grain) and operated City Steam-Mills in Gloucester. They worked the mills with a steam-engine. The crank shaft of the engine was broken, preventing the steam engine from working, and contracted with W Joyce & Co in Greenwich to have a new crank made. Before they could make the new crank, W Joyce & Co required the broken shaft to be sent to them, to ensure the new shaft was made to the appropriate dimensions.
- The defendants were carriers operating under Pickford & Co. The plaintiffs engaged the defendants to deliver the broken shaft to W Joyce & Co. The defendants did not deliver the crank shaft in the time specified (2 days after receiving it from the plaintiffs), but instead delivered it 7 days after they received it from the plaintiffs.
- The delay prevented the plaintiffs working their steam-mills for the five days comprising the delay, which in turn prevented them meeting supply of customers from their own mills, depriving them of the profits they would otherwise have received.

- On appeal, **Barron Alderson** elaborated on the first/second limb test:
- **First limb: general damages** – arise naturally according to the **usual course of things** from the breach. This is recoverable so not too remote.
    - Example: **Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas') [2009].**
- **Second limb: special damages** – may be reasonably supposed to have been in the **contemplation of both parties (knowledge) at the time they made the contract**, as the probable result of breach. This is recoverable so not too remote.
    - Example: Need to also consider heads of loss - **Victoria Laundry (Windsor) v Newman Industries (1949)**: some aspects of claim are compensable/not too remote but other aspects, aren't compensable/too remote – is that particular claim too remote?.
        - Case involved the sale of boilers to launderers and dyers. Buyers told sellers that they intended to put it to use in the shortest possible time, but the delivery was delayed by 5 months.
        - The buyer claimed for lost profits since they could have done more ordinary business plus extra profits but couldn't accept a lucrative contract from the government due to the delivery delay.
        - For the plaintiffs to recover the profits expected on the special contracts, the defendants would have had to know of the prospect of such contracts. Second limb test failed.

But not a perfect test, so can consider **Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas') [2009]**

- Charterer of a ship was meant to return it on a particular date, but return was slightly late.
- The owner of the ship had another contract lined up with a different party.
- Due to a late return, the owner breached the contract with the third party.
- The third party still wanted to take the ship but wanted reduced rent due to the break and market drop at the time.
- Question was how do you quantify damages for this? **Lord Hoffman** suggested: the guiding rule is that **a party may recover losses which were foreseeable** – have facts come to the defendant's **knowledge**? So did they actually **assume the risk**? (further inquiry than Hadley test).
- In this case all the lost rent was not recoverable.
    - Held: HOL reversed Hadley limb 1 test. Reasonable parties would not enter into a contract like this on the basis that the defaulting party would be liable for any loss, however large, occasioned by a delay in redelivery in circumstances where it had no knowledge of, or control over.

CLA: s5D of the Civil Liability Act 2002 (NSW) sometimes applies in tortious or contracts claims.
5D – (1) determination that negligence caused particular harm comprises of: (a) that the **negligence was a necessary condition of the occurrence of harm** (**factual causation**) → were you negligent as a matter of fact?
[Statutory statement of but for test for causation]
(b) that it is **appropriate for the scope of the negligent person's liability to extend to the harm** so caused (**scope of liability**)
(2) In determining an exceptional case, court is to consider whether or not and why responsibility for the harm should be imposed on the negligent party.
(3) if it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent: (a) matter is to be determined subjectively in light of circumstances, (b) any statements made by person after suffering harm about what they would have done is inadmissible.
(4) for purpose of determining the scope of liability, court is to consider whether or not and why responsibility for the harm should be imposed on negligent party.

5A: applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, contract or otherwise. Does not apply to civil liability excluded from operation under s3B. → some say CLA will never apply to a strict obligation, others say it could if this was breached negligently.

Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012]

- Respondent proprietor of subject land and respondent's neighbour entered into an agreement in September 1999 to relocate right of way over a respondent's property which benefited neighbour.
- Neighbour withdrew caveats and respondent alleged breach of contract and the court ordered the appellant to pay for losses suffered. These included surveying and legal expenses required to correct the title, costs of carrying out works on the land to move the retaining wall and fencing, costs of litigation, and costs resulting from inability to sell the land – economic loss under TPA.
- Look at each loss or head of loss separately and ask "is this too remote?" to determine what is recoverable.
- **Failure to exercise reasonable care and skill = apply s5D CLA. CLA IS USED FOR NEGLIGENCE – Part 1A.**
- **Principle:** In circumstances where a claimant seeks to recover legal costs incurred in defending proceedings brought against it, where the litigation is said to have been caused by a third party, the harm suffered may be identified as **the loss of an opportunity to avoid the litigation**. Where the claimant has successfully defended the litigation, the loss will be the difference between the costs incurred and the costs recovered from the other party.
- **Held:** the land surveyor should only be held liable for breach of contract and duty of care up to the date when the surveyor admitted the full extent of the changes he made to the plan.

(Limited by) Foreseeability – interpret Hadley test:

Koufos v Czarnikow Ltd [1969]

- Koufos chartered a ship from Czarnikow to bring 3000 tonnes of sugar to Basra. Owing to deviations, the voyage was delayed by nine or ten days, in which time the sugar price had dropped.
- Koufos claimed the difference in the loss of profit.
- Czarnikow knew there was a sugar market but not that Koufos intended to sell it straight away - Since prices in a commodity market were liable to fluctuate, shipowners should reasonably contemplate that (per **Lord Reid**) it was not unlikely that, if their ships delayed their voyage, the value of marketable goods on board their ships would decline and that, therefore, where there was wrongful delay in the delivery of marketable goods under a contract of carriage of goods by sea the measure of damages was the difference between the price of the goods at their destination when they should have been delivered and the price of the goods when they were in fact delivered, accordingly, the charterers were entitled to recover that difference as damages.
- **The aggrieved party was entitled to recover such part of the damage actually caused by the breach as the defaulting party should reasonably have contemplated would flow from the breach**.
- In this case, the view was taken that 'reasonably foreseeable' is more appropriate to tort than contract cases, and that 'on the cards' is far to imprecise. However, there was no real agreement on the proper criterion to be applied – **Lord Reid**'s perspective of 'not unlikely' is the authority (input of Lord Morris, Hodson and Pearce too).

H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978]

- Plaintiffs ordered a bulk food storage hopper from the defendants for the purpose of storing food for pigs.
- When the defendants installed the hopper, they failed to ensure that the ventilator was open and the food became mouldy.
- The condition of the food caused an outbreak of intestinal infection which killed 254 pigs.
- Plaintiffs brought an action for breach of contracting claiming substantial damages for loss of profit.
- Judge held that the defendants were in breach of their warranty that the hopper should be reasonably fit for purpose. Also found that at the time of the contract, the parties could not have **reasonably contemplated** that there would be serious possibility of mouldy food causing illness (**Scarman and Orr LJ**) → **Where parties contemplate the type of consequence which may follow a breach of contract, they will be liable for specific damage of that type, even where the specific damage was not foreseeable.**
- **Lord Denning:** The defendants were liable for the loss of the pigs that died because they ought reasonably to have foreseen that there was a possibility that they might become ill, even though it was not a serious possibility, but were not liable for the loss of profits.