LAWS1017/5006

TORTS AND CONTRACTS 2

CONTENTS:

Lecture 1 – Introduction to Tort and Contract

1.1 Introduction

Some key questions when considering problem questions

1. Is there a contract? If so, deal with contractual (including equitable remedies).
    a. What monetary remedies are available for breach and what must be removed?
    b. If the party wants relief from the contract itself, do any factors make the contract void or voidable?
2. In addition or alternatively, does tort law or statute provide an alternative or better remedy?
3. If there is no contract, has a tort been committed or does statute provide a remedy? Are the elements of the tort or statutory action satisfied?
4. When and how is liability shared by multiple wrongdoers?

1.2 Conceptual Distinction between Tort and Contract

Conceptual distinction between tort and contract

- What purposes to they seek to serve?
    - Tort is concerned primarily with compensation for injury or damage and protection of people from wrongs.
    - Contract is concerned primarily with the enforcement of agreements. Has an enabling purpose (efficiency, innovation, etc.)
- What is the basis of liability?
    - Tortious liability is imposed for infringements of interests protected by law independently of private agreement.
    - Contractual liability is derived by agreements or transactions freely and voluntarily entered into by parties.
- However, this is not always true as a matter of practical reality:
    - Not all contracts are negotiated and parties do not voluntarily agree to their terms, eg. standard form contracts, contracts governed by laws or conventions, implied terms
    - People may voluntarily assume obligations in torts, usually through an assumption of responsibility or an undertaking that the defendant chooses to do. These obligations arise by law because they undertook the work rather than from the agreement itself.
    - There are circumstances when agreement or consent excludes liability, eg. revocation of a licence or a contractual term precluding negligence

Tort	Contract
Civil wrong other than breach of contract	Enforcement of agreements supported by valid consideration and intended to create legal relations
Protects legally recognised right Compensates and deters wrongdoing	Supports economy and trade Morally right to have contract law to enforce a promise
Concerned with a duty imposed by law owed to the whole world (although some duties may arise from a special relationship or membership of a class)	Concerned with a duty imposed by the parties themselves owed to the other contracting party
Liability imposed by law without agreement of the parties	Liability derived from agreement of parties
Fault based – intentional wrongdoing or negligence Limited exceptions, eg. strict liability for breaches of statutory duty	Strictly based on non-performance irrespective of fault (***Grant v Australian Knitting Mills***)

1.3 Concurrent Liability in Tort and Contract

Concurrent liability in tort and contract

- Arises where the liability imposed by law (tort) is <u>co-extensive</u> with liability derived from the agreement of the parties, either express or implied (contract)
- Generally, there is concurrent liability in tort and contract wherever <u>there would be liability for gratuitous performance without the contract</u>.

- Co-existence of liability in tort and contract was confirmed in ***Donoghue v Stevenson***:
    - A contractual relationship does not exclude the co-existence of a right of action founded on negligence between the same parties, independently of the contract but arising out of the relationship in fact brought about by the contract.
- If there is concurrent liability, the plaintiff can elect to sue in tort or contract, or both.
- The election may depend on:
    - Limitation periods
    - Choice of law
    - Jurisdiction of the court (eg. in ***Matthews v Kuwait Bechtel*** where there was no jurisdiction for torts committed overseas but the court had jurisdiction over contracts governed by English law)
    - Measures of damages available
    - Minority of defendant – liability of the defendant is not affect by their lack of contractual capacity due to minority, per ***Minors (Property and Contracts) Act* 1970 (NSW) s48**
- Example:
    - Employer is under a common law duty of reasonable care in respect of the safety of their employees (tort). There is also an implied term in every contract of employment that the employee will take reasonable care (contract). See ***Matthews v Kuwait Bechtel***.
    - A carrier has concurrent liability in tort and contract on the part of the carrier in respect of the safety of the passenger. See ***Kelly v Metropolitan Railway Co*** where properly triable in both but higher recoverable costs in tort.
    - Liability for negligent misrepresentation during pre-contractual negotiations – defendant still liable in tort (***Esso Petroleum v Mardon***)
    - Professional persons (eg. medical, dental, legal, architects) and clients (***Thake v Maurice***)

Overlap of tort and contract

- The existence of a contract may be relevant but is not conclusive as to liability in tort (***Voli v Inglewood SC***):
    - The duty of care of an architect to strangers is cast upon him by law not because he made a contract, but because he entered upon the work.
    - The terms of the architect's engagement or building contract cannot discharge the architect from this duty or determine what he must do to satisfy it.
    - Nevertheless, his contract with the building owner is relevant as it determines what was the task upon he entered. If it was to design a stage to bear s specified weight, he would not be liable for the consequences of someone negligently permitting a greater weight to be put upon it.
- A contract may expressly exclude or limit tortious liability to which a party to that contract would otherwise be exposed (eg. ***The Stella***)
    - If there is any doubt or ambiguity, the court will read the clause down against the person seeking to rely on it.
    - Exclusion clauses may theoretically exclude tort liability for negligence.

1.4 Practical Implications

Damages

- 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 (***Gates v City Mutual Life Assurance Society Ltd***):
    - He is entitled to damages for loss of bargain (expectation loss), or alternatively damage suffered (reliance loss)
    - Expectation damages:
        - What you would have made if the contract goes ahead.
        - Puts you into the position that would have been in if the contract goes ahead.
    - Reliance loss:
        - What money you lost because the contract failed, including losses because you relied on the contract going ahead.
        - In a sense, putting him back into the position if the contract had not been entered into
- In tort, 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) (***Gates v City Mutual Life Assurance Society Ltd***):

Contributory negligence

- Torts:
    - At common law, contributory negligence was a complete defence to a tortious action in negligence (***Astley v Austrust Ltd***)
    - Contributory negligence now allows the reduction of damages under apportionment legislation.
- Contracts:
    - The common law did not recognise contributory negligence as a defence in an action for breach of contract (***Astley v Austrust Ltd***)
    - ***Law Reform (Miscellaneous Provisions) Act* 1965 (NSW)** now permits an award for breach of contract to be reduced on the basis of contributory negligence.
        - It is available where the wrong involved is the breach of a contractual duty of care which is concurrent and coextensive with a breach of duty in tort (**LRMPA s8**)
        - If the contractual and tort duties are the same, then the defendant can always raise a contributory negligence defence in both claims regardless of whether the plaintiff is suing in tort or contract.
        - Where liability in contract is strict, the contributory negligence of the plaintiff is no defence.

Heads of damages

- Torts – Exemplary damages and aggravated damages are available
- Contracts – Damages confined to compensatory damages. Exemplary and aggravated damages not available.

Standard of performance

- Tort:
    - What standard is a defendant expected to meet to avoid a negligence action?
    - How does the court determine whether a defendant is negligent?
    - What is the source of the law?
- Contract:
    - What standard must a person meet under a contract?
    - Is it a strict liability or a fault/case-based liability?
        - Strict liability – Contractual term must be met.
        - Fault-based liability – A contracting party must perform to a particular standard. Usually involves reasonable care, reasonable endeavours, best endeavours, etc.
    - Where do you look to determine the standard?
        - Look at the terms of the contract
        - Matter of construction
        - In general, a person has only promised to take reasonable care. However, it may be strict (eg. something has to be done by a particular time).
- To what actions in contract does the ***Civil Liability Act* 2002 (NSW**) apply? Where do you look to answer this?

Effect of death on liability

- Tort:
    - Under common law, the death of a person cannot constitute a cause of action giving rise to a claim for damages in a civil court (***Baker v Bolton***)
    - Rule of *actio personalis moritur cum persona* – a personal action dies with the person
    - However, the ***Compensation to Relatives Act 1897* (NSW) ss 3-5, 6B** provides a statutory cause of action for third parties.
- Contract:
    - It is possible to recover damages for breach of contract where an element of those damages was death of a third party caused by the breach (***Jackson v Watson & Sons***)
    - The death of a person does not extinguish liability

Choice of law

- Even if a court has jurisdiction, it must choose which law to apply. This may be complicated if the transaction or action occurs across state or national boundaries.
- Tort:
    - An action will be governed by the law of the place where the tort was committed (*lex loci delicti*)

- Eg. ***John Pfeiffer v Rogerson*** (intranational torts), ***Regie Nationale des Usines Renault v Zhang*** (international torts)

- Contract:
  - An action will be governed by the proper law of the contract.
  - Determined by the express or inferred choice of the parties
  - In the absence of such agreement, legal system that has the objectively closest/real connection with the contract (eg. where formed or accepted)

Limitation periods

- Actions in contract and negligence are both subject to a 6-year general limitation period, and a 3-year limitation period in personal injury cases under the ***Limitation Act 1969*** **(NSW) s14** (contract and tort) and **s50C** (personal injury)
- However:
  - In negligence, time starts to run when the damage/loss is suffered.
  - In contract, time starts to run at the date of breach.
- Tort liability for negligence thus has a potentially longer tail.

1.5 Equitable Doctrines

Overlap of contract, tort and equitable obligations

- Contract and tort do not cover the field of private obligations and remedies.
- Equity has played an important role:
  - Fiduciary obligations – Obligation not just of care but loyalty (cannot act against the interests of a client or the employer)
  - Obligations and liabilities arising from estoppel
  - Obligations of confidence – Information given by one to another in a confidential relationship may be confidential
- Statute may also impose private obligations and remedies

Restitution for unjust enrichment

- In some instances, the common law and equity recognise obligations to reverse or give restitution for unjust enrichment.
- Unjust enrichment is not a freestanding basis for entitlement in Australia but may explain some existing causes of action or remedies.
- Examples:
  - Mistaken payments – Ability of a person to recover a payment made under a mistake, despite the absence of a tort or contract, previously allowed under the common law action for money had and received
  - *Quantum meruit* – Work done and accepted without a binding contract or agreement as to price
  - Repayment of contract price where the contract fails

Equitable doctrines

- Equity is the body of law developed by the Court of Chancery in England before 1873. After Judicature Reforms of 1873 fused the administration of law and equity, the common law courts could recognise equitable principles and vice versa but they remained two separate principles.
- It is still possible to talk about the different positions at common law (eg. there must be consideration) and in equity (equity might recognise rights based on estoppel even where there is no concluded contract)
  - For example, the notion of a trust rests on the notion of a separation of legal and equitable interests in the subject property – trustee holds the property as legal owner for the beneficiaries of the trust.
  - In Australia, there continues to be a strong emphasis on the distinctiveness of the equitable doctrine.
- Equity operates in two jurisdictions:
  - Exclusive jurisdiction:
    - Its own obligations and property which the common law did not recognise, eg. trusts, equitable interests, fiduciary obligations, obligations of confidence
    - Worked out its own remedies for its own obligations eg. account of profit, constructive trusts over profit, charge over property and injunctions which were not dependent on what the common law would do.

- Auxiliary jurisdiction:
    - This was where the court of Chancery/equity would give relief against the hast or inadequate operation of the common law, such as the law of contract or tort.
    - Discretionary relief from harsh contracts entered under – undue influence, unconscionable conduct, mistake, equity and penalty clauses in contracts.
    - Additional discretionary remedies to those offered by the common law, ie. damages, but only where common law damages would be inadequate, eg. injunctions to restrain a nuisance or against a trespasser using the fruits of the trespass, specific performance of contracts in exceptional circumstances.
        - Specific performance happens most commonly to contracts for the sale of land (because each piece of land is unique)
- Note that equitable remedies are always discretionary – courts will only give the remedy if it believes that the remedy is appropriate

Lecture 2 – Causation and Remoteness in Contract

2.1 Introduction

Introduction

- Damages are available as of right for every breach of contract, implied by law unless expressly excluded by the parties
- Legal principles which restrict the scope of damages awards are causation, remoteness, contributory negligence and mitigation
- Compensation principle – Damages for breach of contract must not exceed the loss or damage suffered by the promisee
- The plaintiff bears the onus of proving causation and remoteness (***Alexander v Cambridge Credit Corporation***)

Damages process

1. Is this a common law or CLA case?
2. Causation – Was the damage claimed by the plaintiff caused by the breach?
3. Remoteness – Is the damage within the bounds of remoteness?
4. Assessment issues – Measures of damages, reliance vs expectation

2.2 Causation in Contract

Causation in contract

- In order to provide some limit on the plaintiff's damages, it is required that the plaintiff suffer the loss or damage in respect of which compensation is sought because of the defendant's breach.
- In both tort and contract, it is generally sufficient that the breach was a cause of the loss
- If no loss is proved, the plaintiff receives a nominal sum to show that the defendant committed the wrong. (***Luna Park v Tramways Advertising***)

Applicable test for causation

- **CLA s5D** applies to any claims for damages for harm resulting from negligence, including those brought in contract (**CLA s5A**)
- When is the statutory test engaged for contract claims, ie. when is the test in s5A satisfied?
    - 'Harm arising from negligence' open to two readings:
        - Applies to any situation where harm is caused by negligence – focuses on the conduct of the defendant as a matter of fact (must be careless)
        - Applies whenever you have harm caused by a breach of a duty to exercise reasonable care (breach of a duty not to be negligent) – focuses on the nature of the obligation breached as a matter of law
        - Most courts have proceeded on the basis that negligence needs to be a component of the obligation involved. However, the HCA has not yet construed s5A to conclusively resolve the issue.
    - Therefore:
        - Where it is a **strict obligation** (the defendant either performs or does not), we apply the common law test for causation
        - Where it is an **obligation to exercise reasonable care or skill**, we apply the statutory test. Important that the obligation must concern the defendant's own conduct or performance – a term requiring the product to be reasonably fit for its purpose is still strict.

Common law test for causation

- Factual causation is mainly determined by applying the 'but for' test as well as common sense principles to the facts of the case (***March v Stramare***).
- It is sufficient that the defendant's breach was a cause of the plaintiff's loss; the breach need not have been the sole cause of the loss (***Fitzgerald v Penn***)
- Common sense should be applied where the 'but for' test is inadequate (***March v Stramare***)
    - Multiple causes:
        - Where there are multiple approximately equal causes of injury, it is sufficient that one of these is the defendant's breach (***Simonius Vischer v Holt***)

        - Where one cause has more relevant, the defendant's breach must be the decisive or dominant cause (***Karlshamms Oljefabriker v Monarch Steamship***)
    - Novus actus interveniens:
        - Where an event is a foreseeable consequence of the breach, it will not constitute a novus actus interveniens (***Karlshamms Oljefabriker v Monarch Steamship***)

Statutory test for causation

- For causation, two elements must be satisfied:
    - The negligence must be a necessary condition of the harm occurring (factual causation) (**CLA s5D(1)(a)**)
    - It must be appropriate for the scope of the plaintiff's liability to extend to the harm so caused (scope of liability) (**CLA s5D(1)(b)**) – consider reasonable foreseeability
- Under exceptional circumstances, causation may be accepted even though the negligence was not a necessary condition of harm (**CLA s5D(2)**) – consider where there are multiple causes of injury

Civil Liability Act 2002 (NSW):

- **Section 5D:**
    - **(1)** A determination that negligence caused particular harm comprises the following elements:
        - **(a)** the negligence was a necessary condition of the occurrence of the harm (factual 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 in an exceptional case whether negligence that cannot be established as a necessary condition of the harm should be accepted as establishing factual causation, the court is to consider whether or not responsibility for the harm should be imposed on the negligent party.
    - **(3)** If relevant to determining what the person who suffered harm would have in done if the negligent person had not been negligent for factual causation, any statement made by the person after suffering the harm is inadmissible except where it is against their own interest.
- **Section 5A:** Application of Part
    - **(1)** This Part applies to any claims for damages for harm **resulting from negligence**, regardless of whether the claim is brought in tort, **in contract**, under statute or otherwise
    - **(2)** This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B

Case	***Facts***	***Principles***
Alexander v Cambridge Credit Corporation (1987)	- Auditors of CCC overstated value of the company's assets in breach of their contractual duty of care. - If the assets had been properly valued, the company would have been put into receivership in 1971 and losses would have totalled $10m. Instead, the company traded until 1974 and losses were $155m. - The negligent audit caused the company's continued existence. However, you cannot say that a company's existence is the cause of risks or hazards which are incidental to its existence.	- Relied on common law test (CLA did not exist). The but for test was satisfied but court rejected claim on causation grounds per the common sense test.
Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd (1968) 120 CLR 516	- The defendant was contracted to build a rear door designed to provide security from burglary in the plaintiff's shop. Thieves broke into the shop by forcing the door out of position and stole stock. - The defendant had breached an implied warranty to supply, fit and hang a door which would provide a reasonable means to prevent thieves from breaking into the shop. - The appropriate measure of damages was the value of the goods stolen	- While it cannot be known that a door complying with the warranty would have prevented the thieves from breaking into the shop, the loss suffered from the entry is prima facie the measure of damages. - This is because 1) the loss suffered resulted from the breach and 2) the loss suffered was reasonably foreseeable as likely to result from such a breach.

2.3 Remoteness in Contract

Remoteness in contract

- Damages will not be recoverable if the loss was too remote.
- Damages which are too remote may also have been excluded under the common sense test.
- When given a number of sources of damage, look at each head of loss individually and determine whether each is too remote.
- The difference between damages in tort and contract arises due to the different nature of the relationship between the parties (***Koufos v Czarnikow***):
    - In tort, the defendant is liable for any damage which is reasonably foreseeable, even in the most unusual case, unless a reasonable man would dismiss it as far-fetched.
    - In a contract, the parties deliberately undertake mutual duties and have the opportunity to define these liabilities with one another, including by drawing attention to any unusual circumstances.
    - In tort, there is no opportunity for the injured party to protect himself in some way.

Test for remoteness

- Two limbed test for remoteness at common law (***Hadley v Baxendale***)
- Courts have also interpreted the test for remoteness as relying on:
    - Whether the losses which were reasonably foreseeable as liable to result from the breach at the time of the contract, depending on the knowledge (presumed or actual) of the parties at the time (***Victoria Laundry v Newman Industries***)
    - The assumption of responsibility by the contracting party (***The Achilleas***)
        - True test is whether or not, the parties were taken to have assumed responsibility for that loss within the contract
        - This is usually the same as the Hadley v Baxendale test, but not always
- First limb (general damages):
    - Arising naturally, that is, according to the usual course of things, from breach (***Hadley v Baxendale***)
    - Alternatively, losses which the defendant is presumed to know as liable to result from a breach of contract under the usual course of things (***Victoria Laundry v Newman Industries***)
    - The losses needed to be not unlikely to result, being less than an even chance but nevertheless not very unusual and easily foreseeable (***Koufos v Czarnikow***)
- Second limb (special damages):
    - Such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of breach (***Hadley v Baxendale***)
    - Alternatively, losses which the defendant actually knew would result from breach, including special consequences outside the ordinary course of things (***Victoria Laundry v Newman Industries***)
- We are not concerned with the extent of loss when considering the scope of liability, provided that the type of loss is something that is liable to arise from the breach (***Parsons v Uttley***)

Case	***Facts***	***Principles***
Hadley v Baxendale (1854) 9 Ex 341	- Hadley contracted with Baxendale to deliver a component of the machinery in his mill to a repairer. They were delayed and as a consequence, Hadley lost profit for the time period he could have used his mill. - The defendants had no way of knowing that their breach would cause a longer shutdown of the mill, resulting in lost profits; nor did the plaintiffs communicate the special circumstances to the defendants.	- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Case	***Facts***	***Principles***
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528	- The plaintiffs purchased a boiler machine for their laundry business from the defendants. The boiler machine was delivered late leading to lost profits, including from some contracts with the Ministry of Supply. - The plaintiff was entitled to recover general damages for lost profits as these were reasonably foreseeable. - However, special damages for loss of the Ministry of Supply contracts was too remote. This would require that the defendants knew the prospect and terms of such contracts.	- In contract, the plaintiff is only entitled to recover the losses which were reasonably foreseeable as liable to result from the breach at the time of the contract. - Whether losses were reasonably foreseeable, depends on the knowledge of the parties at the time. - As a reasonable person, everyone is taken to know the loss which would be liable to result from a breach of contract in the ordinary course of things (ie. a serious possibility or real danger). - They are also liable for losses which they actually know would result from breach, including special consequences outside the ordinary course of things.
Koufos v Czarnikow Ltd [1969] 1 AC 350	- The defendants were responsible for chartering a vessel carrying sugar to the respondents. The vessel arrived 9 days later than agreed, so that the respondents were forced to sell the sugar at a lower price. - It was not unlikely that the sugar would be sold in the market at market price on arrival. - The defendant should have contemplated that the delay would have caused some financial loss to the plaintiffs.	- Damages recoverable are such as flow naturally in most cases from the breach, whether under ordinary circumstances or from special circumstances due to knowledge either in the possession of or communicated to the defendants. - Special knowledge may serve to decrease damages as well as increase them. - The losses needed to be not unlikely to result, being less than an even chance but nevertheless not very unusual and easily foreseeable. - The difference between damages in tort and contract arises due to the different nature of the relationship between the parties
H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791	- The plaintiffs purchased a defective hopper from the defendants, causing them to feed mouldy nuts to their pigs. The extent of the infection was greater than expected and the pigs subsequently died. The plaintiffs claimed damages for 1) loss of the pigs 2) expenses in dealing with the illness and 3) damages for loss of sale. - The defendant was liable for all the claimed damages. The illness of the pigs should have been contemplated as a serious possibility flowing from the hopper being unfit for storing nuts.	- We are not concerned with the extent of loss when considering the scope of liability, provided that the type of loss is something that is reasonably within contemplation from the breach. - Denning LJ also adopted a distinction between economic loss (serious possibility) and physical damage cases (any possibility)
The Achilleas	- The defendant had a contract for the charter of a ship with the plaintiff. The defendant returned the ship slightly late. As a result of the late return, the plaintiff breached a follow-on charter with a third party. The third party took the ship at a significantly reduced rent. - Two ways of quantifying damages – Difference between contract price under the first charter and market price at the time for the period of lateness OR lost rent suffered by the owner of the ship for the duration of the second charter. - Market practices for charter ships suggests the larger sum of damages ought not be recoverable	- The *Hadley v Baxendale* is not a fixed rule of law but effectively a guide or assumption as to the parties' intention. Merely a tool for ascertaining the parties' objective intention. - Because it is merely a tool, it is capable of being displaced by other evidence of objective intention leading you to a different conclusion. - The true test is whether or not, the parties were taken to have assumed responsibility for that loss within the contract. - Much of the time, the *Hadley v Baxendale* will be given you the correct answer but it is capable of being rebutted by evidence that the party would not have assumed responsibility for that loss.

Lecture 3 – Measure of Damages in Contract

3.1 Measure of Damages

Assessment of damages

- The general object of contract damages is to place the plaintiff in the position they would have been in had the contract been performed (***Robinson v Harman***)
- The plaintiff bears the onus of proving there is loss (***Luna Park v Tramways Advertising***)
- Where there is no loss, only nominal damages are awarded (***Luna Park v Tramways Advertising***)
- Damages are typically assessed at the date of breach but can be departed from where necessary to do so in the interests of justice (***Hoffman v Cali***)
- Difficulty in assessing damages is no reason not to do so (***Commonwealth v Amman Aviation***)

Expectation damages

- There is a presumption that the applicable measure of damages is the plaintiff's expectation loss (***Clark v Macourt***)
- Expectation interest is the profit or benefit which the plaintiff expected to derive from the contract
    - Typically determined by the difference between the value of what was promised and what was received
    - Total lost benefits from contract minus any savings from expenditures not incurred due to the breach (***Commonwealth v Amann Aviation***)
- Calculation of expectation damages in a contract for the sale of goods:
    - Measure of damages is that resulting in the ordinary course of events (non-acceptance **s52(2)**, non-delivery **s53(2)**)
    - Damages are prima facie equal to the difference between the contract price and the market price, where available, at the time the goods ought to have been accepted/delivered (**s52(3)**, **s53(3)**)

Sales of Goods Act 1923 (NSW):

- **Section 52:** Damages for non-acceptance
    - **(2)** The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.
        - Interpreted as stating the general prima facie rule of damages in contract (***McRae v Commonwealth Disposals Commission***)
    - **(3)** If available, the measure of damages is prima facie ascertained by the difference between the contract price and the market price at the time the goods ought to have been accepted, or otherwise at the time of the refusal to accept.
- **Section 53:** Damages for non-delivery
    - **(2)** The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
    - **(3)** If available, the measure of damages is prima facie ascertained by the difference between the contract price and the market price at the time when they ought to have been delivered, or otherwise at the time of the refusal to deliver.

Reliance damages

- Reliance interest represents the plaintiff's expenditure in preparation for or performance of or in reliance upon the contract.
- Reliance damages may be available as an exception to the general rule where quantification of an expectation award is impossible or where a profit would not have been made (***McRae v Commonwealth Disposals Commission***)
- Calculation of reliance damages (***Commonwealth v Amann Aviation***):
    - Plaintiff must prove that the expenditure was reasonable.
    - There is a presumption that the value of lost benefits would have been at least equal to the total detriment reasonably sustained by the plaintiff.
    - However, the award will be reduced if established that the benefit derived from future performance would not have been sufficient to recoup the past expenditure, thus consistent with the principle in ***Robinson v Harman***.
- Courts will not give both expectation and reliance awards as this would lead to plaintiffs being better off than if the contract had been performed.

Restitution (gains-based) damages

- A gains-based damages award is not available in Australia for a breach of contract (***Hospitality Group Pty Ltd v Australian Rugby Union***)
    - In England, on a case-by-case basis, it may be possible to recover the profits made by a defendant in the course or as a consequence of breaching a contract (***Attorney General v Blake***)
- Restitutionary (gains-based) remedies are often available for a restitutionary cause of action in equity but this is not to be confused with common law actions for breach of contract.

Case	***Facts***	***Principles***
Clark v Macourt (2013) 253 CLR 1	- Concerned an agreement for the sale of a stock of frozen donated sperm and other assets of a fertility clinic. The sperm had not been stored in conformity with medical guidelines and was therefore unusable. - The plaintiff purchased replacement sperm from the US at a considerably higher price. - Damages should be assessed by the reference to the price of the sperm at the date completion, proxied by the cost of acquiring the replacement sperm.	- The general principle is that damages for breach of contract should put the promisee in the same situation with respect to damages as the promisee would have been in had the broken promise been performed. - The relevant question is what was the value of what the plaintiff did not and should have received under the contract - Calculations of expectation damages depend on the amount needed to put the plaintiff in the position if the contract had been performed, not if the contract had not been made.
McRae v Commonwealth Disposals Commission (1951) 84 CLR 377	- The defendant sold to the plaintiff the right to salvage an oil tanker lying in a reef for £285. The value of the tanker remained unknown. The plaintiff incurred substantial costs in an expedition to locate and salvage the vessel, but no tanker actually existed. - It was impossible to place any value on what the Commission purported to sell. - The Commonwealth could not prove that the expense incurred would not have been recouped even if the tanker had existed.	- Reliance damages may be available as an exception to the general rule where quantification of damages is impossible. - The plaintiffs have a prima facie right to full reliance damages unless the defendants can prove that the expense incurred would not have been recouped even if the contract had been performed
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64	- The plaintiff entered into a contract to survey Australia's coastline. They incurred substantial expenses to perform these services, including the purchase and fitting of specialised aircraft. The contract was repudiated by the Commonwealth soon after entry. - On an expectation basis, the agreed payment under the first term of the contract less the savings due to no longer needing to perform would result in the plaintiff failing to recoup their expenditures. - Amann had banked on the likelihood of getting a renewal due to a stronger bargaining position, having already expended the required capital outlay. - The lost commercial benefit (prospect of renewal) was recoverable under the *Hadley v Baxendale* tests for damage under the first limb, being reasonably in the contemplation of the parties as the probable result of breach. - Because the prospect of renewal was impossible to quantify, the plaintiff was entitled to recover reliance damage and the onus was on the defendant to prove that they nevertheless would not have recouped these expenses.	- Where it is impossible to establish the value of any benefits which the plaintiff would have derived, considerations of justice dictate that the plaintiff may rely on a presumption that the value of those benefits would have been at least equal to the total detriment which would have been sustained by the plaintiff in doing whatever was reasonably necessary to procure and perform the contract. - This presumption will be rebutted if established that the benefit derived from future performance would not have been sufficient in value to recoup the past expenditure, thus consistent with the principle in *Robinson v Harman*. - It is prima facie sufficient for the plaintiff to prove their expenditure and that it was reasonably incurred.