

RESTRICTIONS ON DAMAGES

The damages that [X] may be entitled to claim may be restricted in amount on the following bases:

Causation

For [X] to be able to claim damages, the loss must have been caused by [Y]'s breach; [X] must demonstrate a causal connection between the breach and the loss claimed for (*Cambridge Credit*). This involves a two-stage test of the (factual) 'but for' test followed by the (legal) 'common-sense' approach.

In applying the but-for test, the court would ask whether [the loss suffered] would have been suffered but for [the breach]. OTF, this is/ is not satisfied as

- In *Cambridge Credit*, the 'But for' test was satisfied (but for auditor's incorrect report, company would not have continued trading and incurred extra \$145M cost).

If satisfied: As it would have, there is no causation and this would act as a restriction on [X]'s claim to damages.

If not satisfied: As it would not have, the test is satisfied. Whilst satisfying the but-for test is necessary, it is not sufficient. Causation must ultimately be determined as a matter of common sense, having regard to value judgments and policy considerations (*Cambridge Credit*).

In applying the common-sense approach, the Court would look to see if there are any intervening acts (*novus actus interveniens*) that break the chain of causation. OTF...

The court would also look to whether there are multiple causes of [X]'s loss. OTF, However, D's breach does not have to be the sole cause of X's loss but, rather, it is sufficient if [Y]'s breach is *a* cause of [X]'s loss. Therefore, ...

- In *Cambridge Credit*, although the 'But for' test was satisfied, when common sense was considered, the auditor's report was not a cause of extra trading losses.
 - supervening events were the real cause e.g. internal business decisions, collapse of real estate market, floods in Qld, etc.
 - Allowing company to remain in existence doesn't cause losses from any dangers that are incidental to existing

Note: consider each head of damage separately.

Remoteness of damage

[Y] may argue that they are not liable for losses that are too remote from their breach. Stemming from the rule in *Haxley v Baxendale*, damages cannot be claimed for losses that are too remote, that is, damages that do not occur 'according to the usual course of things', from the breach itself, or that were not in "reasonable contemplation" of [Y] at the time the K was formed. This can be seen as two separate limbs, although some preference has been expressed for using the rule as a single principle (*Amann*).

First limb: [Y] must compensate [X] for those ordinary losses which arise naturally, according to the usual course of things, as a result of [Y]'s breach.

- In *Hadley v Baxendale*, this was not satisfied because the delivery person 'may fairly and reasonably' consider that a mill owner would own more than one shaft.

Second limb: [Y] may have to compensate [X] for extraordinary losses arising from the breach if the possibility of those losses was in the “reasonable contemplation” of the [Y] at the time the K was formed.

- Whilst D doesn’t have to have contemplated the extent of the loss suffered or the precise details of the event causing it, the parties must have contemplated the ‘general nature’ of the loss and ‘general manner’ of its occurrence (*Cambridge Credit*)
- Loss needs to be contemplated as “a serious possibility” or “not unlikely” (*Cambridge Credit*).
 - In *Cambridge Credit*, liability was not imposed on the auditors. The economic conditions encountered in 1974 were ‘different in kind’ from those the parties might have contemplated in 1970. The loss had not been contemplated as “a serious possibility”.
- Application of this test involves considering:
 - D’s knowledge (**foreseeability**)
 - Degree of likelihood of damage resulting from the breach (**probability**)
 - **Assumption of risk**
 - [Y] may be able to argue that they did not “assume” liability for a particular risk, even though probable and foreseeable, given the nature of the K.
 - Australian law is unresolved on this issue. No precedence or authority.
- In *Hadley v Baxendale*, this was not satisfied because the delivery person was not made aware that the normal situation (of more than one shaft) didn’t apply here.

Cases:

- *Hadley v Baxendale* – Delivery person not liable for mill’s loss of profits as loss too remote
- *Victoria Laundry v Newman Industries*
 - boiler for laundry business was delivered 20 weeks late
 - loss of profit recoverable as D knew P required boiler for immediate use (+ can reasonably be presumed to foresee loss of business if not delivered on time)
 - loss relating to loss of lucrative govt K unrecoverable as D did not know about it

Mitigation

[Y] will argue that [X] could have taken reasonable steps to avoid or reduce their losses, and as such, cannot claim for these losses (*Burns v MAN*). Mitigation looks to the reasonable steps that have been, or should reasonably have been, taken by [X] to reduce the loss caused by [Y]’s breach (*Simonius Vischer*).

The court would refer to the 3 key principles:

1. P cannot recover for avoidable loss: cannot recover for loss caused by failure to take reasonable steps, or taking unreasonable steps (*Burns v MAN*)

- no need for steps that require excessive risk, cost or uncertainty (*Burns v MAN*)
- Not reasonable to continue using broken truck when operating at a loss (*Burns*)

2. P can recover additional loss incurred in taking reasonable steps to mitigate which are unsuccessful (*Simonius Vischer*)

- SV held position in futures after discovering unauthorised trading, analysis of market was that it was best action to take (*Simonius Vischer*)

3. Plaintiff cannot recover avoided loss: if P reduces its loss by any action it only receives damages for actual loss.

- AP’s damages are limited to the amount that it would have cost them to mitigate
- P can claim for reasonable expenses incurred in order to avoid the loss: *Simonius*
- In *Clark*, K for business included frozen sperm (unusable) → replacement cost 1.2m (cost passed on to patients) → entitled to cost of replacing the sperm on basis of the cost of substitute performance (instead of diminution in value)

- Not case of avoided loss since C didn't avoid/decrease loss → replacement sperm didn't give advantage and didn't determine value of defective sperm

Non-pecuniary loss

As a general rule, damages are not awarded to compensate for intangible non-pecuniary losses (i.e. anxiety, loss or reputation, disappointment or distress) (*Baltic Shipping*). This is, however, subject to some exceptions.

- Exceptions (*Baltic Shipping*):
 - Pain and suffering resulting from physical injury caused by the breach
 - Distress and disappointment arising from physical inconvenience caused by breach
 - Distress and disappointment arising from breach of K that was intended to provide relaxation, pleasure, enjoyment, piece of mind or freedom from distress
 - Damages for loss of reputation is available if it was an object of the K to enhance or protect reputation

EXAM: "party X was upset/very disappointed by this" → discuss non-pecuniary loss but if it doesn't satisfy these, dismiss quickly

COMMON LAW VITIATING FACTORS

- Overlap between the 3 factors. More than one may be evident on same set of facts (e.g. *Thorne v Kennedy*)
- Deane J in *CBA v Amadio* pointed out the distinction between undue influence and unconscionable dealing:
 - undue influence, like CL duress, looks to the quality of the consent or assent of the plaintiff...
 - unconscientious dealing looks to the conduct of the defendant in attempting to enforce or retain the benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so

DURESS

[X] may argue that the pressure exerted on them by [Y] to induce them into entering a contract/altering the contract amounts to duress. To make out duress, there are 2 elements which need to be satisfied (*Universe Tankships*): pressure causing impaired consent and that pressure must be illegitimate.

Forms of duress:

- Duress to person = threats to cause physical harm to P or another person e.g. "I'll kill you if you don't sign"
- Duress to goods = threat towards P's physical property
 - In *Hawker Pacific v Helicopter Charter Pty Ltd* (1991) the P's helicopter was being repainted by the D and the P was unhappy with the job. The P signed a document releasing the D from liability in order to get the helicopter back (which was needed for a charter flight)
- Economic duress = threatening P's economic interests (e.g. *Universe Tankships*)
 - E.g. threatening not to perform obligations unless P pays more than agreed
 - Causation can be hard to establish because P always has alternate course of action (suing for breach)
 - Distinguish from legitimate negotiation strategies
- Emotional duress? *Thorne v Kennedy* court didn't decide...

Step 1: did D place illegitimate pressure on P?

[X] will argue that the pressure that [Y] placed on P was illegitimate as it consisted of unlawful threats or amounted to unconscionable conduct (*Crescendo Management*). In determining whether pressure is legitimate, the court would consider the nature of the pressure and the nature of the demand made (*Universe Tankships*).

NB: Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress." Normal to have some 'push and shove'; determine whether is ok commercial pressure or has passed the line.

- In *Universe Tankships*, as the relevant statute did not provide immunity for the industrial action in the circumstances, the pressure was illegitimate.
 - C.f. Lord Scarman dissent – the pressure was legit – done in furtherance of a trade dispute
- Threat of unlawful action
 - Usually illegitimate eg threat to person or property
 - However, **threat of breach of K** may not always be legitimate (eg a bona fide but mistaken belief about contractual obligations leading to a valid compromise or settlement of claim) (ie is threat of unlawful action but not necessarily illegitimate pressure)
- Threat of lawful action (lawful action duress)

- eg blackmailer threatens to report crime to police (Lord Scarman in *Universe Tankships*)
- In *Thorne v Kennedy*, the HCA left unresolved whether a lawful threat (such a threatening to cancel a wedding) can be illegitimate pressure. Some new laws saying it cant be.

Step 2: Did the illegitimate pressure cause impaired consent?

The traditional English approach was that for there to be impaired consent, there must a 'compulsion of the will' because there was no other practical choice open (*Universe Tankships*). This overbearing will approach has been rejected in *Crescendo Management* (endorsed in *Thorne*) to instead be a question of causation, that is, whether [Y]'s illegitimate pressure has caused P to submit to the demand and enter into the contract. The onus is on [Y] to show pressure made no contribution to decision (*Crescendo*).

- [Y] will argue that [X]'s consent was not impaired as there were practical courses of action other than [e.g. signing the contract], such that their pressure did not cause any impaired consent. For example, [X] could have sued for breach of K (if [Y] was threatening not to complete K).
- [Y] will state that their situation can be analogised to *Crescendo Management*, where although the bank had applied illegitimate pressure in withholding the funds, the pressure did not cause the company to execute the mortgage. CM signed the mortgage for commercial reasons that had nothing to do with the illegitimate pressure from WP. Accordingly [Y] will argue that [X] signed the contract for other reasons such as ...
- [X] will counter argue that legal proceedings are expensive, uncertain, take a long time and are not necessarily a *practical* option. Further, [P] will state that there was no alternative reason for signing.
- [X] will state that pressure must have been a factor in P's decision but need not be sole factor (*Crescendo*)
- Causation may be evidenced by (*Crescendo*)
 - protest;
 - absence of independent advice;
 - lack of alternative courses of action
 - In *Universe Tankships*, UT had no choice. They needed their ship as a matter of "the most urgent commercial necessity" and unless they paid the money they were not going to get it.

Consequences

A finding of duress may result in the contract being rescinded.

UNDUE INFLUENCE

[X] may argue that there was undue influence as there is an unmitigated power imbalance between the parties, of which [Y] took advantage. For [X] to show that there is undue influence, they must establish either that there was actual undue influence or presumed undue influence (*Thorne*).

Step 1: establish whether there was undue influence

Actual undue influence

In order to rely on actual undue influence, [X] must prove that [Y] actually exercised a controlling influence over them (i.e. exerted actual pressure), such that P was not a free agent. This is often difficult to prove.

Presumed undue influence

Undue influence will be presumed if [X] can prove that a “relationship of influence” existed between the parties prior to a contract.

A “relationship of influence” arises out of one party’s confidence in and dependence on the other. The position of trust and influence gives rise to a duty on the [Y] to act in the interests of the [X].

2 categories:

1. “deemed” relationship of influence; or
2. Relationship of influence in fact

- **Deemed relationships of influence:** certain types of rships are deemed to be/not to be relationships of influence.
 - Includes (not exhaustive):
 - Parent and child (only when child is the one complaining)
 - Guardian and ward
 - Religious advisor and disciple (e.g. *Krishna*)
 - Solicitor and client (e.g. *Westmelton*)
 - Doctor and patient
 - Doesn’t include (but can be overcome by actual UI):
 - Husband and wife/fiancé and fiancée
 - Financial advisor and client
 - Teacher and student
 - Child and parent

If the rship does not fall within one of the deemed categories, doesn’t mean there is no presumed undue influence. [X] can prove it on the facts.

- **Relationships of influence in fact:** there will be a relationship of influence in fact where there is evidence that the plaintiff placed trust and confidence in D and relied on them for guidance (*Johnson v Buttress*).

As actual/presumed undue influence is made out, undue influence will be made out unless [Y] can rebut the presumption.

Step 2: rebutting the presumption

To rebut the presumption, [Y] will need to show that [X] entered into the K as a result of free exercise of will and informed judgment.

- **Independent advice** is an influential consideration in deciding whether a [X] was acting independently i.e. whether the plaintiff was given competent advice by an independent and well informed adviser (with adequate time to reflect on that advice).
 - Make reference to this regardless! Even if no legal advice in scenario, note there is no legal advice on the exam.
 - Is it not always required to rebut the presumption (see *Westmelton*)
 - It is not always decisive: *Thorne* (involving actual undue influence)
- **Inadequacy of consideration** is relevant, but not decisive – transaction need not be disadvantageous for K to be set aside, nor advantageous for presumption of undue influence to be rebutted
 - If it is a gift, there is clear inadequacy of consideration
 - Maybe some has been given but it is inadequate eg less than market value
 - If there is inadequacy of consideration, is a relevant and influential consideration to be taken into account
 - NOTE: just because consideration is adequate, doesn’t mean K won’t be set aside.

Cases:

- D doesn't have to be morally blameworthy (*Hartigan v Krishna*) e.g. UI can be found even where there was 'nothing in the nature of a deliberate attempt by the D or anyone in the Krishna movement to get the better of P, to overbear her or deceive her, or to deprive her of the opportunity of making up her own mind'
- improvidence of the gift may emphasise that P was 'susceptible to be influenced even by the slightest and most subtle indications appearing to favour the donation' (*Krishna*)
- *Johnson v Buttress*
 - A relationship of influence in fact existed, in light of the standard of intelligence, the equipment and character of Buttress. He was illiterate, ignorant of affairs, strange in disposition and manner, had no experience in business affairs, and was unstable in his attachments. He depended upon his wife, and after her death, turned to Johnson for guidance and support. He relied and depended upon Johnson and she had an antecedent relation of influence over him.
- *Westmelton v Archer*
 - company had more expertise in commerce and finance than most solicitors would have
 - Archer wasn't obliged to advise the company to obtain independent legal advice
 - Archer dealt fairly and honestly and openly with a sophisticated and well-informed corporate client, and the company wasn't relying upon any confidence or expectation of legal advice
 - Archer was able to rebut the presumption of undue influence