LAWS5006 - Torts & Contracts II

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Topic 2 — Causation and Remoteness of Damage in Contract

1. **Loss**
   a. Did the plaintiff suffer a loss (*Alfred McAlpine Constructions Ltd v Panatown Ltd*)?
   b. Separate the different heads of loss and define it at the beginning of each answer
      i. The loss suffered from the entry is prima facie the measure of damages (*Reg Glass Pty v Ltd v Rivers Locking Systems Pty Ltd*)
      ii. 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 (per Barwick CJ, McTiernan and Menzies JJ [521]-[523] in *Reg Glass Pty*)
   c. Note: Does not apply for claims of debt
2. **Causation** (separate the heads of loss and go through the inquiry process with each loss)
   a. Is it dealt with at common law or the *Civil Liability Act 2002* (NSW), i.e. is a strict obligation, or a fault-based obligation?
      i. **Common law** (strict based obligation): 'But for' test, subject to common law. Traditionally, the question is whether the loss or injury suffered would have occurred 'but for' the defendant's breach, subject to common sense where the 'but for' test is inadequate (*March v Stramare*)
         1) But for: e.g. Failure to properly install security door caused loss of stolen goods (*Reg Glass Pty v Ltd v Rivers Locking Systems Pty Ltd*) — there ***may*** also be a **presumption**
            a) However, note that this case was a slim 3:2 majority (Windeyer and Owen JJ). Owen J at [528] took the view that not breach of contract had been established. He argued that assuming there had been a breach, that causation is difficult to establish because what if the intruder took 2-3 hours or even longer to open the door rather than a few minutes.
         2) Novus Actus Interveniens: Was there a *novus actus interveniens* that would break the chain of causation (If a natural cause, or unrelated act later subsumes damage caused by a breach, the defendant ceases to be liable from that point on.)
            a) Driver who knew a locking mechanism for a trailer was broken but drove anyway broke chain of causation (*Lexmead (Baskingstoke) Ltd v Lewis*)
         3) Common Sense: e.g. Auditors whose breach caused company not to be put into receivership not responsible for continued trading losses (*Alexander v Cambridge Credit*) (per McHugh and Mahoney JJA)
      ii. **Civil Liability Act** (fault based obligation): s5D of the *Civil Liability Act 2002* (NSW) must be applied for damages arising out of negligence, including those brought in contract (per s5A *Civil Liability Act 2002* (NSW)).
         1) Note: Does not apply to strict liability.
         2) Note: Highly likely that this will apply to a claim that could concurrently claimed under tort.
         3) Note: The defendant would want to go down the CLA route if they wanted to argue that the plaintiff was contributorily negligent, so that the defendant would be able to apportion the damages (c.f. common law where it is 'all or nothing')
         4) State in problem question 1 sentence show knowledge: There are two views regarding the application of s5A and s5D of the CLA. The statutory test is engaged when negligence is a **component of the obligation,** i.e. where there is an **obligation to exercise reasonable care or skill**. (c.f. the less supported interpretation that the CLA will apply if the defendant acts negligently as a matter of fact).
            a) Provided there is a contractual duty of care (the contract rehires due and/or reasonable care and skill regardless of an existence of a concurrent liability, as an express or implied term), that is sufficient to enliven s 5A (per Basten JA at [67] in *Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94*)
         5) **Test —** For causation to be established, two elements must be satisfied per **s5D(1) CLA**: 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"), and (can use the causation cases)

b) that it is appropriate for the scope of the negligent persons liability to extend to the harm so caused ("scope of liability") (can use the remoteness cases)

b. Failure to establish causation of the loss but there has been a breach = nominal damages only (*Luna Park v Tramways Advertising*)

3. **Remoteness**: Damages will not be recoverable if the loss was 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, and thus **less strict** (at [386] in *Koufos*).
   a. Define whether the loss is an ordinary damage or a special damage
   b. To determine whether the the loss was too remote requires an application of the two limbed test for remoteness at common law (*Hadley v Baxendale* (1854 9 Ex. 341 at 354 as per Alderson B) which is now accepted as a statement of a single principle (*Commonwealth v Amann Aviation* at [91]-[92] per Mason CJ and Dawson J).
      i. First limb ('general damages'): Arising naturally, that is, according to the usual courses of things, from the breach (*Hadley v Baxendale*)
         1) Background and imputed knowledge (*Victoria Laundry*)
            a) The plaintiff was entitled to recover general damages for lost profits as these were reasonably foreseeable, i.e. the natural losses from the delay in delivering the boiler machine (per Asquith LJ at [539]-[544])
            b) e.g. Loss of general estimate of profit but not of a particularly lucrative contract (*Victoria Laundry*)
            c) e.g. if they are a professional or specialist in the field designing something specific, then they may already have that background knowledge
         2) In the 'usual course of things' (Parke B in *Hadley v Baxendale*). **Reasonably in the contemplation of both parties at the time of the contract.**
         3) The losses needed to be not unlikely to result, being less than an even chance but nevertheless not very unusual and easily foreseeable (Lord Reid at [383] in *Koufos v Czarnikow*)
      ii. 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*)
         1) Defendant must have **actual knowledge**: Losses which the defendant actually knew would result from breach, including special consequences outside the ordinary course of things (*Victoria Laundry v Newman Industries* Per Asquith LJ at [539]-[544])
            a) e.g. lucrative government contract not recoverable because party not told (*Victoria Laundry v Newman Industries*)
            b) e.g. loss of profitable follow up charter not recoverable because of the late charter was not told and/or could not have assumed responsibility (*The Achielleas*)
   c. **Alternative test** (not yet accepted in Australian law but developers occurring) to *Hadley* — suggests it is not the full picture: True question is whether or not the defendant could be said to have **impliedly or expressly assumed responsibility** for the loss in question (Lord Hoffman in *Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas')* [2009] 1 AC 61)
      i. Examine the nature of the contract, extraordinary value of the consideration, industry practice, etc. that it cannot be said to impliedly or expressly assumed for the loss
   d. We are not concerned with the extent of or specific loss when considering the scope of liability, provided that the type of loss or consequence is something that is liable to arise from the breach (***Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791**)
      i. i.e. not foreseen that the pigs would get E.Coli through moulding nuts, but it was serious possibility that a breach of the contract through pour installation would caused injury or death among pigs.
      ii. 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. The plaintiffs claimed damages for 1) loss of the pigs 2) illness expenses and 3) loss of sale.