

Contracts

Measure

The appropriate measure is for the court to determine, not the parties to elect (*Amann*)

Expectation loss: forward-looking (if promise fulfilled)		
Measure	Scenario	Calculation
Difference in market value	Defective goods or failure to deliver goods (<i>Clark</i>) <ul style="list-style-type: none">Defective straws of sperm	[value of what was promised] – [value of what was received] time of breach (<i>Clarke</i>)
Loss of expected profit	Commercial contracts where aim is to make a profit <ul style="list-style-type: none"><i>Amann</i> surveillance flights if profits were assessable	[expected revenue] – [expected costs]
Rectification If recti not reasonable-> DMV If DMV 0-> only nominal (<i>Bellgrove</i>)	Building contract or subjective value beyond making money <ul style="list-style-type: none">Presumptive position for building defects because land is a unique, non-liquid asset (<i>Bellgrove</i>)	[cost to fix] + reasonable + necessary Exceptional to refuse on reasonableness (<i>Tabcorp</i>) <ul style="list-style-type: none">P 'using a technical breach of secure an uncovenanted profit' (Oliver J <i>Radford</i>) Cf <i>Ruxley</i> and <i>Stone</i> lower bar <ul style="list-style-type: none">DisproportionateBenefit to P < cost to D + 3rdNo intent to carry out work
Reliance loss Usually contract for profit	Proxy where expectation loss difficult to measure Rebuttable presumption in P's favour: would have recouped (<i>Amann</i>) <ul style="list-style-type: none"><i>Amann</i>: needed renewal of contract to turn a profit<i>McRae</i>: tanker never exist	(1) Reasonable expenditure (<i>McRae</i>)... (2) outlaid post-promise (<i>McRae</i>)... (3) in reliance on the promise... (4) that P would have recouped if promise performed (presumption in P's favour) (<i>Amann</i>)
Distress	Contract for enjoyment, relaxation or peace of mind (<i>Baltic</i> ; <i>Moore</i>)	
Consequential loss		
Measure	Scenario	
Lost profits	D's failure to deliver goods cause P to lose profits it would have made	
Incidental exp	D's breach causes P to incur costs in storing/reselling goods	
Lost rent	D's breach causes P to lose anticipated rental income <ul style="list-style-type: none"><i>Tabcorp</i> foyer cannot be leased to tenants while being restored	
Distress (rare)	Distress is consequent on physical inconvenience or injury due to breach	
Loss amenity	Where rectification damages would be unreasonable (<i>Ruxley</i> ; <i>Stone</i>)	

Exceptional measures from UK law

- Court may award **negotiating damages** where a party has breached a **negative covenant** in a contract and **no other measure of loss** provides the plaintiff with damages (*Morris-Garner*)
- **Loss of amenity where rectification damages would be unreasonable** (*Ruxley; Stone*)
- Account of profits: 'exceptionally' (*Blake*)
 - whether P had a legitimate interest in preventing D's profit-making activity and, hence, in depriving him of his profit'
 - cynical breach
 - enabled Blake to pursue more profitable activity/agreement
 - Blake's contractual obligations to gvt akin to fiduciary relationship bc confidentiality and loyalty

Reliance loss damages recoverability (*McRae*)

1. Expectation loss

- **Cost of fitting navigation lights and signalling lamps on vessel used for salvage operation**
 - Capital expenditure: the lights/lamps retain their value
 - Expenditures made well in advance of the contract being concluded
 - Ordinary necessities of upkeeping a ship
- **Reconditioning of ship**
 - Capital expenditure
- **Travelling expenses**
- **Coal consumed by vessel in travelling to supposed location of tanker**
- **Hiring/accommodating Mr Johnson for 8 weeks (expert at salvage)**
 - Item expended on has to be reasonable -> fine bc salvage mission
 - Extent of expenditure reasonable -> 8 weeks fine

2. Consequential loss

- **Loss of chartering profits because vessel was used in salvage operation**
 - Discount for market vicissitudes: not necessarily would have had vessel rented out whole time
- **M's crew's clothes that were lost when ship sank**
 - CDC not responsible for consequences of sinking of ship, too remote/novus actus

When are distress damages awarded in contracts for enjoyment?

- **Holiday falls short of promised standards** (*Moore*)
- **Promise not to molest was breached** (*Silberman*)
- **Building work carried out defectively** (*Coshott*)
- **Breach of solicitor's retainer caused client to lose personal injury claim** (*Denkewitz*)
- **Association wrongfully expelled a member** (*Rose; Goodwin*)
- **Promise to convey land breached** (*Allison v Hewitt*)
- **Promise to deliver a blocked house breached** (*Kwikshift*)
- **Defective heater supplied** (*Falko*)
- **Lessor of commercial premises breached covenant for quiet enjoyment** (*Musumeci*)
- **Headmaster of private school allegedly defamed student** (*Vitale*)
- **Distressed caused to employee by wrongful dismissal** (*Addis; Russell*)

- Lessor of residential premises breached covenant for quiet enjoyment (*Celermajer*)
- Promise to provide horse and carriage for a wedding was breached (*Fletcher*)

Causation = 'but for' + common sense (*Alexander*)

Expectation loss: no factual causation because failure to perform promise is enough

Consequential loss: would loss occurred 'but for' D's breach?

Reliance loss: would P have incurred expense 'but for' D's promise?

NAI: 'but for' + common sense (*Alexander*)

Remoteness

Hadley

1. Damages 'may fairly and reasonably be considered arising naturally ... according to the usual course of things'; or
 - If reliance loss: 'is economic loss the type of loss that would naturally follow from breach of this contract?'
2. Damages 'may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the possible result of the breach of it'
 - Subjective + objective -> type of loss
 - Eg special contract term brings circumstance to parties' attention
 - Take into account D's business operations/subjective knowledge here (*Victoria Laundry*)
 - 'it is important to inquire what information the defendants possessed at the time when the contract was made' [533]

Can divide into ordinary business profits and lucrative profits (*Victoria Laundry*)

Can consider market convention and assumption of risk (*Achilleas*)

No contributory negligence

Except where contract DoC is concurrent and coextensive with a tortious DoC (ss 25,26 WA)

Mitigation

Clark: conceptualising replacement sperm purchase

- Hayne J: purchase revealed value of contractual right
- Gageler J (dissenting): not worse off, left in same position bc recoup

Only applies *after* P has knowledge of the wrong

Buying substitute goods

- P cannot claim lost profits but can claim DMV of undelivered/faulty goods

Consider P's financial means

- Especially where Ds wrong is *why* P cannot mitigate (*Brennan J Burns*)

McGregor on Damages, accepted by Australian courts

1. P cannot recover for loss that it would have been reasonable to avoid

- Reasonableness of P's conduct judged on basis of information they possessed at the relevant time [3.134 TB] (*Fazlic v Milingimbi Community*; *NSW v Fahy*; *Arnott v Choy*)
 - Conduct that is objectively unreasonable is not regarded as reasonable only because P allowed baseless facts to outweigh cogent ones (*Fazlic v Milingimbi Community*; *Arnott v Choy*)
 - P does not act unreasonably merely because they are too poor to take mitigating steps (*Burns Brennan J*)
 - Examples of unreasonable failure to avoid loss: [3.135 TB]
 - D fails to deliver goods, P unreasonably delays buying substitute goods, market price of goods increases BUT D's liability does not
 - D fails to perform, P does not obtain substitute performance from third party (*Pialba*)
 - P suffers personal injury but does not seek medical advice or refuses a medical procedure (*Fazlic*)
 - Depends on P's knowledge of benefits and risks of procedure at time of refusal (*ECS*)
2. P can recover for loss incurred in reasonable attempts to avoid loss
- P can recover even if D can suggest less expensive measures (*Branco*) [3.136 TB]
 - P can recover costs of measures which were reasonable to take but turned out to increase, rather than mitigate loss (*Unity v Rocco*); *Mann Judd v Paper Sales*; *Hatfield v TCN*)
 - P can recover cost of successful legal action against third party who becomes insolvent and is unable to satisfy the judgment debt (*GW Sinclair*)
3. P cannot recover for avoided loss
- Bc loss is never incurred, it is avoided
 - If P obtained better substitute through mitigation, no damage (*British Westinghouse*)