LAWS1017 Notes

1. Introduction

Comparing Contract (K) and Tort (T)

Purposes

- **K**: fulfils expectations and provides a mechanism by which people can allocate responsibilities and risks
- **T**: compensates for wrongs and has a regulatory function (people want to avoid liability, therefore they take precautions)

Overlap of K and T

"The fact that there is a K relationship between the parties which may give rise to an action for breach of K does not exclude the coexistence of a right of action founded on negligence as between the same parties, independently of the K, arising out of the relationship brought about by the K (i.e. duty of care)" (**Lord Macmillan - Donoghue v Stevenson**)

- Generally, K liability arises because a person entered a K
- Generally, T liability arises because a person undertook a certain activity

Restitution for unjust enrichment

- **Unjust enrichment**: not a loss suffered by P, but a gain/enrichment by D at the expense of P
- In some instances, the common law and equity recognise obligations to give restitution for unjust enrichment
- Unjust enrichment is not in itself a freestanding basis for entitlement in Australia, but it does explain existing causes of action and remedies
  - E.g. the law generally allows people to recover mistaken payments (i.e. accidentally paying a bill twice)

Measure of damages in K and T

- **T measure of damages**: to put P in the position P would have been in had the tort not been committed (**Parramatta City Council v Lutz**)
- **K measure of damages**: to put P in the position P would have. been in had the K been performed (**Gates v City Mutual Life Assurance Society**)
  - Reliance loss vs expectation loss

Limitation periods for K vs. T

- **Actions in <u>contract</u> and <u>negligence</u> are both subject to a 6-year general limitation period, and a 3-year limitation period in personal injury cases**
- **For a K claim**, the cause of action is complete when the K is breached (as soon as the K is breached, you have a cause of action for breach of K and triggers whatever remedies are available)
  - **Time starts to run out in the limitation period sooner**
- **For a T claim**, there is no cause of action until the damage is suffered (you must wait until the damage has occurred to sue for damages)
  - **Time starts to run out in the limitation period later**

Choice of law

- **T:** an action will be governed by the **law of the place where the tort was committed**
- **K:** an action will be governed by the **proper law of the K** (can be specified in the K expressly or can be decided by the court)

Contributory negligence

- At common law, CN was a complete defence to a tortious action in negligence

- But the common law did not recognise CN as a defence in an action for breach of K
- LR(MP) Act 1965 (NSW) was amended in 2000 to permit an award for breach of K to be reduced on the basis of CN

Standard of performance in K and T

- In a negligence action, a D is expected to meet the standard of 'reasonable care'
- In a K action, a D is expected to meet the standard of performance specified in the particular K (i.e. it may be a **strict liability K** or a **reasonable care liability K**)
    - The distinction between these types of Ks is important bc it may affect how and whether the CLA applies
        - **The CLA applies where the liability for damages arises out of negligence**

Equity

- Equity operates in two jurisdictions:
    - **Its exclusive jurisdiction** - its own obligations and notions of property which the common law did not recognise: trusts, equitable interests, fiduciary obligations, obligations of conscience (equity worked out its own remedies for these obligations)
    - **Its auxiliary jurisdiction** - where equity would supplement the common law by…
        - Awarding remedies for common law wrongs that the common law courts did not award, but only if damages would be inadequate
            - E.g. equity may prevent an injunction to prevent the tort from occurring (for threatened torts)
            - E.g. equity may grant specific performance of a K
        - Giving relief from the harshness of the common law
            - By ordering rescission of a K or the setting aside of a gift that was obtained through undue influence or other unconscionable conduct of the stronger/benefitting party
            - The basis for the equitable relief may arise because of the pre-existing relationship of the parties, or because of the particular conduct of one party before or during the transaction

2. Causation and Remoteness of Damage in Contract

Overriding Issues

1) Causation: was the damage claimed by P *caused* by the breach of K?

2) Remoteness of damage: is the damage claimed within the *bounds of remoteness*? Or if the CLA applies - is it within the *scope of D's liability*?

3) Once that is determined in P's favour, then we turn to assessment issues - the measure of damages in K

- **Reliance loss vs expectation loss**

Causation of Loss or Damage

Common Law Approach

- Common law approach - apply **'but for' test** to decide whether something is 'a' cause, limited by reference to 'common sense' and 'policy' (**March v Stramare**)
    - Whether or not a subsequent event breaks the chain of causal should be assessed by reference to the standard of "common sense" and policy (**March v Stramare**)
- How to deal with **intervening causes**? Compare mere preconditions to the occurrence of the loss?
    - E.g. Voluntary human action of a third party = likely seen as an intervening cause (depends how foreseeable it is)

    - E.g. Unforeseeable natural or unnatural events = almost always be seen as an intervening cause (depends how foreseeable it is)

Civil Liability Act
Section 5D of the CLA
Applies to K claims when the duty that has been breached (i.e. the promise that hasn't been performed) is one to exercise due care or due skill.

Section 5A of the CLA
5A Application of Part
(1) This Part applies to any claim 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.

- *This section makes it clear that s 5 of the CLA can apply to breach of contract (**Monaghan Surveyors**)*

Section 5D of the CLA
(1) A determination that negligence caused particular harm comprises the following elements:
(a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and

- *Satisfy the 'but for' test + common sense + policy considerations (**March v Stramare**)*

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").

- *Lord Hoffman re-characterised the remoteness test in English K law by reference to the scope of liability (**The Achilleas**)*
- *Remoteness - it is appropriate for the scope of liability to extend to D where the type of harm is reasonably foreseeable (**Wagon Mound No 1**)*

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) 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) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

- *Relevant to "failure to warn" cases for medical and commercial risk*

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

***Reg Glass Pty Ltd v Rivers Locking System Pty Ltd (1968) 120 CLR 516**

- **Facts**: D was contracted to supply a 'rear single door' at the P's shop premises. The purpose of the door was to prevent burglaries, but thieves broke in, taking an hour to force the door out of position and stole a large quantify of stock.

- **Issue**: Was the duty breached - did the door provide ‘reasonable protection’?
- **Held (3-2)**:
  - **The K contained an implied term that D’s door would provide ‘reasonable protection’, which was determined by majority to have been breached.**
  - **But even if there was no breach (i.e. the door was built to a standard to provide reasonable protection), there was evidence to suggest that the thieves would have found a way to break in anyway due to their effort and determination.**
    - **Therefore, can it really be said that it was the breach that caused the loss?**
    - **Or was it the intervening actions of the thieves that caused the loss?**
  - **Because there was evidence both ways (evidence that the door did not provide reasonable protection, and evidence that the thieves would have found a way to break in regardless of the door), it was not clear based on the evidence that the breach caused the loss**
  - **But once breach is established (i.e. once it was found that the door did not provide reasonable protection), and it appears that the claimed loss flows from this beach, the court is entitled to *presume* that it does – BUT it remains open for D to negative this causation**
    - **A shift in the burden of proof - D may then provide evidence to prove that there was some other cause of the loss**

Alexander v Cambridge Credit Corporation Ltd (CCC) (1987) 9 NSWLR 310:

- **Facts**: Due to a breach of their contractual duty of care, auditors of CCC overstated value of the company’s assets. If assets had been properly valued, CCC would have been put into receivership in 1971, but it continued trading until 1974. If the company had gone into receivership in 1971, its losses would have totaled ~$10 million. Instead, losses were ~$155 million. The claim was for this difference (i.e. $145 million).
- **Held**:
  - Although the ‘but for’ test was satisfied here, McHugh and Mahoney JJA held that the auditor’s breach was not the (legal) cause of the company’s losses.
    - I.e. if the audit had been done properly, the company would have been put into receivership in 1971 and would not have suffered the additional losses.
  - McHugh JA also thought the loss was ‘too remote’.
  - Compare Glass JA in dissent, finding the loss was recoverable.
  - **McHugh JA:**
    - Focussed on **“common sense”** → although the auditor’s negligence satisfied the ‘but for’ test, the auditor’s negligence was sufficiently superseded in potency by supervening events between 1971-1974 (for such huge losses to eventuate) as to not be a (legal) cause.
      - To say that the auditor’s negligence was the cause is to effectively say that they company’s continued existence and trading was the cause of the loss
    - Also found the loss was **“too remote”** b/c the loss CCC suffered between 1973-74 was not of a “kind… which the parties would have contemplated as being a serious possibility… in 1970” (**Koufos** standard applied)
      - The type of loss was not reasonably foreseeable
  - **Mahoney JA:**
    - Questioned the usefulness of the ‘but for’ test of causation – in any event, found that “allowing a company to remain in existence does not, without more, cause losses from dangers incidental to mere existence.”
  - **Glass JA (in dissent):**

        - Believed that the auditor's negligence was a common sense cause b/c it was a 'but for' cause.
        - Losses also not 'too remote' b/c auditors aware that decisions regarding receivership depended on their findings and that failure to close the co down when there was a breach of the relevant ratios created a 'serious possibility' that market movements would cause serious losses.

Remoteness of Damage

Purpose of the contractual 'remoteness' principle: To place an appropriate limit on responsibility and recovery

The relationship between contractual remoteness principles and the rules of causation: Factual causation and legal causation are different enquiries. For factual causation, you must ask the 'but for' question, and then limit this by reference to common sense and policy. The legal causation enquiry appears more like the remoteness enquiry, because it is inherently normative and involves judgment about what events are legally relevant.

Is the rule of remoteness agreement-based or a default rule externally imposed by the law to achieve fair, proportionate and/or efficient results?

(a) What kind of loss is to be compensated?

Hadley v Baxendale (1854) 9 Ex 341; CMCLA 35.05

- Alderson B held that **losses are recoverable if they fall within either the**:
    - **First limb ('general damages')**: losses arising naturally, that is, according to the ordinary course of things, from breach (usual course of things)
        - E.g. Retailer purchased defective goods from a wholesaler, and the retailer had to sell the goods at a cheaper price. Therefore, the financial loss suffered falls within the first limb because it is loss that arises in the ordinary course of things.
    - **Second limb** (**'special damages'**): losses such as those that **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** (i.e. losses that are more extraordinary)
        - Because of special circumstances, there is a loss that wouldn't occur in the ordinary course of events.
        - E.g. Retailer orders Xmas products to sell for Xmas, needing them by beginning of December. The wholesaler must know that if there is a delay in delivering those goods for a few weeks, that will cause substantial loss to the retailer.

***Victoria Laundry Ltd v Newman Industries Ltd [1949] (about Hadley's <u>second limb</u>):**

- **Facts**: Sale of a boiler to launderers and dyers. The buyers told sellers that they intended to put the boiler to use 'in the shortest possible time', but they didn't mention anything as to why they needed it. Delivery was delayed by a little over 5 months. Buyer claimed for lost profits of two kinds: 1) ordinary business losses during that period, 2) extraordinary profits lost due to being unable to accept new particularly lucrative (post-war) contracts from UK govt.
- **Held:**
    - **The ordinary profits were recoverable, as this is loss that falls within the first limb (losses arising naturally in the usual cause of things - for which the breaching party could have expected to reasonably contemplate)**

- **But the profits lost by failing to be able to perform the exceptionally lucrative govt contracts were not recoverable since this loss was not within sellers' reasonable contemplation.**

Applying the Hadley v Baxendale rule (as done in Victoria Laundry v Newman Industries), expressly telling the other party about the potential loss if the K is not performed properly (i.e. putting it in their reasonable contemplation), is a key factor in determining whether it is reasonable to hold the party responsible for the loss, but it isn't the only relevant factor…

(b) 'Foreseeability'

***Koufos v C Czarnikow Ltd (The Heron II) [1969] 1 AC 350 (HoL)**

- **Facts**: A chartered ship (delivering sugar) arrived late by which time the market price of sugar had dropped, so the charterers (who were shipping sugar) claimed the difference between the price they actually obtained by selling the sugar and the price they would have obtained had the sugar arrived on time.
- **Held**:
  - **It was held that this difference in price was recoverable, even though owners did not know that the charterers intended to sell the sugar immediately upon arrival.**
  - **Lord Reid:**
    - **The relevant question is whether D, with the information he had available, "should, or the reasonable man in his position would" have realised that the particular kind of loss was <u>'not unlikely'</u> to result from the breach.**
      - D does not need to be expressly told about the consequences of the breach; they just must reasonably foresee it
        - It is well within the reasonable bounds of possibility that someone shipping sugar and in the business of selling commodities would want to sell it as soon as it arrived

    Lord Upjohn:
    - **For a reasonable person the breaching party's position, the particular loss must be a <u>'serious possibility'</u> or a <u>'real danger'</u> result of the breach.**
- **Principle:**
  - **1) Level of foresight that is required for a loss to be recoverable:**
    - **The particular kind of loss = <u>'not unlikely'</u>, a <u>'serious possibility'</u> or a <u>'real danger'</u> to result from the breach**
  - **2) The test for remoteness in K is narrower (i.e. a higher threshold) than the test for remoteness in the T of negligence:**
    - **The degree of foresight required to make the loss recoverable in a breach of K claim is higher than what is required in a negligence claim**
      - **Losses that are possibly foreseeable, but unlikely, may be recoverable in a claim for negligence**
      - **Losses that are possibly foreseeable, but unlikely, are unrecoverable in a claim for breach of K**
  - **3) There must be reasonable contemplation at the time of K formation (as opposed to reasonable foreseeability at the time of breach in T)**
  - **4) Any losses that fall within the first limb would also fall within the second limb**
    - **Because if it is a loss that would arise in all cases of breach of that kind, then it is a loss that would be reasonably contemplated by both parties at the time the K was made**

*** H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791, CMCLA 35-18**

- **Facts**: P purchased a metal storage hopper from the defendant to feed pignuts to their pigs. Due to its defective installation, the hopper's ventilation system malfunctioned and the nuts became mouldy. This caused many of P's pigs to develop E coli, which eventually led to the death of 254 pigs.
- P claimed for (1) the loss of the pigs, (2) costs incurred in dealing with the infection and (3) damages for lost 'turnover' (lost profits incurred in not being able to rear subsequently generations of pigs).
- Held (Scarman LJ):
  - Applied the Koufos test:
  - 1) The illness of the pigs due to breach a 'serious possibility' so that loss (and costs incurred) was recoverable.
  - 2) Because the illness of the death was a serious possibility, the death of the pig was then also recoverable due to 'egg-shell skull rule'
    - You don't need to foresee the extent of the loss (i.e. death); just the kind of loss (i.e. illness)
      - Usually in K, as long as you can foresee that an economic loss will be suffered, the full extent of economic the loss is recoverable even if the extent was not foreseeable
  - 3) But damages for lost 'turnover' (i.e. subsequent generations of pigs) was not recoverable because it was deemed to be 'too remote'

c/f Denning LJ's approach, which focussed on the distinction between physical damage and economic loss.

(c) A different approach to remoteness in contract law

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48

- **Facts**: A charterer was late returning the ship to the ship owner by 9 days. Because the ship was returned late, the ship owner missed the delivery date for the next charter contract that it had already committed to perform. This delay gave the follow-on charterer the right to cancel, which it was pleased to take b/c market rates had since fallen sharply since the follow-on charter rate had been agreed.
  - Significantly, there was an understanding in the shipping industry, supported by *obiter dicta* in some cases & textbook commentary, ***that a charterer's liability for late redelivery was limited to the difference between the market rate and the charter rate for the period of the overrun***. This was about US $160,000 vs. the US $1,300,000 lost profit suffered by the owners.
    - The owner was claiming for the difference between what they had originally contracted to hire their ship out for the entire charter vs the cheaper price they had to take
    - The charterer argued the owner was only entitled to that difference in price for the 9 days the ship was late
- **Issue**: whether a charterer breaching a contract through late redelivery was liable for the owner's lost profit on a subsequent charter
- **Held**:
- <u>The Court of Appeal</u> (and other lower courts) held that the loss claimed by the owners was certainly 'not unlikely' and 'highly probable' so that this loss was covered by the 'first limb' in *Hadley v Baxendale* and therefore recoverable.
  - **The understanding in the shipping industry wasn't given much weight in the lower courts because it was not sufficient to constitute a term implied by custom/usage, therefore it was not a term of the K**
- <u>The House of Lords unanimously overturned this decision.</u>
- **Lord Hoffmann:**