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## CONTRACT

The amount the plaintiff would have benefited if the contract had been properly performed: Robinson v Harmon

**Date of assessment:** day of breach

**Once and for all rule:** Cannot go back to the court and request a 'top up' in damages: Lim Poh Choo v Camden and Islington Area Health Authority [1980] AC 174

### Causation

Defendant's breach of contract has caused a loss to the plaintiff

#### COMMON LAW TEST:

**Only 1 defendant:** 'But for' test: Barnett v Chelsea & Kensington Hospital

**More than 1 defendant/causes to the plaintiff's loss:** Common law approach: March v E & M H Stramare

The common law approach seeks to determine whether the defendant's wrong was a material cause off the loss.

*Alexander v Cambridge Credit Corporation (1987) 9 NSWLR 310*

#### Facts:

- Auditors in crease of contract because of their failure to demand an adjustment to its balance sheet. Causal connection between the breach and the loss of \$145m.

**Held:** McHugh: endorsed the common-sense approach. He started with the 'but for' test. However, it is only one way in but not the exclusive approach to determine causation. Need to examine whether it was common sense.

**Result:** liability of the auditors reduced. There was an economic change which overwhelmed the auditor's breach.

### Contributory negligence

Contributory negligence: where the defendant's liability is reduced because the plaintiff caused some of their loss by failing to take reasonable care of their own interest.

Contributory negligence does not apply to claims in contract, unless the breach of contract is a breach of duty of care that is 'concurrent and co-extensive with a duty of care in tort': Law Reform (Miscellaneous Provisions) Act 1965 s 8.

If the plaintiff had been negligent, then there may be scope to argue that:

- The loss is too remote
- The contributory negligence is a novus actus interveniens

### Novus Actus Interveniens

Novus actus interveniens can be argued in contract

- The defendant may attempt to argue that a supervening cause "breaks the chain of causation" between the defendant's wrong and the plaintiff's loss.
- Often difficult to prove, especially where the supervening event occurs because the defendant's wrong increased the risk of the event occurring.

- *Alexander v Cambridge Credit Corporation (1987)*
  - Auditors in breach of contract because of their failure to demand an adjustment to its balance sheet.
  - Casual connection between the breach and the loss of \$145 million
  - The real causes of CCC's loss as a matter of common sense was changes in the economic market leading to a downturn between 1971-4 and the decision to expand operation during this time.
  - A later event may be so potent as to overwhelm the original wrong ☐ economic change did overwhelm the auditor's breach.
  - The downturn was a novus actus interveniens

## Remoteness

The scope of remoteness in contract is shaped by the responsibility that the defendant voluntarily assumes.

### *Hadley v Baxendale (1854) 156 ER 145*

#### **Facts:**

- Plaintiff hired defendant to transport their crankshaft for repair
- Unknown to Defendant, plaintiff had no otherwise crankshaft to be used while their crankshaft was being repaired so plaintiff's mill was at a half.
- In breach of the contract, defendant was late returning the crankshaft.
- Plaintiff sued for loss profits for the period that the crankshaft was late.

**Held:** Defendant did not know that the mill would remain idle until the broken crankshaft was replaced. For all the carrier knew, the crankshaft may have been a spare part.

#### **Note:**

- Focus on objective and actual knowledge prior the contract is formed.

#### **'Two heads' of *Hadley v Baxendale*:**

1. Loss that would flow naturally, according to the usual course of things, from a breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract (i.e. presumed knowledge of the parties)
2. Special circumstances known to the plaintiff or particular damage that would result breach and communicated to the defendant (i.e. actual knowledge of the parties, which liability the defendant accepts)

### *Victoria Laundry (Windsor) Ltd v Newman Industries Limited*

**Facts:** Plaintiff ran a laundry business and needed a boiler. It was taken away and replaced. Newman knew at the time of contract that boiler was used to the part of their business. It was weeks longer than it should be = breach of contract. Sued for loss of profits and sue for loss profits loss with particular contracts they have signed at the time.

#### **Held:**

- Ordinary profits were ordinarily contemplated at the time of contract.
- Those 'particular contracts' were not.

### *Koufos v C Zarnikow [1969] AC 350*

**Keynote:** Koufos considered the remoteness test for negligence and beach of contract. Both involve action of reasonable foreseeability

**House of lords:** the scope of responsibility in negligence is much more generous than a breach of contract

#### **Reasoning:**

- Breach of contract depends on what is reasonably foreseeable. Defendant would only be liable for losses that was reasonably foreseeable and no likely to have occurred.
- For torts: defendants liable for reasonably foreseeably and insignificant risk.
  - Reasonably foreseeable – even with a los likelihood of occurrence would still be within scope.

## Contract and negligence compared

Action	Scope of foreseeability	Likelihood of occurrence
Contract	Loss that would flow naturally, according to the usual course of things, from a breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract.	Not unlikely to occur
Contract	Special circumstances known to plaintiff of particular damage that would result from breach and communicated to defendant.	Not unlikely to occur
Negligence	Any damage that is reasonably foreseeable.	Not far fetched or fanciful

## Mitigation

An obligation on the plaintiff, once the wrong has occurred, to act reasonably to prevent losses from increasing.

The defendant will not be liable for any damages incurred that could have been avoided by reasonable action by the plaintiff:

- Excessive damage not caused by the defendant's wrong; or
- Such damage is too remote

**Test:** What would a reasonable person in the position of the plaintiff would have done.

**Onus:** on the defendant to:

- Raise mitigation as an issue/defence; and
- Prove the failure to mitigate.

*British Westinghouse Manufacturing Co Ltd v Underground Electrical Railways Co of London Ltd*

**Held:**

- Duty to mitigate does not require plaintiff to do anything more than to act reasonably

If the plaintiff has acted reasonably and the losses increase, then the defendant will still be liable: *Simonius Vischer & Co v Holt & Thompson [1979]*

*Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452*

**Held:**

- Plaintiff will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that the other measures less burdens on to him might have been taken.
- Where plaintiff has attempted to reasonably mitigate, the cost of doing so is recoverable as damages → even if the attempt increased the loss