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INTRODUCTION: TORT AND CONTRACT

Tort vs Contract Law

Tort governs infringements of interests protected by the law independently of private agreement

Law of contracts governs expectations arising out of particular transactions between individual persons

CONCEPTUAL DISTINCTION:

- Tort concerned with compensation for injury or damage and deals with multiple wrongs (negligence, assault, etc.)
- Contract concerned with the enforcement of contracts and deals with only one wrong: breach

LIABILITY IN TORT:

- Imposed without agreement
- However sometimes agreement is relevant to liability in tort, eg. consent
- Standard of liability: based on FAULT → intentional wrongdoing or negligence

LIABILITY IN CONTRACT:

- Derived from agreement between parties
- Usual standard of liability: Strict → failure to perform may lead to liability without 'fault'
- However may be lower, eg. in professional relationships contract may promise "reasonable care"

Daniels v R White and Sons and Tarbard [1938]

- Mr Daniels bought sealed bottle of lemonade from Mrs Tarbard (publican), manufactured by R White and Sons. Bottle contained carbolic acid that caused Daniels injury.
- Although R White and Sons owed P a common law duty of care (Donoghue v Stevenson) the P failed to prove a breach of duty.
- However established breach of contract of warranty – not relevant that there was no fault

Practical Implications:

CAUSE OF ACTION:

- Tort: D acquires cause of action at the moment of damage
- Contract: D acquires cause of action at the moment of breach

LIMITATION PERIODS:

- Limitation period under the *Limitation Act 1969 (NSW)* s 14 for commencing action in tort for negligence or in contract is the same – 6 years as a general rule; 3 years for personal injury
- However commencement date differs:

- Tort: commences when P suffers damage (may be considerably later than breach occurred)
- Contract: commences when breach occurs irrespective of whether P has suffered damage at the time

MEASURE OF DAMAGES:

Gates v City Mutual Life Assurance Society Ltd (1986)

- Contract: damages awarded to place P in **position had contract been performed**, including expectation loss and reliance loss (damage and expenditure incurred in reliance on contract)
- Tort: damages awarded to place P in **position had the tort not been committed** (similar to reliance loss)

CONTRIBUTORY NEGLIGENCE (historical importance only)

- At common law, contributory negligence is a complete defence to a claim in tort for negligence, but there is no defence in a claim founded on breach of contract: *Astley v Austrust Ltd (1999)*
- *Harper v Ashtons Circus Pty Ltd*
 - P purchased tickets for himself and family for a performance at D's circus. During performance, P fell backwards from top tier of seats while trying to swap seat with wife and suffered injury. P sued D for breach of contract (failure to provide safety rail).
 - NSW Court of Appeal found no contributory negligence, but held that as a matter of principle, contributory negligence is no defence to an action founded on breach of contract and hence no ground for reduction of the P's damages under apportionment legislation

Today, Law Reform (Miscellaneous Provisions) Act 1965 (NSW) - apportionment principle (reduction of damages on account of contributory negligence) applies in cases of "breach of contractual duty of care that is concurrent and co-extensive with a duty of care in tort"

Concurrent Liability:

Concurrent liability arises where the liability imposed by law (tort) is coextensive with liability derived from the parties' agreement, express or implied (contract)

- *Donoghue v Stevenson* – the existence of a contractual relationship does not exclude the co-existence of a right of action founded on negligence, independently of the contract, though arising out of the relationship in fact brought about by the contract
- Where contractual liability exists, injured party may choose to sue in either contract or tort or both
 - Election will be guided by considerations of forensic advantage with regard to matters such as applicable limitation period and the measure of damages, or matters such as choice of law
- Concurrent liability will exist whenever there would be liability for gratuitous performance without the contract – principle which seems to have emerged from US courts (and probably Anglo-Australian courts)

COMMON EXAMPLES:

- Employer + employee: *Matthews v Kuwait Bechtel Corporation [1959]*
 - o Tort: employer has common law duty of reasonable care in respect of workplace safety
 - o Contract: implied term in every contract of employment that employer will take reasonable care for workplace safety of employees
- Carrier + fare paying passenger: *Kelly v Metropolitan Railway Co [1895]*
 - o P was fare-paying passenger on D's steam train. Suffered personal injury when engine driver negligently failed to turn off steam in time to prevent train running into wall.
 - o D admitted liability → only matter in issue – whether claim properly founded in tort or contract
 - o Practical significance of issue – higher scale of legal costs recoverable by P in tort
 - o English Court of Appeal held action could be brought either for breach of the contract of a safe carriage or for negligence in carrying him
- Professional persons (doctors, lawyers, dentists, architects, engineers, taxi driver) + patients or clients
 - o Owe tortious duty to exercise reasonable care in the context of relationship

BUT...

- Need to remember that tort and contract have distinct fields of operation
 - o I.e. where driver of a motor vehicle negligently causes personal injury to another road user, liability will only be in tort
 - o Where seller fails to deliver goods to the buyer as agreed, liability will be only in contract

Liability of Minors

Where there is concurrent liability in tort and contract, liability of D in tort is not affected by D's lack of contractual capacity on the account of his or her minority: *Minors (Property and Contracts) Act 1970 (NSW) s 48*

Choice of Law Considerations:

- Tort: liability governed by the *lex loci delicti* – the law of the place where the tort was committed
 - o Intra-national torts: *John Pfeiffer Pty Ltd v Rogerson (2000)*
 - o International torts: *Regie Nationale des Usines Renault v Zhang (2002)*
- Contract: liability governed by the proper law of the contract – the legal system which is the express or inferred choice of the parties as the proper law of the contract
 - o In the absence of an express or inferred choice – the legal system with which the contract has its closest and most real connection. See *Bonython v Cth of Australia [1951]*
- Where concurrent liability exists, choice of law considerations may determine whether P should bring action in tort or contract

- eg. Where contract between tour operator and client for provision of European package holiday is expressed to be governed by the law of NSW, and client injured in accident in Slovakia by the tour operator's negligence → claim in tort will be governed by law of Slovakia as the *lex loci delicti* but a claim in contract will be governed by the law of NSW as the proper law of the contract
 - *Garstang v Cedenco JV Australia [2002]*; *Busst v Lotsirb Nominees [2003]*
 - Compare *Insight Vacations v Young (2011)*

GUIDE: WHEN TO USE TORT VS CONTRACT LAW

If there was no fault → contract law

If there was no damage → contract law

If damage did not emerge until after the breach occurred, and limitation period is an issue → tort law

If P could expect damages in relation to expectation loss → contract law

CAUSATION AND REMOTENESS OF DAMAGE IN CONTRACT

Two concepts used to constrain the ambit of the defendant's responsibility for the plaintiff's loss

Loss:

TYPES OF LOSS:

- Nominal damages are damages in name only – recognizes a right has been infringed but no loss has been proven
 - o See *Luna Park (NSW) v Tramways* - Luna Park couldn't prove extent of the breach, thus court could not calculate extent of the damage
- Substantial damages have substance – means you have proved some sort of loss

THIRD PARTY LOSS:

- *Alfred McAlpine Constructions Ltd v Panatown Ltd [2000]* – demonstrated that where loss is to third party, contract law cannot prove a loss to the Defendant and damages will be nominal

Causation:

Damage must have been caused by the defendant (easier to satisfy in contract than in tort)

FIRST QUESTION: what sort of term has been breached?

- If breach of strict term → use common law
 - o *March v Stranmare*: As a matter of common sense, did the breach cause the loss?
- If breach of "reasonable care" term → use s 5D CLA 2002 (NSW) (same as for torts)
 - o 'But for' causation: Would the damage have arisen if the wrong had not occurred?
 - o Scope of responsibility: deals with intervening acts, breaks in chain of causation, etc.

5D Causation : General Principles	(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 (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability"). (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:
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	(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. (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.
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EXAMPLE:

A gets B to come and paint A's house while A is not home. B forgets to lock the house and C breaks in and steals A's belongings. A sues B for breach of contract.

- Q: Did B's breach cause A's loss? Yes – because clause in contract was inserted to deal with that scenario exactly

Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd (1968) CLR – third party caused damage

Facts: Contract to install a security door at rear of shop. Implied term that door, as fitted, would be reasonably fit for purpose of preventing entry by burglars. Breach of this implied term. Thieves broke in and stole stock.

Issue: D argued that P was unable to prove that 'but for' their breach, the theft would not have been avoided.

Held: HC held that as long as it *seems* that the breach caused the loss, then P has made out a prima facie case, and the onus then shifts to D to prove that the thieves would have broken in anyway.

Causation has not generally been a controversial issue in contract cases. In most contract cases there is only one event that has contributed to the plaintiff's loss: the defendant's breach. In these sorts of cases causation may be analysed through a simple but for test, which asks whether or not "but for" the defendant's breach the plaintiff would have suffered the loss in question – *g, Pilmer v The Duke Group Ltd (in liq)* (2001) 180 ALR 249, 263.

More difficult questions of causation arise in those cases where there have been a number of events contributing to the plaintiff's loss. ^ The "but for" test, it suggest that both the defendant's breach and the subsequent events were causes of the plaintiff's loss.

In cases of f multiple contributing events, a subsequent event that contributes to a plaintiff's loss may sometimes break the chain of causation between the defendant's breach of contract and the plaintiff's loss. Such an event is usually described as an intervening event or a novus actus interveniens. Where there is a break in the chain of causation between the defendant's breach and the plaintiff's loss by reason of an intervening event, the defendant will not be liable for the loss. I

? As a general principle, the High Court has said that questions of causation should be determined in a “common sense” way in which value judgments and policy considerations as to whether the respondent ought to have caused the loss in question will be relevant – **March v E & M H Stramare Pty Ltd** (1991) 171 CLR 506, 530.

Remoteness:

What kind of loss is to be compensated?

If the P suffers a loss which is caused by the D’s breach, damages will not be recoverable if the loss was too remote

Hadley v Baxendale (1854) 9 Ex 341 – Lays down test of assessing whether or not a particular loss caused by a breach of contract is too remote; English case adopted by the HC on numerous occasions.

Facts: Hadley ran a mill, and engaged Baxendale (a carrier) to transport mill shaft. Baxendale was delayed in his delivery, and Hadley argued that he deserved compensation because his business could not run for the period of delay. Baxendale argued that he had no knowledge that the delay would cause this dire consequence, because he did not realise the part was of such importance.

Held: Court declined to allow Hadley to recover lost profits in this case, holding that Baxendale could only be held liable for losses that were generally foreseeable, or if Hadley had mentioned his special circumstances in advance. The mere fact that a party is sending something to be repaired does not indicate that the party would lose profits if it is not delivered on time.

KEY RULE: An injured party may recover those damages reasonably considered to arise naturally from a breach of contract, or those damages within the reasonable contemplation of the parties at the time of contracting.

- The technique for applying the key principle of remoteness of damage is to distinguish between claims for ordinary losses (knowledge of which may be assumed) and special losses (for which the defendant will not be liable unless there was knowledge)
- Natural damages (first limb): losses that “may fairly and reasonably be considered either arising naturally, ie. *According to the usual course of things*, from such breach of contract itself”
- Special damages (second limb): losses that “may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”
 - o Party must show that contract breaker had extra, special knowledge that the particular consequence was a likely result of breaching the contract

* **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 428**

Facts: P bought Cochran boiler for laundry from D. During negotiations, informed defendants it was their intention to “put it into use in the shortest possible space of time.” Delivery delayed by 5