الجامعة الإسلامية العالمية ماليزيا
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COMPENSATORY DAMAGES UNDER LAW OF CONTRACT: A COMPARATIVE STUDY UNDER ENGLISH LAW, MALAYSIAN LAW AND ISLAMIC LAW

BY

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THIS THESIS IS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF COMPARATIVE LAWS

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ABSTRACT

The topic concerns the law governing the compensatory damages in English law, Malaysian and Islamic law. This is a library research endeavour for which the writer has gone through various legal opinions of the English writers and Malaysian writers. The modern commentary as well as the classical books were referred to for the Islamic view. For English law, the study was most made to the relevant cases and statutes such as Law Reform (Contributory Negligence) Act 1945, Sale of Goods Act 1979 and Sale and Supply of Goods Act 1994. While for the Malaysian legal position, special reference was made to the Contracts Act 1950 which governs most of contract law in Malaysia, and the Sale of Goods Act 1957. The Civil Law Act 1956 was referred to cover some cases which permits the importation of English law for instance in the insurance law, contributory negligence and other commercial matters.

The English law governing the compensatory damages developed through the emerging cases and some of the rule in these cases were imported into Malaysia, for example the principles in *Hadley v Baxendale*. These emerging cases continuously gave wider discretion of the court to determine the assessment and method to grant damages. While for the Islamic law, the classical jurists were more concerned with the discussion of right and obligations in performing the contract rather than damages which after the breach of the contract. The thesis further found that some of the existing rules in English law and Malaysia are not contradicting Islamic law.The writer sums up by explaining the position of compensatory damages law in England, Malaysia and Islamic law.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

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With great humility, the writer is fully aware of her want of ability and strength to carry out this project though and which she nevertheless did, but only with the help and bounty granted her by Allah (s.w.t.). Praise be to Allah by whose grace the writer is sufficiently equipped mentally and physically to complete this piece of work.

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6. Sale and Supply of Goods Act 1994.

LIST OF ABBREVIATIONS

All ER	All England Report
AC	Appeal Case
ALQ	Arab Law Quarterly
AMR	All Malaysian Report
App. Cas.	Appeal Case
cf.	compare
ch.	chapter
CLJ	Current Law Journal
CLR	Current Law Report
Co.	Company
col.	column
dept.	department
ed.	edition
eg.	example
et.al.	(*et alia*) and others
etc.	(*et cetera*): and so forth
ibid.	(*ibidem*): in the same place
id.	(*idem*): the same
i.e.	that is
JMCL	Journal of Malaysian Contract Law
KB	King Bench
Lloyd's Rep.	Lloyd's Report
LQR	Law Quarterly Review
Ltd.	Limited
MLJ	Malayan Law Journal
MLR	Modern Law Review
n.	footnote
New LJ	New Law Journal
no.	number
P.B.U.H	Peace Be Upon Him
p/pp	page/ pages
para/paras	paragraph/paragraphes
QB	Queen Bench
Rev.	Revised
s./ss	section/sections
S.W.T.	Subhanahu Wa Ta'ala (Praise be to Allah And the Most High)
sec.	Section
v.	(*versus*) : against (in legal terms)
viz.	(*videlicet*): namely
vol.	Volume
WLR	Weekly Law Report
Yale LJ	Yale Law Journal

LIST OF TRANSLITERATION

ا	a	ض	ḍ
ب	b	ط	ṭ
ت	t	ظ	ẓ
ث	th	ع	‘
ج	j	غ	gh
ح	ḥ	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dh	ل	l
ر	r	م	m
ز	z	ن	n
س	s	ه	h
ش	sh	و	w
ص	ṣ	ء	’
		ي	y

CHAPTER ONE

1. PRELIMINARY

1.1 INTRODUCTION

This paper concerns the compensatory damages which are in monetary term available for a refusal or failure to perform an existing contractual obligation or the one vitiated by mistake, misrepresentation, duress or any other illegalities. The analysis will be on the 'expressly planned' damages arising from express terms of a contract or implied terms recognised by law. The study is also confined to unliquidated damages only, anyway, some problems relating to part payment and deposit will be discussed in Chapter 3 part 3.3.

This introductory chapter deals with a number of preliminary matters such as the definition of 'contractual obligation' and 'compensatory damages', the functions of compensatory damages and some observations on the Malaysian legal position. The second chapter details out the action for compensatory damages which may arise from a breach of a term of a contract. The action also may result from an anticipatory breach such as repudiation due to misrepresentation and the duty to disclose some material facts. It also explains the bases of the award.

Chapter three is the discussion on the types of losses in which the question of damages will arise, for example, damages for personal injury, property and economic

loss. Then chapter four deals with the general principles of assessment and factors limiting the award. The next chapter is concerned with the Islamic principles of compensatory damages and also brings out similarities and differences between the English law and the Islamic law system.

This thesis will observe at the very outset that the English law and Malaysian law systems are not directed to the compulsion of promises to prevent the breach of contract, rather, they are concerned with relief to promisee to redress. The common law is not much concerned with the question: how man can be made to keep his promises? Instead, it is concerned with question: how can man be to deal with those who make promises?[1] In other words, the common law provides freedom to make contract to give considerable freedom to breach the contract as well.[2]

1.2 DEFINITION

This study is only concerned with remedy of compensatory damages and the action for damages is always available as of right when a contract has been broken. Mc Gregor defines 'damages' as:[3]

> "... the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum which is awarded unconditionally and is generally but not necessarily, expressed in currency."

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[1] Wheeler and Shaw, *Contract law, cases, materials and commentary*, Clarendon Press, Oxford, 1994, p 173.
[2] Ibid.
[3] Mc Gregor. H, *Mc Gregor on damages*, Sweet and Maxwell, London, 1980, 14th ed., p 1.

The compensatory aspect of damages in monetary terms is brought in the dictum of Lord Blackburn in *Livingstone v Rawyards Coal Co*[4].:

> "...where any injury is to be compensated by damages, in setting the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Therefore, in contract, the 'wrong' is the breach of contract, so that compensation requires the injured party to be put into the position he or she would have been if there had been no breach and the contract had been performed well. The damages are limited to what may reasonably be supposed to have been in contemplation of the parties. In fraud, the reparation is for all the actual damages directly flowing from the fraudulent inducement.

A legally binding agreement arises as a result of offer and acceptance, together with a number of requirements such as consideration, intention to create legal relation and compliance with any legal formalities. The parties also must have capacity to contract and the agreement must be legal.[5] In consequence, a 'contractual obligation' arises demanding the promised performance. The award of damages is made in accordance with the general principle to put the innocent party in the position if the contract had been performed; he should recover no more than what he has lost.

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[4] (1880) 5 App Cas. 25 at 39.
[5] *Concise Dictionary of Law*. Oxford University Press, London, 1983, p 84.

Generally speaking however, the law does not actually compel the performance of a contract, rather it merely gives a remedy normally damages for the breach.[6] The definition of a contract is a mere meeting of minds by way of offer and acceptance supported with consideration. Hence, the definition reveals a weakness i.e. the absence of bargain element in contracts and the lack of emphasis on the obligation arising afterwards.[7] Damages are only given consideration as a matter of right when the contract is broken. Equity does also provide the remedy of specific performance and injunction, but these are only exceptionally granted and discretionary of the court.

1.3 CONCURRENT LIABILITY BETWEEN CONTRACT AND TORT.

A plaintiff seeking compensation may express his claim either as one in contract or in tort. He cannot recover twice for the same injury although he may by suing in contract to avoid an obstacle to an action in tort or vice versa.

There were some cases in which the plaintiff whose natural remedy lies in contract against one defendant had been successful in a tort action against a different defendant. In *Junior Books v Veitchi Co. Ltd.*,[8] the plaintiff entered into a contract with A to build a warehouse. The defendants were nominated as sub-contractors for the flooring. If that were so, then the plaintiff would normally have had an action

[6] Atiyah PS, *An introduction to the law of contract*, Clarendon Press, Oxford, 1995, 5th ed., p 40.
[7] Ibid. pp 41-43.
[8] [1982] 3 All ER 201.

against A, and A, in turn, would have had action against the defendant. However, the House of Lords held that on such facts, the plaintiff could have tort action against the defendant even though there was no danger of physical injury or property damage to the plaintiff. The decision has led to much discussion and criticism later.

Nevertheless, it comes to be recognised that there are circumstances in which the liability of the defendant may sound in both contract and tort. For example, when a defendant negligently perform a contract to supply a service. In *Tai Hing Cotton Mill Ltd v Chong Hing Bank Ltd.*[9] , that working to the advantage of the law development is to be found in searching for liability in tort when parties are in a contractual relationship. The problem with this approach is that it seems to cast doubt on the principle of concurrent liability, although none of such cases were referred to in the Privy Council opinion.

In *Tai Hing*, the plaintiff was seeking to establish a liability in tort which went further than the liability established by the contract between the parties. Here, the concurrent liability ought to be possible where the alleged tortious duty is the same as that which would arise under the contract. However, it was held that unrecognised tortious duties should not be imported into a contractual relationship if they are inconsistent with the express terms of the contract. If the plaintiff frames his action in contract fails, he cannot be allowed to circumvent this failure by suing in tort as an alternative. Therefore in *Tai Hing*, it was interpreted that when there was a contractual

[9] (1986) AC 80.

relationship, the obligation of the parties should be analysed wholly in contractual term and not a mixture of both.

Hence, a plaintiff should opt which claim is more appropriate, in tort or for breach of contract. If punitive damages are wanted, the plaintiff must eschew contract. It depends on which facts substantiate a claim. Nothing precludes a policy permitting some, if not all, breaches of contract to be treated as torts in the way the contract was broken such as where there is an element of negligence.[10] In addition, the ascertainment of the basis of the claim is important to raise the defence of contributory negligence which is usually available in tort cases.[11]

The concurrent liability between tort and contract is coming closer in the case of economic loss. If a plaintiff complains that he had suffered economic loss as a result of the defendant's conduct, he would have encountered a reluctance on the part of the court to allow him to succeed unless he could show that he was in a contractual relationship with the manufacturer or the retailer. If there is no contractual relationship between them, then economic loss suffered should appear to be significant enough to be pursued by the purchaser against the manufacturer.[12] The more expensive the product, the greater likelihood of substantial loss of financial nature, for example, in the case of negligence on the builder of a house.[13]

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[10] Fridman GHL, *The interaction of the tort and contract.* (1977) 93 LQR 422.
[11] Below Chapter 4 part 4.2.2
[12] Cooke and Oughton, *The common law of obligations*, Butterworths, London, 1993, 2nd. ed, p 146.
[13] Ibid.

Due to the harm inflicted is upon an intangible interest, there has been some reluctance to permit tortious actions for economic loss. This fear does not apply to contract actions because one contracting party knows that his liability will be confined to those people treated as parties to the contract. Whilst in tort, the danger of indeterminate liability is more real. In other words, in contract cases, if the breach of contract causes physical harm, then any financial harm caused as a result of this may be recovered provided it is a natural consequence of the defendant's breach of contract. Likewise, in tort cases, so long as the loss suffered is a foreseeable consequence of the breach, then such loss may be recoverable. Thus, if the plaintiff is foreseeably injured as a result of the defendant's breach of duty, it follows that he will be able to recover damages in respect of his lost earnings if he is unable to work due to his injuries. Likewise, any direct consequential economic loss may also be recovered by the plaintiff so as to rectify the immediate effect of the physical harm. Thus, in *Spartan Steel and Alloys Ltd v Martin & Co Ltd*,[14] the Court of Appeal held that an action for loss of profit would fail unless the loss was consequential on damage to property. However, the decision in *Spartan Steel* was not unanimous. The rules remain at common law that only those economic losses directly consequent on damage to the plaintiff's property are recoverable. The plaintiff must have a sufficient expectation or reliance on the property to substantiate his claim.

[14] [1973] QB 27 following *Junior Books Ltd v Veitchi Co Ltd.* [1983] 1 AC 520.

1.4 FUNCTIONS OF COMPENSATORY DAMAGES

Generally, the usual function of the remedies is to relieve the plaintiff rather than to punish the defendant.[15] The primary discussion of this paper is to highlight the remedy by compensation. Other types of remedies are not discussed here, such as restitution, specific performance, declaration, etc. It is one of the purposes of this paper also to emphasise on the legal remedy only, as opposed to equitable, available to a plaintiff for a legal wrong arising under contract.

Hence, an award of damages is to put the plaintiff into as good a position he has been in if the contract had been performed. So in *Robinson v Harman*[16], Parke B said:
"The rule of common law is that where a party sustains a loss by a reason of a breach of contract, he is so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

Therefore, the proper exercise of the discretionary power of the court in assessing and awarding damages must of course have regard to two things i.e. :

a) expectation interest of the plaintiff

b) reliance interest of the plaintiff

The proper discussion on the bases on award of damages and its assessment will be further explained in Chapter 2.

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[15] Burrows AS, *Remedies for torts and breach of contract*, Butterworths, London, 1994, 2nd. ed, p 7.
[16] (1848) 1 Exch 850 at 855.

1.5 MALAYSIAN LEGAL POSITION;

A GENERAL INTRODUCTION.

The consequences of a breach of contract are dealt with under Part VII i.e. section 74-76 of the Contracts Act 1950.[17] While at the stage of pre-existence of a valid contract, Part V i.e. section 38-68 of the Act deals with the obligation for performance of the contract. For sale of goods, the Sale of Goods Act 1957 will be specifically referred to.

Section 65 of the Contracts Act deals specifically with the consequences of rescission of a voidable contract. It states that:

> "When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract restore the benefit, *so far as may be*, to the person from whom it was received."(emphasis added)

Therefore the rescinding party is liable to restore any benefit so far as it can be restored. Then the question of compensatory damages will arise when the benefit used cannot be restored. This is in harmony with section 66 which further states that:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore or to make compensation for it, to the person from whom he received it."

[17] Contracts Act 1950 (Revised 1976). (Act no. 136).

A note should be taken that in the Malaysian context, the anticipatory breach deals with rescission in some areas of law i.e. misrepresentation,[18] mistake[19] as well as certain specific instances pertaining to illegality.[20]

Section 74 provides that the party who suffers by the breach is entitled to receive compensation for any loss or damage caused to him, which naturally arose in the usual course of things from the breach to be likely to result from the breach of it. Further, section 76 which focuses on the liability of the party who rescinds the contract states that: 'A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.' Similarly section 37 of the Specific Relief Act 1950[21] which is of general applicability reads as follows: '... on adjudging the rescission of a contract, the court may require the party to whom the relief is granted to make any compensation to the other which justice may require.' The implications of these sections in the Contracts Act and the Specific Relief Act, on the assessment of damages and the recognised losses will be discussed further in the latter chapters.

In the further discussion, it will reveal that this area of law of damages in Malaysia has been much influenced by the English law in deciding the question of assessment and types of losses suffered resulting from a contract. However, not all the English

[18] Ibid. s 34(1) a
[19] Ibid. Ss. 34-35
[20] Ibid. S.34 (1) (b)
[21] Specific Relief Act 1950 (Act No.137)