FINAL EXAM

CONTRACTS: CIVIL CODE OF QUEBEC

1375 → good faith article (Sec. 6 + 7)– suppose to perform contract of duties in good faith

1378 → contract: an agreement 2 or more people
- "prestation": to do something

1379 → contract of adhesion: one party imposes his will on another party, no negotiation
Ex: sign a standard form printed contract, employment contract = adhesion contract
- any contract that is not an adhesion contract is a contract of mutual agreement
- mutual agreement = some give and take

1380 → NO

1381 → Contract can be onerous or gratuitous
- onerous: each party must do something
Ex: a sale – one gives money, and the other gives the object
- gratuitous contract: contract where only one party does something (ex: a gift) – gives something and gets nothing in return

1382 → NO

1383 → instantaneous and successive performance
- "preclude" = prevent
- where you cannot perform all obligations at same time = contract of successive performance
Ex: a contract of sale → can you pay and get object at same time? Yes, of course
a contract of lease → you cannot, monthly payments, ongoing obligations by both parties, cannot prepaid lease for 12 months and say it's a contract of instantaneous performance; you have ongoing obligations and so does lessor/ landlord

1384 → Consumer contract: contract where a human being buys objects for a personal, not business use, from a professional seller (person in business of selling things)

1385 → Contract is formed when parties have exchanged consent (when both have agreed; presented offer and was accepted) – then you have a valid contract, unless if contract needs to be in a certain particular form
- some must be in writing and certain types of writing to be valid
- both must be capable of contracting

- cannot go up to 7 year old and say I'll give you $7 for skateboard, he says ok → kid consented to it but is not capable of acting on own, needs parental consent, not valid

Ex: marriage needs to be in a certain form and Ontario will, selling real estate needs notary documents, transferring vehicle

- contracts need a valid object/valid cause = what you do & what you get cannot be illegal against public order
- don't deal with minors = minors cannot contract without legal consent
- parent can come back and have transaction annulled

consent – capable (>18 and not interdicted) – valid cause & object

1386 → consent to a contract:
- expressed: she says Yes (verbal) – I make an offer and she says yes
- in writing: signing name to contract; in writing best way no question as to what selling and for how much
- tacit acceptance: through actions, she doesn't say Yes or Sign, but holds out hand
- offer and then acceptance → that's how to form a contract
- valid offer must contain elements:

→ contract of sale → essential elements – price & item being sold
- law will answer all secondary issues (when do I Pay her, when do I deliver, what if fails to pay, what if fails to deliver, what warrants are, where does transaction occur, ways to pay)
- law says she doesn't have to give me object until I pay
- if transaction occurs at her place, I have to go to her
- if don't pay in a reasonable time, annulled contract

1387 → NO

1388 → offeror: the one making offer
offeree: one accepting offer (contract)

1389 → NO

1390 → determinate person: made to one specific person
- indeterminate person: to general public (ex: dog for sale or wanted ad)
- term of acceptance: delay (time) for her to accept (time to decide)
- if term attached, cannot retract offer until term ends
- if no term attached, can withdraw offer anytime before acceptance received

1391 → NO

1392 → offer lapses: meaning no longer valid
- reasonable time: depends on value ($0.75) – relative
- usually not very long if small object for small amount
- where no term specified, reasonable time, usually short

- if said No, cannot go back and say Yes 2 years later
  → a new offer must be made
- offer no longer valid if has rejected → new offer

1393 → if say sure, I will sell it to you for more, or I will sell it to you later = has not accepted the offer, but has made a counter offer
- my offer is now for this amount
- right after made a counter offer, my offer lapses, no longer valid

1394 → silence = if sits there and does nothing (does nothing says nothing)
- silence means she has rejected offer, means NO does not accept

1395 → NO
1396 → NO
1397 → NO

1398 → consent to a contract = who can agree → she needs to agree (to consent) to a contract to be valid
- put out offer, she agrees – that is a consent
- to consent → need to be > 18 and in no way restricted or interdicted to act on own
- if <18 → need parental consent, need parent participate in process with her, consent along with her
- if court says unable to act on own, doesn't always understand what she's doing, need someone to sign (consent) with her
- needs to be capable of binding herself, just being 18 does not mean she is "sane" or able to act on own

1399 → consent must be given in a free and enlightened manner
- vitiated = rendered invalid
- free = didn't force
- enlightened = haven't misrepresented the situation in any way; she must understand scenario and not be confused in any way and not quite sure what she is doing
- lesion = a minor

1400 → honest error: made an innocent mistake as to nature of contract or object itself (Ex: store didn't purposely give you wrong item, 14K ring – store really thought it was 14K ring, they didn't purposely represent it to you)
- but if you were really stupid, court may not give damages (inexcusable error is when you are very stupid) – ex: go into junk store and said oh, I thought it was antique
- dumbness not an excuse

1401 → fraud or misrepresentation or misinterpretation
- someone induces you to believe something that is not true

- someone lies to you or knowing you are under a misinterpretation but does not correct the situation

ex: if in store and telling someone on phone it's an antique and store owner hears, must come and correct you and tell you its not antique

- fraud = misrepresentation → synonymous terms
  (either I committed fraud or knew there was fraud committed against you)
- burden of proof on you, the sufferer
- if had known, would not have contracted (wouldn't have bought it or have contracted under different terms, would not have bought for such a high price)
- if person cannot put in description everything he's telling you, he's probably lying to you, don't buy it(ex: telling you big description, but on bill it says "a table")
- always buy from a legitimate person, so if anything you have recourse
- silence and concealment → I know because I heard you talking to your friend so I know you are acting under a misconception and I don't say anything
- you need to prove this too

1402 → fear by nature – you must prove was forced into it by fear

- fear renders consent invalid – yes you did sign contract (say yes), but wasn't because you were freely consenting, did it because you were forced
- consent is invalid → did not accept/sign on own, was forced
- <u>physical</u> fear – sell to me or I'll beat you up and you believe him

1403 → this law is 2nd type of fear

- threat: <u>emotional</u> fear

Ex: give me your assets Grandma or I'll abandon you
Ex: do it or shame the family
Ex: boss says do it if you want to keep your job

- you must prove

1404 → No

1405 +1406 (not important, he doesn't care, not on exam)→ <u>lesion</u> and only applies to minors

- minor: those under 18
- 2 types of lesions: 1) most common one: where you got really ripped off – inexperienced and they charged you way too much for something
  2) price was fair but you don't have ability to pay for it

1407 → recourse if consent has been vitiated → apply for nul contract

- nul: never existed
- can apply for annulment if error, fraud, fear, lesion → to annul
- if error caused by fraud, fear and lesion, can claim damages as well, in addition to annulment

- cannot get damages in case of error because it was a good faith error, it was a mistake, honest error, the parties were in good faith (S. 1400) → can get restitutions, get money back
- S. 1401 = fraud, misrepresentation → can get damages
- error: cannot get recourse because honest error, everyone in good faith, at most get money back
- in all cases, you have option of keeping item and get a reduction in price
- recourse when comes to invalid consent through fear, fraud, error, and lesion

1408 -1410→ NO

1411 +1413 → cause – what you do (give money)
- object – what you get (pencil case)
- must always have valid cause and valid object
- what both parties do must not be against public order (ex: buying narcotis)

→ give money is not against public order, but receiving narcotis for money is → this contract is against public order so if she sold it to me and I didn't pay her, the contract is still invalid and she cannot take me to court to try and make me pay her (enforce the contract)

1412 → No

1414 -1421 → No

1422 → if contract is annulled under S.1407: it is deemed to have never existed – must return object & money
- if you damaged object, will not get all money back, depending on how much damage was done to it
- obligation to take care of what received – if you have nothing to return, own fault, so you can't get contract annulled and ask for money back

Ex: minor cannot buy expense car, break it and then say I want my money back, I'm a minor, I want contract annulled
- obligation to return what received

1423 – 1431 → NO

1432 → rules of interpreting a contract
- written contracts
- most contracts in business are adhesion contracts (ex: employment contracts, bank contracts, insurance contracts) – usually contracts imposed on you by a party with stronger bargaining power
- General rule: in case of doubt, when contract is not clear, interpreted against the person who wrote the contract, and in favour of adhering party (i.e. weaker party)

- you, with all the power, who wrote the contract and did a bad job and clause is not clear, it will be interpreted in other party's (weaker party's) favour → always

1433 -1435 → No

1436 → Rules of interpretation in consumer contract (S. 1384)
- Rules of interpretation in contract of adhesion (S. 1379)
- if makes no sense, interpreted in weaker party's favour
- if you, with all power and money, is too cheap to hire a lawyer to write contract, you will suffer

1437 → Abusive clause
- 2nd par:
- abuse adhesion contracts: anytime contract imposed on you and you are forced to sign – if there is a clause in it that courts feel unreasonable, it will not be enforceable even though you signed it (this does not mean you are bound by it)

1438 -1439 → No

1458 → breach of contract
- along with S. 1458, need to look at S.1590 (general recourse provision)

1590 – general recourse provision
- " without prejudice to his right to the performance of the obligation in whole or in party by equivalence" = without prejudice to his rights to have someone else perform it

Recourse Provision:
1) can force specific performance of the obligation (i.e. make the person perform the obligation by injunction)
2) cancellation/annulment of contract or reduction of own obligation
3) take any other measure provided by law to enforce right to performance of obligation

- this law concerned with – where one party is in breach of contract, what can the other party, who is not in breach, do? What are his recourses?

1) have someone else perform contract (i.e. "right to performance of the obligation in whole or in part by equivalence)
2) force person in breach to perform contract (obligation) (only in case of S. 1601)
3) have contract cancelled/annulled in certain cases or have own obligations reduced

Ex: I lease you car, after 3 months you stop paying lease → I can sue you for current month in question, but do I want to sue you every month for rest of contract until I paid, and you have my car in your possession → why don't I just cancel contract, take the car back and sue you for whatever you owe at that time (should do this, intelligent)

- don't waste time suing month after month for each month's rent, tell judge I want contract cancelled if he can't meet obligation, and he is liable for any damages done on car
- I (person performing contract) am not bound by term of contract if other party in default, I have option of cutting it short and asking them to return object (ex: return car or eviction-give me house/apartment back)
- various recourses available, not just damages
- recourse will depend on nature of contract – do you want car/house back

1600 → No

1601 → cases which admit of it – it is not very often court allows

- injunction article
- in what situations will court allow creditor to force debtor to perform obligation (read cases on injunction, very important)
- fact that I undertake to do something, many times court will say ok, do it, if you're not doing it, we'll force you to do it (i.e. specific performance)

1602 → creditor may perform the obligation itself, or cause it to be performed at expense of debtor

Ex: you have rented an apartment/house from me and I can prove you smashed window, I sue for eviction and in meantime snow coming in broken window, you have obligation to repair the window, I don't have to wait till 8 months later when I have judgement against you, and meanwhile damages ruining house, I can perform repair right away and use expense as part of my case against you

Ex: mortgage creditors

- in certain cases, depending on nature of contract, creditor himself may perform debtor's obligation – done in situations where you are trying to preserve property to protect your rights

1603 – 1605 → No

1606 → contract can be resolved or resiliated

- resolve: annul (never existed from Day 1)
- resiliate: cancel (valid up to date of cancellation, but not for the future)

1607 → only liable for direct damages

- if contract with me to fix car, and I didn't fix it good, so you got angry and yelled at your boss, which got you fired, cannot sue me for getting you fired → not direct, I didn't make you yell at boss – nothing to do with me, I'm only liable for fixing your car properly

→ if I didn't do a good job fixing and it causes you to get in accident, I am liable for those damages because I did a bad job fixing it

1608 -1620 → No

1611 → Damages are to compensate you: what you have actually sustained (loss of profits, actual loss)
- injury: includes money; costs for future medication, future expenses; case by case
- no what ifs – must be certain and determinant

1621 → Punitive Damages: punishment to wrong-doer so won't do it again
- only available in cases provided by law
- show society wrong so no one else does it
- exception, not rule, not the norm
- can only get in limited situation → under Charter of Human Rights and Labour Standards Act

How Much is Enough To Do The Job?
- look at everything and how serious it was (gravity of debtor's fault…) & bad faith
- look at patrimonial → what he owns, your value (the richer you are, more they will make you pay, depends on how much you have – it has to hurt you)
- wholly or partly assumed by a third person → insurance
→ where the actually liability has been paid by insurance company, you haven't been hurt a lot yet, so they make you pay higher punitive damages
→ insurance doesn't cover punitive – must come out of your pocket
- the extent… to the creditor → how much Good Person already getting

1622 → penal clause
- penal clauses must be in writing and must be expressed, cannot be assumed, never assumed
- most penalties stipulated for a mere delay
- for everyday late in finishing (for construction contract) or breach of obligation, will pay me $500
- still allows me to go after you to prevent the breach, but also ask for penal clause
- must look for actual wording→ most penal clauses are if you are late, still need to finish, but will need to pay me for everyday you are late
- yes enforceable

1623 → creditor who wants to enforce a penal clause does not have to prove he suffered $300 a day in damages, because that's what the contract says, he doesn't have to pull out receipts to prove that
- However, 2nd par: courts can reduce penal clause if they feel pressurable performance or feel was abusive

Ex: I'm late in finishing your house by 5 days, but what haven't I done, I haven't put the grass on lawn, otherwise than that your house is finished, technically I'm in default, but what damages did you actually suffer? Not $300 a day, we'll give you $100 a day

Contract Summary:

- is there a valid contract?
- was consent properly given?
- is there fraud?
- is there misrepresentation?
- is there fear?

- if have valid contract – what if someone doesn't perform his obligation?
- what can you do if someone doesn't perform obligation? → sue them for damages under 1458, and 1601 (ask for specific performance/injunction), and (1590, but 1601 is ok)
- 3 stages of injunction (process of getting an injunction)

Start with 1+2 → temporary injunction at beginning of trial
1) temporary
2) interlocutory
and permanent injunction when you get your judgement, x number of years later
3) permanent

3 types of injunction you can get:
→ order to make you do something (force you to respect something)
→ order to stop you from doing something (i.e. stop using confidential information)
→ order to prevent you from doing something

- value of temporary injunction? When I first sue you, why would I want to ask for an injunction now? Why don't I wait for judge to make a decision in a few years
  - → because things happen in between, she has stolen all confidential information she's using, what good is judgement 4 years from now if she has had 4 years to run around with this information and use it for her advantage to my disadvantage, in 4 years, might not even have any value, only valuable for 6 or 8 months or 1 year maybe
  - → therefore want a temporary injunction to stop her now
  - → if I win temporary injunction I have won my case, I don't care if I ever get to trial
  - → most cases don't go beyond temporary injunction
- can only get injunction in cases which admit of it → 1601 – will never get for personal service contract

ex: hire someone has employee and they won't come in to work, I can never get an injunction to force him to come in to work because it's a personal service contract → can never force a human being to do something they don't want to do (cannot force him to come in to work), so I sue him for damages instead (sue for cost of hiring someone else to replace him, filling his job temporary, fee)

INJUNCTION NOTES FROM BEFORE:

- injunction: enforcement court order
- special recourse
- discretionary: never guaranteed
  → judge may not like you, won't give you, might not believe you
  → must show clearly the right that has been violated
  → must prove it'll lead to more damage (urgent, cannot be quantified)
- if can put a dollar value on damage, you won't get anything (no injunction)
- need protection now, whenever money cannot compensate you, cannot quantify loss in dollars
- show why it is important/necessary to get protection now
- 3 types:

1) provisionary
2) interlockutory } temporary injunction for life of trial

3) permanent → for after, part of final judgement

GIROUX VS. MALIK

- couple bought a piece of property in Laval
- they didn't know it was not a residential property (zone)
- when wanted to build a house on property, realized they were not allowed because not allowed to have a septic tank (no city sewer connection and couldn't put in a septic tank – sewage system)
- seller did not let them know that, even though he was aware of it (this is the case: was he aware of it?)
- real estate agent did not inform them

Issue: do the buyers have any recourse against the seller? If I sell you a piece of land and I can prove that I told you that there is no city sewer here therefore you might have a problem getting a septic tank (I don't know, I tried 12 years ago and I couldn't get it), than you are buying the land at your own risk.

→ if I can prove I said that, you are stuck with property

- in this case, the buyers are claiming they had no idea of any defect in the properly, we thought we were buying it as a residential property,

→ the couple claims they thought the seller bought it himself in 1988 as such, and had never built on it

- facts say the following: bought in 1988, went to get a building permit, city of Laval told him
  - he couldn't build on it because infilled land and there's no sewer system,
  - there's no municipal drainage pipe all connected for your sewer and we won't put one because costs too much,
  - cannot build septic tank because land it improper already filled with crap therefore no proper drainage so cannot build on it
- why didn't Mr. Malik sue the guy he bought it from? We don't know…maybe said in deed of sale that he couldn't build on it, then it would be ok "buying as is with no warranty". If someone sells you something and tells you it's fine but offers no guarantee whatsoever, you begin to wonder and ask questions
- Malik tried to sell it two times before will all info – couldn't sell
  - →1992 tried to sell property, disclosed all of this information to real estate agent, couldn't sell it, no one would buy property they couldn't build on for $45,000
  - → 1995 tried to sell property again, again disclosed all of this information to real estate agent, again couldn't sell it
- 1999 tries to sell the property a third time – clear that this time didn't tell buyers (i.e. either he didn't tell real estate agent or real estate agent "forgot" to inform the buyers/purchaser) – clearly no reference in offer of purchase of any problem on the property
- clearly this third time around he and his real estate agent know if they say too much, they will not be able to sell the property, but how little can they say and be able to get away with it
- city provides water, but no sewage pipes/drainage (sauf egout – nobody knows what this is; not clear)
- Malik knew this property cannot be build on – he wrote in "sauf egout"

- court says based on everyone's testimony and documents and facts, it is clear Malik knew in 1988 this property could not be built on because of the problem → is he allowed to sit there and say nothing about it?
- also proven when real estate agent asked about transaction, why didn't Malik build on this property, shown that his real estate agent said Malik did not build on it because he was going to build a palace but kids all growing up and leaving so he's not going to build it anymore → proven this statement was made by real estate agent when all waiting for notary to prepare documents
- whenever an agent (real estate agent) says a lie or something that is not true, the principal is bound by that whether you authorized him to say it or not, you are going to be liable for that

p. 88 – " au meiller...." Means property can be used for intended purposes
- written in French, they don't speak french
- when asked if anything wrong with the property, he said "no"
- couple bought land in dec 1999 (closed deal Dec 29, 1999, signed papers), within a month had building plan prepared, then went to city hall (jan 10, 2000 – 10 days later), went to city hall to get permit to build a house, city hall said we have tested that property and you cannot build on it (big file dated back to 1988 saying why you cannot build on it)
- none of this information was every made available to buyer by seller; even with modern new septic tanks, still cannot build on it
- bottom of P.89 court says clear Malik knew → if Malik knew had to disclose this information; cannot say oh, not relevant, it is relevant – if you know of anything that will substantially affect transaction must disclose or is fraud through silence (fraud – silence – concealment)
- **fraud through silence → BREACH OF 1401**

1407 allows you to annul the contract in case of fraud, so retroactively it doesn't exist; can also ask for damages
- ask for damages: for material, moral and physical damages
- and you get interest on money

THEY GOT:
- annul contract
- they get $45,000 back with interest
- moral damages: $10,000 for stress, trauma
- couple with 2 little kids, sign offer to buy house, obviously not very informed, didn't have lawyer representing them – had a notary do title search, didn't do a good job (might be recourse against notary there – don't go there)
- couple with 2 kids put every cents they had into buying this property (cash - $45,000), and they can't build on it, sold their existing old house with expectation of building a nice house, running around to find somewhere to live, no place to live (P. 91 "suffered great stress and inconvenience because they could not build their dream house on the land they purchase.....). Therefore entitled to $10,000 in moral damages
- it's fraud – it's bad faith; not a mistake. He knew well, silence fraud
- Tried to sell twice before, wasn't able to, this third time kept mouth shut and maybe it'll sell, he found a gullible couple who didn't know law
- looks too good, it is too good, get lawyer to look at it

- entitled to $45,000 & damages

- some cases subject to automatic right to appeal which can drag out for another 3 years
  "if I'm Malik and I appeal this decision, I do not pay back your money until appeal over with"
  ex: insurance companies have allot of appeals – run person into the ground so they don't come back to bite you
  → court has the power, in exceptional cases to order execution notwithstanding appeal, "court says it is obviously this guy is in bad faith, if he tries to appeal it is totally frivolous and he'll have to pay the money upfront no matter if appeal or not"
  → reference on P. 92, top - middle = appeal

PETER V. FIASCHE

- a man and woman decide to buy a restaurant (smokey's)
- falsifying receipts, receipts are this, but in reality you'll be making a lot more money
- Gino is operating this restaurant (smokey's) – real name is Biagio
- Gucciardo is the wife
- Fiasche is in business, and has been in business for a number of years; and apparently appeared to have made lots of money (i.e. Cadillac, condo in Florida, a house, a restaurant)
- buyer is a friend of theirs, they go way back a number of years, they all came to Canada around same time, wife stays at home (2+ children, husband works at job with a salary, you make salary and that's it, no risk of loss, no chance of gain)
- 1991 – husband find out his job is going to disappear
- what is he going to do? his good friend, rich business man, owner of smokey's says he's selling franchises of his restaurant smokey's (its doing very well that I want to open franchises, do you want to buy one?)

125,000$ → open new franchise

250,000$ → he also offers to sell his own main restaurant; smokey's in West Island (DDO) – Marche de l'Ouest

- husband and wife don't want to start something totally from scratch
- buyers negotiate and Gino willingly or unwillingly agrees to allow them to have it for $200,000; 300 square feet – tiny tiny restaurant
- Deal is $200,000, but they don't have money, he says he's losing my job. Gino tells him to mortgage his house, they go mortgage their house for $100,000 (they just finished paying off the mortgage)
- buyer tells his brother in Toronto to mortgage his house too, gets another $40,000
- now they have $140,000 which they have already borrowed to open this restaurant
- buyer calls his lawyer, "tells him I have this franchise agreement, sales documents, I want to buy a restaurant" – lawyer says he's going on holiday
- by the time lawyer comes back from holiday (a couple of weeks later) – the seller has already gotten the buyer to give him cash down payment of $100,000.
- seller gave him official receipt; signed nothing, done nothing, vague document, already gave him $100,000

- they start training for restaurant for elaborate system to save money from Revenue; they have 4 cash registers (2 at the store and 2 at home), at night they take the tapes home with them and they redo the tapes and delete and change things and enter non actual items
- it's criminal fraud against Revenue Agency → at end of day take cash register home and re-enter sales cutting out certain transactions
- at same time they are doing this – "training" and operating restaurant, in mayhem of all this – there's a lady from CRA snooping around, he asks who's this friend tells him oh, she's from Revenue Quebec, she's just making sure the cash registers work, he said oh, ok, that's fine (blind trust in this friend)
- friend tells him how to do records and shows him last year made $300,000, even though tax returns say $172,000
- accountant does all tax work for seller, then he gives all documents, backup back to seller, I don't keep any backups → what professional does not keep backup to protect himself from personal/professional liability – accountant acts like don't come to me, I don't know anything. I just do everything for him and then give everything back
- very questionable accounting practices and very questionable business practices
- they actually signed agreement summer 1991 → within a month, seller disappears/leaves (gone)
    - → Revenue Quebec sends a notice/claim for $19,000 – gets the business
    - → Revenue Quebec ceased everything and sells it all/ shuts down in spring 1992
    - → original seller buys it all assets back and goes back in business
- he took their money, they lost all their money, tax people sold everything
- 8 years later – in court, they lost $133,000
- if smart, make drag it on and on and on, that's why 8 years, you have the money already, you don't want to go to court
- suing for $133,000 + $15,000 in damages
- are they entitled to get any money back?
- is there an error? Is there fraud? Honest error? Inexcusable error? What's going on?
- From Day 1 when they first bought, did they know about the fraud? Yes, they are buying business knowing full well that only way to make this business pay (make money) and to be able to pay the franchisee and the seller and make this profitable is to cheat the tax people
- all those cash register tapes that they have for sales submitted (the representation that the seller made) were no where near actually sales (were able to prove) – court believes
- they were able to prove there was a fraud going on – court believes
- court questions from beginning that seller made friends and family line up at the cashes to make it look busy
- Is there fraud/Error? Can they Annul the contract?
  → NOT FRAUD (cannot argue to annual contract because of fraud), they knew about everything (cannot argue 1401 – they knew exactly what was going on)
  → court has sympathy for them because they were not business people, they were really tricked by seller
- cause of contract no good (fraudulent cause) – P. 102; purpose of contract was fraudulent (against public order) so contract can be annulled

- P. 103 – " the crucial question here is whether parties to an illicit contract should have the benefit of restitution. Having harmed society by making their pact, should society rescue them when it fails?"
- P. 103 – restitution; court gives $133,000 back, but no damages, she's not entitled to damages as for as court concerned, will nullify the agreement because there was an illegal purpose (cause/purpose against public order therefore contract can be annulled), we'll give you your money back
- not entitled – does deserve it, he saw everything – went in with eyes opened so won't give you, you were one of the perpetrators → totally discretionary, you don't deserve it
- it would be unfair for one party to profit from this illegal transaction, unfair for one party to get both back (money and restaurant)
- he already has the restaurant, no damages, yes money
- yes maybe they were inexperienced, but they knew even wanted to buy under wife's name so collect unemployment insurance for 6 months, everything they're doing is in breach of laws, → court says give them back their money and that's it

CARREFOUR

- Carrefour langelier (shopping centre) builds premises for a cinema in 1991
- they already have a deal with Cineplex to operate a multiscreen cinema
- deal is Cineplex will operate a movie theatre for 20 years based on that shopping centre build the building for it
- what did Cineplex do before they even moved in? they wanted Guzzo to operate it, they want to transfer the lease to Guzzo, Guzzo will operate instead of Cineplex
- shopping centre owners got mad, they said fine, Guzzo can operate, but it has to be a Cineplex (has to look like a Cineplex, smell like one, cineplex signs, Cineplex advertisements)
- 7 years later, Guzzo took down all those signs and said this is now a Guzzo cinema
- shopping centre owner said no way
- they get an injunction/court action to force Guzzo to either change the signs and/or get out and put Cineplex back in and to implement all those provision again (bottom P. 106)
- basically shopping centre owner asks for an injunction to force cineplex and guzzo to conform to the original agreement
- asking for permanent injunction, has gone beyond temporary
- I sue you and ask for permanent injunction to force Cineplex and guzzo to respect the contract – look at defence of guzzo and Cineplex
- I am suing Guzzo for injunction: (these are Guzzo's defences)

1) Duress: contract not even valid (cannot enforce a nonvalid contract, we were forced to sign it through Duress, if I (Guzzo) hadn't signed it, Cineplex would've taken over all east end of Montreal and I would be out of business, I was really forced to enter into contract/agreement with Cineplex and the shopping centre) → court says we don't

believe you, there has been a long history of such contracts between Cineplex and guzzo – you have been dealing with them for 14 years, if you're a victim, you're a willing victim so no proof of Duress, no proof of force or consent was invalidly given)

2) signature under false pretences "we only signed because poor representative of shopping centre said I told tenants that Cineplex was going in, if it's not going to be a Cineplex I'll look so terrible, please sign, so I signed → court says it was crap.

Guzzo says they were tricked into it because Harry Glassman (owner/ principal representative of shopping centre) promised other tenants there would be a Cineplex theatre (false representation) so there has to be one → makes no sense; immaterial what he may have said to other tenants, a business deal is a business deal, cannot rely on that; any business person who signs something just because someone said I promised someone else won't be in business for very long (no proof for signature under false pretences – not like Glassman undertook all of other tenants involved that there would be a Cineplex and even if he did, it doesn't bind you to contract)

3) performance of contract – don't need an injunction because nothing has gone wrong, nothing has changed, the essential intent has been performed, you have a cinema operating in shopping centre, operating very well, who cares, guzzo is bigger than Cineplex in this part of Montreal, who cares what the name is, you Mr. Landlord should be happy that you have such a solid, nice operating theatre in your shopping center → court says maybe that's all true and no prejudice suffered by petitioner (as good if not better operator) → but this is not the issue

→ Issue is you signed the contract, and as a generally rule a party is entitled to enforce a contract even though he doesn't suffer any damages – right to enforce a contract is separate and distinct from the action and damages

→ fact that you undertook to do something, that is sufficicent for me to make you do it, unless you can prove impossibe- I can force Guzzo and Cineplex to conform to the contract (because they agreed to do it) unless they show impossible

- a valid contract signed with their eyes opened between shopping center, Guzzo and Cineplex, the shopping center can make them respect obligation unless they can show it would be impossible to do (i.e. to have a decision by the competition act saying this is monopoly therefore they are not allowed to do it)
- every time one of these big operators buys out another (ex: Gas stations or cinemas), sometimes the Competition Act makes them shut down and sell off certain operations
- Here there is no impossibility → bottom P. 110 – top P. 111 therefore I can get Guzzo and Cineplex to respect obligation
- even if no damages can still enforce contract → <u>cannot</u> argue oh no damages therefore cannot enforce contract
- Difficulties of supervising subsidiary conclusion: Cineplex and Guzzo are saying well if you force us to open, it will be very hard for the court to administer this and make sure that we conform with the judgment

  → injunction is an order of specific performance and up to judges themselves to make sure its enforced, unlike a regular judgement

  - court says, we've enforced a lot more complicated injunctions than this, nothing complicated about this, you guzzo operates as if you were Cineplex, Cineplex advertises → this is not complicated, we'll take a chance, not impossible to administer, up to us to decide

- one of the clauses is if you're in default, the landlord can become owner of all your property in the shopping center → both argue if landlord can become owner and execute that clause for $1 we cannot operate, we don't have our stuff anymore – court says that clause only applies if they throw you out, if they throw you out they can keep all your things, you can take anything with you → are they throwing you out? No they're asking you to operate so immaterial (doesn't apply/ not relevant)
- They said the shopping centre is in bad faith → said shopping centre knew we were going to do this, they let Guzzo operate for 6 months before they took the injunction - good faith is presumed and Guzzo has to prove bad faith and there is no bad faith proven in this situation unless you can show action was so unreasonably and caused great hardship, this claim will not be upheld, no trickery going on here
- (bottom P. 113) balance of inconvenience – who will suffer more? Court says that is not relevant for final judgement, it is not an issue you have to look at here because it can be enforced

KNOW INJUNCTION FOR FINAL!

COPISCOPE INC.

- selling photocopy machines – photocopy service contracts in depanneurs
- issue: noncompetition clause in the sale of a business, not between employee & employer → not necessarily treated in same way same noncompetition clause between employee & employer because most important issue to look at is the reasonableness & enforceability, and bargaining power → looks for who has power
- you paid big dollars for a big shots goodwill/customer list, the last thing you want him to do is open a new business across the street
- Noncompetition in sale of business is the issue of: did he pay for it? Is there a tangible? Bargaining power with relevance to is it reasonable
- TRM was original plaintiff (person who took the original act), they are not the respondent
- TRM Copy → they go to depanneurs/little convenient stores and says we will provide you will a photocopy machine, paper, ink, and maintenance and you will pay us a fixed fee to have the machine there and we split profits
  → they have been in business since 1992 and have about 700 business locations by 1997
  → in their contracts with each of the depanneurs – clause 10 (top p. 116): a noncompetition clause in there → Mr. Depanneur operator, you agree, that for as long as this contract is enforce and for one year thereafter, you will not directly or indirectly participate in any business that uses photocopy services provided by anybody else besides us in a radius of 25 miles from the business location
    - so as long as you're in business with us and for 1 year thereafter, you cannot directly or indirectly offer photocopy services provided by anybody else in any business that you are involved in within 25 miles of the business location

- that's the clause, it is a standard form contract, it is printed, it is given to the depanneurs to sign, therefore it is an Adhesion contract **(1379)**
- they can cancel contract with TRM but providing a 30 day notice to that effect, "we want to terminate the agreement"
- if terminate agreement, the noncompetition clause will com into affect
- in mid 1997 → copiescope went out and started selling copies to TRM customers
- as Copiescope admits, the easiest way to sell photocopy service to depanneurs is to find someone that already have photocopy machines in place and offer more $, abetter deal → you're in business, easiest way to sell you're business and that's what they are doing, got at least 21 – the depanneurs do not care if its TRM or copiescope
- TRM got upset and took an action against Copiescope
- asked for injunction preventing copiscope to provide their services to any of these former operators (clients) of TRM during that 1 year noncompetition clause
- in order for injunction to be granted – TRM needs to prove noncompetition clause valid, if you cannot prove that, you will not get this injunction
- trial judge says looks good to me and grants the temporary injunction
- Copiescope does not like that trial judgment (top of P. 115) "On appeal from a judgement…" first paragraph is a decision which has been appealed, this court has to decide whether that was a good judgment or not – that's what court of appeal has to do
- bottom of P. 117 → issue is whether the noncompetition clause valid or not?
- court of appeal must decide if valid or not → if valid temporary injunction will stand – if not valid, then will not stand, absolutely no injunction what so ever
- is injunction valid? – to answer look at is noncompetition valid? If absolutely not valid, no way judge will give injunction
- is noncompetition valid? P. 118-119 # 1-5
- judge says 2 things: (P. 119 "according to ……")
- judge says not reasonable/ excessive and was an adhesion contract (abuse clause)
- clause not valid; what trade secret.
- no negotiation, adhesion contract, abusive, excessive, forget it → as far as court concerned, this clause is not enforceable, there's noapparent rights, and therefore nothing to enforce by injunction therefore we will not enforce the injunction

CIVIL CODE OF QUEBEC – CIVIL LIABILITY (P. 121)

1457 → you have an obligation to not go around injuring people
- endowed with reason = means you know the difference between right and wrong; to know right from wrong; doesn't mean you can drink/smoke
  → for civil responsibility, its 7 years old
  → for criminal responsibility, its 10 years old
- fault = failure to act in reasonable manner
- reparation = to compensate
- liability in noncontractual situation
- 3rd par applies in 1463 "employer's liability" and in mandates/agents/director/officers (remember 1463; its important)
- exam!! contract issue for liability (1463!!!!!!!!)

1457 → bodily injury for contract (ex: plastic surgery)
- liable if break contractual obligation
- breach of contract; you are liable for damages
- hire someone to build a balcony and it breaks → must prove wasn't built properly and could've hurt yourself

Ex: go to get your bike repaired
- Civil Liability: injure someone in a non-contractual obligation – negligent, careless
- Damages: Bodily injury, Moral (pain, suffering, harassment), Material (property damage, lost work pay)
- if can prove you are at fault, you are liable for all damages
- sue depending on who's at fault; facts when endowed with reason
  Civil: 7 year old knows what right or wrong
  Criminal: 10 year old
  - they will be liable to compensate for injury, whether bodily, moral or material
- you are responsible to damage you do to people, place (property) or things
- 3rd paragraph: in certain cases, liability for faulty acts of others
  - it's yours, don't lend it, your liability
- if borrow someone's car and gets in accident → driver & owner at fault; owner as liable as driver
- No fault insurance → only in Quebec
  - only protects from people, if hits property, no insurance

1458 → liability in contractual situation
- breach of contract
- liable for bodily, moral, material injury → you are liable for these if you exceed mandate (breach contractual duties)

1458 → breach of contract (verbal or written)
- if didn't pay what owe, liable to compensate for injury
- liable for body, moral or material

- moral damage → damage to reputation, humiliation when fired, people laughing at you is not moral damage

Ex: hair dresser dyes it wrong color & burns it

Ex: sell bike, check bounces, sues person who purchased → damage: property amount + bank charges

- injure someone on a noncontractual basis; not relating to contract we had

1459 → parental authority → NO

1460 → NO

1461 → tutor or curator → NO

1463 → applies to mandate – agents (very important!!! – already mentioned)

- relates to 3rd paragraph of 1457
- employer is liable for performance of employee when he/she performing work
- job to deliver packages (employee) → he owns own bike, he hits someone with delivery, whether guy liability is debatable.
  - was he biking on sidewalk? If yes, then he is liable
  - jaywalking? If Yes, he is NOT liable
  - was he biking on a green light? If Yes, then NOT liable

  BUT employer is liable in performance of job
- Principal = employer, mandator
- Agent = servant, employee
- employer compensates for actions of employee
  - if employee is negligent, employer can then sue employee
  - employee is under care of employer
- injured person collects from employer, employer collects from employee (if sufficient funds)

1468 → product safety

- manufacturers are liable for products they manufacture
- manufacturers are liable for defects in products they manufacture

ex: for a number of years, the question was, who can the consumer sue?

- you go buy a car from a dealership (GM motors VS. Cravits case - 1968),
- oldsmobile (brand new) and it's a piece of garbage (a flooded car) – nothing worked, kept taking it back to dealer, nothing worked
- in the end, just gave the whole car back to dealer, went out of business during period in question
- Cravits was also a lawyer → big shot lawyer so he took case all the way to supreme court of Canada
- Cravits sue GM directly – GM argued you can't sue us, we have no contract with you, go sue your dealer (get judgement against the dealer) that's your concern and if the dealer has concern with us, that something different/separate
- Cravits said no, im going to sue you directly

-1979 → Supreme Court of Canada recognized yes, the consumer can sue the manufacturer directly for product defects even though they didn't buy product directly from manufacturer

→ This case started whole concept on product liability

- principle is manufacturer is liable for defect in movable products (manufacturer liable for safety defect in movable products)
- "even if it is incorporated with or placed in an immovable for the service or operation of the immovable"
  - → ex: the floor is made of tiles: before these tiles were immovable, now bolted to floor/incorporated into building (immovable) – now these tiles are part of the immovable
  - → who cares if now they've been incorporated? → nobody except the bank cares (what security does that bank get with this movable/unmovable)
  - → everything that was once movable is technically not movable anymore, but you don't want manufacturer to say well now its not movable anymore so my liability for movable property is no longer here (don't want manufacturer to say it's not movable so I'm not liable/cant sue me) → to prevent manufacturer from getting out of his responsibility (liability)
  - they are trying to say if it was once movable, we don't care that it's part of a building now, you, manufacturer are still liable
- 2nd par (very important): says "all professional sellers who distribute and sell this product are going to be liable" – you are responsible for what you sell because you're making a profit (corporate responsibility)
  - don't want sellers to buy cheap crap, sell at high price, and then say, oh I didn't know it was crap
  - all professional sellers are liable (importer, distributor, wholesaler, retailer, everybody involved in selling the product is responsible)
  - you are liable (responsible for what you sell) therefore you're responsible for checking everything is good – not selling crap
  - buyer should sue seller, seller cannot say sue manufacturer in Singapore or franchise owner in Toronto or importer in BC (buyer could if he/she wanted). Tell seller to do it, I'm allowed to just sue the seller. Always (ideally) sue someone in your province/city so no travelling and it's your law, let seller sue others.
  - to protect me as the consumer, the end user

1469 → product safety

- <u>safety defect definition</u>
- "having regard to all the circumstances" → question of all the facts, look at facts
- "poor preservation or presentation of the thing" – packaging problem; packaging bad so makes in deteriorate
- safety defects can be in many forms
- a bad design (sharp corner), bad packaging (makes in deteriorate), absence of instructions on how to use it properly (so you end up injuring yourself), inadequate warnings as to the dangers involved in using it → safety defects can be in all of these types, not just simply sharp corner, warning label!

- these are safety defects → manufacturers and all professional sellers are liable for them

1470 → a defence available to people in certain situation
- ex: you are sued because you have not completed your obligation within a certain amount of time
- you had something you had to do and you didn't do it – didn't finish it in time; didn't deliver goods on time, didn't produce certain amount of products on time; whenever there is a date of delivery and you cannot respect it, in certain cases, you have a defence → 1470
- superior force = act of God
  → superior force is an unforeseeable and irresistible event
  → unforeseeable – unpredictable/ not the norm; cannot reasonable predict (foresee) it, not something that occurs on a regular basis
  → irresistible – cannot prevent it (avoid it)
- "unless he has undertaken to make reparation for it" = superior force is a defence unless contract says it says you have to finish notwithstanding superior force (if contract specifically says superior force is not defence, then its not)
- if contract is silent, then superior force can be used as a defence
- ex: is strike a superior force = case-by-case basis, depends on situation/facts
  → if employees have been walking around, complaining and protesting, sending letters, calling media telling them if something doesn't happen soon we will go on strike – no longer unforeseeable because
    - talk is in air, information is out there people have been complaining then not unforeseeable
  → if all of a sudden everyone shuts out, then "act of God"
  → if build up, if don't do this we're going to strike, then no longer superior force
- if have an ice storm every 4 years, no longer unforeseeable
- snow next week, not unforeseeable
- Ex: storms/tornado -- Depending where you live, look at facts
- Sept. 11 = unforeseeable

1471 → similar to Sec 2 of charter – some states have past a good Samaritan legislation to protect people who go to aid of injured people and they don't want to get sued (people generally don't want to help you because they don't want to get sued)
- unless you are gross negligent or show intentional fault
- gross negligence or gross fault = reckless disregard to safety of people around you

ex: shoot arrows at squirrels around me – can injure pedestrians, not intended to hit anyone but you don't shoot arrows in a residential area
- intentional fault = prove intended to injure (actual intent to injure)

ex: throw something at someone's head because not paying attention
- simple negligence/ simple carelessness

→ what would a reasonable person do?
→ would the reasonable person leave schoolbag in middle of corridor when they are going to their locker with 100 other people walking around -> reasonable person would not do that, therefore if somebody trips over your bag, falls and breaks nose, you would be liable
→ reasonable person does not push to get on bus, does not push people to get down escalator, does not talk on cell phone and look at shoes when they walk, do not stick umbrellas in front of them when they want → everyone does these things, but the courts will say not reasonable because a reasonable person knows he/she has to act in a prudent manner as not to cause injury to people
→ if not reasonable, court will say No you're negligent, you are liable
→ up to courts to determine

- intentional fault (worst) → gross negligence → simple negligence
- to be liable, must show fault – either intentional fault, gross negligence or simple negligence (to have someone liable, must show they were at least negligent)
- negligent → 1457

1473 → defence of special knowledge

- my product is defective – there is a safety defect in my product, but the person who was injured knew or could have known of the defect and could've foreseen the injury
- victim: someone who has special knowledge; expert in this field, specialist in product

ex: painter buys flammable paint

- can should say do not smoke when opening this can
- but there was no label on this can
- so painter opening can and smoking away, he catches fire
- courts will say, yes, manufacturer, your can was defective, safety defect because there should've been label on it saying don't smoke (very flammable) , but painter is expert in field (knows everything about paint – painting for 25 years), he should have known better than to smoke when opening paint → even if label non there, he knew better
- where the person injured to an expert, then he won't be able to sue (so painter cannot sue because this guy is an expert, he's suppose to know that)

- as a manufacturer, must take reasonable precaution to make sure product safe (case-by-case basis) -- ex: don't sell acid in glass or thin little bottles because can break, sell in thick plastic so won't break

ex: if I sell you paint with normal lid, and you leave it around and child is able to open it and drink it → manufacturer not liable if in good can, paint is paint and it's your responsibility to have it safe, but if start selling paint with Flintstones pictures on it or cans that look like Barbie with cute little tops, manufacturer probably will be liable

- if you are the manufacturer or the professional seller can prove the injured is an expert in that field, you can use as a defence → but not a defence used very often because usually ordinary person that gets injured

- 2nd Par: if he can show took all reasonable steps to produce product and that based on standards he used to produce it there was no indication that something was defective, and as soon as he moment found out something wrong with product, he notified everyone & recalled to fix → manufacturer not responsible
  → case or case basis
  → not liable if showed good faith and showed tried to correct the problem

1474 → called a "waiver" → consent/release form is to be signed if bungee jump, rafting, etc…

- if you want to participate in white water rafting or bungee jumping, they make you said a contract that says you acknowledge that they will have no responsible whatsoever for any bodily damage or injury to the person or property
- they are not responsible for injury, death or injury to property
- they make you sign it, if you don't sign it, they won't let you participate, you don't have much of a choice
- waiver only valid in certain situations:

INJURIES (DAMAGE)	Degrees of FAULTS (liability)
- bodily	- negligence
- moral	- gross negligence
- material	- intentional act

- waiver appears to cover everything (appears to have no liability for injury, any type of injury or damage caused to any person or property no matter how its done), but not really →1474 says what it covers
- 2nd par: when comes to bodily/moral damage, waiver does not apply
- ex: if white water rafting, she falls out and breaks a leg – can she sue the white water operator - will depend; how did she get into water? Did she jump / own faulty acts? Or was it negligence / faulty acts of raft operator?
  -- it is foreseeable will flip over, fall into water? Yes, assume the ordinary risk, if she falls off through no fault of raft operator. → but if at fault – must prove the raft operator was at least negligent
  -- need to prove raft operator negligence to sue → one of 3 faults
  -- if raft operator just going down as usual, usual route and he tells her to hold on and she doesn't → he is not necessarily at fault if boat flips over; it is foreseeable that the boat will hit a rock and flip over
  -- you need to prove operator at fault so just if she breaks a leg, doesn't mean operator liable
- waiver does not apply for bodily damage or moral damage
- in order to sue for broken leg, must prove negligence (he wasn't paying attention and he hit a rock), gross negligence (he was bored so decided to take a different crazy path down river), intentional fault (she was talking so much that raft operator threw her into water or hit her with a paddle) → she has to prove one of these three situation
- cannot just say I was in the boat, I fell into water and broke a leg → not good enough

- waiver does not protect operator for bodily or moral damage – no one to sue unless she has to prove fault
- 1st par: waiver doesn't apply for gross negligence or intentional act → waiver doesn't protect, these 2 are criminal
- property, material damage through simple negligence is protected by waiver
- for material damage, I cannot limit my liability for acts that are gross negligent or intentional

ex: you fall out of raft and lose a shoe, waiver doesn't apply, he is not protected if he is grossly negligence, he fell out of raft because he took boot down wrong part of river or he threw you out intentionally → in these cases, cannot say waiver protects operator

ex: chatting the whole time and banged into a rock (simple negligence) and you went flying out and $300 bathing suit got wet (property damage) → he was negligent, wasn't looking where he was going, she cannot sue (property damage caused by simple negligence/simple carelessness is protected by the waiver) "you are claiming he wasn't paying attention)

- waiver is a limitation of liability; this law only applies to waiver
- if no waiver and it's just a person walking down the street poking umbrella, you can see them

1475 → ex: coat check

- contractual obligation: contract of deposit (you give $2, you give coat and they give you a tag); they are responsible & must take care
- notice provision – at coat check signs saying they are not responsible for theft or damage to the property (not responsible for lost & damage to items that are left there)
- when you approach coat check, they have to show that that sign is clearly visible before you enter into your contract of deposit
  - → if in back of little tag says we are not responsible for theft or damage to property left here, and you didn't see until you got your tag → this is not the same, it is after the fact that the contract has already been made
  - → need to prove the reasonable person approaching the coat check will see sign before enters contract so you have option (choice) to leave coat under those circumstances (contract with them) or go somewhere else
  - → you have option, nobody forces you and saying you have to give us your coat
- come back to get coat, and its not there (coat check person drunk on the floor, coats all over the place, mine is gone) or coat check person is gone, or coat check person gave your coat away to someone else → they are liable because you are paying money to someone behind the counter therefore there is a presumption that they will supervise and take care (contract of deposit) unless there is a sign that says coat check person leaves at 2am and after that you are leaving your belongings at own risk then you can presume they have to supervise

- if you come back with your number and your coat is gone (gross negligence) – they're liable, they are only protected against simple negligence – 1474 applies also here
  → not simple negligence to see 66 as 99 and give your coat to someone else – they are liable
  → the sign protects them only from simple negligence; you claim button missing, cigarette burn, gloves missing, diamond ring in pocket is now missing → you at coat check is protected by all this
  → if you say there is a cigarette burn there now that was not there before, you have to prove gloves were there before, no smoke burn on it before, button was there before → burden of proof is on you, but if coat torn in half, it is clear that you didn't show up to a fancy club with coat ripped in half - can sue someone in there did it
- but missing a button or cigarette burn, could've been there before

1476 → put sign on your property saying NO Trespassing; Sign saying no liability for injury or damages; sign saying beware of dog; danger
- you can be liable if a burglar comes into your property and injures himself.
- question of fault, contributory negligence
- cannot set up house intentional to hurt burglar
- did you do anything to intentionally set up abnormal situation / trick burglar / injure him
- you cannot set a "trap"
- self defence, pretending own property – you can't shoot someone for smashing your car – call cops, but can for smashing your kid, spouse, any person
- You put sign (big, bright, many languages, lights, you cannot miss it!) on front lawn, danger: beware of dog - you walk onto the property to pick up Frisbee, dog bites you → can you sue home owner? depends, probably not, you know of danger and still went
  → if you do sue, the courts will not have much sympathy for you, we're all adults, we competent, we can see the dog, we see sign and understand the danger
  → but if you are a child, and it bites your arm off, child doesn't know how to read, peer pressure to go in, maybe can sue, the younger they are, the less they understand about the dangers, those trespassing
  → must consider where you are, where the property is. If out in the country, far from towns and people
- if in residential area, many kids, many schools, court may say reasonable home owner owning a dangerous dog, it is foreseeable that people (kids) will trespass, you are responsible. Need to fence dog
- Need to fence pools because foreseeable that little kids in neighbourhood will trespass and drown
- sign is not sufficient, need to put a fence; knowing that people are still trespassing with the fence, can fine them, but you, as the homeowner cannot then leave the dog unsupervised, you are creating a danger

- fact that your property, and fact that no one has any right being there, and sign there, not a defence
- there is an old well on your property, all you do is put plywood on top, all you do is put a sign on it that says, "Danger, well!" and after a year or two the wood gets bad, someone will walk on it and fall → you're responsible – reasonable person should have boarded it up/ fenced it off – required to do this
- you have an old house, it's dangerous, it's falling down, so board up so no one will walk in it – if kid climbs in to the top and falls to the basement, you are liable → court will say if it was in that bad state of repair you, as owner should have abolished it / town it down
- if you own it, you have obligation to keep it secure
- warning sign doesn't make you absolutely free from liability → only a warning sign, question of fact, court may hold owner is partially liable, court may hold the victim partially or completely liable
- a warning sign is only a warning sign, if doesn't exclude your liability, but it creates a warning, therefore, once you have a warning, then the reasonable trespasser sees that warning and ignores that warning is probably going to be contributory negligence (maybe 100% or less)

1477 → "imprudent" = dumb to do it
- fact that you agreed to or can be shown that you have tacitly accepted the risks about doing something
- ex: play paint ball – no wavier form
    - any time you play sports, any time you participate in any organized event, certain risks that you have assumed
- just because you have assumed the risk of getting injured paying football, you have not accepted the risk that someone will tackle you illegally → you cannot just argue well "it's a tough game" and therefore he assumed the risk, he only assumed the risk of being injured during fair play, no if someone has broken rules
- depending if followed the rules of fair play
- you assume risks that are associated with fair play

1478 → - more than one person has caused an injury, liability is shared by them in proportion to the seriousness of the fault of each
- 2nd par: contributory negligence = victim is partially or wholly responsible for his injury
- this argument used all the time, standard defence everyone uses
- if you fall down stairs and breaks a leg, and they try to sue building owner of where it happened, can argue contributory negligence (well you were wearing bad shoes/ slippery sole that were inappropriate for the season)

1479 → I am liable for your injury; I have caused you injury
- if courts feel you have made your injuries worse through your own actions (I am not liable for whole injury, you are liable for half)

ex: I am liable because I broke his nose, but it he came at you again, and slipped and fell, court can say yes, I injured that person but I am not responsible for total amount of damage

- victim made it worse for himself

ex: I hit you, you kept coming at me, so I hit you more

- part of contributory negligence

1480 → 3 students after the exam, if one holds, one punches, one kicks → technically 3 separate actions, but they are all acting together – which impossible to determine which cause which injury, court cannot distinguish who caused what injury and they wont even try

- if I can prove the 3 of them as a coordinated group attacked me, courts won't say holding person only 10% liable, punching person....
- the 3 of them are solidarily liable for compensation = joint and severely liable; I can claim up to 100% damages from each of them (but in total (collectively) only 100%)
- you can collect as much as you want from each up to 100%

ex: I get judgment against them for $100,000 – they are solidarily liable, they are not allowed to plea I'm not as liable as next, I can collect as much as I want from each of them up to $100,000 (I cannot collect $100,000 from each and get $300,000 – I can whichever way I want to collect)

- I am not limited to 1/3 each
- if I go after just one, then that one person can go after others
- commercial contract (2 people signed) as co-tenant for a commercial space → they are solidarily liable;
- if you sign as guarantors for someone who wants to borrow money to start a business, you signed as guarantors, each one of you's are solidarily liable for full amount; no division of liability, when it comes to commercial contracts, the rule is solidarily liable
- residential leases is different, if 2 people rent an apartment, you are deemed to be only jointly liable (50% each) unless landlord is smart enough to write solidarily on standard form.

→ if you are jointly liable and one tenant leaves – technically landlord cannot come after you full other 50% (tell you to pay full amount), but he can evict you for non-payment of rent, you cannot stay – cannot collect from you, but can throw you out

HARRIS VS. OSTROMOGILSKI

- Ostro (or his wife) owns a taxi cab
- Ostro owns a taxi license – most people who drive taxi cabs don't own them, they are paid a certain amount of money an hour to drive them
- Harris (45 years old) leasing (renting) cab from Ostro
- every week, Harris comes to see Ostro, Ostro brings the total receipts, makes the deductions of whatever expenses he has, and gives the rest of the money to Ostro
- Harris shows up one day and there's an argument (a dispute), there was a fight → about what? We are not sure
- Ostro says Harris smashed one of his cars before that, Harris says it has nothing to do with him, it was Ostro, he just went nuts on Harris
- 2 sides of story, basically there was a fight
- Ostro punched him
- Ostro (25 years old) came out on top
- Harris came out worse, he was all beaten and bashed up in the face, Ostro had 2 badly swollen hands (cracked bones)
- After the fight, Harris calls the cops, cops came, Harris was a mess in the face, the cop testifies Ostro's hands were all swollen up (this testimony is substantiated). Harris went to hospital for treatment
- Harris files criminal and civil charges against Ostro (top P. 126; # 1-9 → this is what is wrong with Harris – he has been severely beaten up – hematoma = bruise)
- No witnesses; Nobody there except Harris, Ostro & Ostro's wife – wife's testimony useless / worthless
- physical evidence → Harris is 20 years older and face all beaten up and Ostro is a lot younger and his hands all beaten up
- court believes Ostro started fight for no reason ("without reason or probacation attached Harris")
- Harris sues for Damages: **1457** → sues for damages (entitled to all direct damages related to injury)
  → he gets (bottom P. 126) lost income for 2 weeks, permanent partial disability including pain, suffering, loss and enjoyment of life (battle of the expert witnesses – soft damages that are impossible to prove)
- appears Harris is innocent victim, appears Ostro gave a good beating
- Court supports these moral damage fights, if had been 2 guys in a bar – different story
- looked like Harris good guy, and got a beating for no reason
- Doctor for Harris (who was paid 750$) to give his opinion; you paid Doctor (professional witness – this can ruin a doctor's credibility if all they do is go round and around to trials testifying) to say what you wanted him to say
- expert witnesses are giving expert opinion for you, but you are paying them to make them say what you want them to say, keep in mind, expert witness is not just a good Samaritan coming into court – expert witnesses may sound really good, but they are paid to sound really good
- $5000 for pain, suffering, loss and enjoying of life (moral damages), broker eye glasses, etc… (bottom of P. 126) → comes to total of $5,880
- under **1457**, where someone has injured you, you are entitled for all direct bodily injury, moral damage and material damage

- court believes, yes he was attached, and yes he is entitled to the damages (money)
- Top P. 127, exemplary damages (punitive damages)
- his lawyer trying to claim exemplary damages, breach of charter in civil litigation manner
- when I beat you up, I am beating your person under charter, I am not just beating you up and causing you actual damage, I am violating your charter rights
- violating right to peaceful living and not to get beaten up
- argues Charter 1, 4 have been violated
- you have violated the charter if they can show elicit and intentional violation of a charter right, you may be able to ask for punitive damages (S. 1492 of Charter)
- argues violated charter of human rights
- purpose of exemplary damages: punish and prevent, create a good example for public
- here, court says, it is not necessary, he was held guilty of a criminal offence and has already had to pay fine of $2,400, so we'd be duplicating it if we were to give exemplary damages also
- saying yes you can ask for exemplary damages, but in this case, it is discretionary, we will not give it because he was held guilty for criminal offence
- easier to convict someone civilly, (guilty – less burden of proof)
- criminally, much higher burden of proof – court has to be much more convinced the person did it,
- Ostro already convicted criminally before getting to civil trial
- you can bring this up at civil trial – court mentions (P. 125)

WALKER VS. SINGER

- Walker met Singer, they had relationship for about 6 weeks
- Singer says she was pregnant, will get abortion, he didn't like that idea, wasn't too sympathetic
- they live together at some guys house, the next day he comes back, and she had torn up some of his cloths
- he called the cops, filed a police report
- Singer was convicted of criminal offence – don't want criminal offence, you will get disbarred (expelled, thrown out, she was a lawyer)
- the judge gave her unconditional release; you are guilty (criminal offence whatever it is, ex: vandalism, etc..) and you get unconditional release, you are free to go right now, was given immediate parole → you have a criminal record, but given unconditional release right away
- **S. 1457** (P. 130 – 3rd par) – 1053 = today's 1457 – generally breach of liability article
- he sues her, he files a criminal complaint against her for damage to his clothing, she counter suing that he raped her and beat her and abused her
- she goes to crown attorney with her lawyer and they file a complaint of sexual assault (rape battery, beating her up)
- when you want to have a criminal action taken against someone, you usually first go to the police and then to crown attorney – the gvt – and say please take action against this person, he did whatever to me
- he was never charged with rape and battery, no evidence, no case, we don't believe you, crown attorney blew her off
- so no case was actually filed against him, but his concern was his name is now in computer system and was there for 10 years; this was damage to reputation, moral damage

Court says (gives him):

- $700 damage in clothing (actual property damage)
- $5,000 in moral damages / damage to reputation (slandered, sleepless nights, people thinking he's a rapist)
- $3,000 for she is a lawyer, she should know better than to act like this, to treat him like this, intentionally slandering him, violation of his private life, accuse him of those things (punitive damages / exemplary damages)
- $2,000 psychological damage (also moral damage)
- $60 tailor (property damage)
- **S. 1621** (P. 85 – KNOW FOR THE EXAM!) punitive damages (exemplary damages)
- "tourt" – civil responsibility (**1457**)
  → you are liable if you cause injury to another and you know right from wrong
  → you caused injury to others & you should know better

FARMAKIS VS. CANADIAN TIRE

- Farmakis fell off a ladder in Greece
- Framakis bought a ladder from Canadian tire in Canada, Ontario in 1993 (summer)
- 1996 back to Greece to build retirement home for himself
- brought ladder with him, shipped ladder to Greece Fall 1993
- December 1993, Farmakis stepping on ladder that is 5 steps high, he is on the 3rd step (<1metre), facing wall
- after 1hr30minutes he falls, he just says, he falls
- building, using ladder, and fell off and suffered injuries to his back
- he comes back to Canada, brings ladder back with him and sues Canadian Tire
- suing based on 1468 + 1469 (product liability)→ Product safety (safety defect) liability (KNOW FOR THE EXAM!!!)
- suing for product liability
- suing for 2 claims → safety defect in ladder, it was fit for purpose it was intended and therefore it caused him to fall OR there were no appropriate labels on the ladder warning the user of dangers inherit in using it (these 2 qualify as product defects by definition under 1469)
- why did he fall of ladder?

→ we don't know
→ using ladder in Greece Dec. 1993
→ after 1hr 30minutes of work, he falls off
→ ladder did not break, he didn't say any noise or cracking, no evidence ladder broke
→ brought ladder to court for examination and to expert witnesses
→ he was 1 meter from the ground
→ he says either defect in manufacturing (made it unstable or the material was no good and something failed) OR there was no proper warning label as how to use this item (ladder)
→ must have been wrongly manufactured, broken

- defect in design and manufacture qualifies under safety defect
- **1468** → Product liability is a safety defect (default in manufacture, design, preservation, presentation, packaging, warning labels of how to use - instruction, warning of danger)
- silence can also be a safety defect
- he claims wrong in design of ladder or lack of proper instructions of how to use the ladder
- he is not a specialist therefore bring in specialists – expert witness
- bring in expert witness:

→ expert witness for Farmakis said, ladder for person for 200lb with maximum of 800lb with stress weight when carrying, shifting, moving, and material
→ so witness confidently there must be pre-existing defect in ladder for him to fall off
→ expert witness for Canadian tire says we examined the ladder and there is nothing wrong with it, no medal or design problem with it, there is no visible defect in any way, shape or form so we see no way how the ladder could have caused him to fall
→ Judge says it's been 10 years and it has travelled all over the world – to Greece and back so how can plaintiff expert say there must have been a pre-existing defect,

there's no justification for that, maybe there is a defect, but we can't see it, and also it's been 10 years and all around the world, and even today it doesn't look like there is anything wrong with it, but when did it occur – to Greece or back? Your claim that there is a defect, maybe there is, but when did the defect occur?

- claim that there is a defect in ladder itself does not support in any way, shape or form because even today the ladder looks good
- Court agrees with Canadian Tire
- alternate claim: Canadian Tire did not put the appropriate labels on this piece of movable property to warn the user as to what the inherent risk would be with a proper way of using it – this would be a safety defect by definition under **1469**
- Were there labels on this ladder, there was when bought, but Greece man said he peeled off the labels so no labels
  → there were 3 labels, I peeled them off, I only have 2 of them left (if he peeled them off, why does he still have them)
  → Judge says, if you look at the ladder, it appears to have had 4 labels on it at one time and this is apparently the number the manufacturer usually puts on the ladder (standard ladder is suppose to have 4 labels and this one appears to have had 4 labels)
  → labels talk about weight restrictions, manufacturer…
  → we don't know what labels were on it, maybe it didn't have enough labels, but we don't know, plaintiff destroyed that evidence/proof
  → what is manufacturer or retail seller's duty to warn when it comes to a ladder? What are the inherent dangers when using a ladder? Virtually nothing except weight restriction – a ladder is a ladder, it is at low end of the scale when it comes to warning people about how to properly use it, other than open, weights
- Judge says anyone can use a ladder, no duty to warn for step ladder, I don't care if labels were there to begin with, I think they were on there and I think he peeled it off himself, but even if the labels haven't been there, what duty is there to warn with a step ladder, virtually none, no real great duty to warn
- therefore no safety defect with ladder (judge is not convinced)
- fact that ladder made it back to Canada, and to the court, and 10 years later, still looks in perfect condition → he has no claim. What is his claim? How can it be structurally defective if now, 10 years later it is good as new
- he says they didn't warn him, then says he peeled 3 off
- he doesn't have much of a no case to start with
- he destroyed whatever evidence he would've had by peeling off the labels
- there is no safety defect

WALFORD (LITIGATION GUARDIAN OF) V. JACUZZI CANADA INC.

- the family bought a 4 foot deep above ground pool from Pioneer that was manufactured by Jacuzzi
- then, they installed a 10 foot slide on the tiny little pool
- 15 year old daughter slid down it head first and knocked her chin on the bottom of the pool and suffers quadriplegia
- obviously going pretty fast into 4 feet deep water, smacked head on the bottom of pool, instant quadriplegia (no feeling from head down)
- tragic situation
- under 18, cannot sue on own, litigation guardian = parent suing on her behalf / parent representative, Mrs. Walford suing on behalf of 16 year old girl
- Tort law = **1457** (civil liability / responsibility issues)
- claim: manufacturer of slide and manufacturer of pool should be liable for this horrific damage because the slide fits onto the pool and that they shouldn't have sold her the slide in the first place
- Pioneer sold slide to them
- they are suing Jacuzzi (the ones who manufactured the pool) and the suing the distributor of the pool and the suing the person who sold them the slide – suing everybody
- they should not have sold them the slide, they should have asked what kind of a pool are you attaching it to, we won't sell you slide because your pool not big enough → is there any issue of liability?
- they are claiming it was the responsibility of the seller to ensure they did not sell her a slide that was too big for her existing pool
- they are claiming they shouldn't have sold slide to them
- pool and slide were not sold together as one (if it had been, could have been an issue → if they had bought the 4 foot deep pool and the 10 foot slide together, seller might have had obligation to tell them he does not recommend that)
- Court says no proof to support the assertion (the claim) that Pioneer employees (those that sold them the slide) were specifically asked whether a 4 foot pool and a 10 foot slide could be used together →
- Court says No proof that Pioneer knew or ought to have known (no evidence) that selling them this big slide would allow them to install it was to a little pool (under an unsafe circumstance)
- No evidence to show that there is any breach of any warranty or any issue of liability on part of pool seller or slide seller
- they have to make their claim, if no safety defect (no absence of labels claim), no claim that product should have had labels that were not there, basically saying they are liable because they sold us this dangerous product without telling us how to properly use it or instruct us as to their use
- Court says you have to prove it! But they have no proof, yes we know you bought the slide and pool from them, but she has to prove she told these people what she wanted all this stuff for and she had a little pool, then she would have a claim (her word against theirs, nothing in writing)
- saying they didn't tell us how to use safely

- honest family: daughter being negligent & careless because mother admitted in court to telling her to be careful, not to slide head first down the slide
- Court says the cause of this accident was not the fault of the manufacturers or the suppliers of the property, but the daughter was just being negligent & careless
- if the 2 products had been sold together as one unit → a different story
- she has no claim – no case, not liable (professional seller)

- did bring up a separate issue that maybe the slide was an old slide, maybe should have had a better warning label on it → but this is new material, this isn't going to change the situation
  (apparently this was an older slide and the newer slides have better warning labels on it)
- looking for clear negligence on part of professional seller, they if know about potential risk, they have to warn you (in writing or verbally), but the 2 products were not sold together
- tragic but no liability

→ if you have a lot of money, drag the lawsuits on for as long as possible (standard is 4 years, can go for 10 years) do this because the other party has to pay the legal lawyer fees as well

MORSE V. COTT BEVERAGES WEST LTD.

- she (16 year old) was trying to open a bottle of cola (2L) - twist top cola
- she couldn't open it, it was too hard to open, so she used a nut cracker, she put the nut cracker on it and tried to open it, and it popped into her eye
- carbonated beverages has gas in it, she was shaking it around (intentionally or not by using a nutcracker), all of a sudden it popped, the cap went flying right into her face
- her claim against COTT beverages; suing → the cap was put on too tight and therefore in her attempt to remove it, it caused the cap to shoot right off and injure her in the eye
- she suffered (her injuries to the eye) – for a few days she couldn't see anything, now, 9 years later still light sensitive
  → she had about a year or so of severe worry (afraid) and stress thinking she would have cataract in her eye
  → she was cut from all sports teams where she used to play – she used to be first string in basketball and baseball, then she was put to second string
  → even then she was scared to play, she wanted to protect her one good eye (scared her from sports)
  → she was pretty traumatized
  → 10 years later, her eye is pretty much ok, but it's been rough 10 years, she was young, 16
- her claim against COTT: product safety legislation, product supply must be of acceptable quality, top P.140 → obligation to provide products that are safe and of sufficient quality as to not injure the customer
- one of the big pieces of evidence the plaintiff was able to submit to the court would have been bottle and cap
- top never found, bottle was lost (lawyer lost it, COTT had 4 years to go look at the bottle and they never did) → too bad, they never went, Court says too bad, in favour of Morse
- this situation was foreseeable – the manufacturer of the people who make these bottles (makes the bottle and then bends the caps to fit) have detailed manual that was given to COTT (user instructions and warnings to deal with pressure of the caps)
  → the manual tells the user how the need to do torque tests – pressure tests – every hour to make sure the caps are not too tight, if the caps are too tight, they give clear warning as to what the problems can be
  → well known that a top that is on too tight and someone tries to force it off, it can shoot off because the pressure builds up in the bottle, all this information is known to COTT because it was provided to COTT in the manuals they had
- pressure tests to ensure bottle caps not to tight (not too much pressure) → P. 142
- Was COTT going about doing their pressure tests to the bottles every hour or so? Yes, it says there should be 10 -15 lbs of torque and tons of the bottles were too much, 16-24 bottles tested well above the specification of 5-14 lbs per square inch

→ their own foreman was telling them, yes, 25lbs is fine, don't worry, not an issue, that could be opened, they say 4-15, but its fine → COTT was just letting these go through for all intensive purposes

- Court says COTT was aware or should have been aware by warnings by Alcoa that if it produced caps that were too difficult to open by hand, consumers will resort to use of an appliance or tool. COTT was also aware or should have been aware by warnings provided by Alcoa that use of a tool will increase the risk of injury if sudden ejection of the cap, nevertheless, COTT produced product with closure removal torques in excess of specifications and did not warn consumers of the danger of sudden cap ejection or that if the product was not openable by hand it should be returned to the retail seller (P. 143)
  → COTT knew or ought to have knew because they had all this information in their hands and available to them, that this was an injured product, dangerous, if you can't open it by hand, that you should never use a tool on it and that you should return it to retail seller and get a refund → COTT had no such warning on the containers
  → COTT is therefore liable
  → COTT knew it was too much pressure, but still letting go through (P. 143)
- P. 144 → who is liable for a safety defect → the manufacturer includes all professional sellers (**S. 1468**)
- what damages does she claim?

→ bodily injury, moral and material damages → outside of Quebec, called general damages
→ we call it **1457** – this is the general damages; she gets $18,000 for general damages
→ this $18,000 = moral and bodily
→ then they add specific material damages to it 98$ lost income, $60 for contact lenses, $31 for medical treatment, $30 for sunglasses, $175 for prescription sunglasses

→ 1457 → general damages ($18,000)
→ P. 145 top (general damages)

- exemplary / punitive damages
- our consumer protection act allows for punitive damages in certain cases, this law says when it comes to product liability (safety defect), it allows for exemplary or punitive damages → 1621 → only when allowed ($36,000)
- when do you get punitive damages – same rules apply as in Quebec, in Quebec, can you get punitive damages for safety defect, no, impossible, because 1468 doesn't say you can get punitive damages →
- 1621 says only in specific cases, i.e. the charter, psychological harassment, consumer protection
- you cannot get punitive damages unless the law specifically allows you to
- she gets $36,000 in punitive damages – no rule as to how to establish it, the court clearly felt COTT was in bad faith, they were grossly negligent and had a total disregard for the consumer (general public) so they gave her $36,000 in addition to her 18,000$ for pain and suffering

- this is very generous for Canadian standards, yes she was traumatized and her eye is light sensitive, but besides that she came out ok
- courts are very tough on manufacturers where it feels the manufacturer doesn't care and knowingly and willingly lets dangerous products out into public → court had no hard feelings for manufacturers – sends a good message to manufacturers and retailers

Comm 315 detailed outline
May 2006

This detailed outline is an indication of what was covered in class. IT DOES NOT LIMIT THE SUBJECT MATTER TO THE ELEMENTS INDICATED HERE. It is meant to help you study.

1- Contract law

Necessary elements to form a contract

- Consent 1385, 1399,
  - Error 1401
  - Fear 1403
  - Lesion 1406
- Capacity 1398
- Object 1412, 1413
- Cause 1410

Consequences of missing element: nullity 1407

Types of contracts

- Bilateral 1380
- Consumer and adhesion 1379, 1384
  - Certain stipulations not valid
    - External clause 1435
    - Illegible or incomprehensible clause 1436
    - Abusive clause 1437

Enforcement 1590

- Putting in default (lawyer's letter) 1594
- Specific performance 1601
- Payment
- Resolution, resiliation or cancellation 1605
- Damages 1607
  - Types
    - Future 1611
    - Punitive 1621
    - In contractual matters 1613

All cases in casebook concerning contractual law p. 86 et s.