

Reading 1A: Court Systems and Procedures

Friday, June 17, 2011

12:19 PM

➤ **The System of Courts in England**

- Courts are very important in a common law legal system.
 - A major portion of business law continues to be created by judges
- We study the English courts because much of our own law is derived from English Case Law, so knowing the structure of the courts that decided cases makes them easier to understand. Additionally, the English system affords a good starting place because England has a single government and its system of courts is easier to grasp.
- There are three levels of courts:
 - **First Level:** Trial Courts
 - **Second Level:** Court of Appeal
 - **Third Level:** Final Court of Appeal
- **The Courts of First Instance**
 - Aka Courts of original jurisdiction because actions begin and trials take place in this court.
 - Witnesses are called and an initial judgment is rendered.
- **The Court of Appeal**
 - The next level of courts
 - Actions do not originate in this court, but a party who is dissatisfied with the decision of a court of first instance may appeal here to have the decision reconsidered.
 - **Appellant:** The party who petitions for an appeal
 - **Respondent:** The party who defends on an appeal
 - The appeal is not a new trial and no witnesses are called, the court does not listen to questions of fact because they were for the trial judge to decide.
 - The court of appeal proceeds on the basis of the written trial record, and lawyers for each side argue only questions of law
 - The appellant is claiming the trial judge made an error in the law and the respondent is saying the trial judge was right.
 - The court may do one of 4 things:
 - Agree with the trial judge, and dismiss the appeal
 - Agree with the appellant and reverse the trial judgment
 - Vary the trial judgment in part
 - Declare that the trial judge erred in failing to consider certain facts and send the case back for a new trial in the lower court.
 - ◆ **New Trial:** A case sent back by the appeal court for retrial by the lower court.
 - The Court of appeals typically hears the case in a panel of three, occasionally 5, verdict is based on a majority.
- **The House of Lords**
 - Parties dissatisfied with a decision made by the Court of Appeal can go before the house of Lords, the ultimate court of appeal and the highest court in the land.
 - Only lawyers and judges who have been elevated to the peerage actually hear and decide these appeals.
 - Lord Chancellor and up to nine Lords of Appeal in Ordinary (full time salaried judges)

➤ **The System of Courts in Canada**

- The Canadian constitution divides legislative powers between the federal and provincial governments.
 - Gives the provinces jurisdiction over the administration of justice
 - The operation of police forces and the court system

- Gives the federal government jurisdiction over trade and commerce, banking, bankruptcy, and criminal law
 - The government is divided this way due to the fact the USA had undergone a civil war, in which Canadians believed was caused due to the locally elected judges who passed discriminatory laws against outsiders (citizens from other states)
 - The Canadian government planned to therefore avoid the problem of local bias by placing jurisdiction over matters that might be affected by local influence in the hands of the national government.
 - Generally there are 3 tiers of courts in the Canadian system
 - The courts of first instance
 - The intermediate provincial courts of appeal
 - The final court of appeal, the Supreme Court of Canada
 - The names and jurisdictions of the courts differ somewhat from province to province but in general they follow the same pattern as set below.
 - **The Provincial Court System**
 - The primary system of courts that deals with most matters of private and public law.
 - **The Courts of First Instance**
 - Trial courts where witnesses give evidence and initial judgements are made.
 - The topic of dispute will determine in which trial court the dispute belongs.
 - Two branches:
 - ◆ The inferior trial courts
 - ◇ Created by provincial legislation for a particular purpose.
 - ◇ **Small Claims Court**
 - ▶ Private disputes for smaller amounts of money
 - ▶ Simple and Informal, cost of taking action is low
 - ▶ Most consumer or client disputes and collections are handled in this court
 - ▶ Busiest civil court
 - ◇ **Provincial Division**
 - ▶ Decides very little private law
 - ▶ Hears criminal cases of almost every type except for serious things like murder, treason, sexual assault.
 - ▶ No jury trials are held before Provincial Division judges
 - ▶ The accused may elect to have a jury trial, then the case must be held in an upper trial
 - Accused must have a case for which they could be sentenced 5 years in prison.
 - ◆ Superior Trial Courts
 - ◇ Constitutionally created courts presided over specific topics
 - ◇ **Surrogate Court (Probate Court)**
 - ▶ Supervises the estates of deceased people.
 - ▶ Appoints an administrator to wind up the affairs of anyone who dies without leaving a will (intestate), settles disputes over the will and division of assets, approve accounts of executors and administrators.
 - ◇ **General Division or Superior Court**
 - ▶ Unlimited jurisdiction in civil (private) and criminal actions.
 - ▶ Federally appointed judges sit in this court that deals with divorce and most serious criminal matters, as well as all civil (private) disputes outside the jurisdiction of the small claims court.
 - Most of the time inferior court trials are appealed to the superior court before they move on.
 - **Intermediate Appellate Court**
 - ◆ **Court of Appeal**
 - ◇ Each province has one intermediate appellate court.

- ▶ Appellate Division, the Supreme Court en banc, and Queen's Bench Appeals as well as the Court of Appeal
 - ◇ All matters appearing in the court of first instance are appealed to the Provincial Court of Appeal
 - **The Federal Courts**
 - **Supreme Court of Canada**
 - The final court of appeal in Canada
 - 9 judges and hears appeals from both the provincial and federal courts of appeal.
 - Special jurisdiction to rule on the constitutionality of federal and provincial statutes when they are referred to the court by the federal Cabinet.
 - **The Federal Courts**
 - **Courts of First Instance**
 - ◆ **Tax Court of Canada**
 - ◇ Hears appeals of taxpayers against assessments by the Canada Customs and Revenue Agency
 - ◇ Either the taxpayer or department may appeal the decision.
 - ◆ **Federal Court of Canada**
 - ◇ Federal government maintains the federal court of Canada in 2 divisions
 - ▶ Trial Division
 - ▶ Appeal Division
 - ◆ **Intermediate Level Appeal**
 - ◆ **Federal Court of Appeal**
 - ◇ Hears appeals from the Federal Tax Court and the Federal Court of Canada Trial Division
 - **International Issue**
 - **The System of Courts in the United States**
 - Both Canada and the USA have federal systems of government and common law legal systems, but major differences between their constitutions
 - ◆ USA, individual states have more autonomy and have the residual power that in Canada rests with the federal government.
 - ◆ Canada has the power to create a full system of three tier federal courts throughout Canada. Provincial courts deal with cases of first instance, where they then move to provincially and federally appointed courts.
 - ◆ USA has a full system of federal courts that handles some, but much less cases, than the individual state courts.
 - ◇ Most states have an independent three tier system too.
 - ◆ Canadian judges are appointed to a life term, and begin from being a lawyer, screening by a committee then selected by the Minister of Justice and the Cabinet.
 - ◆ American Supreme Court judges are appointed by a president through the Senate.
 - ◇ State judges are selected for limited terms by election.
- **Procedural Law: Using the Courts**
 - **Rules of Civil Procedures:** The Provincial regulations that set out the steps in a private law suit, including forms, fees, and timelines.
 - **Who May Sue?**
 - Not everyone has the capacity to start an action
 - Adult Canadian has full access
 - Generally, non Canadians can sue, but during hostilities they are viewed as aliens and are forbidden the right to sue.
 - A child under the age of 18-19 needs adult representation
 - ◆ If a child starts a case without an adult, the court will 'stay' proceedings until a parent or litigation guardian is appointed.

- ◆ Children are presumed not to have the sound judgment needed to undertake the risks of court proceedings.
 - ◆ Insane person cannot sue without the representation of a sane adult either.
 - Corporations may sue and be sued
 - ◆ Thought of as a single person
 - In all cases, an action is brought forward by a person either for their benefit or for the benefit of another person
 - **Unincorporated Collectivity:** A group of persons that in most cases is not recognized by the courts and that may not be sued or sue.
- **Standing to Sue**
- Courts have been reluctant to permit actions by individuals when their rights are not specifically affected.
 - Litigious members of the public may choose to litigate many matters in which they have no direct interest.
 - On the other hand, the risk of serious injury to large groups from some matters has grown, making the individual at risk.
 - Effective means must be available to the public to protect itself from careless and unscrupulous enterprises, especially if no governmental body is taking steps to protect the public.
- **Class Actions**
- Courts are reluctant to take away an individual's right to litigate their own claim.
 - On the other hand, it would be unfortunate to clog the courts with hundreds of repetitive claims.
 - Sometimes the amount in dispute is not worth the cost of a lawsuit unless multiple plaintiffs can pool their resources.
 - ◆ This is known as a class action
 - ◇ An action in which an individual represents a group of possible plaintiffs and the judgment decides the matter for all members of the class at once.
 - ◇ Benefits include avoiding multiple actions and inconsistent results
 - A court must approve the idea of a class action before it can succeed
 - Whether there is an identifiable group, common issues, a class action be a preferable procedure?
 - ◆ If yes, a class action proceeds, and it makes the matter a **res judicata**
 - ◇ A case that has already been decided by a court and cannot be brought before a court again
 - Most class actions are brought forward by plaintiffs
- **Settlement out of Court**
- **Advantages**
 - Even when parties start court proceedings the disputes rarely go to trial
 - Most are resolved by a **settlement**
 - ◆ An Out-of-court procedure by which one of the parties agrees to pay a sum of money or perform an act in return for a waiver by the other party of all rights arising from the grievance.
 - ◇ Speedy and definite and avoids the expense of litigation
 - ◇ Each party avoids risk as well
 - ◆ Many settlements are stopped as soon as they are started
 - Why are courts so important then?
 - ◆ The decided cases supply the principles by which aggrieved parties may gauge the relative merit of their claims, predict the outcome of a possible court action, and strike a value for their claims
 - ◆ The court is the last resort, it settles the issue when the parties themselves cannot

to a published scale of fees



▪ **Total Costs of Litigation**

- A solicitor client fee is almost always greater than an award of party and party costs.
 - ◆ The plaintiff will usually still need to cover some of their lawyer costs even if they win.
- If solicitor-client costs are awarded, the loser must pay in full the winners client costs.
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○ **Legal Aid**

- The resource costs time and money, and it is being debated whether our economy can continue to subsidize legal aid fees, and legal aid services have been cut back.
- (LEGAL AID DOES NOT COVER BUSINESS SUITS)
- There are two forms of legal aid
 - **Judicare**
 - ◆ A model of legal aid in which lawyers agree to be paid according to government fee schedules for serving clients who qualify for legal aid.
 - ◇ Are paid substantially less
 - ◇ Found on a list, and used by people who can't afford lawyers.
 - **Community Legal Services or Legal Clinic**
 - ◆ A model of legal aid where legal services are delivered by community law offices with full time staff lawyers and managed by boards elected by residents of the community.

○ **The Economics of Civil Litigation**

- Is it worthwhile to start an action?
 - Key business law risk-management question
 - ◆ Always the risk of losing...
 - ◆ Reward should be greater than amount you're paying your lawyer
 - Litigation has business costs, and not just monetary legal costs
 - ◆ Might not be worth a business's time and effort to fight

○ **Contingent Fees**

▪ **Contingency Fees**

- A fee paid for a lawyer's service only if the client is successful; no charge otherwise.
 - ◆ If the lawyer wins, they get a % of the won proceeds
 - ◆ A lawyer may take several cases and only win one, but earn enough to cover the other lost cases that he wasn't paid for.

▪ **Contingency fees in Canada**

- Slow to adopt them cause they believe they:
 - ◆ Encourage unnecessary litigation
 - ◆ Expose defendants to costs of defending themselves against claims that have no merit.
 - ◆ Encourage some clients to agree to unconscionably large % fees demanded by their lawyers.
 - ◆ Drive up the cost of settlements and court awards, increasing insurance premiums.
 - ◆ Cloud the judgment of lawyers

➤ **Methods of Enforcing Judgment**

○ **Judgment Creditor**

- A party who has obtained a court judgment for a sum of money

○ **Judgment Debtor**

- A party who has been ordered by the court to pay a sum of money
- If financially sound, order of the court will be convincing enough
 - If they resist, or cannot make that money, an enforce payment must be made
 - The judgment creditor can take as much of the assets of the debtor to make up for the

money they are owed.

- ◆ If that's not enough, the creditor can wait for more, or write off the remaining amount they are owed.
- ◆ Can request a **Garnishee Order**
 - ◇ An order requiring the debtors employer to retain a portion of the debtors wages each payday and surrender the sum to the creditor
- ◆ RARELY, the creditor registers the judgment with the sheriff and requests to **levy execution** against the assets of the debtor to satisfy the judgment.
 - ◇ Seize land

Lecture 2: Systems of Law (Decisions)

Wednesday, September 14, 2011

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➤ **Systems of Law**

○ **Civil Law System**

- Only used by Quebec in Canada
- Oldest form, originated in Europe, and is currently used still in Europe a lot.
 - French speaking Canadians continued using it now
- Works well in jurisdictions that use it
- Fast and Efficient
- All civil law is written and codified, and whenever there is an action, the judge will decide the most relevant civil code from the book, and make a decision based on that code.
 - No necessity to look at past decisions.... Simply the code.
- Hard to predict outcome of case, because nothing is used from past experiences.
- Very generalized, becomes kind of stagnant.
- Can be inconsistent based on what segment of the code each judge uses.
- Only used for civil law cases, the criminal code is used for criminal cases, the same method is used though... no precedents just a different code.

○ **Common Law System**

- Not nearly as old
- Originated in 12th century in England
- Based on local customs originally
- Based on theory of precedents
 - Stare decisis
 - Based on previous cases, whereas we let the former decision stand from previous cases.
 - Judges *must* look at past cases from a higher or equal court with similar facts before they can make a decision on the case at hand.
- A bunch of cases were published so that other lawyers and judges could follow them to make decisions that would remain predictable and consistent.
- Judges do not use bad decisions that were obviously wrong, or decisions that just don't apply or have relevance... so it's fair.
- Much more complicated and messy, cause lawyers and judges need to look for past cases, and hunt them down to use as reference... there isn't just a rule ready to be used from a book.
- To speed up the process, in common law court the only remedy that was achievable was money... if you weren't demanding money, you couldn't sue.
 - This led to the creation of the Equity System

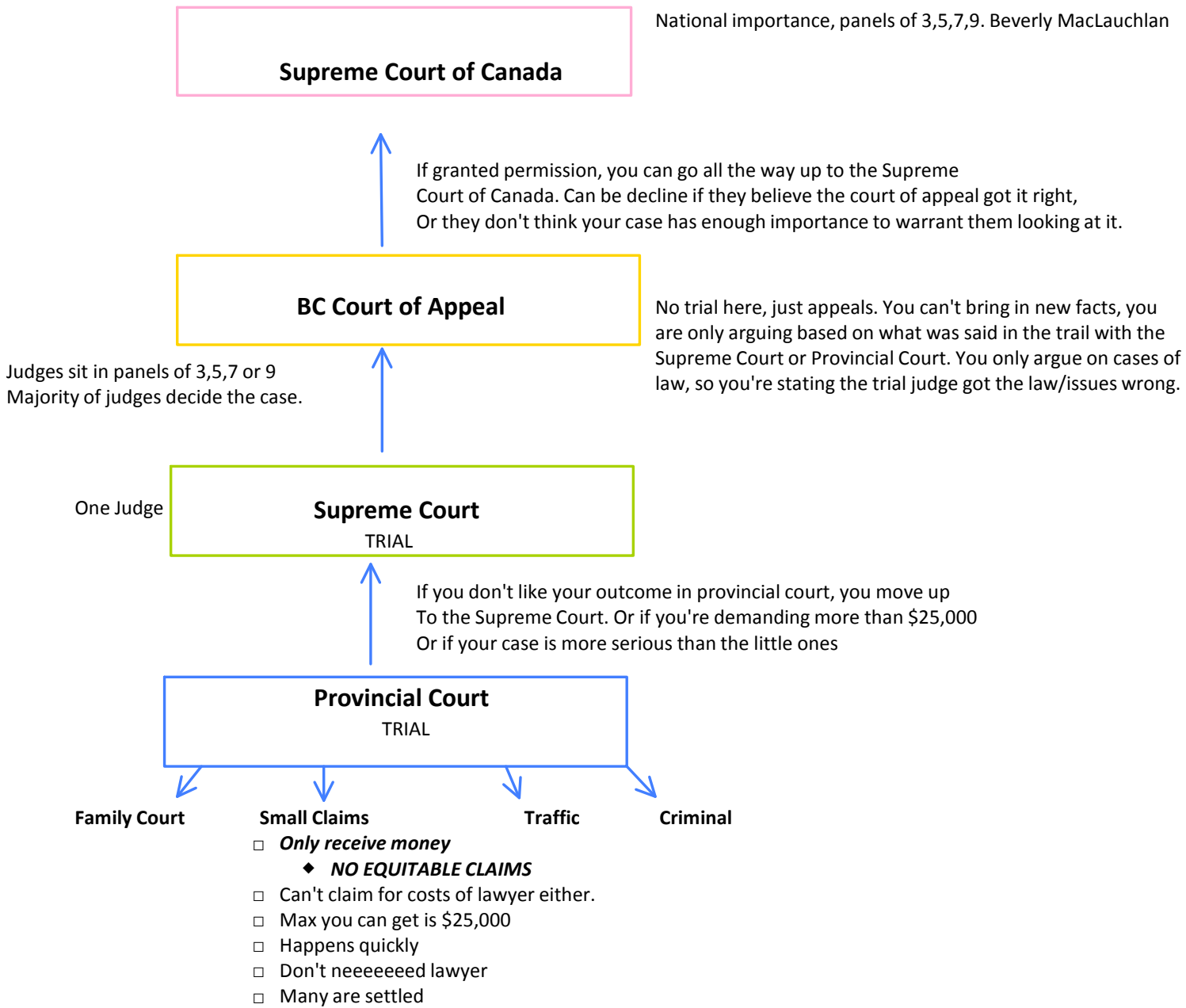
○ **Equity System**

- Developed by the King
- 13th Century England
- Has now kind of merged with Common Law System
 - Both systems do remain distinct, however the courts have merged.
- Settles all disputes that have been kicked out of Common Law courts because they plaintiffs were demanding something other than money.
 - Court existed side by side until 1875

- Provided own remedies other than money
- You are not allowed to get both equity and money.
 - ◆ If the judge says no, you leave with nothing, unless you asked for damages in the alternative
- Decisions are based on morals, fairness, equity, etc.
- Rules are extremely stringent:
 - Plaintiff can only ask for an equitable remedy if:
 - ◆ Money would be inadequate
 - ◆ The subject matter of the contract is unique
 - ◆ Plaintiff must act quickly in suing... "fast feet"
 - ◆ Plaintiff must have "clean hands"
 - ◇ Conduct hasn't lead to the lawsuit, it's the defendant who has caused the necessity for the plaintiff to sue
 - Even after all this the remedy is discretionary
- In Business Law:
 - **Specific Performance**
 - ◆ Court order to live up to obligations under a contract
 - **Injunction**
 - ◆ Opposite to specific performance
 - ◆ Court orders to stop doing something that you promised you would do in a contract
 - ★ □ **Rescission**
 - ◆ The court unravels the contract and places the parties back to their pre-contract position.
 - ◇ Back to the status quo
 - ◇ Gives you the option to start over and make different decisions
 - ◆ Example
 - ◇ Ellen has a house that is great
 - ▶ Puts it up for sale, I make an offer, and you accept it, for \$800,000.
 - Consideration is Ellen promises to sell, I promise to buy.
 - ◆ EVERYTHING IS IN WRITING as required by law of BC
 - ▶ Completion date has been set at December 1st, 2011.
 - The execution of the contract (house traded for money) will be done on December 1st.
 - ▶ On November the 15th, Ellen receives a phone call from a potential buyer who is offering her \$900,000 instead.
 - Phones me and says she won't sell anymore
 - **BREACH OF CONTRACT**
 - ◇ But can you take it to Common law?
 - ▶ Not really... because the only remedy is money, and you haven't lost anything
 - So we go to Equity
 - ◇ We want Specific Performance, forcing Ellen to perform under the contract, and sell us the house for \$800,000

Diagram

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➤ **How Common Law Works**

- If a decision is made in the Supreme Court of Canada, it withholds over every other area.
 - Additionally, all decisions made in BC Supreme Court are binding in any courts in BC.

Reading 1B: Sources of Law

Monday, September 12, 2011

1:04 AM

➤ **Federalism and the Constitution**

- Federal and Provincial each have their own existence.
- Certain areas are allocated to provincial jurisdiction and others to federal.
- When a conflict arises, it is first determined whether it falls under provincial or federal law.
 - If a case is found to be outside the powers and jurisdiction, it is found to be void and **ultra vires**.
- **Residual Power**
 - Powers that fall within federal jurisdiction because they are not expressly allocated to the provinces by the Constitution.
- All federations face the same problems in that practical problems don't divide easily in well defined subjects that are either federal or provincial.
 - Many overlap, giving each side **concurrent powers**
 - Overlapping powers of both levels of government to regulate the same activities.
 - When both sides pass legislation and conflict arises between the statutes, the federal legislation prevails, and the provincial law is nullified.

➤ **The Charter of Rights and Freedoms**

- A Constitution often prohibits all government interference in certain areas, and removes them from the legislative power of both levels.
- The Charter of Rights and Freedoms protects human rights, or according to our law **public rights**
 - Individual rights arising from private law such as recognized entitlements encompassing traditional freedoms associated with civil liberty and basic human necessities.
- The Charter is entrenched in the Constitution; it cannot be repealed.
 - Any changes in the Charter can only be by way of amendment as provided for in the Constitution Act (by consent of the Parliament of Canada and the legislature of at least 2/3 the provinces of Canada voting with a majority.
- Rights entrenched in the Charter cannot be infringed by ordinary legislation
- The charter permits a legislature to override certain other sections
 - **Sunset Clause:** The overriding section of the Charter becomes expired 5 years after its create unless it is re-enacted by the legislature.
- None of the rights set out in the Charter are absolute
 - They are object to reasonable limits
 - In general a statute is presumed to be valid though
- The Charter applies to Governments and governmental activities, it has limited applications between private persons.
- **The Rights and Freedoms Protected by the Charter**
 - **Fundamental Freedoms**
 - Freedom of religion, thought, belief, expression, media and communication, peaceful assembly, and association.
 - **Legal Rights**

- Everyone has the right to life, liberty, security of the person
- The right to be secure against unreasonable search or seizure
- Not to be arbitrarily detained
- Right on arrest to be informed promptly of the reasons of arrest, retain and instruct counsel without delay, and to have the validity of the detention determined by way of habeas corpus and the be released if detention is not lawful.
- **Equality Rights**
 - Every individual is equal, has right to equal protection and benefit from the law without discrimination.
- **Democratic Rights**
 - Every citizen of Canada has the right to vote
- **Mobility Rights**
 - Right to enter, leave or remain in Canada
 - Can move and live in any province
 - Pursue gaining of a livelihood in any province
- **Significance of the Charter for Business**
 - Applies to government and not the private sector...
 - Government regulates and control businesses through legislation

➤ **Challenging the Validity of a Statute**

- The court will declare a statute invalid if
 - The subject matter is outside the constitutional jurisdiction of the government
 - It violates the Charter of Rights and Freedoms
- In order to tell, the court must investigate the purpose and effect of the statute... what does it do and why?
- If a legislature enters any type of reform it faces 2 problems
 - If its entire statute is ruled unconstitutional, it will be void and make no change at all in the law.
 - Courts have sometimes been criticized for interpreting statutes too narrowly so as to interfere as little as possible with existing private rights.
- Parliament cannot overcome a decision by the Supreme Court that a statute is unconstitutional.
 - If the statute is just misunderstood, the government can introduce an amendment to broaden the application of the statute
- Three ways to challenge the validity of a statute
 - **Argue that the subject matter of the legislation is not within the jurisdiction of the relevant government**
 - **Argue that the legislation violates the Charter of Rights and Freedoms**
 - **Argue that the interpretation of the legislation is wrong.**

➤ **Classifying Law**

- Public Law: Dealing with government
 - Constitutional law, criminal law, taxation
- Private Law: Dealing with non government relations.
 - Contracts, torts, property law
- **Substantive Law:** The rights and duties that each person has in society
 - The right to own property, to vote, etc. The duty to avoid injuring someone.
 - What the law is

- **Procedural Law:** Law that deals with the protection and enforcement of substantive rights and duties.
 - How the law is enforced
- **Who Makes Law?**
 - The government through legislation
 - Made by federal, provincial and even local governments
 - The courts through case decisions
- **Legal Systems: Civil Law and Common Law**
 - **Regions of the World Under Each System**
 - **Civil Law**
 - System of law involving a comprehensive legislated code, derived from Roman law that developed in continental Europe and greatly influenced Napoleon.
 - Has roots in **Roman Law**
 - ◆ The system of law codified by the Eastern Roman Emperor
 - Covers not many places...
 - Civil law values legislation over case law
 - **Common Law**
 - The case-based system of law originating in England and covering most of the English-speaking world based on the recorder reasons given by courts for their decisions.
 - Common law gives case law the same or sometimes greater value than legislation.
 - **The Need for Consistency and Predictability**
 - Like cases need to be treated alike.
 - Reduces the number of disputes that go to court because parties can anticipate how a case will turn out based on past outcomes.
 - The law itself must also be fairly predictable.
 - In order to explain how cases are linked, judges develop principles that describe their connection to one another.
 - Principles build into a framework of predictability and rules that serve as background for the vast majority of legal relations.
 - In civil law countries, judges try to decide similar cases in the same way most of the time, although they are under no binding rule to do so.
- **Common Law: The Theory of Precedent**
 - **Certainty vs. Flexibility**
 - **Theory of Precedent**
 - Customs of following already decided cases to solve current ones.
 - ◆ Aka stare decisis.
 - ◆ Needs to take situation into consideration still though.
 - Judges are only bound to follow decisions of a higher level court.
 - Judges can **distinguish** the current case from an earlier precedent too.
 - ◆ Identification of a factual difference that renders a prior precedent inapplicable to the case before the court.
 - ◇ Enables them to adjust the law slowly to changing circumstances and values
 - This theory is still largely used and almost all previous cases impact

current ones.

- **Accommodating Change**
 - In order to overrule an established precedent, the matter must be addressed by a court higher than the one establishing the initial precedent.
 - Excessive overriding is avoided to maintain consistency and predictability.
 - We need to proceed with caution when using a previously decided answer to a similar case as the answer to our new one.

➤ **The Sources of Law**

- **The Variety of Sources**
 - Judge made law is the oldest form of law
 - Government also makes law, consisting of the statutes passed by Parliament and by provincial legislatures.
 - Cabinet passed
 - Province passed
 - Statutes give municipalities the ability to make law
 - **Subordinate Law:** Law created by administrative agencies whose authority is granted by statutes in order to carry out the purposes of the legislations.
- **Statutes**
 - Statutes **codify** existing case law precedents in an area rather than to change it.
 - Set down and summarize in a statute the existing common law rules governing a particular area of activity.
 - Courts are often called upon to interpret a statute and decide whether it applies to the facts of a case, and if it does, to decide also on its consequences.
 - Decision then forms a precedent
 - When deciding a case using case-law, the courts regularly use principles from earlier decisions even when facts are quite different.
 - On the other hand, courts are much less likely to apply the provisions of a statute unless the facts of the case are specifically covered in the statute.
 - ◆ **Strict Interpretation of Statutes**
 - Statutory interpretation takes a variety of approaches.
 - The meaning may be plain and obvious and literal or,
 - **Liberal Approach:** Interpretation that considers the legislative intent, purpose and history of the statute, as well as the context.
 - ◆ Encouraged in Canada
 - **Legislation Framework**
 - Two main legislation classes
 - ◆ Passive
 - ◇ Simpler
 - ◇ Consists of statutes that change the law
 - ◇ Is not used to supervise peoples activities, solely used to provide a legal framework.
 - ◆ Active
 - ◇ Administrative Law and Government Programs
 - ◇ Gives the government itself power to carry on a program
 - ▶ Parliament itself is not in the right body to run any

program requiring continual supervision

- **Subordinate Legislation**
 - New laws
 - Sometimes sets down broad criteria, sometimes it will be detailed and technical.
 - Important regulations require the approval of the Cabinet in the form of an order-in-council.
 - ◆ Lesser regulations may be authorized by the minister
- **Case Law: Judge Made Law**
 - **The Common Law**
 - Case law precedents remain the bulk of our private law
 - Based on the theory of precedent
 - Depends on info from a **system of courts**
 - ◆ The organization of courts into a hierarchy that designates the responsibilities of the court and determines the importance of the precedent. Trial, appeal and final appeal.
 - Before many cases, was based off of canon law, feudal law, and merchant law.
 - **Equity**
 - With more cases, the common law rules became more precise and increasingly strict.
 - **Equity:** New rules developed by the courts of equity as exceptions to existing rules of common law.

Lecture 1: Types of Law

Monday, September 12, 2011
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➤ *Types of Law*

<i>Procedural</i>	<i>Substantive</i>
<ul style="list-style-type: none"> • Form and organization of a Trial. <ul style="list-style-type: none"> • Laws of evidence • Laws of pleadings <ul style="list-style-type: none"> ○ How to begin a law suit • Machinery through which the substantive law is enforced. <ul style="list-style-type: none"> • Rules of evidence and conduct 	<ul style="list-style-type: none"> • More useful in Business • Laws that create, define and regulate our rights in society. <ul style="list-style-type: none"> • Laws in Canada are made by: <ul style="list-style-type: none"> ○ Government makes Statute law or legislation <ul style="list-style-type: none"> ▪ Federal ▪ Provincial <ul style="list-style-type: none"> □ Municipalities ★ ○ Judges make common law and case law!! <ul style="list-style-type: none"> ▪ Make law on a daily basis based on their decisions in trials ○ Administrative tribunal <ul style="list-style-type: none"> ▪ Workers Compensation Board (WCB) ▪ Human Rights Commission ▪ Labour Relations Board ▪ Given power by government to have hearing in narrow areas, and are now creating laws as well. • Generally the federal government has the highest authority to make law. Sometimes they co-exist, but it gets tricky. • Two branches: <ul style="list-style-type: none"> • Public <ul style="list-style-type: none"> ○ Laws that govern the relationship between persons and government (at all levels) <ul style="list-style-type: none"> ▪ Persons: Human person or a corporation, a non human legal entity. ○ All criminal law ○ Tax law ○ Constitutional law ○ Immigration • Private/Civil <ul style="list-style-type: none"> ○ We're more focused on this ○ Laws that govern the relationship between persons (human and corporate) ○ Divorce, family law, contract law, negligence or tort law, land law, property law, employment law, company law, partnership law, wills and estates

➤ *Substantive Comparison*

<p>Criminal Lawsuit</p> <ul style="list-style-type: none"> • Purpose: Remove the accused from the society (jail) to protect society...Rehabilitation, restitution • Who Commences Action? <ul style="list-style-type: none"> ○ Crown counsel as represented by the criminal attorney's office ○ Crown vs. Person ★ • A case can go to both sides, example if someone 	<p>Civil Lawsuit</p> <ul style="list-style-type: none"> • Purpose: Compensation to the victim (plaintiff). Generally only in the form of money. • Who Commences the Action? <ul style="list-style-type: none"> ○ Plaintiff (victim) ○ Person vs. Person
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physically assaults you, it will definitely be trialed criminally, and then if you choose you can pursue it in a civil lawsuit for compensation.

- **Who has the Burden of Proof?**

- Crown
- 'R' vs. Ellen
 - R is the Queen... Crown

- **How much Proof is needed?**

- Beyond a reasonable doubt

- **Jury**

- 12 members
- Decision to have a jury is made by the defendant
 - Why have a jury?
 - So complicated, you can hope the jury won't get it, and not be able to come to a reasonable conclusion... You might think jury would be more lenient.
 - With a jury, the judge simply orchestrates a trial, and instructs jurors what the law is and how to imply it. Judge decides sentencing as well.
 - Selection of the jury is done by both parties, each party getting a veto.
 - UNANIMOUS

- If a person is suing the government, it is still public law, just not necessarily criminal.

- Constitutional Law

- In order to be criminal, the crown needs to be the plaintiff.

- **Burden of Proof?**

- The plaintiff
- Lauren vs. Ellen

- **How much Proof?**

- A balance of probabilities, 51% rule.
 - What is most likely in the situation

- **Jury**

- 8 members
- Unique
- Decision still made by defendant
- Decision must be only a majority

Court Assignment

Monday, September 12, 2011
11:28 AM

➤ **Court Assignment**

- Probably get going soon...
- Attend trial of your choice (civil or criminal) at the Law Courts at 800 Smithe Street, Vancouver for at least 1 hour and then answer:
 - Where possible, state the following regarding the trial you watched
 - Name of case (xv. y)
 - The date you attended
 - The name of the Judge hearing the case
 - The names of the lawyers for each party
 - A brief summary of what was going on in the trial while you were watching
 - From your observations and from what you have learned in class about trials, would you say that the trial process, in general, is more co-operative or adversarial in nature?
 - From your observations and from what you have learned in class would you say that the processes and procedures used by the courts are a good way to arrive at the truth?
- Pen and paper, no laptops
- Go earlier in the week, earlier in the day
- Make sure to go to the Supreme Court on the far side of Smyth Street, the Provincial Courts are on the near side....exnay.

Case 1: Leibmann vs Canada

Tuesday, September 13, 2011
10:08 PM

➤ **Jist**

- Lieutenant Leibmann was an excellent member of the Canadian Forces and was nominated for a higher position which he did not receive due to the objection that he was Jewish.
- He is claiming that the refusal to appoint him to the position constituted discrimination contrary to s.15 (1) of the Canadian Charter of Rights and Freedoms.

➤ **Facts**

- He joined the reserve in 1983 and served in a variety of positions. By 1990 he was Lieutenant and was serving as an officer in HMCS Discovery in Vancouver.
- When the case took place, he was employed by the government as a communications officer.
- The appellant wanted to participate in the portion of the forces who were deployed in the Persian Gulf operation, and was nominated for the EA position by his Commanding Officer on January 11, 1991.
- At first, it seemed as though the board looked favourably towards Leibmann, and on January 21 1991 they recommended to the Directorate of Military Manning at National Defense that he be hired under a reserve force contract.
 - The message indicated he was being considered for the EA position.
 - When Leibmann received a copy of the recommendation he began to prepare to deploy to Bahrain, following a set of instructions that had been sent to him.
- The Maritime Command staff figured out he was Jewish
- The Canadian Forces has no formal policy about the consideration of personal characteristics such as religion in the selection process.
 - Staff dismissed the accusation that the appellants religion may negatively impact his ability to effectively carry out the required duties
 - He was not chosen for the position
- Was informed in February 1991 he was not selected, and contacted the staff officer who told him it was thought by the superior officers that they "Decided that it was better not to send a Jew to the middle east"
- The appellant finally brought action in the Trial Division of the Court
 - Sought a declaration that the process by which his nomination was considered had infringed his constitutional right to equality under the Canadian Charter of Rights and Freedoms as well as a number of Statutory rights
 - Also sought declarations and injunctions relating to Canadian Forces Administrative Order 20-53, Policy for Employment of Canadian Forces Personnel on Peacekeeping Duty
 - Forfees the possibility that Canadian Forces personnel may be restricted from participating in peacekeeping operations due to the "cultural, religious, or other sensitivities of the parties or host country"

➤ **Decision Appealed From**

- Following an 11 day trial and testimony argument, it was decided the applicant was equipped for the position, and that the evidence "clearly supports his allegation that he was not selected for the position of Executive Assistant because of his religion"
- The trial judge was "satisfied that Lieutenant Leibmann did have legitimate grievances with respect to the manner in which the defendants conducted themselves in the selection process"
 - He did not however directly address the appellants allegation that this conduct had infringed his right to equity.
- The trial judge did give consideration to order 20-53, finding that it was not contrary to the equality provisions of the Charter.
 - However he concluded that since Operation Friction that Leibmann had applied for was not a peacekeeping mission, he concluded there was no reason that any other policy applied as a precedent to the appellants situation.

- He dismissed the appellants claim.

➤ **Issues**

- The appellant appeals to this Court, repeating the claims he has already made.
 - Supported by two interveners who have focused their submissions on 20-53 and the policies that precede and follow it.
- Should the court inquire into the constitutionality of CFAO 20-53?
- Were the appellants rights to equality under s.15 of the Charter limited by the process by which his nomination for the EA position was considered
- If the appellants equality rights were limited were those limits "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"?

➤ **Relevant Constitutional Provisions**

- **The Canadian Charter of Rights and Freedoms**
 - Guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
 - 15.1 Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.

➤ **Analysis**

- **Issue 20-53**
 - The appellant seeks a declaration that CFAO 20-53 is unconstitutional.
 - He also seeks that the Chief of Defense Staff be prohibited from considering race, religion or ethnic origin in deciding whether a CF member will be deployed on an operational posting.
 - ★ ▪ The CFAO **was not** applied to preclude the appellant from participating in Operation Friction.
 - The order was not issued until after the decision had already been made, not to mention it only applied to peacekeeping operations.
 - The order would not have applied to the selection of Liebmann
 - ◆ All other issues in the Charter that were replaced by 20-53 all dealt strictly with peacekeeping operations as well.
 - There was no need for any screening at all
 - Liebmann still wants the Court to hear and determine the constitutional challenge to CFAO 20-53.
- **Issue: The Appellants Equality Rights**
 - Section 15 of the Charter deals with a person's equality rights with respect to the law.
 - There was no selection policy to apply to the appellant's nomination and circumstances, however the decision was made under delegated statutory authority.
 - The Governor of Council appoints a Chief of the Defense Staff who has the power to control and administer the Canadian Forces.
 - Unless specifically directed, all orders and instructions to the Canadian Forces are required to give effect to the decisions and to carry out the directions of the Government of Canada.
 - All officers involved in the case in the process of considering the appellant's nomination were acting pursuant to the statutory authority to control and administer the Canadian Forces.
 - As such the decision not to appoint him is subject to scrutiny under s. 15 of the Charter.
 - As seen in *Law vs. Canada*, the Supreme Court of Canada summarized the proper approach to a s. 15 (1) analysis.
 - The onus of establishing an infringement on a Charter of Right rests with the person claiming the right outlined that "A court that is called upon to determine a discrimination claim under s. 15.1 should make the following three broad inquiries":
 - ◆ Does the law
 - ◇ Draw a formal distinction between the claimant and others on the basis of one or more personal characteristics
 - ◇ Fail to take into account the claimants already disadvantaged position in

Canadian society based on one or more personal characteristics.

- ◆ Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
 - ◆ Does the differential treatment discriminate by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or placing the view that an individual is less worthy of recognition as a human being, and of respect and equality.
 - The trial judge's findings of fact establish that the appellant has made out the first 2 elements of the test.
 - The decision makers drew a distinction between him and others, and subjected him to differential treatment on the basis of a personal characteristic
 - ◆ The respondents had not previously consented these findings.
 - But did the decision makers' differential treatment of the appellant discriminate against him within the meaning of s. 15?
 - Judge must reference the purpose of the equality protection
 - ◆ As stated in *La Forest v. BC*:
 - ◇ Equality guarantee was designed to **prevent the imposition** of differential treatment that was likely to inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned, and that was likely to make them believe their hopes and expectations were worthless.
 - Whether a person's dignity has been demeaned must be subjective and objective, objective being the analysis from the perspective of a person in similar circumstances.
 - From 7 years of being in the Canadian Forces he had acquired the skills and knowledge needed to be an EA
 - Decision makers denied him the opportunity for growth and the benefit of applying his skills and knowledge in order to serve his country.
 - His dignity took a hit, as he previously had stated ideas that he was previously unlimited to jobs, but then suddenly found out he was unable to acquire higher jobs because he's Jewish, even though he was qualified. He felt as though he wasn't a good enough representation of his country. Shattered in one way, angry in another.
 - The respondents concede that the appellant's dignity was demeaned in the subjective sense, objectively though they couldn't prove it... how? Who knows.
 - It was concluded that the decision makers, while maybe being Jewish would hinder Liebmann, made no effort (or very little) to actually invalidate or validate their concerns
 - The analysis was apparently conducted in a factual and evidentiary vacuum.
 - The decision makers applied stereotypical thinking and based their decision upon presumed characteristics of both Jews and Arabs.
 - Imposed the burden of proving his religion would not affect his safety or ability on the appellant.
 - The appellants rights were limited in a discriminatory manner, contrary to s. 15 of the Charter.
- **Issue: Section 1**
 - But was it a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society?
 - Burden falls on the respondents to prove this.
 - No such arguments were made to prove this.

➤ **Conduct of the Respondents**

- The respondents claimed the appellant did not get the position as there was no position to fill, and that the decision not to send him to the Persian Gulf had nothing to do with his religion.
- Trial judge did not believe the respondents witnesses...
 - Another person was hired, negating their point that there was no position to fill

➤ **Conclusion**

- The appellant is entitled to a declaration that the refusal to select him for duty with CFME because of his religion was unconstitutional, being contrary to his rights to equality under the Canadian Charter of Rights and Freedoms.

Reading 1C: Alternate Dispute Resolution

Monday, September 19, 2011

11:23 AM

New Book 42-44, 450-454

➤ **Alternative Dispute Resolution**

- Informal ways to resolve disputes rather than resorting to the courts are common due to the rising costs and delays involved in using the court system.
- **ADR:** Alternative dispute resolution-using private procedures instead of the courts to resolve disputes.
 - **Arbitration** A form of ADR where a dispute is referred to an arbitrator who adjudicates the matter and the parties agree to be bound by the arbitrators decision, although there may be a right to appeal to the courts.
 - **Adjudicate:** Hear parties and deliver a decision with reasons.
 - ◇ Arbitrator will hear the parties two sides, in an informal manner then will deliver a decision.
 - ▶ Decisions bind only the parties involved, and remain confidential.
 - The goal is party autonomy
 - Parties design their own process by selecting the rules, the forum, the arbitrator and even the law that will be applied to the dispute.
 - ◆ Often parties agree to refer to the arbitrator any dispute that may arise under the agreement.
 - ◆ Parties agree in advance to be bound by the adjudicators decision, but sometimes a party may appeal to the courts.
 - **Mediation** : A form of ADR here a neutral third party who is acceptable to both sides acts as a mediator, assisting the parties to reach a settlement
 - Mediator has no power to make a binding decision, but assists the parties in reaching a settlement.
 - Mediator hears both parties, identifies and clarifies the issues and explores middle ground that might be acceptable.
 - ◆ **Evaluative:** Mediator offers an opinion on the substance of the dispute.
 - ◆ **Facilitative:** Where the mediator guides the process only.
 - Allows for imaginative settlements not possible in courts and considers factors and interests beyond who would win in a court room.
 - Process begins with the mediator and both sides present, and after preliminary remarks by the mediator, each side presents its position, then the mediator asks questions and clarifies any questions that they may have surrounding the case.
 - ◆ Separate meetings may be held with each of the parties to explore the prospects of agreement.
 - Success rate is pretty high
 - Key qualities of a mediator are impartiality, sensitivity to each side's concerns and the ability to understand and analyze the disagreement, as well as the ability to present a creative approach to suggesting solutions.
 - Parties sometimes agree to mediation with no intent to settle, just to buy time to gather more facts before actually going to court.
 -
- **ADR Advantages**
 - Speed- cases are resolved by mediation or arbitration much more promptly than through the courts

- Cost- Promptness in itself saves money, in addition since the parties themselves have chosen this method, they usually co-operate to avoid delays and keep the hearing as short as possible
- Choice of Adjudicator: Unlike the courts, parties can choose a person whom they believe is especially suited to resolve the issue because of her experience and expertise in the area of the dispute.
- Confidentiality: The parties can agree to keep the dispute private to avoid harming their reputations.
- Preserving Ongoing Relations: Less likely to force tension and create animosity between the parties, and will allow them to potentially continue to work together after.
-
- ADR is widely available and enforceable which makes it very useful.
- By placing an ADR clause in a business agreement, businesses can take a proactive approach to legal risk management and ensure that if a dispute does arise it will not have to be resolved in the courts.
- In some provinces, any case must undergo a 3 hour mediation session before being allowed to proceed to courts
- **ADR Limits**
 - Situations that involve an imbalance of power between the parties can result in abuse.
 - Parties may be forced unwillingly into ADR, or into undesirable agreements.
 - ◆ Family arbitration is not allowed to attend mediation unless supervised to protect against this.
 - ◆ Consumers are another group that are being protected from mandatory ADR processes.
 - ◆

➤ **The Resolution of International Business Disputes**

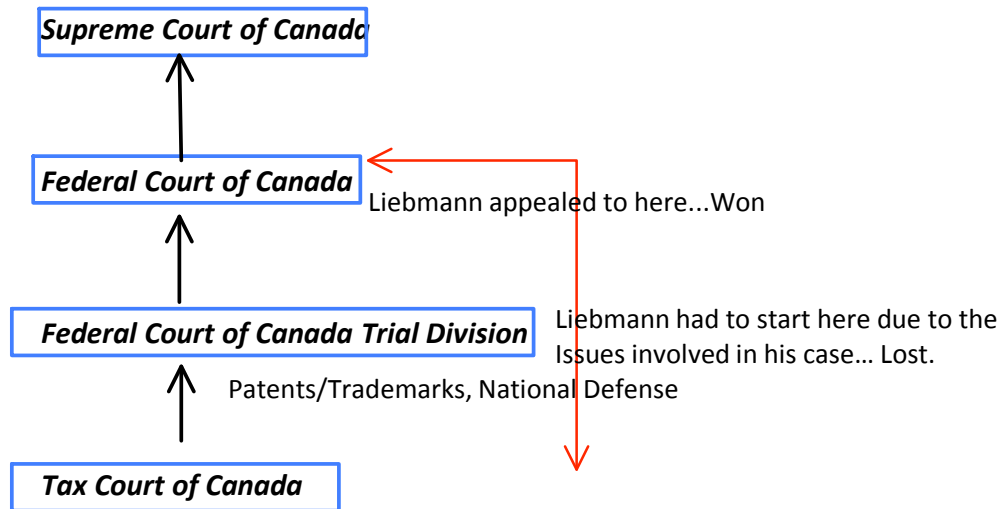
- Foreign trade and foreign investment can give rise to disputes.
- Disputes may be resolved before a national court, an arbitrator, or some form of international tribunal
- **Courts**
 - Courts are open to the world, meaning you don't have to be a citizen of the country to appear in it's court, but sometimes problems may arise with international elements.
 - **Jurisdiction**
 - Whether or not a court hears a case is up to the court
 - Courts do not encourage "forum shopping" , where the plaintiff looks for the jurisdiction where they would receive the easiest case.
 - ◆ The case must have some connecting factor with the country in which a party seeks to bring the action.
 - Courts in a country will normally assert jurisdiction over foreign defendants if:
 - ◆ A tort was committed there
 - ◆ A contract was to be preformed there
 - ◆ Damage from a tort or breach of contract was sustained there
 - ◆ The dispute concerned property or goods situated there
 - ◆ The activities complained of were conducted there
 - ◆ The contract stipulated that it should be governed by the laws of the country.
 - ◆ The parties to a contract specified that those courts should have jurisdiction in the event of a dispute.
 - Jurisdiction is limited in 2 ways:

- ◆ **Forum Non Conveniens Principle:** Court may decline jurisdiction if it considers that there is some other forum that is more appropriate or is more closely connected to the matter in dispute.
 - ◆ Court may also decline jurisdictions if it considers that the courts of other areas concerned might refuse to enforce its judgment.
- **Standing**
 - Some restrictions apply:
 - ◆ A foreign corporation that has not been licensed or registered in Canada cannot be a plaintiff in Canadian Courts
 - ◇ Foreign plaintiffs without assets within the jurisdiction may be required to post **security for costs**.
 - ▶ Money deposited into the court in case of an unsuccessful foreign plaintiff is ordered to pay the legal costs of the successful defendant.
 - ◆ It can be hard for a foreign defendant to be served with a writ because they may not be anywhere close to the jurisdiction
- **Choice of Law**
 - It is not unusual for the courts of one country to apply the laws from another.
- **Enforcement of Foreign Judgments**
 - Even if a plaintiff wins in an international jurisdiction, its not over necessarily...
 - ◆ IF the defendant has assets within the jurisdiction, judgment may be levied against those assets by court order.
 - In common law, a local judgment for a sum of money is considered a debt, and it can be enforced in Canada that it must be paid.
 - ◆ Usually only enforced though if there was a noticeable reason for why the case was held there, and not in the host country.
- **Commercial Arbitration**
 - **Arbitration:** Alternative dispute method in which disputing parties select an independent neutral adjudicator to privately decide their dispute.
 - **Party Autonomy:** The parties freedom to determine how their dispute will be resolved.
 - ◆ Major benefit of arbitration
 - **Arbitration Clause:** A term in a commercial contract designating arbitration as the process for resolution of any disputes arising between the parties.
 - ◆ Designates everything to happen in the arbitration to avoid any home court advantages.
 - **Advantages**
 - ◆ Ability to select arbitrator with great experience in the area of the dispute
 - ◆ Non public nature and confidentiality of the proceedings
 - ◆ Costs are lower and decisions are faster.
 - ◆ Awards may be awarded with ease.
 - ◇ Arbitration is consensual, both parties agree to be there.

Lecture 3: Civil Processes

Monday, September 19, 2011
11:35 AM

➤ Federal Courts



➤ Civil Process

- Arduous and time consuming.
 - Starts with a civil wrong being committed... 9/10 case won't even make it to a lawyer because the problem is relatively small, and people think lawyers are too expensive, not needed, etc.
 - If it DOES make it to the litigant consulting a solicitor it often avoids suing and is just alternate dispute
 - ◆ Writ of Summons is issued (Notice of civil claim)
 - ◇ Letting them know you're suing them
 - ◇ The defendant HAS to do something now, and must respond within 21 days
 - ◇ Documents not only give notice, but are also filed to the courts for the judge to read and learn about the case (pleadings)
 - ▶ Plaintiff gives version of the facts
 - ▶ Relief sought
 - What you intend to win, and how you calculated it
 - ▶ Legal basis for all of your arguments
 - What laws, rules and enactments are you relying on to support your arguments.
 - ◆ If you don't do these properly, your case might be dismissed right away.
 - Arguments raised here may be framework for actual case
 - ◆ If you bring up arguments in the case that you didn't document in the notice of claim, you cannot bring it up in trial.
- ◆ Writ is served on defendant
 - ◇ Defendant must be found and personally served (not mailed) the document
 - ▶ Eliminates any confusion that the defendant didn't receive it
 - ▶ Lessens the amount of cases because sometimes the plaintiff can't find the defendant
 - ◇ Hire a PI (find individual to give writ to) or a Process server (hand writ)
 - ▶ Processor will fill out an affidavit swearing that the served the

defendant the claim and that they have to then show up and you have in fact noticed them that you are suing them

◇ If you can't find the defendant... you can't sue them

◆ Defendant enters appearance

□ Pleadings are then given

◆ Statement of Claim

◆ Defense Counterclaim

◇ Combined with the documentation of defense entering the appearance

▶ Forms the response to civil claim

– Eliminates paper work, speeds up process.

◇ If you don't reply within 21 days to the civil claim, you lose automatically

▶ Default Judgment

– As soon as you default the plaintiff can do basically anything they have to in order to gain the relief they claimed.

◆ Seize assets

◆ Compel him to come to court giving you a list of all his assets, and you can choose what you want from him

◆ Reply and Defense to Counterclaim

◇ Law suit back by the defendant against the plaintiff

◇ All will be heard in one action

◇ And/Or... Third Party Notice

▶ Allows the defendant to bring in other defendants to either share the blame or shift the blame off the defendant and onto these new people.

– If a defendant chooses to bring in co-defendants, they need to pay costs

– Co defendants cannot deny being brought in...they can defend themselves but that's it... can third party someone else to shift blame again... can get pretty strenuous

□ Notices all end up in the Court House

□ In a year, you'll go to Discoveries

◆ Given a date and time to meet with the other party and their lawyer, and a court reporter.

◆ No witnesses

◆ Anything said here is sworn in, and can be used against you in trial

◆ Any document you intend to use in trial needs to be given to the other party, so that everyone is aware of everything that is gonna be used.

◇ Other documents later will not be allowed.

◆ Identities and testimonies of witnesses needs to be shared as well, 90 days before the trial is scheduled to run.

◆ ADR goes on here

◇ After this you know where weaknesses are in the case, and holes, so you might think its better to mediate and settle instead of going to court.

◇ Only 3% actually make it to trial...

□ In another year, you will get to trial

◆ Average trial takes between 3 and 4 days only

◇ Defendant not found liable, case dismissed

◇ Defendant found liable, ordered to pay damages

➤ **Costs**

○ **Solicitor/ Client Costs**

- The amount of money the plaintiff or defendant has to pay their lawyers to defend/commence a law suit.
- Average \$300-\$400 an hour
 - Will at least double in court, or they may charge a flat fee per day in court
 - ◆ Be practically \$10,000-\$15,000 in court fees... so your problem better actually matter.
- Sometimes do work on a contingency basis
 - If the lawyer wins, you pay them a percentage of your winnings
 - ◆ Maximum in an injury claim is 33.3%, in anything else they can take whatever is negotiated.
 - If lawyer loses, they get nothing except for "disbursements"
 - ◆ filing fees, photo copying fees, experts reports, etc.
 - ◆ Can add up quickly...

○ **Party & Party Costs**

- Called 'costs' in court
- The amount of money the judge may award the winner (paid by the loser) to *partially* compensate the winner for the solicitor/client costs.
- These costs are based on a tariff in the Supreme Court Rules.
 - Very discretionary
 - View appendix B in the course package
 - ◆ Winner's lawyer claims charges he wants the loser to pay based on a scale and units.
 - ◆ Scale A-C
 - ◇ A: 60\$ per unit, matters of little or less than ordinary difficulty
 - ◇ B: \$110 per unit, matters of ordinary difficulty
 - ◇ C: \$170 per unit, matters of more than ordinary difficulty
 - ◆ Most you're gonna get is about 40% of actual costs, then the winner has to pay the rest.
- Even if you win, if your court attitude was brutal (late, annoying, gaming, etc.) you can be forced to pay the loser's costs.

- If you're gonna lose, don't go to trial, cause you'll have to pay a shit ton of money.

➤ **ADR**

- ...

➤ **Liebmann**

- ...

Wednesday, September 21, 2011

11:33 AM

➤ **Methods of Dispute Resolution**

- **Negotiation**
- **Mediation**
 - Both parties sit in a room with a mediator (a neutral party who doesn't actually make a decision) and you discuss the issue at hand.
 - You are allowed to bring a lawyer if you want
 - Mediator, once a decision is close to being made will draft an agreement, which will eventually hopefully be signed by both parties, enforcing the decision.
- **Conciliation**
 - Two parties HATE each other, and they can't even be in the same room.
 - Conciliator runs back and forth between the two rooms to try and reach some form of consensus.
 - Sometimes info gets jumbled being re-stated multiple times and can make matters trickier.
- **Arbitration**
 - Someone makes the decision who is NOT a judge
 - You have no option for appeal, because it was not done specifically in the courts, even though the process was most likely very court like.
- **Adjudication**
 - Practically in a court

➤ **Advantages of Alternate Dispute Resolution Techniques**

★ ○ **Only appropriate on the Civil Side**

- **Flexibility**
 - Procedures can be designed to suit the dispute
 - Parties in mediation reach their own solution
- **Less Expensive**
 - Due to the speed, you don't have to pay for hundreds of hours of work
- **Speed and Finality**
 - The average trial that takes 4 days, a good mediator can resolve in roughly 4 hours.
- **Confidentiality**
 - Process is not open to media or any other party, so parties can protect their reputations
- **Choice of Mediator/Arbitrator**
- **Less Damaging to Business Relationships**
 - If companies have to continue to work with each other after, they don't want to sue each other and rip each other apart

Lecture 4: Constitutional Law

Wednesday, September 21, 2011
12:07 PM

➤ **Constitutional Law**

- In Canada, there is the Constitutional Act of 1982
 - Recently new, and the Charter of Rights and Freedoms was embedded into the constitution
 - Charter provides a number of rights and freedoms and prevents discrimination
- Who does the Charter Apply to?
 - Government!!
 - And... Government Action or decisions made by government officials.
 - Prevents Government from making laws that would be unconstitutional
 - Page 12 in the textbook has the rights and freedoms protected by the charter, as well as legal, equity, democratic rights on page 13.
 - Doesn't have direct application to any one individual
 - Creates laws that would infringe upon our rights in the Charter.
- Stated in the Charter, that none of the rights in the Charter are 'absolute'....
 - You only get these rights subject to such reasonable limits described by law
 - If the government wants to, they could deny you those rights, but they'd have to have a really good reason to do so.
- All laws created by the government are presumed valid until they are challenged.
 - At a challenge, the Government would try to defend the challenge
 - If court finds the law to be unconstitutional to the Charter, the law is declared "Ultra Vires"
 - Government is acting beyond its powers
 - ◆ The law is now null and void.
 - ◆ It is the legislatures job to re-write the law, not the court's.
- S. 33 "Notwithstanding" Clause or the "Sunset" Clause
 - Any law can be made, but after 5 years, the clause will be dropped unless it is specifically reenacted by the government

Lecture 4: Case Briefs

Wednesday, September 21, 2011

12:34 PM

➤ **Must Find 5 Key Elements**

- **Facts**
 - Know what they are and be able to remember them
 - Need to know these facts so that when you read other cases that have similar facts you can predict the legal outcome should the case go to court.
 - Legally relevant facts
 - Look especially for facts used to decide the case
 - Can totally copy em right down.
- **Issues**
 - What are the legal questions the judge has to answer
 - May be more than one issue... we will then have to answer steps 3-5 for each issue
- **Law**
 - My sources of law are:
 - Textbook, cases, class notes, statutes
- **Application of Law**
 - **For Plaintiff**
 - How the plaintiff argued their case
 - **For Defendant**
 - How they defendant counter argued and defended themselves
- **Conclusion**
 - Answer to the issue
 - Doesn't have to be ridiculously long, just a straight answer, no recap is necessary.

- After finding the facts, then the law, application of law, and conclusion for all the issues, you make a grand conclusion based on the partial mini conclusions from the issues.
 - Sometimes beneficial to work backwards from the conclusion to the issue... if there are 3 mini conclusions, there are 3 issues.

➤ **Liebmann Example- Public Side, Civil.**

- Liebmann was in the Navy reserves, then was nominated for a position promotion. HE was extremely fit for the job, and had training and was totally suitable for the position.
- The Persian Gulf War was going on
- He was packing his bags, was all set and stoked to go, then it was discovered that he has a German last name, and is Jewish so he isn't the right candidate for the job anymore.
 - Denied the position
- Issue: Caused action against the government saying the judgment was unconstitutional based on his rights stated in the charter of rights and freedoms section 15
- Issue: Liebmann argues S.15 of the Charter
 - Governments defense is that they have under section 1 of the charter, that they have a justifiable reason for the discrimination.

○ **Issues**

▪ **Issue #1- Does CFAO 20-53 apply?**

- Order applies to peace keeping missions, and how the government must follow sending people of certain religions to go on peace keeping missions.
- Denies the right of certain officers of various religions to go over seas.
- Order was created after the whole Liebmann incident, and applies to peace keeping missions only...
 - ◆ Doesn't apply to Liebmann at all...
 - ◇ Disregarded

▪ **Issue #2- Does the Charter apply to Liebmann?**

- Charter under normal circumstances does not apply to the individual, and only to the government...
- LAW: Charter applies to government and government decision making
 - ◆ This case its quite interesting, because Liebmann can connect to the government, making it suitable
 - ◇ Charter applies to Government Decision making, and so since Liebmann is in the department of Defense, he is kinda involved in the government enough to count.
 - ◆ Federal Government
 - ◇ Created National defense act, which in turn gives power to the chief of defense, below in rank is the officers (who decide upon hiring and firing)

▪ **Issue #2.1- Is the decision NOT to hire Liebmann contrary to S. 15?**

- Section 15: Every individual is equal before and under the law, in particular with race, religion, sex, etc.
- Charter was all relatively new back when this case existed
- If Liebmann couldn't prove the connection to the government, he would have to place a court in the bc supreme court, under the human rights act
 - ◆ The wording there however is not as broad...and he might be in trouble there.
- Stated in the Charter,
 - ◆ The decision not to hire Liebmann was due to a personal characteristic
 - ◆ The claimant was not subject to different treatment, there was not reasonable reason why he couldn't go on the mission.
 - ◆ The differential treatment discriminates him, and perpetuates a view that he is less worthy of recognition or value as being a human being.
 - ◇ Liebmann can prove that the decision not to hire him was discriminatory, and falls under S. 15 in the charter.
 - ▶ Case doesn't end here though... Government is given the opportunity under section 1 to justify why they didn't send Liebmann.

▪ **Issue #3- Does S. 1 work for the government? Was there reason not to send him cause he was Jewish?**

- Burden of proof flips now onto the government to show on a balance of probabilities that they were justified

- Government didn't really have any proof at all as to why they refused to send Liebmann...
 - ◆ No arguments, no paper work, no really...anything..... Just kinda accepted the loss.
 - ◇ LIEBMANN WINS.
 - ◇ They were banking on the choice that section 15 would have held up and not applied to him.

- **Conclusion**

- At the end of the day, overall conclusion was that he wins, and in the future the government would know that its not acceptable and is legally liable.
- Liebmann got his costs for trial and appeal
- Liebmann paves the way for future people in the area
- He doesn't get the position... no lost wages, no anything really, other than a written notice that says the rejection of him due to religion was against the charter and was unconstitutional.

Reading 2A: Offer and Acceptance, Writing

Saturday, September 24, 2011

12:22 PM

➤ ***The Role of Contract Law***

- Law restrains our conduct in order to protect society, but it also expands our freedom of choice: it enables us to bargain with others for mutual advantages.
- Contracts are a prime example of voluntary legal relationships
- There is however often a great inequality between parties to contracts in terms of bargaining power, expertise, intelligence and in some situations there is no opportunity whatever to bargain
 - Many unfair contracts are made
- Contract law however responds well to the individual's needs and wishes as it accommodates most relationships with a minimum conflict

➤ ***The Nature of a Contract***

- Contracts generally begin with a promise, but not all promises become contracts.
- Contract law is concerned with legally binding promises

➤ ***The Nature of an Offer***

- A contract does not come into existence until an offer has been made by one party and accepted by the other party.
 - ***Offer:*** A tentative promise made by one party, subject to a condition or containing a request to the other party.
 - ***Offeror:*** The person making the offer
 - ***Offeree:*** The person to whom the offer is made.
 - When the offeree accepts the offer by agreeing to the condition or request, the offer is transformed into a contract.
 - The offeror is bound to carry out his promise while the offeree is bound to carry out the condition or request.
- A mere invitation to do business is not an offer to make a contract.
 - Showing a jacket in a store window does not guarantee anyone who wants to buy it can.
 - A prospective customer acting in response to the invitation may make an offer and the merchant may in turn accept or refuse.

➤ ***The Communication of an Offer***

- In most situations an offeror communicates orally or in writing, but it doesn't have to be necessarily so.
- An offeree cannot accept an offer until she is aware of it
- We cannot be required to fulfill contracts when people work for us without our knowledge.
 - We are entitled first to receive an offer to do the work, which we may then accept or reject
- If goods or services are presented to someone who has the ability to reject them but doesn't, is presumed to have accepted the offer

➤ ***An Offer made by Tendering a Written Document to the Offeree***

- ***Standard Form Contracts: Their Risks and Benefits***
 - Businesses that deal with the general public often present the terms of their offers in written documents handed to their customers.

- An offeree cannot change and terms of the contract
 - **Standard Form Contract:** An offer presented in a printed document or notice, the terms of which cannot be changed by the offeree but must be accepted as-is or rejected.
 - ◆ There is no real element of bargaining...
 - ◆ Too often is this presented as an evil. In all certainty it is used in part for efficiency and standardizing modern business.
 - Sometimes there are no other alternatives and the offeree pretty much has to accept the contract.
 - Ex. Plane tickets to places, there are no other ways to get there...
 - Offeror businesses are strongly tempted in these cases to disregard the interests of its offerees, the general public, and give itself every advantage
 - ◆ It rarely resists the temptation...
 - In many situations the standard form contract is essential...
 - Imagine waiting in line to buy movie tickets if every single customer was allowed to negotiate their price.
 - There are 3 means of protection from inequality in bargaining.
 - IF the business falls within an area regulated by government board, the terms of such contracts are subject to board approval.
 - ◆ The board is usually effective and protects the public, eliminating these extremely expensive contracts.
 - Some areas of the public are offered special protection, such as consumers.
 - ◆ Consumer protection legislation provides disclosure requirements and cancellation options
 - In the vast range of unregulated activity, the public receives only as much protection as the courts can find in the general law of contract.
- **Required Notice of Terms**
- Courts begin by presuming that an unqualified acceptance of an offer is an acceptance of every term of that offer.
 - What if people don't know that there are certain terms in the contract?
 - ◆ If the offeror tried to make it known that this was a term, the offeree is liable.
 - ◆ If the offeror didn't really tell the offeree ever of the clause, the offeree may have a case.
- **Unusual or Unexpected Terms**
- An offeree may be willing to accept terms printed on a ticket or displayed on a poster because she assumes, reasonably, that the risk relates closely to the bargain she has made.
 - Unexpected terms in a contract need to be brought directly to the attention of the offeree
 - There is a difference between the offeree not reading the expected terms and therefore not obliging, and not reading terms that would never even be expected to accompany the contract.
 - ◆ That being said, if an offeree ever signs a contract where the unexpected terms were stated and they just didn't read them, it'll be quite difficult for them to get out of that contract.

➤ **The Lapse and Revocation of an Offer**

○ **Lapse**

- The termination of an offer when the offeree fails to accept it within a specified time, or if no time is specified, then within a reasonable time.
- Once an offer has lapsed, the offeree can no longer accept it, even if they were unaware that it has lapsed.
- An offer may lapse:
 - When the offeree fails to accept within a time specified in the offer
 - When the offeree fails to accept within a reasonable time, if the offer has not specified any time limit
 - ◆ Reasonable time all depends on the situation
 - ◇ Does the wording indicate urgency? Is the industry one of constant change and turnover?
 - When either of the parties dies or becomes insane prior to acceptance

○ **Revocation**

▪ **Notice of Revocation**

- An offeror may be able to revoke an offer at any time before acceptance, even when it has promised to hold the offer open for a specified time.
- The offeror must however provide notice of revocation to make it effective.
- The court will consider the offer revoked if it would be unreasonable for the offeree to suppose that the offeror still intended to stand by its offer.

○ **Options**

- An offeree may bind an offeror to keep its offer open for a specified time in one of two ways
 - She may obtain a written offer under seal
 - She may make a contract called an option to keep the offer open.
 - ◆ **Option:** A contract to keep an offer open for a specified time in return for a sum of money, as well as not to make contracts with other parties that would prevent it from fulfilling its offer.
 - ◇ The offeree may still reject this offer after signing an option though.
 - ▶ **Exercise the Options:** To accept the offer contained in an option.

➤ **Rejection and Counter-Offer by the Offeree**

- Until one offer by one side is accepted without qualification by the other, there is no contract, and the parties have no legal obligation to each other.
- When an offeree receives an offer, but wishes to change some terms, they have not accepted the contract, but have instead made a counter offer of his own and has rejected the offer.
 - A counter offer terminates the previous offer.
 - If the original offeror rejects the counter offer, the initial offer isn't just revived.
 - The offeror must agree to reinstate it if they wish
 - If the offeree merely questions the terms are the best he can expect, that is not him rejecting it, just questioning it.

➤ **The Elements of Acceptance**

○ **Positive Nature**

- Acceptance must be made in some positive form, whether in words or in conduct with one exception, if the conduct that the offeror considers is the offeree accepting the offer is something the offeree does on a regular basis even when not accepting contracts, the offeree need not forgo their habits.
- An offeror cannot insist on silence as a mode of acceptance and so require the offeree to act in order to reject the offer.

○ **Communication to the Offeror**

- Some types of offers can be accepted without communication because the offeror asks only that the offeree perform an act, implying that the act will amount to acceptance.

○ **The Moment of Acceptance**

▪ **Business Negotiations: Tenders**

- The moment a contract is formed by acceptance of an offer, each party is bound to its terms. We must be able to analyze business contracts so we can identify:
 - ◆ Who made the offer
 - ◆ When it was communicated
 - ◆ When the offer was accepted.
- Inviting tenders (seeking offers from suppliers) is a key example of the need to determine the point at which acceptance takes place.
 - ◆ Inviting tenders may be to obtain firm offers for a fixed quantity of goods, or it may be to explore the market of available suppliers and develop the best terms for proceeding.
 - ◆ The party inviting the tenders promises to consider the tender and not ignore the request entirely
 - ◇ If all goes well, the parties will enter into contract.
 - ◆ Sometimes however, inviting tenders is simply to see what's out there.
 - ◇ Successful bidders make standing offers
 - ▶ **Standing Offer:** An offer that may be accepted as needed from time to time.
 - Each requisition then becomes an acceptance by the municipality of the standing offer.

○ **Summary**

- An offer may come to an end when:
 - A lapse has occurred
 - The offeror revokes the offer before the offeree has accepted it
 - The offeree rejects the offer or makes a counter offer
 - The offeree accepts before any of the above have occurred
 - ◆ The offer ends and a contract is instated.

➤ **Transactions Between Parties at a Distance from Each Other**

○ **Modes of Acceptance**

- When the parties are at a distance, the offeree may accept only in the way proposed by the offeror
- Acceptance by mail is complete when a properly addressed and stamped

letter of acceptance is dropped in the mail.

- The offeror needs to explicitly express how they would like to be contacted about acceptance, or it is up to the discretion of the offeree to accept however they seem acceptable.
- In an instantaneous method of communication is used like phone, email, or fax, the acceptance is **made** when the offeror receives the acceptance, not when the offeree sends it (the lapse shouldn't be too large)

○ **Modes of Revocation**

- Revocation of an offer is subject to the same means of communication as seen above.
- EXCEPT
 - Revocation by post is only effective after the offeree actually receives the letter, not when it is sent as in modes of acceptance.
 - Unless the offeror knows or ought to know that the revocation will not reach the offeree at her usual address, delivery at that address established the fact and time of revocation, and the offeree is deemed to have notice from that time on.

○ **Determining the Jurisdiction Where a Contract is Made**

- Parties to a contract are often not in the same city or state, and if a dispute arises it is important to know where the contract was formed since the law in the two places may be different.
- **Jurisdiction:** The province, state, or country whose laws apply to a particular situation.
 - This place is determined by the moment in time when the contract is effective.
 - ◆ Ex. In the case of mail, the offer is accepted when the offeree mails acceptance, so the jurisdiction is that town. In the case of telephone, the acceptance is made when the offeror receives acceptance, so that'd be in the offeror's town instead.

➤ **Uncertainty in the Wording of an Offer**

- If parties enter into a loosely worded arrangement, a court may find the agreement too ambiguous and uncertain to be enforced.
 - Ex. The promise to give a 'fair' share of the profits of a business
- Even if the wording of a contract seems uncertain, a clear enough meaning may be found in evidence of local customs or trade usage that gives a new precision to the terms.
 - Courts have a policy of making contracts effective wherever possible, they hold that
 - Anything is certain that is capable of being calculated or ascertained
 - Where a contract may be constructed as either enforceable or unenforceable, they will favour the interpretation that will see the contract enforced.

➤ **The Effect of an Incomplete Agreement**

- The law does not recognize a contract to enter into a contract
 - If someone promises that they will soon promise to do something, its not legally binding.

➤ **Formation of Internet Contracts**

- Two types of legislation govern the formation of online contracts
 - Ecommerce
 - Modernized contract formation rules to allow clicking an icon to satisfy the acceptance of communication requirement of contract formation.
 - Consumer Protection
 - Deals with the problems surrounding long detailed standard terms linked to an order webpage
- Before a consumer enters into an internet agreement, the supplier shall disclose specific information about the total price of the good, the terms of payment, and warranties among other things.
 - Additionally that the supplier must provide the consumer with an express opportunity to accept or decline the agreement.
- Upon clicking an I accept icon on the screen, the consumer (offeree) accepts the sites offer, entering a contract.

➤ ***The Use of a Seal***

- **Covenant:** a serious promise
- **Covenantor:** One who makes a covenant
- To this day, a document under seal is still called a deed.
 - **Document under Seal:** A covenant recorded in a document containing a wax seal, showing that the covenantor adopted the document as his act and deed
 - **Deed:** A document under seal, which today is usually a small, red, gummed wafer.
- Today any form of a seal is acceptable, even the word SEAL written across the document.
 - Must be on the document at the time of party signing
 - The enforcement of a seal requires that the application of the seal must be a conscious and deliberate act.
- A promise made under the seal of the promiser does not require consideration to make it binding.
 - The seal says "I fully intend to be bound by this promise"
- A seal does not do away with any of the other requirements to make an agreement binding.

➤ ***An Intention to Create Legal Relations***

- Even when an apparently valid offer has been accepted there is no contract in law unless both sides also intended to create a legally enforceable agreement.
 - The law presumes that the necessary intention is present in almost all instances when an agreement appears to be seriously made.
 - A defendant may rebut the presumption by using the external or objective test of the *reasonable bystander*
 - ◆ If to such a person the outward conduct of the parties lacked a serious intention to make an agreement, then no binding contract results.
 - ◇ It is often easier to rebut the presumption between friends or members of a family where it is often clear that there was no intention to create legal relations.
- Parties may include in their contract an express term that in the event of its breach neither party may sue the other.

➤ **Equitable Remedies**

○ **Reasons for the Intervention of Equity**

- There are circumstances where money alone are inadequate.
 - Common law remedies must be monetary
- **Equitable Remedies:** Special non-monetary remedies given only when damages alone will not adequately compensate for a loss.
 - Failure to comply places a defendant in contempt of court and can lead to a fine or imprisonment.

○ **Reasons for Denying a Remedy**

- The court decides if there is a good reason to go beyond the ordinary common law remedy of monetary damages, however if a plaintiff satisfies to principles of equity, they are practically guaranteed equitable remedies. The terms are:
 - A plaintiff must come to court with clean hands
 - ◆ They must not have acted unethically
 - If after learning of the defendants breach, a plaintiff delays unreasonably in bringing an action, a court will deny an equitable remedy.
 - A court will not intervene on equitable principles when to do so would affect an innocent purchaser.
 - A court will not grant a remedy when the plaintiff has not paid a substantial consideration for the defendants promise
 - A plaintiff must ordinarily be a party against whom the remedy would be awarded were he the defendant instead.

○ **Specific Performance**

- An order requiring a defendant to do a specified act, usually to complete a transaction.
 - The defendant is obliged to complete the contract
 - A performance of a contract that relies upon the personal skill or judgment of the defendant will not be ordered to specific performance, and the plaintiff will be awarded money instead.
 - ◆ Ex. A musician will not be ORDERED to perform, cause he will do a shitty job. Instead if he breaches contract, he will have to pay money.
- Specific performance is most often applied to contract for the sale of land as each piece of land is unique, and monetary remedies are not adequate.

○ **Injunction**

- A court order restraining a party from acting in a particular manner, such as committing a breach of contract
 - **Negative Covenant:** A promise not to do something
- Ex. A tenant signing a lease contract may have to incur an injunction not to turn the house into a strip club.
- Courts may prefer injunction to specific performance as it does not require continued monitoring.
 - They simply order the defendant to stop committing certain actions.

➤ **Foreign Trade**

○ **Export/Import Contracts**

- Generally fall into 2 categories:

- **Contracts for the international sale of goods**
 - **Contracts for the supply of services abroad**
 - Goods and services can be supplied in three ways:
 - The supplier may deliver directly to the customer in the other country
 - Delivery may be made through the supplier's own marketing organization established in the other country
 - The customer may accept delivery in the suppliers home country and himself arrange to ship the goods home.
 - Whichever method is accepted, the contract constitutes the essence of the transaction. The most common type of export transaction is **contracts for the international sale of goods**.
- **The Contract of Sale**
- Contracts with an international element present special problems due to the fact that the goods are to be delivered to a customer in another country.
 - Usually the sale of international goods requires a number of parties and consists of several distinct though related contracts.
 - Carriers, banks, insurers etc may be involved as well as the buyer and seller.
- **The Proper Law of the Contract**
- Whose law governs the contract or its various components?
 - Several contracts often make up the transaction and each one might be governed by a separate law.
 - ◆ To determine which law applies (**Proper law of contract**: The law of the country or jurisdiction by which the provisions of a contract are to be interpreted and its effect determined) it is necessary to refer to the **conflict of laws**:
 - ◇ The principles of law that apply to resolve questions covered with private relationships that are affected by the laws of two or more countries.
 - ◆ Parties often explicitly state by which jurisdiction they will abide to in the contract before signing.
 - ◇ Can be a neutral law, not necessarily one of the parties jurisdictions.
 - ◆ When parties do not state it, the courts will attempt to determine the intention of the parties from the surrounding circumstances.
 - ◇ May be inferred from the terminology of the form of the document,
 - ▶ When the courts can't decide what was the intention, they will assign what they consider to be a closely connected jurisdiction with the contract.
- **Contractual Terms**
- Terms or expressions may have different meanings in different legal systems or to parties from different countries.
 - **Incoterms**: A set of standard contractual terms adopted by the International Chamber of Commons are used now commonly.
 - The adoption of widespread standard form contracts are common

Lecture 5: Contract Law

Monday, September 26, 2011
12:17 PM

➤ **Terms**

- Contract = K
- Contract isn't always what we think it is

➤ **Key Elements in a Contract**

- As soon as these 6 elements are apparent, there is a contract.

▪ **Intent**

- Both/All of the parties must show intent to be bound by the promises made in the contract.
- If intent is denied by 1 of the parties, the court will ask:
 - ◆ "Would a reasonable person looking at the outward conduct of the parties say they showed intent?"
 - ◇ Just based on the outward content, does it LOOK like they have intent.
 - ◇ Objective Test
- 2 Presumptions:
 - ◆ If the parties are "strangers" and in commerce, generally intent is presumed.
 - ◇ Can be challenged with proof of conduct that suggests otherwise.
 - ◆ If the parties are close friends/ family members, there is a presumption of NO intent.

▪ **Offer**

- Proposal plus Intent
- Clarity on at least 3 terms:
 - ◆ Parties
 - ◆ Object (Subject matter of the contract)
 - ◆ Exchange (If the exchange is money, there must be a price)
- An offer should contain ALL the terms because once accepted, it is binding.
 - ◆ You can't go back and add terms or change the terms you had... you've got to make an offer so that if it's accepted, you have to be prepared that those are the set terms. If you later try and change the terms, you are breaching the contract.

▪ **Acceptance**

- Acceptance has to be acceptance of ALL the terms without any changes. If you change even one term, that is your counter offer. The previous offer is gone... and won't come back unless the initial offeror wants to reinstate it

▪ **Consideration**

- 3 Types of consideration
 - ◆ Unilateral
 - ◇ Promise and an Act to be exchanged between two parties
 - ◆ Bilateral
 - ◇ Two promises made, one from party A to party B, one from party B to party A.
 - ◇ Most contracts are bilateral

- ◆ Promise made under seal
 - ◇ A seal on a contract is almost a substitute for their promise
 - ◇ The person that the contract is being presented to has to sign on top of the seal so that it is proved that the seal was on there before the time of signing.
 - ▶ They knew they were signing under seal
 - ◇ Has to be a red looking seal
 - ◇ It can be pre-printed into the document
- **Capacity**
 - All mental, being able to understand the contract
- **Legality**
 - To prove a contract exist, needs to prove all 6.
 - To prove there isn't a contract, just needs to prove there isn't 1.
 - True even if the contract is not in writing
 - Only two contracts in BC that need to be in writing to be enforced are
 - Contract for Land
 - ◆ Purchase and sale, lease or mortgage of land
 - Personal Guarantee
 - ◆ Guarantees the indebtedness of another party to a person
 - ◆ One party promises to pay the debt of another if that party doesn't pay
 - Victim of a contract needs to try and fix it first, mitigation, and has to prove she tried to minimize her losses,
- **Offer Vs. Invitation**

➤ **Issues**

- **Is there a Contract?**
 - Intent, offer, acceptance, consideration, capacity, legality
- **If so, was there a breach in Contract?**
- **If so, what are the damages?**

Case 2: R vs. Alberta Ltd.

Tuesday, September 27, 2011
12:53 PM

➤ **The Court and Formation of Contracts**

- Criminal charges consisted of:
 - Misleading advertising under s. 52 of the Competition Act
 - Not supplying bargain goods advertised under s. 57 of the Competition Act
- Competitors and investigators tried repeatedly to buy from the accused a certain model of televisions set which it repeatedly during the period had advertised for sale at a bargain price.
 - Sales people informed the buyers that the TV sets had been sold out, and had been for a while and there was little hope that there would be anymore in anytime soon.
 - The would-be buyers asked for rain checks, some of them received them, but then the accused never fulfilled them.
- The Provincial Court convicted the accused on nearly all counts,
 - An appeal was allowed, and acquittals were entered
 - It is believed that all counts should stand, for the exception of 4:
 - It was proved that the wholesaler had on hand at all times a large and ready supply of the TV they had been advertising.
 - ◆ Orders made by the accused could have been filled within a half day
 - ◆ The wholesale manager claims the accused should have had 100 on site at all times, but the store manager claims that the number is excessive and unnecessary.
 - ◆ The store manager said they had at least 5 TVs on site, and doesn't know why their sales associates said they were out, and wouldn't be restocked.
 - ◇ The accused did not make any attempt to acquire any more TV sets than the 5 on hand during the period in question.
 - The appellant then suggests that the charge of false advertising must stand or fall on facts existing at the time the advertisement was run, and that later acts or omissions cannot make an advertisement punishable which was not punishable beforehand.
 - ◆ However events that occurred after the advertisement is run can be evidence of what were the facts at the time the advertisement was run.
 - ◆ Additionally, when people were trying to purchase the TVs that were being advertised, the accused was constantly running ad campaigns with identical wording to the ones that started the campaign, so really times overlapped and all the advertisements were eligible to be used as evidence.
 - ◆ Even if 100 sets may have been excessive, its apparent that 5 set is way too small.
 - IT was proposed that the accused never had honest intent and that

the whole thing was a scheme from start to finish

- ◆ Judge completely agreed.
 - ◆ Even if it was proved that the advertisement wasn't entirely false, it was obviously extremely misleading.
 - ◇ The fact that the wholesaler had a ton on hand was not made known, nor was it of any use to the shoppers.
 - ▶ ***The convictions for false or misleading advertising sound proper.***
- ***The customers faced a clear situation of bait-and-switch advertising, as when they went to the store to purchase the inexpensive TVs they were immediately redirected towards more expensive ones.*** (s.57 of the Competition Act)
- Failing to supply the goods advertised in reasonable quantities
 - 5 TVs was not enough
 - The fact they neglected to use the TVs that were sitting in the warehouse is also not useful for them.
 - It cannot be said that there was in deed any supply at all available for the consumers.
 - A defense of due diligence may be open in this case
 - Judge saw way otherwise.
 - It is clear that the accused ran the advertisements, so s. 57 put a duty upon the accused to supply the product, and they did not, nor did they have any intent to.
- The accused claimed multiplicity in counts, however due to the fact that they ran the advertisements over and over and over again, they are up for multiple counts, and there is no multiplicity.
- The accused also argued that virtually all the elements under the charges of s. 52 and 57 were virtually the same, so half the convictions were redundant.
- False.
 - S. 57 claims the accused failed to sell the product after the advertisement had been released.
 - S. 52 claimed that the advertisements used were entirely false or misleading only, and has nothing to do with the actual act of supplying the product.

Case 3: Rudder vs. Microsoft Corporation

Thursday, September 29, 2011

4:46 PM

➤ **Background**

- When a party is transacting business with someone in another jurisdiction, there will often be a clause in the contract whereby the parties agree where any litigation in connection with the contract will take place. The court will usually, but not always, give effect to such a clause. In this case, the plaintiffs argued that there were a number of factors that should influence the court in refusing to enforce the forum selection clause.

➤ **Facts**

- A motion passed by Microsoft states that the parties have agreed to the exclusive jurisdiction and venue of the courts in respect of any litigation between them. And that in any event Ontario is not the appropriate forum for the conduct of this proceeding and that the service ex juris of the Statement of Claim ought to be set aside.
- Microsoft service is an online service providing many services including internet to their customers. The service is offered to customers around the world from a station in Washington.
- The proposed plaintiffs were members of MSN (The Microsoft Network), both law school graduates. They were bringing forward this case on behalf of a Canada-wide class defined as:
 - All persons resident of Canada who subscribed for the provision of Internet access or services through MSN, Microsoft since September 1, 1995.
 - Estimated to be roughly 89,000 MSN members across Canada
- The plaintiffs claim damages for breach of contract, breach of fiduciary duty, misappropriation and punitive damages in the total amount of \$75,000,000.00
 - The plaintiffs allege that Microsoft has charged members of MSN and taken payment from their credit cards in breach of contract and that Microsoft has failed to provide reasonable information concerning accounts.
 - Statement of Claim was served on Microsoft at their offices on January 5, 1998.
- The contract which the plaintiffs have alleged has been broken is a "Member Agreement"
 - Members of MSN are required to electronically execute this agreement prior to receiving the services provided by the company.
 - Located in the contract is a line stating that any court concerns will be taken up in the state of Washington in King County.
 - ◆ The defendant relies on this clause.
- The plaintiffs argue that the court should not give credence to the forum selection clause contained within the contract.
 - They state that the contract was so long and online, that it is not expected that anyone actually read the entire contract, and hence would not notice this segment of the contract.

- The plaintiffs also argue that the Washington courts would not be acceptable for this type of lawsuit anyways.

➤ **Analysis and Disposition**

- Forum selection clauses are generally treated with a measure of deference by Canadian courts. It was decided that forum selection clauses should be treated the same as arbitration agreements.
 - Must show respect for the agreements that the parties have signed, and is consistent with the principle of international comity.
- A court is not bound to give effect to an exclusive jurisdiction clause, but that the choice of the parties should be respected unless there is strong cause to override the agreement.
 - The burden for showing said strong cause rests with the plaintiff and the threshold to be surpassed is beyond the mere balance of convenience.
- The two plaintiffs contend that regardless of the deference to be shown to forum selection clauses, no effect should be given to the particular clause at issue in this case because it does not represent the true agreement of the parties.
 - They are claiming that the member agreement between MSN members and Microsoft is not set up to represent the forum selection clause apparently, and they are expecting member to miss the clause written in the forum.
 - They are arguing that said clause should be looked at as fine print, and that it should have been specifically pointed out to members before they sign the contract.
 - Since it was not, the plaintiffs are claiming that it should not be included in the contract that they are seeking to enforce.
- The plaintiffs are basically saying that since only a portion of the agreement appeared on screen at a time due to its electronic format, the terms not originally on the screen are technically the 'fine print' of the contract.
 - All MSN users however were obliged to click an 'I Agree' button at the bottom of the contract, claiming that they had read the entire document, so the fact that they clicked the button without reading the whole contract in detail was their own fault.
- The plaintiff actually admitted in his statement that he had 'scanned over' the contract, looking for costs that would be charged to him by MSN. And that after he found the portion containing the costs, he stopped reading the contract.
 - After satisfied with what it was going to cost him, Rudder clicked 'I Agree' to the terms in the contract.
- There is no term in the agreement that is particularly difficult to read, and all terms are of equal legibility.
 - No words that are referred to as "legalese"
 - Words that are unknown to the common person not involved in law
- There is even a blurb at the bottom of the contract that states "If you click 'I Agree' without reading the membership agreement, you are still agreeing to be bound by all of the terms of the membership agreement, without limitation"
 - The plaintiff admitted to reading this screen, however he said that he didn't really think about it, and never really does when signing up for things

online.

- It's a little weird because the plaintiff seeks to have some parts of the contract enforced (which he did not read) and other portions that he did not read exempted from being legally binding.
 - To move this contract into being absurd would create basically any online contract to be useless and not actually applicable, so obviously the judge did not do so.

- Since both the plaintiffs have attended law school as well, their defense becomes even worse due to the fact that they have studied contract law, and should know all the in's and out's of it

- Simply put, the plaintiffs haven't really succeeded in meeting the burden of showing a strong cause as to why the forum selection clause should not be determinative.
 - The law to be applied will be that of King County in Washington.
 - The defendant shows a clear connection to this jurisdiction, therefore it is relevant... the plaintiffs do not really show any clear connection to Ontario at all, other than for the fact that they are claiming they are representing all of Canada who are MSN customers.
 - The defendant is clearly favoured.
 - There is also nothing to suggest that the defendant would not receive a fair trial in Washington, and it would almost be more advantageous to do so.

- The forum selection clause is upheld.
- The defendant will have its costs covered as long as they present a request within 2 weeks.

Class Analysis of Case 3

Monday, October 03, 2011

11:39 AM

➤ **Rudder vs. Microsoft**

- Class Actions against Microsoft
- Rudder is the head of the class action
 - A number of plaintiffs all have the same claim against the defendant, and one single remedy will satisfy all of them at once.
 - Class is made up on MSN subscribers who have accepted an online contract with MSN and they are now complaining because they are saying that they are entitled to damages for breach of the online contract.
 - ◆ Case doesn't even get into this though, because Microsoft states that the case can't even be brought against them in Ontario, and it has to be settled in King County Washington.
- Subscribers are saying that the clause shouldn't bind them because they didn't read it, it was buried in the contract as it didn't come up on the first page of the online contract.
 - Court pretty much says if you click I Accept, then you are accepting all the terms and not just the ones that you like.
 - The fact that it didn't appear on the first page means nothing, and the terms were in the same font and size as the rest of the contract.
- Since the contract is binding, the terms must be respected as long as it is not an attempt to get some sort of advantage.
- The clause of jurisdiction is favoured by the courts because it gives clarity to your contract, as deciding which jurisdiction to use is often very subjective and hard to determine.
 - Courts do like them, but they still have the rights to override the jurisdiction clause if they want.
 - Law will respect the jurisdiction clauses, unless there is a very good reason for why it should not be upheld
 - If there is no forum selection clause at all, the court in the home jurisdiction would look at the factors
 - Which jurisdiction is the evidence on issues of fact situated
 - Whether the law of the foreign country applies and its differences from the domestic law in any respect
 - The strength of the jurisdictional connections of the parties
 - Whether the defendants desire to enforce a forum selection clause is genuine or merely an attempt to obtain a procedural advantage.
 - Whether the plaintiffs will suffer prejudice by bringing their claim in a foreign court because they will be:
 - ◆ Deprived of security for the claim
 - ◆ Be unable to enforce any judgment obtained
 - ◆ BE faced with a time bar not applicable in the domestic court
 - ◆ Unlikely to receive a fair trial

➤ Supplement, good case to practice with is on page 22

Case 4: Montane Ventures Ltd v. Schroeder

Friday, September 30, 2011
2:42 PM

➤ **Background**

- The essence of a contract is, at least in theory, the meeting of the minds of the contracting parties. The two parties must have a common will in relation to the subject matter of their negotiations and must have struck an agreement. Sometimes it is difficult to tell what constitutes a rejection or a counter-offer. When the offeree is merely requesting information or clarification, that does not constitute a counter offer or a rejection and the offer remains in force.

➤ **Facts**

- The plaintiff, Montane Ventures seeks an order of specific performance directing the defendant, Frank Schroeder, to complete an agreement to sell real property located at 100 Mile House.
- On September 3rd and 4th 1999, a contract of purchase and sale was negotiated between the parties which stated that Montane would purchase from Mr. Schroeder property described as Lot 1 at a price of \$215,000, with the sale to be completed on **November 30, 1999**.
- Montane's realtor communicated directly with Mr. Schroeder regarding the lease.
- On September 8th, 1999, Schroeder faxed the realtor information regarding the lease, and requested that he have Montane initial and return a copy of the fax. He also requested the realtor call him directly, and during the conversation they discussed alterations to be done to the property.
 - The realtor asked whether a final inspection on the alterations had been completed, but Schroeder advised that he had not asked for a final inspection permit yet, and would do so right away.
- On September 9th, 1999 the realtor forwarded an addendum to the agreement, removing the subject to clause regarding the lease with the Internet Café, and concluded the form with the line:
 - "Seller agrees to provide final inspection certificates for alterations re above lease by Sept. 22, 1999"
 - Mr. Schroeder responded as though this was a counter offer, and a rejection of the previous contract, and therefore stated that he was no longer prepared to complete the original contract.
 - He also added he would in fact sell the property, but at a \$10,000 increase of the original price.
- ***The issue at hand is whether the addendum constitutes a counter offeror rejection.***
 - The courts then look at the intent of both parties, whether the preparation of a further document is a condition precedent to the contract (Rejection) or is it an incident in the performance of an already binding obligation (therefore not being a rejection).

- The inclusion of the last sentence in the addendum by the realtor follows from the previous condition that both parties must be okay with the Internet Café Lease.
 - After reviewing the lease, as he was supposed to, the realtor wanted more information, and states that the last sentence was only to confirm the conversation the two had held previously on the telephone, it was not intended to be a counter offer.
 - Since Mr. Schroeder was not required to sign the addendum, there is no suggestion that it is a counter offer.

- It is concluded that the last line was not a counter offer, and was solely there for the purpose as to confirm the agreement made on the previous day over the phone.
 - The phone call only took place as per request of Mr. Schroeder, and hence proves the neither Montane nor the realtor had any intent to make a counter offer as neither took initiative themselves to contact Mr. Schroeder to propose such a counter offer.
 - If the concluding sentence on the addendum had required a signature to ensure acceptance, then it would be classified as a counter offer, but no such request was ever made.
 -

- Montane wins "Specific Performance" in that the accused is ordered to fulfill his commitment in the contract and sell the property to Montane for the agreed \$215,000. Montane will have it's costs covered at scale three as there is no justification for awarding special costs.

Class Analysis of Case 4

Monday, October 03, 2011
11:42 AM

Lecture 6: Offer and Acceptance

Monday, October 03, 2011

11:40 AM

➤ **Coupon Example**

- **Ex. Bring in this add and deduct \$20 from the purchase of 2 buffet dinners**
 - Offer! Not just an invitation
 - You need to do an action, and they promise to pay for the action
 - You buy buffet, they pay you \$20

- **Ex. Buy one get one free**
 - Offer!
 - By buying one, you are entering the promise and giving consideration on your behalf, then they give you one free, their consideration.
 - Unilateral

- **Ex. Sushi Special, 18 pieces for 5.75\$**
 - Invitation
 - They aren't asking you to do anything.

➤ **Lapse**

- Legal term of expiry of an offer after which the offer can no longer be accepted.
- Offers will lapse:
 - When the time limit specified in the offer elapses
 - Offeree has not accepted within that time
 - When the offeree fails to accept in a "reasonable time", if no time is specified the judge chooses when is a reasonable time.
 - When the offeror revokes the offer prior to acceptance
 - Always okay, unless there's an option contract
 - When there is a counter offer made
 - Any change to the terms of the original offer
 - When either party dies or becomes insane prior to acceptance
 - Any inability to understand the terms of a contract

➤ **Acceptance**

- Must be the "mirror image" to the offer.
 - Must be in acceptance to all the terms without any sort of changes at all
- Offeror should control:
 - Terms
 - Make sure you have all the terms in the contract that you want... because you don't get another option to alter them once an offer has been made unless you get a chance to counter offer.
 - How long the offer is open for
 - Date and time
 - How acceptance should be made
 - So that you can control exactly how you find out the acceptance was made so you know for sure that a contract has been made and accepted.

- Acceptance must be made in the manner either implied by the offeror, or

requested by the offeror.

- Implied:
 - Reply by same method used by offeror
- Requested
 - Reply in the manner that the offeror instructs you to.
- Methods of Acceptance
 - **Telephone**
 - No written documents
 - Acceptance is complete when they are heard by the other party, not necessarily when they are spoken over the phone.
 - **Mail**
 - **Postal acceptance rule**
 - ◆ Only applies if the offer comes by mail and there are no instructions regarding acceptance
 - ◆ Or you are told to accept by mail
 - ◆ Rule doesn't apply to courier
 - THEEEEN, acceptance is complete when the letter is put in the mail box, not when the offeror receives it.
 - If you want the offeree to accept by mail but don't want the postal acceptance rule to apply:
 - ◆ "Reply by mail, the acceptance is complete when the letter is received by me"
 - **Email**
 - Acceptance complete when "capable of being retrieved by offeror"
 - ◆ Clean this up in your offer
 - **Fax**
 - NO LAW
 - Cases are inconsistent
 - Set out terms in the offer
- Revocation of an offer can be done by ANY means, but if you revoke by mail, it's not complete until it is delivered to the other parties address
 - Doesn't have to be read, just delivered
 - Kind of a stupid way to revoke an offer

Reading 2B: Consideration

Friday, September 30, 2011

3:10 PM

➤ **The Meaning of Consideration**

- **Consideration:** The price for which the promise of the other is bought
- An accepted offer will not be recognized as an enforceable contract unless it has consideration.
 - The accepted offer must form a **bargain**
 - Each party pays a price for the promise of the other
 - ◆ Unilateral contract: The price paid for the offeror's promise is the act done by the offeree.
 - ◆ Bilateral contract: The price paid for each party's promise is the promise of the other.
 - A promisor usually bargains for a benefit to himself, such as a promise to pay money, deliver goods, or provide services; but it doesn't need to be directly for his own benefit.
 - As long as the promisor bargains for the other party to do SOMETHING- or to promise to do something- that she otherwise would not do, the promisor will have received will have received consideration.

➤ **Gratuitous Promises**

- Consideration is essential to make a contract binding in law.
 - A person may however make a promise to another without bargaining for anything in return, referred to as a **gratuitous promise**.
 - Although accepted by the person to whom it is made, does not become a contract and is not enforceable in law.
 - ◆ They are void for lack of consideration.
- The law does nothing to prevent performance of a gratuitous promise, it simply states that if the promisor does not perform, the promisee has no legal remedy...
 - He can't sue for the promisor to perform the promised action because he wasn't doing anything in return, so he barely even has reason to obtain the promised benefit other than as a matter of honour.
 - If a promise is performed, the promisor has no right to later change their mind and take it back. They voluntarily gave the gift, and it is no longer their property and they have no control over it.

➤ **Adequacy of Consideration**

- While the consideration given in return for a promise must have some value in the eyes of the law, the court does not inquire whether the promisor made a good bargain.
 - The court is not responsible to make sure the promise was fair... if a party agrees to a totally unfair consideration, that's their fault.
 - It is not up to the courts to assess the adequacy of Consideration.
 - Sometimes however they feel the due diligence to do so, in case the consideration was given under fraud, duress, or undue influence exerted on the promisor.
 - ◆ The courts may order that the promise is void at the promisor's option.

➤ **Motive Contrasted with Consideration: Past Consideration**

- **Motive:** The promisor's reason for making the promise
 - Regarded as irrelevant in court
 - Cannot change a gratuitous promise into a binding contract, and cannot reduce a binding contract into a merely voluntary obligation.
- **Past Consideration:** A gratuitous benefit previously conferred upon a promisor
 - If one person promises to reward another who has previously done an act gratuitously the promise is not binding.
 - The promise is gratuitous because the consideration has occurred in the past, and the person who performed such consideration was unaware of the promise to come, and hence did not perform in accordance to the expected promise.
 - It can be said that there was motive to repay the previous consideration bearer-- but motivation is not the same as consideration, and is not legally enforceable as a promise.
 - **Past Consideration is not Consideration**
- **Moral Cause:** Moral duty of promisor to perform his promise
 - In civil legal law systems, moral cause may be sufficient to make a promise binding, but this is a very subjective.

➤ **Relation between Existing Legal Duty and Consideration**

- When party A has an existing contractual duty to party B, and a later promise by B to pay A something extra as motivation to perform the obligation is not binding.
 - Party A was already bound to perform the act, therefore they are providing no additional consideration to party B for their promise, and party B can safely say they are offering a gratuitous promise.
 - A's failure to complete their previous promise would be breach of contract, and should A complete the contract after hearing the secondary consideration given by B, party B had no legal duty to pay the consideration as they received no additional consideration in the promise.
- What if a third party enters the promise?
 - Ex. Party A promises to build a building for party B... Party B leases out a room in the building to Party C. Party A says they probably won't complete the project, so Party C offers to pay Party A more to make sure they finish.
 - In this case, consideration was obviously provided between A and B initially, and a contract was made. The additional consideration provided by party C, it is regarded as enforceable, however now, should Party A fail to come through, they have promises to both party B and C and can be taken to court by both of them.

➤ **Gratuitous Reductions of a Debt**

- Unrealistic rule
- Ex. If a man owes VISA \$1000, and VISA offers to reduce it to \$500 should he pay it immediately, this is a gratuitous reduction of debt. Technically, the man was offering no consideration to VISA in return of their promise, therefore it is not enforceable in court, and should VISA wish to, they could sue for the remainder of the balance as agreed upon in the real contract.
 - This only occurs in the case of money. Visa can sue for the remainder of the

money after the gratuitous reduction of debt was promised. Had they demanded \$500 and a bracelet, they could not sue for the remainder of the debt.

- It also only applies to the specific debtor and creditor. If the creditor, so desperate to get money, accepts a partial payment from a third party, they must accept this sum and not sue for the remainder of the debt to either the party or third party at any time.
- The rule is not applied should the creditor accept in writing under seal that the paid amount was sufficient.

➤ **Equitable Estoppel**

○ **Evolution of the Principle**

- If a party makes a gratuitous promise to another party, then the promisee goes out and makes investments and spends money based on the received promise, should the promisor back out, they are not held liable to anything that the promisee spent, nor are they required to fulfill their gratuitous promise.

○ **Estoppel Based on Fact**

- When one person asserts as true a certain statement of fact and another relies on that statement to his detriment, the maker of the statement will be prevented (estopped) from denying the truth of his original statement in a court of law, even if it turns out to be untrue.

- If a person tells someone something, and that person makes decisions based on the fact, in a court of law the initial person must remain consistent that they believed what they told the other was true, even if it is later proven not to be.

- **Estoppel** applies to an assertion of existing fact... debatable as to whether it applies to a promise of future conduct.

- Truth of existing facts is objective, future promises, not so much.

- **Promissory Estoppel (Equitable Estoppel)**

- The courts exercise of its equitable jurisdiction to estop a promisor from claiming that she was not bound by her gratuitous promise where reliance on that promise caused injury to the promisee.

- Essentially, forcing a promisor to go through with their promise even though it was gratuitous since the promisee underwent additional costs when relying on that information they were promised.

- Takes the side of the promisor.

○ **Injurious Reliance**

- Loss or harm suffered by a promisee who, to his detriment, relied reasonably on a gratuitous promise
- Regarded as a cause of action, not just defense.
- Essentially the same as estoppel, but is taking the view of the promisee (person promised to)

➤ **The Effect of a Request for Goods or Services**

- When one person requests the services of another and the other performs those services, the law implies a promise to pay.

- Such a promise is implied between strangers or friends if the services are rendered in a customary business transaction.

- Not implied between family, because it can be proven that they

expected it to be gratuitous.

- Even if neither party mentions price, the implied promise is for payment of what the services are reasonably worth.
 - **Quantum Meruit:** The amount a person merits to be paid for goods or services provided to the person requesting them.
 - ◆ Applies to goods and services supplied upon request.
 - After the requested service is performed, the parties may agree on a reasonable price, and after this neither can change their mind and ask the court to find a better reasonable price.

➤ **The Use of a Seal**

- **Covenant:** a serious promise
- **Covenantor:** One who makes a covenant
- To this day, a document under seal is still called a deed.
 - **Document under Seal:** A covenant recorded in a document containing a wax seal, showing that the covenanter adopted the document as his act and deed
 - **Deed:** A document under seal, which today is usually a small, red, gummed wafer.
- Today any form of a seal is acceptable, even the word SEAL written across the document.
 - Must be on the document at the time of party signing
 - The enforcement of a seal requires that the application of the seal must be a conscious and deliberate act.
- A promise made under the seal of the promisor does not require consideration to make it binding.
 - The seal says "I fully intend to be bound by this promise"
- A seal does not do away with any of the other requirements to make an agreement binding.

➤ **An Intention to Create Legal Relations**

- Even when an apparently valid offer has been accepted there is no contract in law unless both sides also intended to create a legally enforceable agreement.
 - The law presumes that the necessary intention is present in almost all instances when an agreement appears to be seriously made.
 - A defendant may rebut the presumption by using the external or objective test of the *reasonable bystander*
 - ◆ If to such a person the outward conduct of the parties lacked a serious intention to make an agreement, then no binding contract results.
 - ◇ It is often easier to rebut the presumption between friends or members of a family where it is often clear that there was no intention to create legal relations.
- Parties may include in their contract an express term that in the event of its breach neither party may sue the other.

Lecture 7: Consideration

Monday, October 17, 2011
11:28 AM

➤ **Consideration**

- Bilateral
 - Two promises are made, one to each person involved in the contract
 - Promise to do something, promise not to do something, promise to pay something
 - ◆ Forbearance
- Unilateral
 - A promise made to a person, to which they respond with an act
- Won't look at the fairness between the contract unless there is a power imbalance.
 - If power is abused, they may check out the fairness of the contract
 - Whether a party was capable of taking advantage of another

Case 5: Caligiuri vs. Tumillo

Friday, September 30, 2011

4:30 PM

➤ **Background**

- The defendant seeks leave to appeal this small claims court matter. The issue is whether there was proper consideration given in exchange for a promissory note

➤ **Facts**

- The plaintiff, Ms. Caligiuri gave \$50,000 to her son so that he could (with other shareholders) start up a company to own and run a bar.
- In exchange for the \$50,000, Caligiuri required the company and all the shareholders sign a promissory note in her favour.
- The defendant, Mr. Tumillo, put money into the company and later became a shareholder afterwards.
 - Therefore two months after the initial promissory note, another promissory note was signed by Mr. Tumillo and the other shareholders to repay one sixth of the \$50,000 to Caligiuri on demand.
 - The bar failed, and MS. Caligiuri sued for her \$50,000 on the basis of her promissory note.
 - Mr. Tumillo argued that there was no consideration for his signing, as the \$50,000 had been paid before he joined the company, so he says no consideration was paid to him.
- The trial judge decided that consideration was there, as had he not signed the note, he would not have been allowed to be a shareholder.
- Under S. 15 of the Small Claims Practices Act, leave to appeal will only be offered on questions of law.
- 52 of the Bills of Exchange states:
 - Valuable consideration for a bill may be constituted by
 - Any consideration sufficient to support a simple contract
 - An antecedent debt or liability
 - An antecedent debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.
- Tumillo claims that where the funds advanced upon a promissory note are not paid to the maker, there must be a sufficient link between the advance and the promise to constitute good consideration flowing to the promisor in order to make the note enforceable.
- In this case, the promissory note was not issued in accordance of the payment. The advancement of funds had already been made to the company before Tumillo was ever present as the scene.
- It is claimed however that consideration need not move directly to the promisor. While it need move from the promisee, there is no requirement as to who it moves to.
- The courts agreed that by Ms. Caligiuri not withdrawing her \$50,000 upon the promissory note provided by Mr. Tumillo, that was regarded as consideration on her behalf.

Case 5: Discussion

Monday, October 17, 2011

11:48 AM

➤ **Tumillos Argument**

- His argument is that he joined after the fact, and that he didn't get any consideration

Paragraph 11 is where the judge starts talking about the law & 12, 14

➤ **Caliguiris Argument**

- Says her consideration is that she promised not to call the note assuming he signed, and if he didn't sign the promisory note then she would call the loan and the corporation wouldn't have any money.
- She had the right to call the loan at any time
- **Acceptable as consideration**
-

➤ **Judge**

- Cannot decide a case based on fact, just on law.
 - The question about the acceptability of consideration is law

Case 6: Tulsa Heaters Inc. v. Syncrude Canada Ltd.

Friday, September 30, 2011
4:49 PM

Case 6: Discussion

Monday, October 17, 2011
12:23 PM

Livingstone vs. Evans

Wednesday, October 05, 2011

12:06 PM

➤ **Facts**

- Evans offers to sell his land to Livingstone in a letter for \$1800.
- Livingstone sends a telegram back to Evans asking what is his lowest cash price he will accept. Offers to pay \$1600 instead
- Evans sends a telegram back saying no.
- Livingstone writes back saying okay \$1800 is good.
- Evans now thinks there is no contract, so he offers the land to Williams.
 - Livingstone wants the land, so he sues for Specific Performance
 - Equitable, because it's not a money claim.
 - ◆ He will need to prove the land was unique, and the subject matter of the claim is inadequate, his hands are clean, and he acts quickly.

➤ **Issues**

1) Do Evans and Livingstone have a contract?

- i. Law: In order to have a contract, we need to have 6 elements
 - 1) We will prove intent, offer, acceptance and consideration.
 - a) **Intent**
 - i) In a commercial contract between strangers, intent would be presumed.
 - ii) Intent is likely presumed, as the parties do not know each other, and Evans doesn't appear to be denying intent.
 - b) **Offer**
 - i) A Proposal of some sort, and clarity on parties, object, price.
 - ii) We know the parties are Evans and Livingston, the object is the piece of land...
 - ▶ Livingstone asks an inquiry about the lowest price he will accept, does not change contract.
 - ▶ Livingstone says he will pay \$1600, counter offer, original offer lapses.
 - c) **Acceptance**
 - i) Livingstone does not accept the \$1800 offer, and offers a counter offer of \$1600.
 - ii) Evans says he cannot accept a lower price, thinking he has rejected the offer, therefore there are no offers remaining on the table.
 - iii) Livingstone thinks that was simply a re offer of \$1800, and that Evans is still wanting to offer the land to him, seeing as his answer wasn't straight no, it was simply "I can't reduce the price"
 - ▶ Ambiguous response
 - ▶ The court agrees with this, and states a contract was made
 - d) **Consideration**
 - i) Both parties need to be offering something of benefit to

- the opposing party.
- ii) The exchange of promises, or a promise for an act.

ii. If so was it breached?

1) Yep!

2) Do Evans and Williams have a contract?

3) What are the remedies

i. Specific Performance

1) Evans must sell him the land

2) Livingstone acted quickly, had clean hands as he didn't do anything to mess up the deal, the land is unique, and the subject matter of the claim is inadequate.

➤ **On Midterm**

- On the midterm, we would be given the facts and then we would need to find out what the law is that's being breached
- Need to assume that the marker does not know any law
- Talk about law that applies first, before any facts are mentioned
- Don't start with the answer, just come up with it at the very end
 - If you start the question with an answer in mind, you will have a bias in all of your answers

Foakes vs. Beer

Monday, October 17, 2011
12:04 PM

➤ **Information**

- Mrs. Beer agreed to lend money to Dr. Foakes and he promised to repay it over 5 years.
 - Had to pay the principle sum off in five years in monthly installments, plus interest
 - He was making a ton of late payments
- Mrs Beer said he didn't have to pay interest and in return he would pay her regularly and monthly like he was supposed to do.
 - **This is an amendment**
 - **A Mutual modification**
 - **A Forbearance**
 - He needs to improve his side of the deal as well, but he doesn't he just pays it off monthly over 5 years, which he was already obligated to do.
 - ◆ Past consideration does not equal good consideration in the new mutual modification
 - Her promise was therefore a gratuitous promise, which is unenforceable by law.
- Mr. Foakes gave his payments, paid the principle in 5 years, and then Mrs. Beer sued him for the interest
- Mrs. Beer wins, and Dr. Foakes needs to pay the interest

➤ **Mr Foakes**

- Should have gotten her promise under seal
- Reduce the term to pay every 29 days, reduce the term AT ALL give her some benefit from the deal at all to make it consideration

➤ **Other**

- Common law rule: Gratuitous promises are unenforceable
- However since 1884 equity law has created an exception
 - Equity says that gratuitous promises should sometimes be enforced if certain conditions are met
 - p. 127
 - a) The two parties have a contract
 - b) One party makes a gratuitous promise to the other that modifies the contract
 - i) Ie. That the strict terms of the contract will not be enforced
 - c) The other party relies on that promise
 - d) And alters their conduct so that it would be a hardship now if the promise was not lived up to
 - e) Equity can only be used as a defense to a claim made by the promisor
 - i) Equitable/promissary estoppel can only be used as shield and not as sword...
 - ▶ Equity enforces a gratuitous promise, equity prevents the promisor from denying the promise
- WHAT IS FAIR

Reading 3A: Interpretation

Friday, October 21, 2011

7:35 PM

➤ ***The Relationship Between Formation and Interpretation of Contracts***

- The large majority of disputes are not about the formation of contracts but about their meaning
- **Construing:** Interpreting
- Each party firmly believes that his interpretation of the contract is the only sensible one and that the other party must be dishonest to suggest that there is any other.
 - A lawyer often tries to show their client that the claim of the other side has some merit
 - Then the lawyer may encourage a compromise
- In the vast majority of cases parties do not have conflicting interpretations and everything is understood.
 - However words can be ambiguous, and people tend to think they made sense when they didn't.
- When parties need to go to court for misinterpretations, the judge settles on the most reasonable meaning that can be attributed to the words used in the contract.
 - Very difficult to do.

➤ ***The Interpretation of Express Terms***

- ***Two Approaches to Interpretation***
 - ***Strict or Plain-Meaning Approach***
 - A approach that restricts interpretation to the ordinary or dictionary meaning of a word
 - Few words have a plain or ordinary meaning though
 - The meaning of words changes
 - ***Liberal Approach***
 - An approach that looks to the intent of the parties and surrounding circumstances and tends to minimize (but does not ignore) the importance of the words actually used.
 - Looks to the purpose of the parties in drafting their agreement: what did they intend?
 - Stresses the circumstances: negotiations leading up to it, knowledge of the parties, and any other relevant facts.
 - Minimizes the importance of the actual words
 - However in law conduct (and words) serve as the primary guide to one's intentions...
- ***How the Courts Apply the Approaches***
 - Rather than choosing between them, the courts will just emphasize one over the other.
 - Generally, they have to decide how far past the words used they should be looking...
 - If the words are ambiguous, the courts will look at the surrounding facts to some extent
- ***How the Courts Choose between Conflicting Testimony***

- Globalized terms have been developed for use in contracts that are well known by everyone to avoid misinterpretation
- Contracts must contain a clause stating the choice of law from one of the countries.
 - Sometimes there is a neutral body of principles though, like the UNIDROIT Principles of International Commercial Contracts

➤ ***The Parol Evidence Rule***

- ***The Meaning of the Rule***
 - A party cannot later add a term previously agreed upon between the parties but not included in the final form of the contract
 - They will be held to the written contract
 - Applies to both written and oral agreements

➤ ***Implied Terms as a Method of Interpretation***

- ***Comparison with Interpretation of Express Terms***
 - Another approach courts can use when deciding the intention of the words used is admitting the existence of an implied term
 - ***Implied Term:*** A term not expressly included by the parties in their agreement but which, as reasonable people, they would have included had they thought about it.
 - ◆ This term will only be used when it is obviously necessary to accomplish the purpose of the contract
- ***Terms Established by Custom or Statute***
 - Are recognized among business people because they made good sense or because they led to certainty in transactions without the need to speed out every detail.
 - When a party fails to comply with an implied term, the courts will recognize its existence and enforce the contract as though it had been an express term.
- ***Reasonable Expectation of the Parties***
 - The courts will imply terms reasonably necessary to make a contract effective, if not, the fair expectations of a party would be defeated.
 - The courts will not go further than necessary though, and will not make a new contract for the parties
 - They will not imply a term that is contrary to the expressed intent of the agreement
 - ◆ Term will only be implied on grounds of business efficacy
 - ◆ So parties basically need to bring any terms that they want in the contract forward at the beginning cause they won't be added later.
 - If not every single matter was addressed in the contract, judges won't necessarily address it, they can just leave it be.
 - However some times they need to later deal with crucial matters where a term must be implied, so that the purpose of the contract will not be lost.

Case 7: BKDK Holdings vs. 692831 B.C. Ltd

Saturday, October 22, 2011
7:52 PM

➤ **Reasons for Judgment**

○ **Whats Happening...**

- In an agreement, the petitioner BKDK Holdings Ltd. Agreed to sell and the respondent 692831 BC Ltd agreed to purchase a number of shares in a company called Meridian Travel.
 - Purchase price was \$750,000 payable in three installments of \$250,000 each on April 30, 2008, 2009 and 2010.
- Another company exists that BKDK does work for, and the clause is that if that company takes their business elsewhere other than to BKDK and they do so by obtaining the RFP, they will need to give 692831 BC Ltd a discount of \$70,000 that they may deduct from the final payment
- Contrary to the beliefs of the parties, the third company did not end up going up for sale, not giving BKDK a chance to keep their partnership rights, and BKDK lost the partnership, however they maintained 3%.

○ **And then....**

- So basically, 692831 wants the price reduction, however BKDK doesn't think they owe them one because they maintained 3% of the partnership and didn't lose it ALL.
- Also, the deal was the 692831 needed to actually try to purchase them still, and since they didn't go up for sale, there was no way they could actually do that anyways.

○ **Analysis Breakdown**

- The court should strive to give meaning to an agreement and reject an interpretation that would render one of its terms ineffective
- They are to search for an interpretation which from the whole of the contract would appear to promote or advance the true intent of the parties at the time of entry into the contract
- The judge should give particular value to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using the terms
- The judge needs to analyze whether an unsuccessful bid for the RFP process was a condition that 692831 needed to fulfill to be entitled the price reduction
 - Decided that the interpretation that both parties made from the agreement were possible
 - But the case of 692831 was more appropriate
 - ◆ BKDK's interpretation was not business sensical
- In regards to the fact that they didn't lose the entire account and still maintained 3% of it, BKDK is being silly and yes, they technically lost all of it.

Reading 3B: The Sale of Goods Act

Saturday, October 22, 2011
8:44 PM

➤ **History**

- Any cases dealing with the sale and distribution of goods go by the Sale of Goods Act.
 - Does not change the law, simply sets out accurately what it is.

➤ **Consumer Protection Legislation**

- Does not apply to consumers
- Most provinces have developed additional legislation addressing the specific needs of the consumer
 - Applies to the sale of goods as well as to the supply of services
- Applicability of the Sale of Goods Act
 - Applies to
 - **Sales**
 - ◆ NOT
 - ◇ Exchanges of goods, bailments or leases, consignments or non contractual transfers of property.
 - **Of Goods**
 - ◆ NOT
 - ◇ Sales of land or intangible property
 - ◇ Provision of services

○ **Contracts of Sale**

- A contract where the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price.
- Money must be a part of the contract
 - Not allowed to simply trade items
- **Agreement to Sell:** A contract of sale in which the transfer of goods is deferred to some future time.
 - Specified date or an indefinite date that depends on the fulfillment of a particular requirement.
 - May be formed even when the goods are non existent at the time being.
 - Binding
- **Consignment:** The transfer of goods from one business to another for the purpose of sale
 - The consignor is a seller to the consignee who receives a shipment of goods from the consignor in the performance of a contract of sale.
 - Sometimes though the consignor will sell the goods to a consignee (agent) who will offer them for sale at their new location.
 - ◆ Ownership of the goods does not transfer between the consignor to the purchaser.
 - ◇ The difference between who *owns* the goods is important as it determines who bears risk if the goods are damaged or destroyed.

○ **Goods**

- Personal property other than money and choses in action
- For the sale of goods act to apply, the subject matter of the contract must be goods
- **Real Property:** interests in land... don't count
- **Personal Property:**
 - Choses: Things in actions
 - ◆ Represent contractual binding obligations
 - Chattels: Tangible personal property
 - ◆ Derive value intrinsically from the utility or satisfaction they provide.

- **Ownership and Possession**
 - Possession is who literally has the item in hand
 - Ownership is who owns title ship of the item
 - I can own a car, and lend it to your possession
 - In Sale of Goods Act, possession and ownership need not be held by the same party always.
 - The buyer can technically own it when the seller still possesses it
 - The buyer can possess it when the seller still owns it to ensure payment.

- **Terms in a Contract of Sale**
 - **The Caveat Emptor Principle**
 - Let the buyer beware!
 - Applies where the goods are in existence and are specific items that may be inspected by the buyer, and when the seller has made no misrepresentation about them.
 - Encourages the buyers to take care and to determine that the goods are what they want before they contract to buy them.

 - **Statutory Protection for the Buyer: Implied Terms**
 - **Conditions and Warranties**
 - **Condition:** A major or essential term of the contract, the breach of which may relieve the injured party from further performance.
 - **Warranty:** A lesser or essential term that does not relieve the injured party from performance
 - ◆ They must perform their side, but they can also sue for damages

 - **Seller's Title**
 - Caveat emptor applies to the quality of the goods not their ownership
 - In offering to sell the goods, the seller implies that he has ownership rights to do so.
 - **Common Knowledge:** A piece of information known to all players, and all players know that all players know the information, and all players know that all players know that all players know.
 - In a contract of sale
 - ◆ An implied condition is that the seller has the right to sell the property at the time they promise they will sell it
 - ◆ Buyer will have and enjoy possession of the goods
 - ◆ Goods will be free from any charge or hindrance in favour of a third party, not known by the buyer at the time of the contract.

 - **Description**
 - **Implied Term as to Description**
 - ◆ It is implied that goods sold by description will conform to the description
 - ◇ Only refer to characteristics of the good, not words of praise about it.

 - **Suitability and Quality**
 - Two exceptions to the general rule that the buyer must exercise care as to the suitability and quality of the goods
 - ◆ There in implied warranty or condition as to the quality or fitness for a particular purpose of goods supplied under a contract of sale when:
 - ▶ Case of contract for the sale of a specified article under its patent or other trade name, there is no implied condition
 - **Implied Term of Fitness**
 - ◆ It is implied that the goods are of a type that is suitable for the purpose for which they are bought.
 - ◆ Buyer should specifically mention the purpose unless its obvious.
 - ◆ The buyer makes known to the seller the purpose that they goods are needed for,

and that the seller is well enough knowledgeable to say truthfully that the goods are suitable for the purpose.

- **Implied Term of Merchantable Quality**
 - ◆ It is implied that the goods are in reasonable condition and are free from defects that would make them unsuitable for use.
 - ◆ Implied condition that the goods shall be of merchantable quality, but if the buyer examines them the clause is gone since it is assumed if there were any problems the buyer would have found them.
 - ◆ What if the defect didn't exist at the time of the contract signing?
- **Sale by Sample**
 - **Implied Term that Goods Correspond with the Sample**
 - ◆ Implied that when a sample of the goods to be sold has been provided, the actual goods supplied will correspond to that sample in type and quality.
 - ◇ Bulk must correspond with sample in quality
 - ◇ Buyer will have a reasonable opportunity of comparing the bulk to the sample
 - ◇ The goods will be free from any defect rendering them merchantable that would not be obvious from the sample.
- **Exemption Clauses**
 - The words used in an exemption clause must precisely describe the type of liability disclaimed, or implied liability is still part of the contract.
- **Payment**
 - When the contract doesn't give concrete guidance about what the buyer is to pay, the pay is assumed to be a cash sale.
 - The courts do not consider the time that a buyer has to pay reason for the seller to back out of the contract, unless explicitly stated in the contract.
 - The seller is not allowed to cut the contract and get the goods back just cause someone didn't pay them on time.
 - Unless stated in the contract
- **Delivery**
 - Terms relating to the quantity to be delivered
 - A condition
 - Must pay for what she agrees upon accepting at the contract rate
 - Terms relating to the time of the delivery
 - IF the goods are not delivered on time, it is considered a breach of contract and the buyer is allowed to look elsewhere for purchase of the products.
 - Terms relating to the place of the delivery
 - FOB- Free on board
 - ◆ Seller will place the goods at the location
 - CIF- Cost, insurance, freight
 - ◆ Price is quoted, the seller undertakes to arrange insurance and to ship the goods to the buyer.
 - COD- Cost on Delivery
 - ◆ The seller undertakes to deliver the goods at the buyer's place of business or residence
- **Risk of Loss**
 - If the buyer and seller do not agree when the risk of loss passes from the seller to the buyer, problemo.
 - **FOB and CIF Contracts, the goods remain at the risk of the seller until they have been**

delivered to the carrier

- *COD contracts, until the seller or the carrier has delivered them to the buyer, the risk is with the seller.*

➤ **Title to Goods**

○ **Who May Pass Title?**

▪ **Nemo Dat Quod Non Habet**

- No one can give what he does not have regarding the ownership of property

◆ **EXCEPT**

- ◇ Certain sales made by an agent
- ◇ Sales made under any special common law statutory power of sale or under a court order.

○ **The Effect of Agency**

- When a business ships the goods for sale to an agent, it is expected that the agent looks like they own the goods.
 - Agent has same authority to deal with goods as the real owner does

○ **Seller or Buyer in Possession**

- If a buyer buys the goods then resells them before they have legit ownership of them... or a seller sells the goods to two buyers, the innocent buyer who just happens to buy the goods is protected under the Sale of Goods Act.

○ **When does the Title Pass?**

▪ **Specific Goods**

- Goods in existence and agreed on as the subject matter of the sale
 - ◆ Rule 1
 - ◇ When there is unconditional contract for the sale of specific goods, the property in the goods passes to the buyer when the contract is made
 - ◆ Rule 2
 - ◇ When there is a contract for specific goods and the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, the property does not pass until such a thing is done and the buyer receives notice.
 - ◆ Rule 3
 - ◇ Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing for the purpose of ascertaining their price... property does not pass until such act or thing is done and the buyer has received notice.
 - ◆ Rule 4
 - ◇ When goods are delivered to the buyer on approval or on "sale on return" or other similar terms, the property passes to the buyer
 - ▶ When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

▪ **Unascertained Goods**

- Goods that have not been set aside and agreed upon as the subject of a sale
 - ◆ Like future goods
 - ◇ Goods that have not yet been produced
- Rule 5
 - ◆ The ownership transfers as soon as the goods are material and available

- Unconditional Appropriation (permanent possession) does not take place until a seller can no longer change his mind and substitute other goods for delivery to the buyer
 - ◆ Delivery amounts to unconditional appropriation

- **Bills of Lading**
 - A document signed by a carrier acknowledging that specified goods have been delivered to it for shipment.
 - ◆ Provides evidence of the terms of the contract between the shipper and the carrier to transport the described goods to a stated destination
 - ◆ May be evidence of title to the goods
 - Can be made out so that one carrier can transfer the goods and ownership to another, who isn't the end owner.
 - The seller often makes the bill of lading out to himself, to ensure that ownership doesn't transfer to the buyer until they have full out paid.
 - Useful to transfer ownership independently of their physical possession.

- **Shipment and Insurance**
 - Either the buyer or the seller will assume responsibility of the goods during transportation, and this is decided in the contract before the shipment of the goods.
 - ◆ Same deal for arranging insurance
 - The contracts price represents whether it is the seller or the buyer who arranges and pays for shipment and insurance.
 - ◆ EXW
 - ◇ Ex Works
 - ◇ The seller only needs to make it available at their warehouse
 - ◇ Buyer bears cost and risk of transportation
 - ◆ FOB
 - ◇ Free on board
 - ◇ Buyer arranges shipment and sellers obliged to delivered the goods to the carrier named by the buyer.
 - ◇ Seller's responsibility ends when the goods are safely on board the transportation device
 - ◆ CIF
 - ◇ Cost, insurance, and freight
 - ◇ Seller assumes responsibility for shipping the goods, and for insurance
 - ◆ DDP
 - ◇ Delivery duty paid
 - ◇ Seller bears risks and costs of transporting the goods to an agreed destination and sometimes even pays the import duties.

- **Payment**
 - In international trades, the seller will state the price in their own currency, though they may accept other currencies if the exchange is right
 - ◆ **Exchange Controls:** Restrictions on the conversion or export of currency
 - ◇ If the buyer country has these, the seller will require actual payment to be made in a "hard" currency.
 - Seller may be careful and use **Foreign Exchange Risk Management**
 - ◆ Methods of reducing the risk involved in currency fluctuations

- **Financing**
 - Sellers want to get their money as soon as they ship the good, whereas buyers won't want to pay for it until they have it.
 - ◆ **Collection Arrangement:** The seller employs the services of its bank to collect payment by depositing documents with the bank and receiving credit for the price.

- ◆ **Letter of Credit:** A document that the buyer of goods obtains from the bank and uses to pay the seller

Lecture 8: Sale of Goods Act

Monday, October 24, 2011

11:34 AM

➤ **Sale of Goods Act**

- A set of implied terms in a contract
- Only going to look at two parts, what the SALE of a GOOD is
- Purpose of the act is to in general protect the consumer of unscrupulous sellers
 - Love if a consumer
 - Hate if a seller
- Implies terms into your contracts for the sale of goods that you didn't negotiate or necessarily agree to but are deemed to be in your contract for your safety.
 - Law acts as though these are in your contract even though you didn't ask for them to be

➤ **What is the "Sale" of a "Good"**

- **Sale:** Where title or ownership or property in goods passes from the seller to the buyer for money consideration.
 - Don't have to worry about what the consideration is... it's always goods for money.
- **Goods:** Chattels.
 - Tangible personal (not attached to land) property
 - Chair that we are sitting in (can be moved, totally personal property)
 - Desk in this room, attached to the floor is real property... it is land. It is connected to the land.
 - SGA does not apply to land or anything attached to land
 - Doesn't apply to a gift, has to be goods for money.
 - Doesn't apply to services
 - ◆ Sometimes you buy something that is attached to a service element (Dream Carpet case), these count.
 - ◇ Ex. Sale of food in a restaurant is sale of a good.
 - Doesn't apply to a barter situation where goods are exchanged for goods or services for services.
 - ◆ Money needs to be there!

➤ **Breaches of the Act**

- **Warranty:** Refers to a minor nonessential term of the contract. IF a minor term is breached the contract is not discharged.
 - Each party must still perform and later the non breaching party can sue for damages
 - S 16 C
 - Implied warranty that goods be free from liens, chattel mortgages, etc.
 - Ex. A owns car B is a mechanic
 - ◆ B does work on the car and is owed \$2000 as repair bills. A will not pay
 - ◆ B will go to court house and attach a mechanics lien on the car, so that A cannot sell the car without somebody paying B first.
 - ◆ B can bring an action against A to have the car sold to satisfy the debt.
 - ◇ Shows that A owes B money

- ◇ Car is security
- **Condition:** Breach of an essential term
 - Contract is discharged
 - Non breaching party can get rescission (return goods and get their money back) or damages... most parties go for rescission
 - S. 17 18 and 19
- **Fundamental Breach:** A breach that is so serious that the whole purpose of the contract is destroyed.
 - Must prove that the goods are absolutely irreparable
 - Nothing you can do that will make them right and tradeable
 - Remedy: Sue for damages or rescission AND any exclusion clauses in the contract limiting the seller to liability are negated.
- **S. 16 Implied Condition that the seller have title to the goods at the time of sale**
- **S. 17 Implied Condition that goods match their description**
- **S.18**
 - **Fitness for Purpose**
 - Implied condition
 - Buyer must communicate the purpose to the seller, choose a seller that typically deals with goods of that description, and show the seller that you're relying on their skill & judgment in the selection of the good that would be fit for your purpose.
 - ◆ Don't prove all three, you can't use this section
 - Must have relied upon the seller of the item
 - **Merchantability**
 - Goods have to be saleable without a reduction in price!
 - Must be good for at least one of the range of purposes that goods like that would normally be used for.
 - ◆ Not looking at your particular purpose...
 - **Durability**
 - Goods must last a reasonable time
 - If they fall apart after 2 weeks you can take them back
 - Look at the use to which you put the goods, and the circumstances
- **S. 19**
 - Implied condition
 - If you buy something by sample, the bulk of the goods matches the sample
 - Buyer has a reasonable time to inspect the goods
 - Not deemed to have accepted the goods upon delivery
 - Seller is liable for hidden defects
 - ◆ If you inspected them but the defect is so hidden that you wouldn't have noticed it, they're liable.
 - Courts are on the buyers side
- **S. 20**
 - If a seller is selling new goods to an ordinary customer, the seller cannot exclude liability for breaches of sections 17-19.
 - Even if there is an exclusion clause in the contract, it is entirely negated.
 - If they sell used goods, they are allowed to include an exclusion clause in the contract, but it **MUST** be included prior to the contract being accepted.
 - Therefore, SGA applies, unless there is an exclusion clause
 - ◆ Clause must be in clear language, bold print, **OBVIOUS** that it is there

- An exclusion clause can be made for fundamental breaches... but you'd have to be stupid dumb to sign one of those.

Case 9: Dream Carpets Ltd vs. Sandhedrai

Sunday, October 23, 2011

1:24 PM

➤ **What's Happening**

- Dream Carpets claims that the defendant Sandhedrai owes them \$3020.00 relating to flooring materials and underlay that were sold to them and installed by Dream Carpets.
- Defendant agrees he entered an agreement with Dream Carpets, but that there were deficiencies in regards to the quality of the work done
 - Defendant counterclaims for breach of warranty and breach of the agreement and seeks damages to replace the carpet

➤ **Issues**

- Did Dream carpets supply the specific carpeting chosen by the defendant?
- Did Dream Carpets install the carpeting properly?
- Were the deficiencies raised by the defendant a fundamental breach of contract?
- If there was a breach of warranty or conditions, is the defendant entitled to damages?

➤ **Analysis**

- **What were the Terms of the Agreement?**
 - No dispute about the agreement, no dispute about how much the defendant still owes
 - Chacha Shell would be used for the most part, and a different carpet would be used in the basement.

➤ **Application of the Sale of Goods Act**

- Defendant acknowledges he did not pay the balance owing to the claimant, but the defendant said this is because the claimant breached the agreement because it did not install the specific carpeting he had selected
- A number of deficiencies were not completed, and the defendant claims he relied on the claimants reputation as a good carpet company to install it correctly.
 - Defendant maintains it is an implied condition as stated in the Sale of Goods Act that the flooring would be supplied in good and merchantable quality.
 - Ss 17 and 18 of the Sale of Goods Act
 - Section 17
 - ◆ Implied condition that the goods must correspond with the description
 - ◆ The sample needs to be of proper showing of the real thing
 - Section 18
 - ◆ If the following 3 conditions are met, it creates an implied warranty of fitness:
 - ◇ Goods in question are of a description that it is in the course of the sellers business to supply
 - ◇ The buyer has made known the particular purpose for which the goods were to be used
 - ◇ The contract is not for the sale of a particular article under its patent or trade name.

Case 10: Kovacs vs. Holtom

Sunday, October 23, 2011

1:35 PM

➤ **Facts**

- The plaintiff made a purchase agreement with the defendant for the sale of a 1963 Falcon Futura for the price of \$2500. As stipulated in the agreement, the defendant would retain the vehicle for the purpose of restoring it, at which point he would contact the plaintiff for delivery. Before the restoration was complete, the vehicle was destroyed in a fire (believed to be caused by arson.) The plaintiff has brought this action to the court seeking damages in the amount of the purchase price.

➤ **Issues**

- Is the defendant liable to the Plaintiff for the loss of the car?
- If so, what remedy does the plaintiff have against the defendant?

➤ **Analysis**

- Defendant claims the plaintiff had assumed the risk
- At the very least, the plaintiff was supposed to deal with the property diligently

➤ **Transfer of Property**

- **Section 20 Sale of Goods Act**
 - When there are future goods involved in the contract, the ownership transfers at the time the parties intend it to be transferred.
 - Regard the situation, intention of the parties, and the conduct of the parties.
- **Section 21**
 - If there is a sale of goods that something has to be done to the goods before the item can be sold, the ownership does not pass until that thing is done.
 - Property of the defendant...
- **Section 2**
 - Goods are in a deliverable state, a state in which the buyer would be bound to take delivery of them.
 - They weren't
 - Property of plaintiff...
- Since there was no clause in the contract addressing the transfer of property, the judge assumes they didn't even think about it, and the property is still that of the plaintiff.

➤ **Solution**

- The plaintiff must give the defendant back the \$2500 they paid for the restored car, and they must cover court costs as well.

Lecture 9: Ownership Transfer

Wednesday, October 26, 2011
12:02 PM

➤ **Rules**

- ***Risk and Loss follows title, so if there is nothing in the contract that states when ownership transfers, it is assumed according to the following rules:***
- Rule 1:
 - Specific goods/Ascertained goods
 - Must be in a deliverable state
 - Go to the store, try on a ring, and it's perfect. Doesn't need to be altered, or anything, you want to buy it now.
 - Same ring, but you want to pick it up in 3 weeks. If it gets stolen while the store is holding on to it, too bad its your problem.
 - The transfer of title occurs when the contract is made
- Rule 2:
 - Specific goods/Ascertained goods
 - Certain work must be done in order to put the goods into a deliverable state.
 - Same ring, but its too big, so you send it off to get fixed. Title doesn't pass until the ring is sized properly and the company phones me to tell me its ready.
 - The transfer of title occurs when the work has been done and the buyer has been notified
- Rule 5:
 - Unascertained Goods
 - The transfer of ownership transfers when the product is delivered to the carrier (train, boat, etc)
 - If the seller is passing it directly to the buyer, title passes when it is in the sellers hands.

Reading 4C: Exemption Clauses

Sunday, October 23, 2011

3:09 PM

➤ **Exemption Clauses**

○ **Their Purpose**

- An exemption clause is a clause in a contract that exempts a party from liability.
- A party who is at significant risk of harm to the other party if they breach the contract can plan to cover their liability.
 - They can get insurance against the risk and raise its price when making the contract to cover the insurance they needed.
 - Self insure... charge a higher fee and build up a reserve fund to pay any claim that later arises.
 - Include an exemption clause, excluding themselves from any liability.
- Allow the supplier of the foods to keep their prices low
- If the supplier is sued for damages despite the exemption clause, it will completely disclaim liability, and will avoid the difficult question of the extent of their liability for the harm done.
- If the supplier is in the position of using a standard form contract, they will have an advantage over the customer.
 - Customer may gladly accept a lower price, but not realize there is an included exemption clause.
- Work well when both parties have reasonably the same amount of knowledge surrounding the law.

○ **Attitudes of the Courts: Requirement of Adequate Notice**

- If an exemption clause is on a contract that the customer doesn't sign, like a receipt, the term is not considered to be part of the bargain.
- Even if the person signs the document, they can plead non est factum in that they didn't know the clause was there and it was not made obvious.
 - If successful, entire document is void
 - Contractor must draw attention to the exemption clauses in the document
- If the clause was expected, the customer will have no help if they didn't see it, its their fault.

○ **Strict Interpretations of Exemption Clauses**

- Exemption clauses should be strictly construed against the party that draws them because they permit parties to evade legal responsibility ordinarily placed on suppliers
- The burden is on the drawing party (the party that prepared the agreement or the particular clause) to prove the actual cause of the loss is covered by the clause.
- Courts narrowly describe the failure that is covered by the clause

○ **Fundamental Breach**

- If there is a breach that is so serious it defeats the purpose of the contract.
 - In the absence of the exemption clause, the aggrieved party could have treated the contract for discharged and sue for damages.
 - With an exemption clause though, it can be so broad that it protects

the wrongdoer from any liability.

- Courts label is instead as a "fundamental Breach"
 - A breach that is so significant it deprives the innocent party of most of the benefit of the contract.
 - ◆ Exemption clause becomes ineffective

➤ ***Possible Criminal Consequences of Breach***

- When a party breaks the contract with the knowledge that the action will
 - Endanger human life
 - Cause bodily harm
 - Expose valuable property to damage
 - Deprive the inhabitants of a place of their supply of light, power, gases or water
 - Prevent the operation of a train by a common carrier

Lecture 9: Infants Act in Regards to Capacity

Wednesday, October 26, 2011
11:38 AM

➤ **Infants Act**

○ **Only worry about section 19**

- A contract made by a person who was an infant at the time (under the age of 19) the contract was made is unenforceable against him or her unless it is:
 - A contract specified under another enactment to be enforceable against an infant
 - Affirmed by the infant on his or her reaching age of the majority
 - Performed or partially performed by the infant within one year after his or her attaining the age of majority
 - Not repudiated by the infant within one year after his or her reaching the age of majority.
- A contract that is unenforceable against an infant is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.

Case 11: Dawe vs. Cypress Bowl Recreations

Sunday, October 23, 2011

3:42 PM

Facts:

The plaintiff (Ted Dawe) was injured in a skiing accident on January 6th, 1991. This accident was allegedly caused by the negligence of the ski-lift operator, "Cypress Bowl Recreations Ltd," whom the plaintiff argues did not adequately inform him of the risks associated with a section of the skiing area. At argument is whether the exemption clause on the lift purchase ticket should waive Cypress Bowl's liability for the injuries experienced by the plaintiff.

Issues:

1. Did the defendant take reasonable care to inform the plaintiff of the exemption clause (or can we reasonably expect the plaintiff to be aware of this clause)?
2. Should the said clause exempt the defendant from liability to the plaintiff?

Decisions:

1. The defendants may all necessary efforts to inform the plaintiff; therefore, we can reasonably expect the plaintiff was aware of the clause.
2. The clause will apply, and the defendant is not liable for damages.

Reasons:

1. The clause was printed in bold letters directly on the front of the ticket. As well, numerous signs were placed throughout the ski area indicating that the defendant exempts itself from liability for any accidental injury (including one within the vicinity of the area in which the plaintiff himself was injured.) As well, since the plaintiff is a learned individual who is clearly literate, we can definitely expect he would be aware of this clause.
2. Provided the defendant makes a reasonable effort to inform the plaintiff of the exemption clause, and the plaintiff agrees to continue the transaction/relationship, the plaintiff will assume all risks associated with the contractual activity. Continuing the relationship while being aware of the clause's existence equates to consenting to the exemption clause, whether or not consent is explicitly stated.

Legal Principles:

- If an exemption clause is communicated to a party, and the party consents to the clause (whether explicitly by acknowledgment or implicitly by continuation of the agreement) the party is bound by the clause and it will be strictly enforced in court
 - *Reasonable attempt must be made to communicate the exemption clause*
- If a plaintiff is aware that there is writing on a ticket/contract, and is able to read or comprehend this writing, he or she is bound by any conditions stated within this writing (whether he or she is actually aware of the implications or not)

Porelle vs. Eddie's Auto Sales Ltd.

Sunday, October 23, 2011

3:49 PM

Facts:

-

The plaintiff (Porelle) purchased a used 1987 Oldsmobile Delta 88 from the defendant. After a short period of ownership, the plaintiff experienced problems with the vehicle, requiring repairs to the amount of \$2141.42. At the time of the sale, the plaintiff signed a contract with the defendant exempting himself from damages due to defects in the vehicle. At issue is whether the implied conditions in the "Sale of Goods Act," in reference to the sale of used goods, will override the explicit clause in the contract.

Issues:

1. Was there a breach in the "implied term as to fitness" condition?
2. Will the exemption clause in the contract negate all the implied terms of the Act?

Decisions:

1. The implied condition has not been breached.
2. The implied terms in the Act can be negated by the express terms in the exemption clause.

Reasons:

1. According to the Sale of Goods Act s. 16 (D) in reference to "the implied warranty as to fitness," if an express condition agreed to by the contracting parties is inconsistent with the implied warranty of the Act, the implied term is waived. As the conditions of the exemption clause were consented to by the plaintiff (by means of signature) the plaintiff effectively exempted the defendant from any liability for a lack of fitness for purpose. The courts must uphold this exemption.
2. In reference to the sale of used goods (as opposed to the sale of new goods) the warranties/conditions implied by the Act only apply when there are no express terms within the contract that come at odds with these implied terms. By seeing the exemption clauses printed clearly on the front and back of the written contract, and signing agreement to these clauses, the plaintiff waived his rights provided to him under the Act.

Legal Principles:

- Implied terms in the Sale of Goods Act are meant to protect the purchasers of new and used goods
- Terms agreed to in contractual negotiations (i.e.// exemption clauses) can alter or negate these implied terms, provided it is not during: a retail sale of new goods to an individual for non-business use.

Case 12: RE: Collins

Sunday, October 23, 2011
3:51 PM

Facts:

- After the divorce of Mr. Philip Collins and Ms. Andrea Collins, Mr. Collins has made annual spousal support payments and generous child support payments to their two children (Simon and Joely Collins.) Once Ms. Collins remarried to a Mr. Fleming, Mr. Collins ended the spousal support payments, thus relieving Ms. Collins from her state of financial security. Mr. Collins then subsequently purchased a property for his two children, to be held in trust and maintained by their mother until they reach the age of maturity. Ms. Collins, who had no ownership interest in the property, made the children aware of her discomfort with her current financial position. The children each agreed to sign over their ownership of the property to their mother, who would then have ultimate discretion as to the maintenance of the property and estate. Due to the infants act, neither title transfer offer was legally enforceable. Once Joely reached the age of majority, she confirmed her agreement (thus making it legally enforceable); this action is to grant a court order allowing the remaining infant, Simon, to officially transfer his ownership interest to his mother.

Issues:

1. Is the agreement to transfer title to Ms. Collins to Simon's direct benefit?
2. Does Simon Collins require the protection accorded by the Infants Act?

Decisions:

1. It is not for the child's direct benefit (or "best interest") to have the contract ordered enforceable.
2. Simon will be best served by the protection of the Act.

Reasons:

1. The proposed contract does nothing more than offer direct benefit to Ms. Collins at the direct expense of the children. Furthermore, granting such a request will not alter the contributions required by Mr. Collins to Simon, and will therefore provide any financial benefit whatsoever. As such, the proposed contract confers no direct benefit to Simon and should therefore not be ordered enforceable.
2. At this time, Simon requires the protection of the Infant's Act to maintain his vested interest in the trust created solely for his benefit. If at a later age he wishes to transfer these benefits to his mother he may do so, but if he changes his mind he should not be bound by an illegitimate agreement.

Legal Principles:

- The age at which a person reaches majority at common law is 21
- Contracts entered into by those under this legal age are considered unenforceable against the minor (though they may be enforced by the minor against the other party)
- Courts can order contracts enforceable against a minor provided that: a) The contract directly benefits the minor, and b) The minor does not require protection under the "Infant's Act"

Reading 4A: Discharge of Contract

Sunday, October 23, 2011

4:20 PM

➤ **The Ways in Which a Contract May be Discharged**

○ **Discharge of a Contract**

- Cancel the obligations of a contract; make an agreement or contract null and inoperative

- Discharged by performance, agreement, frustration, and operation of law

➤ **Discharge by Performance**

○ **The Nature of Discharge by Performance**

- The expected outcome in contracts
- The contract ends when they have performed all their respective obligations satisfactorily
- Both parties must complete the performance
- Services rendered, goods delivered, a cash payment made etc.

○ **Tender of Performance**

- An attempt by one party to perform according to the terms of the contract
- If the seller of goods attempts to sell them (performance) and the buyer rejects them, the seller does not need to try again, he has fulfilled his side of the deal.
 - Can sue for breach of contract

➤ **Discharge by Agreement**

○ **Waiver**

- An agreement not to proceed with the performance of a contract already in existence.
- Occurs if neither party has performed their side yet, and both sides need to agree to call off the bargain.

○ **Substituted Agreement**

▪ **Accord and Satisfaction**

- A compromise between contracting parties to substitute a new contractual obligation and release a party from the existing one
- Ex. A seller may realize they cannot obtain an imported good that they said they could, and they may offer related goods at a cheaper price, if the buyer releases them from their original promise.
- The difference between material alteration is that in material alteration, the parties are primarily concerned with a new arrangement, and the discharge of the old agreement is irrelevant.... In accord and satisfaction the main goal is to get rid of the old contract, and by making a new one that just so happens to accomplish that.

▪ **Novation**

- The parties to a contract agree to terminate it and substitute a new contract.
- **Material Alteration**

- ◆ Get rid of the old contract, and create a new one by substituting the matter of the contract.
 - **A Change in Parties**
 - ◆ If a party in the contract leaves, and the remaining parties agree to replace them with someone new.
 - ◆ The old contract ends, and a new one begins with the new party.
 - **A Contract Provides for Its Own Dissolution**
 - Before agreeing to a contract, sometimes a party will know of a possible event that will not enable them to fulfill their promise.
 - If the other party agrees, they can include a term in the contract that if that event occurs, the contract will result in being terminated, or an additional condition added or removed.
 - **Condition Precedent**
 - A future event that must have occurred before the promisor's liability is established.
 - ◆ Ex. A offers B a job, B accepts but says only if A can find him a place to live in the city. B's acceptance is not complete until A finds a place.
 - ◇ Some people don't think that this is the contract being discharged, but that a contract was never even made.
 - ▶ Wrong, parties cannot just withdraw, unless the condition precedent is proven to be impossible to fulfill.
 - **Condition Subsequent**
 - An uncertain event that brings a promisor's liability to an end if it happens
 - ◆ Ex. Baseball fans who buy tickets but then the game is rained out before it even starts will get out of their liability and can get their money back.
 - In contracts for the shipment of goods, **Acts of God** (the raging of a natural element) can be a condition subsequent if it destroys the goods.
 - **Option to Terminate**
 - A contract can include a term that gives one or both parties the option of bringing an end to the contract before its performance has been completed.
 - Must be included in the original contract, and approved by both parties.
- **Discharge by Frustration**
 - **Effect of Absolute Promises**
 - Common law used to hold a party absolutely responsible for a failure to perform their promise, even if the failure wasn't their fault.
 - The clauses don't have to be in the contract, because if it's not their fault, people don't really think about putting it in the contract in the first place.
 - Courts excuse people from failure that wasn't their fault... sometimes.
 - **Doctrine of Frustration**
 - The law excuses a party from performance when external causes have made performance radically different from that contemplated by the parties.
 - If tasks are just harder to perform due to unforeseen events, that does not

discharge a party, the event needs to be totally impossible.

- The event that makes the promise impossible must occur after the contract is made.

- ***Self Induced Frustration***

- A party willfully disables itself from performing a contract in order to claim that the contract had been frustrated.
- Breach of Contract

- ***The Effect of Frustration***

- ***Harshness of the Common Law***
 - Frustration can cause serious hardship for the opposite party

➤ ***Discharge by Operation of Law***

Lecture 9: Frustration

Wednesday, October 26, 2011
12:16 PM

➤ **4 Ways to Discharge a Contract**

- **Performance**
 - All goes as planned
 - No breach, no law suit, the contract just is fulfilled
- **Agreement**
 - Parties mutually agree to abandon the contract
- **Frustration**
 - The contract is discharged by frustration and neither party is liable to each other if:
 - There is a completely unforeseeable event, beyond the control of the parties, and without fault of the parties.
 - Could be an act of god.
 - ◆ Earthquake, flood, fire, etc.
 - That happens after the contract is made
 - ◆ But prior to completion
 - Makes the contract IMPOSSIBLE to perform, or radically different than the intention intended by the parties initially.
 - Frustrating event has to be directly or indirectly referable to the contract, and not just a random event.
 - If all 4 of these rules occur, the parties are left on their own to bear the damages.
- **Breach of Condition**
 - Breach of a major/essential term

Case 13: Jedfro Investments Ltd. Vs Jacyk

Sunday, October 23, 2011

5:45 PM

➤ **What's up**

- Three guys wanted to buy a property off Air Products, and they paid for part of the purchase and the balance was secured by a note and a trust deed in favour of Air Products.
- They were all supposed to have paid by 1991, but the land was not saleable as originally planned, so the note was extended and paid off partially until 1996, when Air Products demanded the remaining 3.8 million.
 - Only Jacyk could pay his part, so in order to not lose the property, he paid the whole note, benefiting all three parties.
 - Jacyk then wanted a bigger share of the profits since he footed the bill essentially.
 - Matukas thought that was fair
 - Iwasykiw said no way, and vouched to come up with the part he owed originally, yet never really did.
 - ◆ Time expired, and he didn't pay anything, and his venture was foreclosed, losing the 1.4 million he had invested initially.
 - ◇ Iwasykiw sued the other two for breach of joint venture agreement.
- **Judge claims that Iwasykiw could have saved himself like Matukas did, but he chose not to, hence bringing the misfortune on himself.**
 - Since he hasn't paid any money, it was stupid of him to expect to still be involved.

➤ **Analysis**

- So was the initial contract voided?
 - Not from performance or frustration... agreement?
 - Even though all the parties were acting as though the initial contract was done and a new one was made when Jacyk bought the note, it never was literally ended and a new contract began.
- It was decided that by Iwasykiw not paying his portion, that was not him saying he didn't still want to be part of the contract, he just didn't want to accept this new portion of the contract that Jacyk was proposing.
- By Jacyk asking for new terms, it showed that he was saving the joint venture, not terminating it.
 - Joint Venture remains in force.
- Jacyk was not obliged however to buy the note, that was an action that any third party could have done.
- The appellant states that as part of the joint venture all decisions must be made by all three of them, and Jacyk buying the note was not.
 - No. He was acting on the best behalf of the joint venture, and since he was part of the venture, the fact the other two couldn't fulfill their deal doesn't mean he should lose out on his share, so he did what needed to be done.
 - No breach of contract
- Iwasykiw had the option to pay the amount, and should not get his initial 1.4 million back since the company gave him fair notice before foreclosing the

account.

- It is not the function of the court to re-write the contract, and relieve one of the parties in any situation.

Case 13: Class Analysis

Wednesday, October 26, 2011
12:20 PM

Joint venture between Morris, Peter and Louis.

Traded money to AirProducts for land.

Didn't have enough money, so they bought a promissory note to pay the purchase price used as a security.

AirProducts got nervous, and threatened to close the deal because they didn't think they were going to get paid.

Peter acted alone, and purchased the whole promissory note from AirProducts to save the venture.

Did this before there was any agreement about how Louis and Morris would pay him back though...

Terms that existed in the joint venture agreement were not followed.

Louis and Peter made a deal concerning the payment, but Morris never paid Peter back.

Morris is now angry because the venture went south, and he wants his initial investment back, and says that Peter had no right to go out and buy the entire promissory note himself, and that this ended the joint venture, and that Morris should get his investment back.

Uhhhhh no.

Their conduct was that they all wanted to save the joint venture, and not terminate it. They wanted it to stay alive

Promissory note was not discharged by performance or agreement... was not discharged by frustration or breach of condition either due to the circumstances, so the agreement was still there, and Morris is not entitled to his initial investment.

Case 14: Saturely vs. Lund

Sunday, October 23, 2011

6:14 PM

➤ **What's Up**

- Plaintiffs entered into a written agreement for the sale of their home for \$243,000. Sale was to close August 20th, 2004 and there were no limiting conditions as to how the defendants were to finance the purchase price.
- The defendants were currently selling their own home for \$410,000 with a closing date of August 4th, 2004.
- On July 23rd 2004, there was an oil spill in the defendants house, making it unsellable. They were supposed to use the funds from selling their house to purchase the new house, so now they couldn't buy it.
 - They fixed the oil spill problem in 2005, and sold the house for \$415,000
- On October 8th 2004, the plaintiffs sued for specific performance (they must buy the house) or for damages of breach of contract.

➤ **Analysis**

- Defendants maintain that it was an implied condition that they had to sell their house first to pay for the new one, and due to events beyond their control they should be excused from the contract.
 - Frustration
- Both parties agreed that an initial contract was made to sell the house, and that the plaintiff was ready and able to sell it still.
- Defense though?
 - No proof that it was implied that the defendants property needed to be sold as condition for the sale to go through.
 - Since there is no proof that the sale of the other house is connected to this case, the oil spill and any claimed frustration associated with it is irrelevant.

Case 14: Class Analysis

Wednesday, October 26, 2011

12:32 PM

- Saturley and Lunds have an agreement that Lunds will buy Saturley's house on August 20th, 2004.
 - On July 23rd. Lund's current house got filled with oil in the basement somehow, so they could no longer sell their house, which they were counting on the money from to buy Saturley's house.
 - Didn't have enough money to pay the Saturley's, so the Saturley's sued for damages or specific performance.
 - Lunds claim frustration, that it wasn't their fault the oil was there, and there was nothing they could do because they couldn't sell the house and therefore didn't have enough money.
- Judge states that the oil leak in the Lunds house was too far away from the actual contract, seeing as that was not listed as a condition precedent in the contract.
 - The oil spill in the Lund's home is a totally separate event, and the fact that there is oil there doesn't impact the contract between the Lund's and the Saturley

Lecture 9: Rules for Calculating Damage Costs

Wednesday, October 26, 2011
12:41 PM

➤ **Rules**

- To be recoverable, the damages must be reasonably foreseeable to the parties at the time of the contract
- Plaintiff must do what is reasonable to mitigate or to minimize their losses on breach.
- Can't allow losses to accumulate.

Reading 4B: Breach of Contract and Damages

Sunday, October 23, 2011

6:30 PM

➤ **Implications of a Breach**

- Not every breach may discharge a contract
- Breach does not discharge a contract automatically
 - Even when a breach is reason enough to discharge the contract, the party that suffered the breach must raise it in order to be discharged.
- In order to discharge the whole contract, the breach needs to breach the entire contract, or breach a segment that entirely changes the meaning of the contract.
- Breach of a minor thing entitles the injured party to damages, but they are still required to fulfill their obligations.
- If the breach is of a fundamental term, the party committing the breach is still bound, but the injured party may elect to discharge the contract.
 - **Minor Breach:** A breach of non essential term of a contract, or of an essential term in minor respect.
 - Ex of the later. A promised 10,000 bags of flour, only brought 9,998.
 - **Major Breach:** A breach of the whole contract or of an essential term so that the purpose of the contract is defeated.
 - **Conditions:** Essential terms of a contract
 - **Warranty:** A non essential term of a contract

➤ **How Breach May Occur**

- A party can breach their contract by:
 - **Expressly Repudiating its liabilities**
 - A declaration by one of the parties to the other than it does not intend to fulfill their promise.
 - The person being promised to is immediately allowed to treat the contract as discharged, and to sue for any lost damages.
 - ◆ Before finding a replacement contract they must inform the repudiating party that they have terminated the contract and is reserving rights to sue.
 - They can also insist on performance
 - **Anticipatory Breach:** A breach that occurs in advance of the time agreed for performance of a contract.
 - Simply ignoring the contract is not repudiation, they need to explicitly state they are not going to fulfill the contract.
 - **Acting in a way that makes its promise impossible to perform**
 - Must be a willful or negligent act
 - Can take place either before or during the performance
 - **Either failing to perform at all or tendering an actual performance that falls short of its promise.**
 - **Types of Failure**
 - ◆ Failure of performance only becomes apparent when the time for performance arrives or during performance.
 - ◆ The extent of the failure has an effect on the nature of the remedies available to the injured party.
 - ◆ Promisee will only be freed from liability if there is a good

reason to think that future performance will be defective or the expected deficiency to date is important to the whole performance promised.

- **The Doctrine of Substantial Performance**
 - ◆ Performance that does not comply in some minor way with the requirements of the contract.
- **When the Right to Treat the Contract as Discharged is Lost**
 - ◆ Sometime, even if they deserve discharge from the contract, the injured will only receive damages:
 - ◇ The aggrieved party has decided to proceed with the contract and accept benefits under it despite the breach
 - ◇ The aggrieved party may have received the benefit of the contract and not learned of the breach until performance was complete.

➤ **Types of Remedies for Breach**

○ **Damages**

- A money awarded to compensate an injured party for the loss caused by the other party's breach.
- **Purpose of an Award of Damages**
 - Puts the party in the same place they would have been in had the contract been completed.
 - Designed for compensation, not punishment
 - Strictly economic removes any moral biases.
- **Mitigation of Damages**
 - A party that has suffered a loss as a result of breach of contract is expected to do what it can to mitigate (reduce the loss) the extent of the loss
 - An injured party can only recover the losses resulting from the breach that could not be reasonably avoided.
- **Prerequisites for an Award of Damages**
 - To qualify for recovery, damage arising from the breach of contract must 'flow naturally from the breach'.
 - ◆ The loss resulting from the breach must be within foreseeable limits of what the parties would have expected as a likely consequence of a failure to perform.

➤ **The Measurement of Damages**

○ **Expectation Damages**

▪ **Differences between Tort and Contract**

- In tort, only conceivable time for measuring damages is the time of wrongdoing-- the moment the tort is committed.
- In breach of contract, the reason for referring to the earlier moment of formation is that from that moment, a promisor becomes liable to uphold the promise, and the promisee becomes entitled to a continuous expectation of performance until the time for performance arrives.
- Courts include in their award to the breached party an amount equal to the expected profits on the aborted transaction.
 - ◆ **Expectation Damages**

- **Opportunity Cost**
 - The lost chance of making a similar contract with a different promisor
- **Contracts of Sale**
- **Consequential Damages**
 - Secondary, one stage removed from the immediate effects of breach.
 - May arise from breach of a wide variety of contracts, not just the sale of goods.
- **General Damages**
 - An estimated amount that a court may award, over and above specific losses for harm that cannot be calculated in precise monetary terms, but that the court believes are necessary to compensate the aggrieved party fairly.
- **Reliance Damages**
 - If a person gets bailed on in a contract at the last second, but they are able to find a suitable replacement and not suffer, they cannot sue for expectation damages.
 - They can sue for the fact they lost time, and effort in finding a replacement
 - ◆ Reliance Damages
- **Liquidated Damages**
 - An amount agreed to be paid in damages by a party to a contract if it should commit a breach
 - The actual loss due to the breach may not related to the agreed upon sum at all, it could be way more or way less.
 - If the terms were accepted though, they must be paid
 - Provide economic incentive to promisor to perform and the promisee to minimize its actual loss
 - If a term in the contract specifies a HUGE amount a court may find it is intended merely to frighten the party into performance.
 - **Penalty Clause**
 - ◆ Court will disregard it when awarding damages based on an assessment of the actual loss suffered.
- **Nominal Damages**
 - Acknowledge a breach of contract where the loss sustained by the promisee is negligible.

➤ **Problems in Measuring Damages**

- **Mental Anguish**
 - Non economic contractual interests that should be covered.
 - Damages for mental distress may be awarded in any breach of contract if the damage was foreseeable by the parties at the time the contract was created.
- **Wrongful Dismissal**
 - Apart from financial loss (for which they are entitled) the dismissed employee may feel humiliated and suffer a serious loss of confidence...
 - Needs to be serious, the person can't just be kinda sad...
 - ◆ The employer needs to have lied about the reason of dismissal, of have defamed the reputation of the employee.

- Plaintiff must prove psychological harm for which mental anguish damages are claimed; it will not be presumed by the court.
- ***Lost Holidays***
 - There are many contracts that cost a lot of money but are not intended to confer an economic benefit on the vacationer.
- ***Attitude of the Courts***
- ***Cost of Performance vs. Economic Loss***

Case 15: West Coast Transmission vs. Cullen

Sunday, October 23, 2011
6:31 PM

Facts:

- Kato engineering, the supplier of power generators to Cullen for assembly into “genset” power units for sale to Westcoast Transmissions, was found liable to Cullen for the sale of unmerchantable (non-workable) products in reference to the Sale of Goods Act. This liability, which Cullen was then liable to Westcoast Transmissions for, was calculated as the purchase price of the defective units. Westcoast Transmissions appeals this decision to include the costs of replacement power generation (i.e.// alternate power generators) required to maintain operations, as well as the purchase price of the units, in the calculation of damages.

Issues:

1. Does Cullen’s liability to Westcoast include the costs of backup/replacement power generation?
2. Is Kato liable to Cullen?

Decisions:

1. The trial judge’s ruling that Cullen is held liable only for the sale price of the “gensets” is upheld.
2. Kato is not held liable to Cullen, because it was not foreseeable that WestCoast wouldn’t have a back up generator

Reasons:

1. Presumably even if the power generators provided by Cullen worked, Westcoast Transmissions would have to incur the costs of backup generation in order to reduce the risks of operating on only one source of power. Since the injured party should take all reasonable steps to minimize the extent of their injury, we should have expected Westcoast to invest in backup power generators and cannot hold Cullen responsible for their mismanagement.

Legal Principles:

- Damages are meant to be equal to the amount that would return the injured party to the position they would be in presuming the other party performed their contractual obligations; damages are limited to the amount the offending party should reasonably expect the injured party to incur in costs as a result of their breach
- The injured party has the obligation to take all necessary steps to minimize their injury due to the breach of the other party

Case 16: Blackcomb vs. Schneider

Sunday, October 23, 2011

6:31 PM

Facts:

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The defendant (Darwin Schneider) submitted a deposit for the option to purchase land from the plaintiffs at a later date. After several written exchanges over the year since the option was purchased, the defendant's solicitor informed Black comb's representatives that Mr. Schneider could not close on the deal (due to financial difficulties.) The plaintiff offered the defendant a final extension on the agreement, at which point the defendant would be considered in breach and have his rights to purchase and deposit forfeited to the plaintiff. This action is brought by the plaintiff to receive a court order for the amount of the deposit (plus applicable interest) provided for the plaintiff.

Issues:

-

1. Did the plaintiffs breach the agreement by not clearing encumbrances on the property prior to closing?
2. Will the 10% deposit provided by the plaintiff be interpreted as a deposit or a penalty?

Decisions:

1. The plaintiffs were not in breach of contract.
2. The fee is considered a deposit, and not a penalty. As such, it must be forfeited to the plaintiffs.

Reasons:

1. The agreement specified encumbrances must be clear before the effective closing date. As the first closing date listed was June 14th of 1999, and the encumbrances were removed well before this date, there was no breach of contractual term.
2. A cash outlay is considered a penalty at the time of contract formation, and not at the time of dissolution. Since the plaintiff (Black comb) only stands to gain by the discharge of contract, as they can then sell the property for a significantly greater market price, they would have no motivation to penalize the defendant for not closing on the agreement. Since the fee was calculated as a genuine pre-estimate of damages at the time the contract was formed, it is considered a deposit regardless of the ensuing events.

Legal Principles:

- If a party foresees that breach of the contract may cause them to suffer harm, they may include these foreseen consequences in the contract in the form of mandatory deposit
- If the clause is perceived to be a genuine attempt by the firm to pre-estimate damages, the courts will hold that it is a deposit; if it is interpreted as punitive in nature, it will be construed as a penalty and declared invalid

If considered a deposit, the clause will remain enforceable even if the party does not suffer the damages it genuinely expected to incur in breach

MIDTERM

Monday, October 31, 2011
11:27 AM

Reading 5A: The Parole Evidence Rule

Monday, October 31, 2011

11:27 AM

➤ **Parole Evidence Rule**

○ **The Meaning of the Rule**

- When negotiating a contract, parties often talk about many terms beforehand, making offers and counter offers over and over again.
 - Sometimes when the agreement actually gets put into a written document, some of the terms that a party thought were in it, aren't and they are unhappy.
 - ◆ If there is no clear evidence that this term was actually agreed upon and was simply omitted by error, the contract will be enforced as written.
- Because of the Parole Evidence rule, a party cannot later enforce a term that was not agreed upon in the written contract, even if it was agreed upon apparently in words.
- Does not refer to the formation of the contract, such as legality, the capacity of the parties, mistake, duress, undue influence or fraud.
 - Operates only to exclude the addition of terms not found in the written document.

○ **The Consequences of the Rule**

- Sometimes parties agree to omit terms from the contract, but assume that it will still be in there somehow.... Stupid.
- Court will not be lenient on the rule because then companies would just go to court and try and make the contract more beneficial for them when it shouldn't be.
 - Basically if you want a term to be included in the contract and enforced, it needs to be in the written final document.

○ **The Scope of the Rule**

- **Does the Document Contain the Whole contract?**
 - Sometimes the court may find that the written document was not intended to embody the whole contract

○ **Interpretation of the Contract**

- Does not effect express terms already in the written contract

○ **Subsequent Oral Agreement**

- Does not exclude evidence of an oral agreement that the parties may reach after they have entered into the written agreement.
 - Subsequent oral agreement may change the terms of the written agreement
 - Courts will hear this case.

○ **Collateral Agreement**

- A separate agreement between the parties made at the same time as, but not included in, the written document.
 - Maybe because the written contract did not seem like the place for it
 - The collateral agreement may be enforced as an entirely separate

contract from the written one

- Separate consideration needs to be demonstrated though, or else this rule would be heavily abused.

○ ***Condition Precedent***

- Any set of circumstances or events that the parties stipulate must be satisfied or must happen before their contract takes effect.
- Can be enforced if it was orally made.
 - Even if the contract explicitly states everything must be written.

Case: General Tire vs, Aylwards Ltd.

Friday, December 16, 2011
2:18 PM

Facts:

The plaintiff seeks summary judgment for money payable to the company under a loan guarantee. The defendant agrees on the principle debt outstanding, but argues against its liability on the debt due to collateral agreements of the debt structure that did not occur. Thus, the defendants argue, the guarantee was contingent upon conditions that were not met and is therefore legally unenforceable.

Issues:

1. Should the alleged misrepresentations of the plaintiff automatically discharge the defendant's liability?

Decisions:

1. The defendant is liable to repay the debt outstanding.

Reasons:

1. The court finds the collateral representations to be "vague, non-specific, and incompatible with the guarantee." Where ambiguous agreements made between parties come at odds with the express terms of a written contract, the terms of the contract will stand. Therefore, the collateral agreement receives no consideration, and the defendants remain liable for the balance of the debt outstanding.

Legal Principles:

- "Parol Evidence Rule": When terms of a written contract are clear and unambiguous, the parties are not permitted to introduce evidence outside of the contract to alter its fundamental meaning
- Exceptions to this include: a) subsequent oral conditions; b) collateral oral agreements; c) written documents not meant to be the final form; or d) an oral condition precedent (subject to...)
 - In A, B, and C above consideration must be proven to exist for both parties to the agreement, such that it is clear that the intentions of the parties are markedly different from those implied in the written form

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Lecture 10: Parole Evidence Rule

Monday, October 31, 2011
11:27 AM

➤ **Parole Evidence Rule**

- If you have a clear unambiguous written contract, any other written or oral evidence that is outside of the actual contract isn't even looked at in the court room.
 - **Parol:** Any source of the terms of the contract (oral or written) that is not part of the final written contract, even if agreed upon,
- Where the rule applies:
 - Rule 1
 - Written contract that is clear and unambiguous
 - ◆ No interpretation issues
 - Rule 2
 - Later, one party alleges that there were further oral or written terms not included in the contract
 - Rule 3
 - If these extraneous terms add to, qualify, vary, subtract from or contradict the written contract then only the written contract is enforced.
- **General Rule:** Prevents parties from coming to the court and trying to change the contract into something more favourable and better for them.
 - **Exceptions to the Rule**
 - Parole Evidence will be looked at if there are formation issues, interpretation issues, or if there is evidence of misrepresentation (undue influence, duress, unconscionability)
 - Will be looked at if there is a condition precedent
 - Will be looked at if the evidence is a collateral contract
 - ◆ A separate contract with separate consideration

Reading 5B: Misrepresentation

Thursday, November 03, 2011

12:25 PM

➤ **Misrepresentation and Torts**

- Misrepresentation amounts to a tort when it is made fraudulently or negligently.
 - If the misrepresentation is innocent in that the party who made the promise genuinely thought they were telling the truth, no tort has been committed.
 - Becomes fraudulent if the innocent party fails to try and fix it after it was been learned of.

➤ **Misrepresentation and Contracts**

- Usually occurs during bargaining before a contract is formed.
 - **Material:** Could be reasonably expected to influence the decision of a party to enter into a contract.
 - Court may nix the contract at the request of the injured party.
 - If the misrepresentation was negligent or fraudulent, the court may also award damages.
 - If misrepresentation was innocent, no damages will be claimed, and the injured party will only be entitled to the right to **rescind**
 - ◆ Set the contract aside and put the party back in their pre contract position.
 - ◇ If the matter cannot be reversed or restored, aggrieved party loses the right to rescind
 - ▶ Too bad so sad, doesn't get anything.
 - Injured party can claim misrepresentation was based on a term of the subsequent contract, in which case the party is entitled to a remedy based on breach of contract.

➤ **Consequences of Misrepresentation in Contracts**

- Innocent misrepresentation results in the voiding of the contract
 - If the injured allows an unreasonable amount of time to pass without repudiating, or takes further benefits under the contract, she loses her right to rescind.
 - Sustained out of pocket expenses while performing the contract, before becoming aware of the right to be able to rescind, they may be entitled to **indemnity or compensation**.
 - Money award given as a supplement to rescission for loss sustained in performing a contract.
 - This loss must arise directly out of performing the contract
- In sale of land, the right to rescission for innocent misrepresentation is lost once title to the property is transferred, and the transaction is complete.
 - People when buying property are supposed to take this step before they purchase the house, so if there are any terms in the contract stated about the property that are misrepresentation then they should notice them on their own before hand.

➤ **Opinion vs. Fact**

- A false assertion is a misrepresentation only if it is made as a statement of fact.

- Opinion can't really be misrep
- People can't sue if the seller's opinion doesn't match the product.
- **Expert Opinion:** An opinion given by a person who purports to have specialized knowledge of a subject.
 - Equivalent to a statement of fact
- Actions can be taken as assertion of fact as well

➤ **Signed Documents and Misrepresentation by Omission**

- If a party is expected to sign a document hurriedly or rushed and isn't given a chance to read or understand it, and the other party has a good idea that the signing party probably won't understand some terms, it can be stated that they are not expected to accept all the terms, because they didn't even have time to read them all.

➤ **Silence as Misrepresentation: Contract Requiring Disclosure**

- **When One Party has Special Knowledge**
 - Failure to include pertinent information is also considered misrep.
 - The party in the superior position with more information has the duty to inform the others so that any risks are apparent.
 - **Utmost Good Faith:** A duty owed when a special measure of trust is placed in one party by the other.
- **Contracts of Insurance**
 - Really requires utmost good faith
- **Sale of Corporation Securities**
 - Directors naturally know more about the corporations than do the investing public
 - **Prospectus:** A statement issued to inform the public about a new issue of shares or bonds.
 - Tempting opportunity for misrep to get more people to invest in your not so super company.
- **Sale of Goods Compared with Sale of Land**
 - **Caveat Emptor:** Let the buyer beware
 - Applies only to quality and condition of goods, not to ownership

Case: Weinmann vs. Brinkman

Friday, December 16, 2011
6:27 PM

➤ **Facts**

- Real estate transaction between the Weinman's (plaintiffs as the purchasers) and Brinkman (home seller and defendant) under an agreement of purchase and sale entered into on May 30, 2006.
 - Transaction closed on July 4th, 2006
 - On July 12th, Weinman noticed water leaking in the basement.
- Weinman states Brinkman knew about the problem, and were under affirmative duty to inform them... they seek to hold the defendants liable for the estimated cost of repair.

➤ **Issues**

- At the time of the agreement, were the parties aware of a water problem in the basement
- As a matter of law was this a "patent" or "Latent" defect and if latent, had the defendants sought to conceal it from the buyers?
- In all the circumstances, are the plaintiffs entitled to recover from the sellers?

➤ **Breakdown**

- The defendants bought the property in 1994 and knew there was water that could enter the basement
 - They knew because this happened on an intermittent basis and the water drained away into a drain.
 - They painted the basement right before selling it, but it doesn't seem like that was to hide the problem.
- The house inspector noted some staining/dampness from water penetration and noted that it should be investigated and corrected.
- On the seller property information form Ms. Brinkman stated the house was not subject to flooding, and answered that she was aware of any moisture or leaking problems in the basement.
- The plaintiffs real estate agent didn't provide the Weinman's with a copy of the sellers property information form, and the plaintiff's did not ask for it even though there is a line indicating its existence on the listing that the plaintiffs received.

Case: Collins vs. Dodge City East

Friday, December 16, 2011
2:26 PM

Facts:

-

The plaintiff purchased a used motor vehicle from the defendant. The defendant's agent purported that the vehicle would be "fully equipped," including an Air Conditioning (AC) feature that the agent himself actively demonstrated to the plaintiff. Several months after the plaintiff owned the vehicle (and during the season in which the AC was first needed to be and was used) the plaintiff realized that the AC was not actually installed. Subsequently, the plaintiff had AC installed by a certified mechanic, and brought this action to seek the damages equal to the costs of AC installation.

Issues:

1. Did the agent engage in misrepresentation?
2. Should the court award the damages sought by the plaintiff?

Decisions:

1. Both the agent's words and actions are construed to be misrepresentation.
2. The court will award the damages sought by the plaintiff.

Reasons:

1. Whether or not the agent knowingly made the misrepresentation, the agent's words and action lead the plaintiff into a false assumption that AC would be included in the vehicle. This was a material misrepresentation, as it altered her incentives and ultimately to purchase the vehicle that she otherwise would not have.
2. The purpose of damages is to rectify the injury party and return them to the position they would be in if performance was adequately provided by the offending party. In these circumstances, the plaintiff should be awarded the costs required to install the AC so that she would be in the same position as if the AC was installed at the given purchase price.

Legal Principles:

- Remedies for Misrepresentation: A person need only show that he or she was misrepresented about a material aspect of the contract in order to receive the appropriate remedy

Lecture 10: Misrepresentation

Monday, October 31, 2011
12:17 PM

➤ **Misrepresentation**

- Misrepresentation, undue influence, duress and unconscionability all result in the remedy of rescission.
 - Undue Influence: Mental domination
 - Duress: Physical domination
 - Unconscionability: Combination of undue influence and a very unfair contract
 - Mental domination
- If title to land has already passed to the buyer, rescission is NOT available.
- Misrepresentation happens in the negotiations BEFORE the contract.
 - False statement is NOT included in the contract
- To prove misrepresentation, the plaintiff must show:
 - Defense made a false statement either:
 - Innocently
 - ◆ Maker of the statement honestly believes it to be true
 - ◆ Remedy: Rescission
 - Negligently
 - ◆ Where the maker of the statement is careless
 - ◆ Remedy: Rescission or damages, never both
 - Fraudulently
 - ◆ Maker of the statement deliberately misleads the other party
 - ◆ Either expressly or by omission
 - ◇ Straight up lie to their face
 - ◇ Failure to disclose a latent (hidden) defect that you are aware of at the time of the sale
 - ◆ Remedy: Rescission or Damages
 - ◆ Proof of a fraudulent misrepresentation nullifies an exclusion clause.
 - Defense made a statement of a Material Fact
 - ◆ An opinion given by a professional equals fact
 - Defense made a statement that induces the plaintiff to enter the contract

Reading 5C: Unconscionability, Duress, and Undue Influence

Thursday, November 03, 2011

7:42 PM

➤ **Undue Influence**

- The Domination of one party over the mind of another to such a degree as to deprive the weaker party of the will to make an independent decision.
 - Contract formed under undue influence is voidable at the option of the victim.
 - Must act quickly
- **Special Relationships**
 - Occur commonly when one party has a special relationship compared to the other party.
 - Doctor patient, lawyer client etc.
- **Dire Circumstances**
 - One party is temporarily in dire straits and will agree to exorbitant and unfair terms because they are desperate for aid.
- **Burden of Proof**
 - **Constructive Fraud:** The unconscientious use of power by a dominant party to take advantage of the weakness of the other party.
- The degree of domination is difficult to ascertain because it involves questions of personality, but unfairness can be measured against the market value of the goods in the contract.
- **Arrangements between Husband and Wife**
 - Hard to prove between husband and wife
 - It is expected that deals made do not always need to have benefits for both parties, and one may want to simply provide a benefit for the other.
- **Importance of Independent Legal Advice**
 - It is smart for a dominant party to insist the other party seek independent legal aid before agreeing to the terms.
 - Refutes a claim of undue influence
 - If hired, will be conclusive evidence against any future claims.

➤ **Unconscionability**

- **Inequality of Bargaining Power**
 - **Unconscionable Contracts:** Contracts between parties of unequal power that result in an unfairly advantageous bargain for the powerful party.
- **Loan Transactions**
 - Borrower is typically in a financial crisis desperate for money
 - Will agree to any contract as long as he gets money

Case: Buckwold Western Ltd. V Sager:

Friday, December 16, 2011

4:41 PM

Facts:

Ms. Collyne Sager (the defendant) signed a loan guarantee on June 27, 1991 on a loan from the plaintiff (Buckwold Western Ltd.) to her husband's company (London Carpets.) Ms Sager was a principal owner of shares in her husband's company, and maintained (unbeknownst to her) a substantial equity position in the company at the time of signing. As a condition of extended credit being provided by the plaintiff to London Carpets, both Mr. Sager and his wife were required to provide personal guarantees of repayment. Mr. Sager presented the documents to his wife without consultation of a legal professional, and after some debate she signed the documents. Ms. Sager raises the defense that, due to signing under duress or undue influence, she should not be required to repay the outstanding loan balance.

Issues:

1. Is this case an example of duress or undue influence?
2. If not, is the creditor entitled to enforce the guarantee?

Decisions:

1. This is not a case of duress or undue influence.
2. The creditor has all rights to legally enforce the guarantee.

Reasons:

1. No improper pressure (duress) was ever placed upon Ms. Sager to sign the documents. Any pressure that was implied by Mr. Sager to sign the documents was purely commercial, and did not influence her ability to make a sound and reasonable judgment free of pressure from a party to the contract. The argument of undue influence is also not applicable, as Ms. Sager was given sufficient time to consider the consequences and signed the documents based on her independent judgment.
2. Since the creditor supplied the goods in reliance on the guarantee, they are entitled to legally enforce this document.

Legal Principles:

- Where there is a special relationship resulting in domination, the contract is voidable for undue influence
- Threats of violence/imprisonment to force individuals into contracts are considered duress; the contract is voidable at the option of the injured party

Lecture 11: Undue Influence, Unconscionability and Duress

Monday, November 07, 2011

11:40 AM

➤ **Undue Influence**

- Occurs where one party to a contract is so dominated by the power or influence of the other party that the decision to make a contract is not his/her own.
 - **Weaker party must be robber of his or her free will.**
 - Feel they have no other choice but to sign the contract
 - Rescission is the remedy
- Contract made by undue influence can rescinded by a court if plaintiff acts quickly.
 - Even if the contract is fair
- There is a presumption in law that a "professional" is always the stronger party, and exerts undue influence over the other party in a contract.
 - "Presumed Pressure"
 - Need to take greater steps than the average person to rebut that accusation.
 - Professional must prove no undue influence occurred
 - ◆ Explain contract fully
 - ◆ Send client home with the contract
 - ◆ Give client lots of time to sign
 - ◆ **KEY: Recommend they seek independent advice.**
 - Greater skills and expertise than a normal person has
 - Will never really be considered a 'weaker party' once court knows we have a Bcomm
 - In the case of husband and wife, send home two contracts so that each person must commit to the contract, and that later the wife cannot claim undue influence

➤ **Duress**

- Where one party to a contract threatens the other (or a close family member) with physical violence or imprisonment (actual or psychological)
- In commercial contracts, duress takes the form of economic duress
 - Some sort of financial pressure, blackmail

➤ **Unconscionability**

- Two Elements:
 - Undue Influence
 - Mental domination of one party over the other
 - The stronger party actually abuses that position of power
 - They know they are more powerful, and they prey on weaker parties and get them to sign contracts that are grossly unfair.
- Remedy is Rescission
 - No punishment

Reading 5D: Legality

Thursday, November 03, 2011

9:05 PM

➤ **Bankrupt Debtors**

- A bankrupt person, until discharged by the court, is under certain contractual disabilities.

➤ **The Role of Legality in the Formation of a Contract**

- Object and purpose of a contract must be legal
 - Not offensive to the public good and not violating any law
- In the evidence of any proof, courts assume that the transactions are legal
- If it is proved to be illegal, the contract will be void and/or unenforceable.

➤ **The Difference Between a Void and Illegal Contract**

- There is no stigma in a void contract
 - The contract did not succeed, rescission is awarded, but that's it.
 - Part of the contract can be void while the rest is still good
 - The void term is **severed** from the contract and the rest remains in tact.
- When void and illegal, the contract is in no way enforceable.
 - Courts will not help parties who knowingly entered illegal contracts
 - Plaintiff will not receive anything

➤ **Contracts Affected by Statute**

- **Significance of the Wording of a Statute**
 - Some statutes only prevent a particular type of contract from having any legal effect by stating that such agreements shall be void.
 - Can go further and state they are unlawful or illegal.
- **Contracts Void by Statute**
 - **Agreements Contrary to the Purpose of Legislation**
 - Any agreement between employer and employee that will deprive the employee of the protection of the Act is void.
 - It is said to be against the statute, if a bankrupt person gives any huge gifts or makes any trades that are evidently unbeneficial to them, and go bankrupt within the year, they may redeem these goods and use them to pay back the bankruptcy.
 - **Promises to pay a Betting Debt**
 - Impossible for a winner to collect money from the loser in court.
 - **Betting in Canada**
 - **Wager:** An agreement between 2 people in which each has some probability of winning or losing.
 - ◆ These parties must be distinguished from **stakeholders** -- a person that manages a betting arrangement for a fee and redistributes winnings
- **Contracts Exempt from the Betting Prohibition**
 - **Insurance Contracts**
 - Obviously insurance contracts people aren't wanting to win the bet...

but they just take into consideration that should the feared loss occur, one will receive a measure of compensation.

- ◆ **Insurable Interest:** An interest where a person has financial benefit from the continued existence of the property or life insured or would suffer financial detriment from its loss or destruction.

- ◇ Insurance contracts are invalid unless the party making the contract has an insurable interest in the property or life insured.

- ▶ When buying life insurance, a financial benefit is not necessary to be proved, as a detriment is presumed to exist in the loss of the life...

- **Stock Exchange Transactions**

- Contract is an actual sale of personal property

- Bona fide contracts for the purchase and sale of shares are therefore valid and enforceable.

- ◆ If the subject of an agreement is a wager about what the price of a particular security will be at a specified future time, without a bona fide intention of acquiring, selling or taking delivery, this agreement is an offence under the criminal code.

- **Contract for the Future Delivery of Goods**

- When goods are purchased or sold for future delivery at a price agreed upon in advance one contracting party may gain at the expense of the other because of price changes between the time of the contract and the time of delivery.

- **Agreements Illegal by Statute**

- Some statutes make certain types of agreements illegal.

- Competition Act

- Other statutes do not deal directly with contracts but impose penalties for certain kinds of contracts.

- Any contract that involves such conduct is itself illegal, not because the statute refers directly to contracts, but instead the object of the contract is illegal by statute.

- Provincial statutes and municipal by laws require the licensing or registration of various classes of business and professional people.

- If this type of person sues to collect for services provided, the defendant may raise as a defense that the plaintiff has not been properly registered for his trade.

- When an action is brought against a person who is not licensed, the defendant cannot use his own misconduct in not complying with a statute as a defense to an action by an innocent person.

- Basically a person is not allowed to use evidence of his own wrongdoing for his advantage before the courts.

- **Contracts Illegal by the Common Law and Public Policy**

- **The Common Law**

- Generally the conduct reprimanded is a private wrong or tort, and whenever the contract contemplates a tort, it is illegal.

- Slander, Libel, trespass, deceit, and incitement to break an existing contract with someone else.

- Insurance protects the policy holder from negligence, and not from deliberate acts of harm, like fraud.
 - Car drivers who are negligent and get in a car crash are still entitled to their contract of insurance.
 - A person or business can also exempt themselves from liability to negligence.
 - Subject to government regulation
 - **Public Policy**
 - Contracts may be regarded as illegal if they are contrary to public policy.
 - Against the interests of Canada, relations with foreign countries, national defense, public service or the administration of justice within the country.
 - Even though the act is neither a tort or a crime in itself.
 - Embezzlement is common in the business world
- **Agreements in Restraint of Trade**
 - Very common for business contracts to be challenged on grounds of restraint of trade or reduction of competition
 - Courts regard competition as a necessary element of our economic life and regard agreements that diminish it as undesirable.
 - Some agreements in restraint of trade are simply unenforceable, while others may violate the competition act and trigger regulatory or criminal sanctions.
 - **Restrictive Covenant:** A term in restraint of trade
 - May not invalidate the entire contract
 - Courts may refuse to enforce offending term, but enforce rest of the contract still.
 - Party wanting to enforce the supposed restrictive covenant can rebut the presumption that it is against public policy.
 - Contracts in restraint of trade:
 - **Agreements where the vendor of a business undertakes not to carry on a similar business in competition with the purchaser of the business.**
 - Vendors of businesses can persuade the purchaser to pay for goodwill if they make a promise that they will at no point in the future do anything to diminish the goodwill.
 - ◆ Agree that he will not enter a business that will directly compete with it, as that would attract some of his customers to the new company, diminishing the value of the company.
 - Any restrictive covenants in the contract on sale of a company will be assessed by the courts to decide if they are within the public's interest or not.
 - **Agreements between employer and employee in which the employee undertakes that after leaving her current job, she will not compete against the employer by starting their own business or accepting a job with a competing business.**
 - Difficult to convince courts that these contracts are in the public's interest.
 - No equality of bargaining power, and an employer is able to impose terms unfairly on the employee.
 - Makes it virtually impossible to leave the employer
 - Must distinguish agreements that try to govern an employee's means

of livelihood AFTER he leaves his job in which the employee agrees not to compete directly or indirectly while he remains in the service of the employer.

- ◆ While a worker works for a company, they can't on the side work for a competitor.
- Restrictive covenant can be enforced if the company can prove it is beneficial for them and not against public policy.
 - ◆ Placed upon employees who have secretive knowledge about the company they are leaving.
 - ◇ Must be reasonable as to the area covered, actions restricted, etc.

Lecture 11: Legality

Monday, November 07, 2011
12:28 PM

➤ **Illegality**

- The contract must be legal to be enforced
- Two types:
 - Statutory Illegalities
 - Maksymetz Case
 - A statute makes the contract illegal
 - ◆ Criminal Code
 - ◆ Income Tax
 - ◆ Securities Act
 - ◆ Competition Act
 - Any contract that offends Public Policy
 - Any contract that is a restraint of trade
- Focus: Non competition and Non solicitation clauses in employment contracts.
- ***If contract is illegal, then its void and there is absolutely no remedy for the plaintiff at all.***

Case: Maksymetz V. Kostyk

Friday, December 16, 2011

4:42 PM

Facts:

- Masymetz (the plaintiff) seeks an accounting of the value of shares owing him in a settlement reached during a prior legal action. This ownership interest in the firm (the Gateway Hotel Ltd.) was to correlate to Masymetz's interest in a partnership that managed the hotel (and which subsequently obtained an option to purchase the hotel.) However, due to legal and regulatory requirements the purchase was denied by a governing body (the Manitoba Liquor Board), which declared the option to purchase illegal and thus "void ad initio." The plaintiff wishes to have the court enforce compensation for the value of the interest in the hotel owing from the settlement. The defendants argue that, since the contract was illegal to begin with, it is "ultra vires" for the court to order such an accounting.

Issues

1. Was the original contract (that the settlement was based on) legal?
2. If not, can the court enforce a settlement based on the breach of an illegal contract?

Decisions:

1. The original contract was not legal and was therefore invalid.
2. The court will not force an order upon the defendants based on an illegal contract.

Reasons:

1. As the proposed division of ownership interest within the option to purchase did not comply with legislated standards (namely that a non liquor-license holder cannot hold more than 10% of the company) the ownership agreement was deemed illegal and therefore invalid.
2. Regardless of the circumstances, the court cannot force an order upon parties who are knowingly in breach of an illegal contract (as the illegal contract is ultimately unenforceable.)

Legal Principles:

- Legality: A contract that involves illegality cannot be enforced by a party that knowingly agreed to the illegality

Reading 6A: Privity of Contract and Assignment

Tuesday, November 08, 2011

2:14 PM

➤ **Privity of a Contract**

○ **Limits on the Scope of Contractual Rights and Duties**

- The scope (power to affect relations) of the contract is confined to the parties who agreed to it.
 - People not involved in the contract have no rights or duties under it.
- Sometimes though contracts need to be allowed to affect people outside of it.
 - **Third Party:** A person who did not make the contract, but is affected by it.
- To succeed in an action if contract, the plaintiff must prove **privity of contract** with the defendant
 - Show that they are both parties to the same contract, so a random can't sue.
 - ◆ Third party cannot sue because they have not given consideration for the promise.
 - Rule can have harsh consequences when it prevents a third party from enforcing a contract when the whole object was to benefit him.

○ **Comparison with Rights and Duties in Tort**

▪ **Liability of Sellers of Goods**

- The seller of goods is held liable according to the terms in the sales of goods act only to the person who physically bought the good.
 - ◆ If a person buys food, and she eats it and its poisonous, she may sue. If her family eats it and its poisonous, the family members cannot sue for damages as they didn't purchase the good, and only the purchaser could sue for breach of contract.
 - ◆ The other members have no privity of contract

▪ **Liability of Manufacturers**

- The manufacturer of the product can be sued, as they made the product and the merchant assumed the goods were proper when they acquired them.
 - ◆ Manufacturers are under a high duty to make their products safe

➤ **Vicarious Performance**

○ **How it Occurs**

- A promisor cannot escape liability to the promisee by appointing a substitute for himself without the consent of the promisee, even if the other person is willing to accept full liability.
- **Vicarious Performance:** A third party performs on behalf of the promisor who remains responsible for proper performance.
 - If the promise is not carried out sufficiently, the promisee may seek a remedy for breach of contract against the promisor, but not against his employee.
 - The employee can look only to the employer for payment, and not the promisee.

- **When is Vicarious Performance Allowed**
 - When personal performance by the promisor was not the reason why the promisee entered into the contract.
 - Ex. If J Biebs promises to perform, he cannot use vicarious performance and have some one else show up and do the concert.
 - When goods are to be shipped to a destination that requires the services of more than one carrier, both parties understand that not only employees of the first carrier but also of another carrier will perform.
 - Its not always crystal clear as to when a specific individual is expected to perform or when vicarious performance is allowed.
 - Sometimes vicarious performance is arranged when it shouldn't have been, but the other party may not have an opportunity to protest until the work is finished
 - Promisor breached a term in the contract
 - ◆ Promisee may sue for damages to compensate for whatever loss they can show resulted from vicarious rather than personal performance.
- **Tort Liability**
 - While performing a contract vicariously, an employee may commit a tort.
 - The promisee may sue both that employer for vicarious liability and the employee personally.
 - Sometimes the employer is kind of protected in the case that the damage did not occur in the course of employment.
- **Exemption Clauses**
 - Employers often protect themselves from tort liability.
 - Insert exemption clauses in their standard form contracts to exclude liability for negligence.
 - By shifting responsibility to the promisee, the promisor may lower their price for the promise.

➤ **Assignment of Rights**

- **The Nature of an Assignment**
 - An assignment of liabilities to a third party is not possible, apart from land law.
 - Assignment of contractual right is however common.
 - **Assignor:** The party that assigns its rights under a contract to a third party.
 - **Assignee:** A third party to whom rights under a contract have been assigned.
 - **Assignment:** A transfer by a party of its rights under a contract to a third party.
 - Contractual rights are valuable and may be considered a type of personal property along with the ownership of goods.
 - Not tangible, and only valuable as it can be enforced in the courts.
 - ◆ **Choses in Possession:** Rights to tangible property that may be possessed physically.
 - ◆ **Choses in Action:** Rights to intangible property such as patents, stocks, and contracts that may be enforced in the courts.
- **The Importance of Assignments**
 - A willingness to accept the ownership of choses in action as a form of

personal wealth is an important mark of a modern industrial society.

- Ability to have saving accounts, shares and bonds

○ ***The Role of Equity***

- An assignment of rights and a sale of goods are similar.
 - In assignment the subject matter is the transfer of contractual rights; in a sale the subject matter is the transfer of ownership in goods.
- Equity required that only a clear intention to assign a benefit be shown either orally or in writing by the assignor and it would then permit the assignee to recover the benefit from the promisor.

○ ***Third Parties who May Play a Role in a Contract***

- By vicarious performance
- By accepting responsibility as a trustee to confer benefits on a third party
- By an insurance contract
- By an agent making a contract on behalf of an undisclosed principal
- By a commercial contract containing an implied collateral contract binding a third party
- By assignment of rights to a third party.

➤ ***Notice to the Promisor***

○ ***The Effect of Notice on the Promisor***

- All assignments require that notice be given to the promisor, but promisor's consent is not entirely required.

○ ***The Effect of Notice from Contending Assignees***

- Exception to privity in a contract
 - A party other than the original party is permitted to claim the benefit of rights under the contract.
- What if an assignor assigns the right to collect a debt to two people, when really only 1 is supposed to obtain it?
 - The assignee who first gave notice to the debtor is the one entitled to payment, and the other is entitled to sue the assignor for damages.

Case: Peacock V. Esquimalt & Nanaimo Railway Co.

Friday, December 16, 2011

4:42 PM

Facts:

- Plaintiff put up a deposit on a land purchase on behalf of a syndicate of buyers (Wessex Management, West Steel Corp, Darrell Brown, and Alan Parkin) from the defendants (Esquimalt & Nanaimo Railway Company.) As a condition of the purchase agreement, if the contract is breached the purchasers are entitled to a refund of deposit (net the necessary costs of clean-up.) A fire occurred which rendered the land non-manageable for the purchasers (a subsequent frustrating event,) thus discharging the contract. The plaintiff pursues a claim to the value of the deposit, claiming that an oral agreement between itself and the defendants obligates the firm to return the deposit in the event the purchase is not completed. The defendants claim the plaintiff has no privity to the contract (as a third party) and has no title to repayment of the deposit.

Issues:

1. Was the plaintiff a contracting party to the defendants for the purchase of property (subject to the balance of probabilities)?
2. Are the defendants liable to the plaintiff for the amount of the deposit?

Decisions:

1. The plaintiff does not satisfy the court that he is a contracting party.
2. The defendants have no liability to directly repay the deposit to the plaintiff.

Reasons:

1. There is no established truth to the claim that an oral agreement existed between the plaintiff and the defendants. The signing over of the deposit obligation to the plaintiff acts as a creation of a contract between the purchasers and plaintiff (as the purchasers will be liable to repay the deposit if the purchase does not complete) but does not act to bring the plaintiff into the contract between purchaser and seller (in this case the defendants.)
2. Since the plaintiff is not a contracting party to the defendants, they have no financial or legal obligation in the courts to repay any charges that are components of the contractual agreement.

Legal Principles:

- Outsiders to a contract cannot enforce any promises made between contracting parties to which the outsider does not have privity
- To succeed in an action in contract law, the plaintiff MUST prove that he/she has privity [is a contractual party] to the agreement

Lecture 12: Privity of a Contract

Wednesday, November 09, 2011
11:38 AM

➤ ***Privity of a Contract***

- Contract is only enforceable by members in a contract
- A owes B \$5000, B owes C \$5000
 - A: Debtor/Promisor
 - B: Assignor
 - C: Assignee
 - C will lay an assignment on A, and B will no longer be involved in the exchange

Reading 6B: Negotiable Interests

Tuesday, November 08, 2011
3:06 PM

➤ **Negotiable Instruments under Assignment**

○ **Their Nature and Uses**

- A special type of assignment
 - **Negotiable Instrument:** A written contract containing a promise, expressed or implied, to pay a specific sum of money to the order of a designated person or to the bearer.
 - ◆ Ex. Cheque, promissory note, draft
 - ◆ Arises from a prior contract
 - ◇ A buyer delivers a negotiable instrument in payment for goods or services received., but the delivery of the instrument does not complete the promisor's obligation.
 - ▶ If they do not honour the instrument when it is due, the promisee may sue on the negotiable instrument

○ **Negotiability Compared with Assignability**

- **Negotiation:** The process of assigning a negotiable instrument
 - The payee of an instrument may negotiate it in two ways:
 - ◆ If the instrument is payable to the bearer, he need only deliver it to a third party
 - ◆ If the instrument is payable in his name, he must endorse his name upon it and then deliver it.
 - ◇ **Endorse:** Sign one's name on a negotiable instrument.
 - Negotiation is a special type of assignment in which the new holder of the instrument acquires from the transferor the rights that the instrument has to convey.
 - ◆ **Holder:** A party who acquires a negotiable instrument from the transferor.
 - Essentially, negotiation is a privileged type of assignment that is freed from certain of the restrictions that apply to an ordinary assignment of contractual rights.
 - Differs from an assignment of rights in some ways:
 - ◆ **Notice to the Promisor**
 - ◇ Notice is important in assignment
 - ▶ Written notice is necessary before an assignees may take advantage of a statutory assignment
 - ▶ Notice protects an assignee against the risk of the promisor being unaware of the assignment and paying the assignor or other assignees.
 - ◇ Notice does not affect the transfer of a negotiable instrument as the promisor is liable to pay only 1 person.
 - ▶ Even if the promisor receives notice of the assignment, neither he nor his bank will pay the assignee unless and until the assignee presents the instrument.
 - ▶ Promisor pays debt only once, to the holder of the instrument for the time being and in exchange for the instrument.
 - ▶ Essentially, pays for the return of his negotiable instrument.
 - **Defense of the Promisor**
 - An assignee (the person the cheque was promised to) may succeed in an action against the promisor (the company who wrote the cheque) where an assignor himself may not have succeeded (the person the cheque was originally written to).
 - In an ordinary assignment, the assignee never receives any better rights than the assignor had, however this is not the case for negotiations.
 - **Form of Action**
 - A holder of a negotiable instrument can sue in her own name; it is not necessary for her to join in the action of any of the other parties who have signed the instrument.
- ### ○ **Commercial Importance of Negotiability**
- Negotiable instruments have long been seen as being free from the formalities and many of the risks

- of an ordinary assignment of contractual rights
- Law restricts the possibility of abuse in the face of such defenses as fraud, undue influence, duress etc by requiring a holder of a negotiable instrument to show that he was unaware of the origin of the tainted instrument and that he or some previous holder of the instrument must have given value for it.
- This makes it possible for banks to easily accept peoples cashed cheques, as they are free from liability should there have been any weird stuff happening before that innocent party received the cheque.

➤ **Nature and Uses of Negotiable Instruments**

○ **As Personal Property**

- Negotiable instruments are a special kind of chose in action.
- Every one contains an express or implied promise made by one or more party to pay the amount stated in the instrument.
 - In absence of evidence stating otherwise, the promisee is assumed to have given consideration for the promise from the promisor.
 - Typically a self contained contract with all the necessary written evidence of its terms stated on its face.
 - One side usually satisfies its promise to pay for goods or services by giving the other side the instrument.
 - ◆ Delivery is only **a conditional discharge**
 - ◇ The debtor is discharged under the original contract only if the negotiable instrument given in payment is honoured.
 - ◆ In the debtor dishonours it, the promisees rights remain under the original contract.
 - ◆ Promisees will then due on the negotiable instrument rather than on the original contract because it is easier.

○ **Types of Instruments**

- Three common negotiable instruments
 - **Bills of Exchange (Drafts)**
 - ◆ A Draft is a written order by one party, the **drawer**, addressed to another party, the **drawee**, to pay a specified sum of money to a named party, the **payee** at a fixed or determinable future time or on demand.
 - ◆ Originates with a drawer (creditor) requesting the debtor acknowledge their indebtedness to agree to pay according to the terms stated in the instrument.
 - ◆ Drawer may designate themselves as the payee.
 - ◆ Drawee consents by signing the instrument with the word accepted, and their signature and date.
 - ◇ Drawee then becomes an **acceptor**
 - ◇ A draft may circulate among a number of holders even before it has been accepted. Its payment is promised payment.
 - ◇ Acceptor may indicate that the bill is to be paid out of its bank account, and the bank the cheque is deposited into will present the draft to the other bank of the promisor, and they will have entitlement to take the money from that account.
 - ◆ Three types:
 - ◇ **Demand Drafts**
 - ▶ A bill of exchange payable immediately upon presentation without any days of grace.
 - Ex. Cheque
 - ◇ **Sight Drafts**
 - ▶ A bill of exchange payable "at sight" three days of grace are allowed after presentation for acceptance.
 - ▶ Can be used as a collection device
 - ◇ **Time Drafts**
 - ▶ A bill of exchange payable within a stipulated period after the date stated on the instrument or after presentation. Three days of grace should be added in fixing the maturity of a time draft.

- ▶ Can we used as a means of finance for the business drawing them

□ **Promissory Notes**

- ◆ A written promise to pay a specified sum of money to another party at a fixed time or on demand.
- ◆ Promised by **the maker** to the payee.
- ◆ The maker is usually a debtor of the payee and it prepares the instrument itself, though it may do so at the request of the payee.
- ◆ Not presented for acceptance, contains simply an express promise to pay.

□ **Cheques**

- ◆ A bill of exchange drawn against a bank and payable on demand.
- ◆ From the holder's point of view, a cheque contains the implied promise of its drawer that the drawer has funds on deposit at the bank sufficient to meets its amount, or that the amount is within the terms of a line of credit granted by the bank.
- ◆ Essentially the cheque writer is a promisor, and the bank is the drawee.

◇ **Certification**

- ▶ An undertaking by the bank to pay the amount of the cheque to its holder when later presented for payment.
- ▶ Takes form of the banks stamped acknowledgment with date on the face of the cheque. At this time, money is given to the drawee and deducted from the drawers account.
- ▶ Certification at the request of the holder prevents any attempt by the drawer to stop payment on the cheque.

◇ **Post Dated Cheques**

- ▶ The drawer may postdate a cheque, and then the bank is not entitled to pay the instrument before its date.

◇ **Stop Payment**

- ▶ An instruction from the drawer of a cheque to the bank not to pay the cheque.
- ▶ If after issuing the cheque the drawer realizes the drawee breached a contract or something along those lines.

◇ **The Use of Cheques**

- ▶ Not a legal tender
- ▶ A creditor is entitled to payment up to the designated amounts for each denomination

➤ **Prerequisites for Liability**

- Until an instrument is delivered, a drawer, acceptor, or maker has no liability and even after signing it may reconsider and tear it up before delivering int.
- Once an instrument has been delivered any further transfers by the payee to a new holder as well as any later transfers to other holders are seen as negotiations.

➤ **Negotiability**

○ **Meaning of Negotiability**

- The special quality possessed by negotiable instruments as a distinct class of assignable contract.
- Transfers are distinguished from those of regular assignments by:
 - A negotiable instrument may be transferred from one holder to another without the promisor being advised about each new holder, and the promisor becomes liable to each successive holder in turn.
 - An assignee can receive better rights to sue than the assignor originally had.
 - A holder may sue in its own name any other party liable on the instrument without joining any of the remaining parties.
- These aspects make negotiable instruments highly transferable compared to regular assignments, assuming they meet the following criteria:
 - The promise must be set out in writing, otherwise the transferee holds no evidence of the promise

- The obligation must be of money value only
 - Money promised must be a "sum certain". May be repayable in installments or with interest, and is still a sum certain. Cannot say though something along the lines of "Pay the value of your services rendered"
 - Promise must be unconditional
 - Negotiable instrument must be payable at a fixed or determinable future time or on demand
 - Negotiation must be of the whole instrument, not for part of the amount
 - The negotiable instrument must be signed by the drawer if it is a draft or cheque, or by the maker if it's a promissory note.
- **Consequences When a Document is not Negotiable**
 - Companies can refuse to accept negotiable instruments and can instead still want to pay the person/company they were always supposed to pay.

➤ **Methods of Negotiation**

- **By Endorsement and Delivery**
 - To endorse an instrument, the person whom already is the possessor must endorse it as well as assign it to a new holder.
 - Endorsement is typically seen in the form of a signature from the payee.
- **By Delivery Only**
 - Endorsement is not necessary for instrument in "bearer" form.
 - Bearer form when
 - ◆ It is initially made payable to the bearer
 - ◆ When no payee has been named and a space is left blank for the insertion of a name
 - ◆ Payable to an abstraction
 - An order instrument is safer because any attempt to negotiate it dishonestly results in the offence of forgery.
 - Forgery is an exception to the rule that a holder may acquire a better right than the transferor had.

➤ **Endorsement**

- **Types of Endorsement**
 - Endorsement in Blank
 - The payee on an order instrument signs his name and nothing else by way of endorsement, making it payable to the bearer.
 - Special Endorsement
 - The payee specifies the next person to whom payment is to be made.
 - ◆ Pay to Morgan (signed by Travis)
 - Restrictive Endorsement
 - The payee may endorse something "for deposit only" making it non negotiable
 - The amount may only be deposited into the account of the promisee, and if someone steals it and tries to cash it, the money will only go into the account of the real person, and cannot be stolen.

➤ **Liability of Parties**

- **An Endorser**
 - **Dishonour:** The failure by the party primarily liable to pay the instrument according to its terms
 - An endorser is liable to any holder for the amount of the instrument should the party primarily liable dishonour it
 - Unless the endorser does not receive prompt notice of the dishonour from the holder.
 - If the order is negotiated several times, the endorser's liability extends to any subsequent holders as well as the current holder.
 - An endorser who is held liable has recourse against any prior endorser, but no subsequent ones, they all actually have recourse against him.
 - If nothing can be recovered, the ultimate loser is the first endorser.
 - If an instrument contains a forged endorsement, the drawer and any endorser prior to the forgery

are freed of liability.

- Unless the forger can be caught, the person who acquires the instrument immediately after the forgery will likely be the only loser.

- **A Drawer**

- The drawer of a draft understands that upon duly presenting the draft it will be accepted and paid according to its terms, and if it is dishonored, the drawer will compensate the holder who is compelled to pay it.

- **Notice of Dishonour**

- Neither an endorser or a drawer will be liable in the absence of prompt, express notice of dishonour from the holder.
 - If dishonour occurs, the holder must give notice to the endorser or drawer within one business day.

- **A Transferor by Delivery**

- Anyone who negotiates an instrument in bearer form
 - Since no endorsement is required, a transferor by delivery is not liable on the instrument as an endorser if the party primarily liable simply proves financially incapable of paying it.

- **An Acceptor or Maker**

- On the death of an acceptor or maker, the liability passes to his personal representative.

- **Limitation Periods**

- The holder of a negotiable instrument must duly present the instrument for payment, and when necessary, give the required notice of dishonour in order to establish his legal rights against all prior parties to the instrument
- Must also take legal action in a court within the prescribed period by the relevant provincial legislation

➤ **Holder in Due Course**

- **Negotiation Compared with Assignment of a Chose in Action**

- Remember that an innocent purchaser of goods can keep them even if the person who sold them to them obtained them fraudulently and would have had to surrender them to the original vendor.
- Also remember that an innocent transferee of a negotiable instrument may be able to enforce payment when the transferor himself could not do so.
 - This leads us to see that a negotiable instrument transfer is more like a transfer of title of goods than an assignment of a chose in action.
 - Negotiations give the exception that an assignee of a chose in action takes no greater rights than the assignor had.
 - ◆ A negotiable instrument may become more valuable when it is transferred.

- **Requirements to Become a Holder in Due Course**

- A holder in due course is when the holder of the negotiable instrument acquires more than the transferor himself had entitlement to.
- Must satisfy 4 conditions:
 - Must have taken instrument complete and regular on its face
 - Must have acquired it before it was overdue and without notice of prior dishonour
 - She or someone else must have given consideration for the instrument
 - Must have taken the instrument in good faith and without notice of any defect in the title of the person who negotiated it.

- **Purpose of the Requirements**

- **Notice**

- Deprives a holder of any advantage in conspiring with a transferee to take the instrument from him with a view to evading the defences of the party liable.
- Transferees who accept the instrument knowing it is dishonoured can be defeated by any of the

defences the liable party might have used against the transferor.

- **Advantages**

- Banks are willing to discount drafts and cash cheques drawn on other banks with little delay or risk to themselves, as they become holders in due course of them at that point.
 - ◆ If law didn't recognize the concept of holders in due course, banks would be reluctant to purchase your cheque off you and cash it as they would be nervous they'd get their money.

➤ **Defences**

- **Meaning of Defence**

- The various arguments that a party liable on an instrument may put up against a holder who demands payment.
- Will it succeed?
 - The status of the holder relative to the party liable is considered
 - The type of defence of the party liable.

- **Types of Holders**

- First the relationship between the holder and the party alleged to be liable on the instrument needs to be examined.
 - **Immediate Parties:** The holder of the instrument and the party alleged to be liable have had direct dealings with each other.
 - **Remote Parties:** Parties who have not had direct dealings with each other.
 - ◆ Holder in due course is ALWAYS a remote party

- **Types of Defences**

- A holder's chance of success in collecting from an immediate party is no better than his contractual rights under the agreement between them.
- Negotiable instrument does not increase the holder's rights
- Against the party immediately previous to them they can use a mere person defence that they could not use against remote parties though.
- Holder in due course who is a remote party has the best chance at acquiring the payment
 - If the remote party does not qualify to be a holder in due course, they are entitled to real defences and defect title defences, but not mere person defences.
- **Mere Personal Defences**
 - Only available when the parties are immediate parties.
 - ◆ Lack of consideration
 - ◆ The right of set off
- **Defect of Title Defences**
 - **Regular on its Face:** Nothing appears out of order on the document of negotiable instrument.
 - If a holder takes the instrument with knowledge of defects, he is NOT a holder in due course and a defence based on a defect from the defendant will be successful.
 - Defects:
 - ◆ Incapacity to a contract from drunkenness or insanity
 - ◆ Discharge of the instrument by payment or renunciation of a holder's rights in it.
 - ◆ Absence of delivery when the instrument was complete at the time
 - ◆ Fraud, duress, undue influence or illegality
 - ◆ Want of authority in an agent to complete the instrument on behalf of the party primarily liable.
- **Real Defences**
 - Good against any holder in due course
 - ◆ Incapacity due to infancy
 - ◆ Cancellation of the instrument
 - ◆ Absence of delivery where the instrument is incomplete when taken
 - ◆ Fraud as to that nature of the instrument when the promisor is blind or illiterate
 - ◆ A forged signature on the instrument
 - ◆ Want of authority in someone who has represented himself as an agent, to sign on behalf

- of the party liable.
- ◆ Alteration of the instrument has occurred

Case: Bank of Nova Scotia vs. Rock Corp of Canada

Friday, December 16, 2011

4:43 PM

Facts:

The defendant (The Rock Corp of Canada) drew a cheque on RBC payable to the order of Bruno Tessori. Tessori took the cheque to BNS and cashed it, without endorsing it in any way. By the time the cheque made its way to BNS, a stop order had been placed on the cheque and it was dishonoured. BNS claims that it was a “holder in due course” to the provisions of the Bill of Exchange Act (s. 165[3]) and therefore is due the face value of the cheque from the drawer. Whether or not the bank is considered a holder in due course is the sole issue brought before the court.

Issues:

1. Is the Bank of Nova Scotia a “holder in due course” as specified in the Act?

Decisions:

1. The Bank of Nova Scotia is not a holder in due course

Reasons:

1. The relevant section of the Act, s. 163(5), states that: “where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course.” Since the bank did not actively deposit the funds to the credit of Tessori’s account, or make any dealings with the subject’s account whatsoever, the transaction in question does not infer such rights to the bank as specified in the Act. By not having the subject endorse the cheque in any manner when cashing it, the bank waived its rights to assume the role of a “holder in due course.”

Legal Principles:

- The rights of a holder in due course (of a negotiable instrument) are superior to those of a regular assignee of contractual rights
- In order to receive these superior rights, the holder must satisfy the court that it has accepted an endorsed negotiable instrument from the designated payee and is completely ignorant of any stop payments or fraudulent causes of payment that would render the instrument void
- A bank may acquire the rights of a holder in due course if it meets all of the above conditions except endorsement, and in the absence of such endorsement credits the payee’s account for the face value of the instrument

Case: 2203850 Nova Scotia Ltd. Vs. Sarkar

Friday, December 16, 2011

4:44 PM

Facts:

The appellant (the Money Mart) brings an action against the respondent (Dr. Sarkar) that the respondent should be held liable for the face value of an instrument to which the appellant alleges he is a holder in due course of. The appellant effectively cashed a cheque post-dated by the respondent for a client of the Money Mart (for services rendered.) Prior to cashing, the respondent placed a stop payment for the amount at its financial institution, thereby dishonouring the cheque. In trial court, the adjudicator ruled that, in reference to “the Bank of Commerce v. Burman et al,” the appellant was not a holder in due course since the instrument was post-dated at the time of cashing. The appellant brings this action to establish that it is in fact a holder in due course, and is subject to the appropriate equities provided by this role.

Issues:

1. Is the appellant (Money Mart) a holder in due course?
2. Does the appellant run the risk of countermanding (not receiving payment of funds) from the honouring of a post-dated instrument?

Decisions:

1. The appellant is found to be a holder in due course
2. The appellant shall not be countermanded and shall receive payment for the honouring of the instrument

Reasons:

1. A holder in due course must meet the necessary criteria, namely that it: (a) Became a holder prior to the complete and regular instrument becoming overdue and without notice of it being previously dishonoured; and (b) Took the bill in good faith at face value and had no notice of defect in the title of the person who negotiated it. Since post-dating a cheque does not render it less than complete or regular on its face, the action of the appellant do not bar it from being considered a “holder in due course.”
2. A holder in due course has the right to enforce payment against all parties that are liable on the face of the bill. Since it was established that the appellant is in fact a holder in due course, they may enforce payment against the respondent and his financial institution unencumbered.

Legal Principles:

- A holder in due course acquires the rights of the payee without having to be concerned with the elements of the transaction for which the rights arose
- In the case of a holder in due course of a cheque, the drawer (writer of the cheque) cannot subsequently revoke the obligation provided by the instrument

Lecture 13: Negotiable Interests

Monday, November 14, 2011

11:29 AM

➤ **Negotiable Interests**

- A owes B \$5000, B owes C \$5000
 - A: Debtor/Promisor
 - B: Assignor
 - C: Assignee
 - C will lay an assignment on A, and B will no longer be involved in the exchange, and now A will be in debt to C.

- A party can assign contractual obligations but not so as to avoid liability itself
 - House owner hires contractor who outsources work to a roofer.
 - Roof leaks, house owner sues contractor
 - ◆ What if the contractor went bankrupt? Owner cannot sue the roofer directly because they were not actually in a contract together.
 - Contractor would then sue the roofer
 - Landlord has a lease with a tenant from 2010-2015
 - Tenant just can no longer afford to keep up rent payments...
 - ◆ Tenant may assign lease to an assignee, moves into home, pays remainder of rent to landlord.
 - ◆ Assignee defaults? Landlord sues original tenant because that's where the original contract was.
 - ◆ Assignee burns the place down negligently? Landlord sues original tenant still.
 - Assignee will have to sign a covenant to the landlord.
 - ◆ Now if the assignee defaults, landlord will sue tenant... Tenant's gonna get sued no matter what probably as soon as there is a problem.

- As between competing assignees, priority is generally in order of notice
- Assignee takes subject to the equities (defences) between the parties. Assignee gets no greater rights than the assignor had. (C gets no greater rights than B had)
 - B sold A a car for \$5000, told them the car had 50,000 km, but it actually had way more... B owes C \$5000... C makes an assignment to A for the \$5000.
 - Now C vs. A
 - Can A sue C for fraudulent misrepresentation.... Weird because they didn't lie...
 - ◆ A didn't have any choice about receiving the assignment, so they can't be made worse off from receiving it.
 - ◆ If A had good defense for not paying B... the same defense will work against C

➤ **Negotiable Instrument**

- In writing signed by maker
- Payable to order or to bearer
- Payable on demand or at a fixed future time
- Unconditional promise to pay a sum certain.
 - Ex. Doesn't say.. Pay me the value of 20,000 magazines. It says pay me

\$50,000.

- In case of home owners and mortgagees, the first mortgagee to give notice gets paid insurance first, then the second mortgagee, then the owner.

Reading 7A: Torts, Negligence, Contributory Negligence and Vicarious Liability

Monday, November 21, 2011
11:25 AM

➤ **The Scope of Tort Law**

- Tort law is used to compensate victims for harm suffered from the activity of others.
- No punishment, the punishment is left to criminal law if the conduct happens to be criminal.
- Circumstances that create a right to compensation
- Hard to decide who should be responsible for bearing the loss.

➤ **Development of the Tort Concept**

- Early tort law has developed in two ways:
 - The law takes into account the fault of the defendant
 - Takes into account causation, whether the defendant's conduct could be considered the cause of the harm.

➤ **The Basis for Liability**

- **Fault**
 - Blameworthy conduct that is unjustifiable because it intentionally or carelessly disregards the interests of others.
 - People will be more inclined if to be careful if they must pay for the consequences of their carelessness.
 - Most situations where carelessness occurs people aren't sued by tort as they are covered by insurance. However they are in turn deterred from being careless by higher premiums and possibility for criminal charges.
- **Strict Liability**
 - Doesn't apply very often, but does apply in regards to someone doing an activity that is inherently dangerous regardless of the amount of care taken.
 - So even in the situation of someone suffering, if they weren't necessarily at fault, they can still be sued seeing as they took on that responsibility of having the dangerous activity.
 - In cases where strict liability is prohibited the courts tend to raise the standard of care to be so high that it is impossible for the defendant to show they have satisfied it, and they are practically strictly liable.
- **Social Liability**
 - Social standards change which force the law to adapt in many ways.
 - For example with car crashes, they are no longer looked at as being a tort law as they classify under "**no fault**" insurance
 - A system of compulsory insurance that eliminates fault as a basis for claims.
- **Vicarious Liability**
 - Relates to employees committing torts in the course of their employment.
 - Some cases an employer may be personally at fault for an act committed by an employee.
 - Ex. The employer instructs an employee to do a dangerous job that they

know they are not trained to do. In this case, the employer may be entirely liable and the employee may not be at risk at all.

- The employer may be found liable even when those acts arose in the course of employment
 - Can be held responsible for criminal as well as negligent acts of the employee.
- Reasons why:
 - Although an employee is personally liable for the torts he commits while acting for himself or the employer, they have limited assets available to pay compensation for the potential harm they have caused.
 - Fairness: The person who makes the profit from an activity should be held liable for any loss
 - ◆ **Vicarious Liability:** Liability of an employer to compensate for harm caused by an employee

➤ **Negligence**

- **Negligence:** The careless causing of injury to the person or property of another.
- Three requirements:
 - **Defendant owed the plaintiff a duty of care**
 - **Duty of Care:** A relationship so close that one must take reasonable steps to avoid causing harm to the other.
 - Should the defendant have foreseen that his actions might do harm to the victim.
 - ◆ Would a normally intelligent and alert person- a reasonable person- have foreseen that those actions would likely cause harm.
 - The plaintiff must go further however, and show that the defendant owed a specific duty of care to them specifically.
 - Whether such a relationship exists depends on foreseeability, moderated by policy concerns.
 - The courts sometimes held that a duty of care is owed to people other than the individual who is directly injured
 - **Standard of Care:** The level of care that a person must take in the circumstances.
 - A general duty on every person to take reasonable care to avoid causing foreseeable injury to other persons and their property.
 - Court considers the degree of likelihood that harm will result from the activity in question and the potential severity of the harm; as well as the social utility of the activity and the feasibility of eliminating the risk.
 - ◆ Permissible to not take every precaution to eliminate even teensy risks, but not allowed to not take every known precaution to eliminate disastrous risks.
- **Defendant breached that duty**
 - **Causation:** Injury resulting from the breach of the standard of care.
 - Plaintiff must prove that a duty of care was owed to her and that duty has been breached, and also that she has been injured as a result of the breach
 - No matter how blameworthy a person's conduct may be, he will not be held liable for damage that he did not directly cause.
 - **Remote Damages:** unrelated or far removed from the conduct.
 - ◆ Must consider the extent of liability for negligence.
 - ◆ The court looks at what is a likely injury to the average defendant

- ◆ There is however some element of subjectivity in the valuation of the damage.
- **Economic Loss**
 - ◆ The remedy given in cases of negligence is a sum of money by the way of damages.
 - ◆ **Economic Loss** can also be compensated, which would be the wages lost due to missing work, or the expense of renting a replacement car in the care of a car crash.
- **The defendant's conduct caused injury to the plaintiff**
 - **Burden of Proof:** The plaintiff in a tort action must prove all of the elements of her case, however it is sometimes hard for a plaintiff to know exactly how their harm came about.
 - Therefore, if the plaintiff can show that it was most likely the behaviour of the defendant that caused them harm, the burden of proof shifts to the defendant to prove that it wasn't.
 - ◆ Once burden shifts, he will be found liable unless he produces evidence to satisfy the court that he was not at fault.
 - ◆ **Res ipsa loquitur:** The facts speak for themselves
 - **The Plaintiff's Own Conduct**
 - ◆ Even if the defense has been negligent, sometimes the plaintiff is largely responsible for their own damages.
 - ◆ **Contributory Negligence:** Negligence of an injured party that contributes to her own loss or injury.
 - ◇ Can apply even if the victim is not to blame for what happened, but their subsequent actions contribute to the extent of the original injuries.
 - ◇ The plaintiff is expected to act reasonably to minimize or mitigate their damages suffered.
 - ◆ Now courts must apportion damages according to the respective degree of responsibility of the parties.
 - ◆ An appropriate standard of care is applied to both the plaintiff and the defendant
 - **The Relevance of Insurance**
 - ◆ In many tort cases the actual loss falls on an insurance company
 - ◆ Courts do not admit evidence about the existence or amount of insurance coverage in negligence actions because their decisions must be based strictly on the merits of the dispute being tried
 - ◆ When an insured party gets money from her insurance company, her right to sue the other driver passes to the insurance company.
 - ◇ **Subrogated:** One person becomes entitled to the rights and claims of another.

➤ **Product Liability**

- Liability of manufacturers for injury or loss caused by defects in their products.
- Manufacturers tend to breach an implied contractual undertaking that a product is not defective.
 - Contractual remedies sometimes don't work out though, because the manufacturer doesn't have a contract with the end user, they simply have a contract with the retailer.

- This law has therefore been adopted under tort law, as it is hard for the retailers to notice these defects sometimes, therefore the manufacturers have a growing responsibility for the safety of consumers.
 - The manufacturer ultimately owes a duty of care to the final user on top of the duty of care they owe to other retailers in the chain.
 - The manufacturer will be held liable unless it can show that the cause of the defect was not something for which it should be held responsible (circumstantial evidence principle)
 - **Duty to Warn:** Manufacturers owe a duty to consumers to give proper warning of dangers associated with the product.

➤ **Occupier's Liability**

- The duty of care owed by an occupier of land to visitors to the premises.
 - **Duty owed to an Invitee**
 - **Invitee:** A person permitted by an occupier to enter premises for business purposes.
 - Highest duty is owed
 - Ex. Store to a shopper
 - Duty to take care to prevent injuries from hazards of which the occupier is aware and also those of which as a reasonable person he ought to be aware.
 - **Duty owed to a Licensee**
 - **Licensee:** A visitor (other than an invitee) who enters the premises with the consent of the occupier.
 - Duty to remove concealed dangers of which the occupier knew about.
 - This has kinda been abolished now though, and it's the same deal as an invitee.
 - **Duty owed to a Trespasser**
 - **Trespasser:** A person who enters premises without the permission of the occupier
 - Occupier must not set out to deliberately harm the trespasser or recklessly disregard the fact that his acts might injure a trespasser.

➤ **Other Torts**

- **One Tort too Many?**
 - **Intentional Torts**
 - Torts involving conduct that was not accidental
 - Does not mean damage was intended
 - **Deceit:** Knowingly making a false statement with a view to its being acted upon by another person.
 - **Conversion:** Dealing with the goods of another in a manner that is inconsistent with the other's ownership
 - **Inducing Breach of Contract:** Intentionally causing one person to breach his contract with another.
 - **Nuisance**
 - **Public Nuisance:** Interference with the lawful use of public amenities
 - ◆ Ex. Blocking a highway with your car
 - ◆ Actions against the wrongdoer may only be brought by the government, unless an individual is able to show a special injury that is substantially greater than that suffered by everyone else.
 - **Private Nuisance:** Interference with an occupier's use and enjoyment of

her land.

- ◆ Ex. Excessive Noise
- ◆ Courts weigh competing interests and compare:
 - ◇ The degree of interference with the occupier's use and enjoyment of the land
 - ◇ The economic importance of the offending activity.

▪ ***Trespass***

- Unlawful entering or remaining on the land of another.
- Owner of land can bring action against trespasser but will often get little more than nominal damages

▪ ***Assault and Battery***

- ***Assault***: The threat of violence to the person
- ***Battery***: Unlawful physical contact with a person
- Assaulter may be liable in tort to compensate the victim, but these cases are rarely litigated as private actions

▪ ***False Imprisonment and Malicious Prosecution***

- ***False Imprisonment***: Unlawfully restraining or confining a person
- ***Malicious Prosecution***: Causing a person to be prosecuted for a crime without an honest belief that the crime was committed.

Case: Campbell Estate vs. Peterson

Friday, December 16, 2011

4:46 PM

Facts:

The plaintiff in this case is the estate of deceased parents (representing their orphan children) who were the innocent victims of a traffic accident. Originally, the plaintiffs filed an action against the driver of the truck (Mr. Peterson) that, due to a waste disposal bin falling from his truck and fatally injuring the defendant's parents, is alleged to be negligently liable for their deaths. This action is brought by the defendant to name the manufacturer of the bin (Universal Handling Equipment) partially liable for improper manufacturing, which allegedly resulted in the dislodging and falling of the bin (thus causing death.)

Issues:

1. Was the manufacturer of the bin negligent in their actions?
2. To what extent is the co-defendant liable for damages in tort?

Decisions:

1. The manufacturer is held to be negligent in their construction/installation of the subject disposal bin.
2. The manufacturer is 80% responsible for liability of damages in tort.

Reasons:

1. Due to the actions of the assembly workers to construct and install bins that did not conform to the engineering department's specifications, as well as an absence of appropriate standards for testing the bins to ensure their safety, the manufacturer is held negligently liable for their actions.
2. The risk Universal took in installing bins that are not properly configured for use in the truck, and which might not be detected by Mr. Peterson, is far greater than the risk Mr. Peterson took in assuming the bins were properly configured and fit for use. As such, Universal would have more reason to expect injuries to a third party as a result of their actions than Mr. Peterson, and should be held to be negligent to a proportionally greater extent.

Legal Principles:

- When a defendant is sued in negligence, they can attempt to establish a complete or partial defense based on negligence of a third party who can be joined as a co-defendant to the action
- If the plaintiff is successful in their action, damages will be apportioned based on the relative liability of each defendant in tort
- Third party negligence must be based on a breach of the party's "duty of care"; established only by proving: a) a breach of a reasonable standards; b) that the breach caused harm; and c) that the damages/harm were reasonably foreseeable

Case: Hollins vs. Dow Corning

Friday, December 16, 2011

4:48 PM

Facts:

- Ms. Hollis was prescribed plastic surgery from her doctor to correct breast defects she naturally developed. After the surgery, and as a result of her line of work, the implants ruptured within her body, causing the silicon capsule to become lost within her chest. Ms. Hollis brought an action before trial court indicted the manufacturer of the implants (Dow Corning), the surgeon who conducted the implants (Dr. Birch), and the surgeon who removed the ruptured remnants (Dr. Quayle), all on counts of negligence in tort. The trial judge found the firm liable for negligence, while all other parties were cleared of their respective convictions. In appeals court, this decision was overturned on the grounds that the rupture could not be casually connected to faulty manufacture; however, the court did find that the firm was negligent in its failure to inform a “learned intermediary” (in this case the surgeon.) Dow Corning brings this case to the Supreme Court as a final appeal to clear itself of negligent liability.

Issues:

1. Does a manufacturer have a liability to inform the end-user of risks inherit in the product when no direct communication link is expected?

Decisions:

1. The manufacture is ultimately liable to inform the end-user (or a learned intermediary where no such direct communication is possible) of all risks associated with the product.

Reasons:

1. Where the manufacturer cannot directly communicate with the consumer of the product, there is no manner in which to expect the customer will be fully aware with the risks associated with product usage. When the manufacturer has no liability to inform the administer/agent of the product, and they in turn have no source of information with which to warn the customer, the customer will have no recourse against damages resulting from using the product (as both parties can escape negligent liability.) Therefore, in the absence of a direct communication link between manufacturer and customer, the Supreme Court of Canada established a liability of the manufacturer to inform some “learned intermediary” that will administer the product.

Legal Principles:

- The responsibility of a manufacturer is to warn a learned intermediary of risks associated with the products usage where warnings are unlikely to reach the consumer directly

Lecture 15: Torts

Wednesday, December 07, 2011
2:53 PM

➤ **Torts**

- **Tort:** Civil wrong
 - Wrong for one person to do to another
 - If a tort is committed, a plaintiff can civilly sue a defendant for compensation
- **Intentional Torts:** Defendant intended to do the tort
 - Civil action and can also have criminal action
 - R vs. Accused for criminal, doesn't compensate the victim, just punishes the accused.
 - Civil compensates the victim
 - Assault and Battery
 - False Imprisonment
 - Defamation of Character
 - Trespassing
 - ◆ Going on somebodies land without permission
 - Conversion
 - ◆ Taking something that doesn't belong to you
- **Unintentional Torts**
 - Negligence
 - ◆ Carelessness
 - ◆ For a defendant to be liable for negligence, there use to have to be some type of contractual connection between the parties.
 - ◇ Not anymore...
- Purpose of tort law is to compensate not punish
 - Must prove that the breach therefore caused harm
 - Damages must be reasonably foreseeable
- **Thin Skull Rule**
 - Take your victim as you find them
 - IF the injury is way worse to someone who is particularly vulnerable than other people, you are liable for everything that goes wrong.

➤ **Duty of Care**

- Duty of care is anyone you should reasonably foresee will be affected by your actions
 - **Not** everyone
 - **Not** anyone it actually affects
- Breach of reasonable standard
 - Except is USA, managers there are strictly liable

Lecture 14: Negligence

Monday, November 21, 2011

11:26 AM

➤ **Negligence**

○ **Plaintiff**

- Duty (Standard)
- Breach
- Causation

○ **Defense will automatically try and argue:**

- No duty
- No Breach
- No Causation
- VOLENTI
 - Complete defense in that, if the defendant can prove it, they are not liable at all.
 - Defense has to prove:
 - ◆ Plaintiff was aware of the physical and **legal risks** of engaging in an activity
 - ◆ And Consented to both
- Contributory Negligence
 - Partial defense , can never be a complete defense ever.
 - Under the **negligence act** the court can apportion/split liability depending on their degree of liability
 - Split between plaintiff and defendant, or between defendants (co-defendants, third parties)
 - Question Court Asks: Did the plaintiff contribute to their losses by failing to take proper care
- Failure to mitigate partial defense, plaintiffs conduct AFTER the breach is looked at.
 - Question: Did the plaintiff do what was reasonable to mitigate the loss?
- VICARIOUS LIABILITY
 - Employer is JOINTLY liable with the employee for the negligence/torts committed by an employee who is acting in the scope of their employment
 - Generally the plaintiff will go for the deeper pocket, ie the employer... and the employee may not necessarily be sued.
 - ◆ The plaintiff has the right to sue either though, or both, its all up to them.

➤ **Duty of Care**

- Did the defendant owe a duty of care to the plaintiff?
 - To whom do you owe a duty of care?
 - To those persons it is reasonably foreseeable will be affected by your actions
 - TEST: Would a reasonable man have foreseen this conduct causing harm to this plaintiff?
 - Is this duty limited by public policy considerations?
 - What standard of care do you owe those persons to whom you owe a duty

of care?

- TEST: What would the reasonable man foresee as being dangerous conduct having regard to the probability and seriousness of the harm?
- **TEST FOR PROFESSIONALS**
 - ◆ The court must determine whether the conduct of the professional was up to the standard of the person of reasonable competence practicing in the same field.
 - ◆ Liability for any negligent misstatement **ONLY** arises
 - ◇ When the professional is asked for advice/opinion
 - ◇ The professional provides that advice/opinion knowing that that person may rely upon it.
 - ▶ Not liable to anyone else who maybe overhears the advice... only the exact person you are giving the advice to.
 - ◇ An opinion of a professional equals fact
 - ◆ Your opinion doesn't have to be PERFECT, but as long as there are facts that back up your opinion, and can justify your opinion, you're probably good to go.
 - ◆ Contractual duties are where the relationship between the parties is governed by a contract.
 - ◇ Common Law
 - ◆ Tort duties are where a duty of care, skill and diligence is imposed in circumstances where there is no contractual relationship between the parties
 - ◆ Fiduciary Duties
 - ◇ Can be imposed in a relationship based on trust, with or without a contract and involves moral and ethical duties.
 - ▶ Equity Court

Reading 7B: Negligent Misstatement

Wednesday, December 07, 2011

5:47 PM

➤ **Professional Liability: The Legal Dilemma**

- Professionals are people who have specialized knowledge and skills that their clients rely on and are prepared to pay for.
 - Professional opinions are not infallible though.
 - The purchase of professional services reduces risk
 - When a client pays for and relies on advice and it turns out to be wrong, is the professional liable for the loss or harm suffered by the client?
- The benefits gained by a plaintiff who recovers damages will exceed the losses of a professional defendant who has to pay them but can recoup the costs by increasing fees and by purchasing insurance against liability.
 - So if the courts award too many people who received 'bad advice' professionals will need to charge such ridiculously high prices for the service, and no one will want them.

➤ **Liability of Professionals**

- Professional liability is considered under three headings:
 - **Contractual Duty**
 - An agreement to provide professional services to a client contains a promise to perform those services with due care.
 - A breach of the promise is a breach of the contract and the client may then sue for damages.
 - **Fiduciary Duty**
 - A duty imposed on a person who stands in a special relation of trust to another.
 - Can exist even if the services are free, aka no contract
 - Three characteristics to be classified as fiduciary:
 - ◆ Fiduciary has scope for the exercise of some power
 - ◆ Fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
 - ◆ Beneficiary is peculiarly vulnerable to or is at the mercy of the fiduciary holding the power.
 - Lawyer/client and doctor/patient are inherently fiduciary
 - If there is a fiduciary duty, more obligations are imposed than are expressed in the contract or required under tort law.
 - ◆ Must act honestly, in good faith, and only in the best interest of the client.
 - **Conflict of Interest:** A situation where a duty is owed to a client with the interests of the professional, another client, or another person to whom a duty is owed.
 - ◆ Has a duty not to profit or attempt to profit at the owner's expense
 - **Duty in Tort**
 - A plaintiff might choose to sue either in contract or in tort, instead of only being able to sue within the contract.
 - Duty may be owed in tort to persons other than the client who is paying for the services.

- ◆ Many people may rely on a professional opinion given to a single client
- ◆ **Third Party Liability:** Liability to some other person who stands outside a contractual relationship.
- **The Choice of Action**
 - Sometimes a professional might be liable in tort, but not in contract etc.
 - It is important when choosing whether you're suing for breach of contract, breach of fiduciary duty, or for negligence.
 - **Ex. Negligence**
 - ◆ Suing in tort make it advantageous to sue in tort, however here the contributory negligence plays a part.
 - The form of the action also affects the amount of damages awarded in some cases.
 - ◆ Breach of fiduciary duty means the defendant is under a **duty to account**
 - ◇ The duty of a person who commits a breach of trust to hand over any profits derived from the breach.
 - ◇ You're fucked if you get successfully sued for breach of fiduciary duty.

➤ **Liability for Inaccurate Statements**

- **Misrepresentation**
 - **Deceit:** The making of a false statement with the intention of misleading another person.
 - A victim who relies reasonably on this and suffers a loss may recover damages from the person who made the statement.
 - Deceit may also take place when a person deliberately conceals or withholds information
 - **Fraudulent Misrepresentation:** An incorrect statement made knowingly with the intention of causing injury to another.
 - Done on purpose
 - **Negligent Misrepresentation:** An incorrect statement made without due care for accuracy.
 - Breach of the duty of care, but not necessarily on purpose.
 - Duty of care need not be owed to every conceivable person, but should be confined to the particular person.
- **Hedley Byrne Principle**
 - **Disclaimer:** An express statement to the effect that the person making it takes no responsibility for a particular action or statement.
 - A person who makes a misstatement may be held liable for losses suffered by a wider group than those with whom she has had direct contractual or fiduciary relationship.
- **Limits to the Principle**
 - If this is taken to the extreme, professionals would face almost unlimited liability, as anyone who hears the advice or reads it or anything could claim it was deceit and sue them.
 - There needs to be a sufficiently close relationship between the plaintiff and the defendant that in the reasonable contemplation of the defendant, carelessness on its part may cause damage to the plaintiff.

- Liability should be restricted to the use of the information for the same purpose as that for which it was prepared.
 - Eligible plaintiffs must not only be foreseeable in a general sense, but foreseen in relation to a contemplated transaction.
 - The plaintiffs reliance on the misinformation must have been reasonable
 - It can be reasonable to rely on a statement, but negligible to rely exclusively on it.
- **Omissions**
 - The duty to take reasonable care includes the duty not to omit essential steps in providing professional services
- **The Standard of Care for Professionals**
 - A professional must exercise the same degree of skill and possess the same level of knowledge as is generally expected of members of that profession.
 - Decided based on professions code of conduct
 - Professional opinion
 - The degree of skill and knowledge shared must be commensurate with the particular task undertaken.
- **Causation**
 - Based upon reliance
 - Did the client rely upon the advice of the professional? Would the client have acted that way if they had not received advice from the professional?
- **The Role of Professional Organizations**
 - **Responsibilities and Powers**
 - Most major professions are governed by professional organizations which are established and regulated by provincial statutes.
 - **Codes of Conduct**
 - Rules of a professional organization setting out the duties and appropriate standards of behaviour to be observed by its members.
 - Can be used to determined the level of duty of care owed by the profession.

Case: Hercules Managements Ltd. Vs. Ernst & Young

Friday, December 16, 2011

5:29 PM

Facts:

- The plaintiffs in this case were investors in a firm (Northguard Acceptance Limited, or NGA) that was regularly audited by the defendants. The plaintiffs used the audited financial statements provided by the defendants to guide their investment decisions, thereby leading them into investing in the firm before it went into receivership. The plaintiffs charge that the defendants negligently prepared the audited statements and as such should be held liable for the economic losses they suffered. This case is a summary judgment on the court's finding that the defendants weren't in fact liable for these damages.

Issues:

1. Is there a real or substantial relationship between the defendants and the plaintiffs (or were the auditors aware that the plaintiffs were using their audited statements)?
2. Do the defendants owe the plaintiffs a duty of care for the purposes in which the statements were used?

Decisions:

1. A real/substantial relationship exists between the auditors and Hercules Managements.
2. The defendants do not owe a duty of care to the plaintiffs for the purposes in which the audited statements were used.

Reasons:

1. It was earlier established that the defendants (E&Y) were well aware of the plaintiffs (Hercules Management) and were aware that the plaintiffs were making use of their audited financial statements. As such, a relationship between the two parties is implied.
2. The purpose of the audited financial statements was to provide investors with an overview of management's performance and suggestions for retaining or removing management from office. However, the purpose of the statements was never to guide investment decisions, and therefore no duty of care is established for this purpose of usage.

Legal Principles:

- Auditors owe the users of the statements they prepare a duty of care where the injured party makes use of the statements for the purpose in which the statements were prepared, and the auditors are aware of this party's usage prior to preparing the statements.
- When the users of the statements are not made apparent to the auditors prior to the audit being prepared, no duty of care is established for the auditors to the users.

Case: Rangen Inc. vs. Deloitte & Touche

Friday, December 16, 2011

5:28 PM

Facts:

The plaintiff provided aqua culture products to a fish farming business based on audited financial statements conducted by the defendant. Subsequently, the fish farming business defaulted on its trade credit, inflicting an economic loss on the plaintiff of several hundred thousand dollars. In trial court, the judge found that there was not an acceptable proximity of closeness between the defendant and plaintiff with which to establish a duty of care. The plaintiff brings this action to the appeal court claiming that such a duty of care should exist and be enforced against the defendant.

Issues:

1. Is there a substantial proximity of closeness between the defendant and plaintiff?
2. Should the defendants owe the plaintiff a duty of care, and be held liable for the plaintiff's purely economic losses.

Decisions:

1. There is no substantial proximity of closeness between the parties.
2. The defendants owe no duty of care to the plaintiff, and as such are not liable for the losses.

Reasons:

1. A substantial proximity exists where the defendant is aware of the parties that will make use of the information provided, or the precise purpose of the information when the names of the parties are not available. Since Deloitte & Touche could not reasonably foresee that the plaintiff would make use of the statements for this precise purpose, there is no substantial proximity established.
2. The main determinant of liability in cases of negligence causing purely economic losses is that a close proximity exists between the plaintiff and defendant. As discussed in (1), the facts of the case do not establish such proximity and thus do not provide awards for Rangen Inc. Given the case at hand, awarding damages to the plaintiff would constitute imposing liability of an indeterminate amount for an indeterminate time to an indeterminate class.

Legal Principles:

- An auditor's duty of care in cases of misstatement has been limited to those parties it can reasonably foresee will use the prepared statements, and only for those purposes the auditors expect the statements to be used for at the time of preparation (or more accurately the risks the auditors expect to incur.)
- Auditors do not owe a duty of care to any parties that the auditors do not expect to directly prepare the statements for

Lecture 15: Fiduciary Duties

Wednesday, November 23, 2011

11:49 AM

➤ **Fiduciary Duties**

- ◇ Can be imposed in a relationship based on trust, with or without a contract and involves moral and ethical duties.
 - ▶ Equity Court
- ◇ Hardest part is figuring out who the fiduciary is (the person who is relied upon)
 - ▶ Created when one party puts trust and confidence and reliance in another, or where there is an agency relationship.
 - Disclose all material facts concerning the transaction that the client might want to know
 - Undivided loyalty to the principle (client)
 - Duty to account to principal all bonuses or commissions received
 - No conflict of interest- must act in best interests of principals
- ◇ Figuring out who is the fiduciary:
 - ▶ The fiduciary has scope for the exercise of some discretion or power
 - If you as a client have gone to a person because you don't have the expertise and you need the to engage in an activity for you
 - ▶ The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests
 - ▶ The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
 - Although not a weaker party, since the client doesn't hold the power that they are giving to the other party, they are giving power to the other party.
- ◇ If you are found to be the fiduciary and you breach the duties, the consequences are DIRE
 - ▶ Any breach of any of the duties (in supplement bubbles)
 - ▶ The party must cough up all the profit to the principal.
 - Any payment from the client
 - Any payment from another person conflicted in interest
 - Liable for the losses on investment as well as **consequential losses** such as legal and accounting fees
- ◇ Courts have little patience for these cases, if it seems a little bit off, they getcha.
- ◇ The minute you find a fiduciary duty, you need to make sure they aren't breaching any of the duties they owe their client
- ◇ Fiduciary relationships are also created where there are agency relationships, its automatic, and all the rules apply again.

Case: Hodgkinson vs. Simms and Waldman

Friday, December 16, 2011
5:30 PM

Facts:

The plaintiff approached the defendant with the objective of receiving independent financial advice. After an initial consultation in which the plaintiff explained his circumstances and investment objectives, the defendant made the suggestion that Hodgkinson purchase a stake in "Multiple Urban Renewal Buildings" (or MURBs.) Subsequently, the real estate market collapsed, and the plaintiff lost a substantial portion of his investment funds (\$350,507.62 in total.) What the plaintiff did not know at the time, however, was that the defendant also acted on behalf of the firm the plaintiff invested in. As such, the plaintiff argued, the defendant should be held liable for his damages suffered due to the breach of fiduciary duty. This is a summary judgment of the Supreme Court's finding that the defendant is in fact liable for breach of duty.

Issues:

1. Should the defendant's failure to disclose his relationship with the MURB firm constitute a breach of fiduciary duty?
2. If such a breach does exist, should the defendant be liable for the plaintiff's losses due to market movements?

Decisions:

1. The defendant is found guilty for a breach of fiduciary duty.
2. The defendant is ultimately liable for the losses suffered by the plaintiff.

Reasons:

1. The defendant went out of his way to represent himself as an **independent** advisor. Since the objective of the plaintiff was to secure independent advice, and his reliance on the defendant caused him to suffer harm, the defendant's actions constitute breach of fiduciary duty.
2. If the plaintiff were aware of the relationship between the defendant and the MURB firm, he would likely not have invested in this industry. As such, the losses suffered by the plaintiff were contingent upon the breach of fiduciary duty conducted by the defendants, and liability should be assigned accordingly.

Legal Principles:

- Advisors run the risk of liability where they try to marry the interests of two clients
- "Fiduciary Duty": Financial advisors are burdened with the duty to act in the best interests of their clients (specifically by avoiding "conflicts of interest")
- Breach of fiduciary duty exists where the plaintiff can establish a reliance was made upon the party giving advice, which lead to losses being suffered by the plaintiff

Reading 8A: Agency Relationships

Wednesday, December 07, 2011

7:14 PM

➤ **The Nature of Agency**

- A relationship where an agent (person acting for another person in contractual relations with third parties) is authorized by another person for whom she acts (the principle) to negotiate contracts with third parties.
- Typically a contractual relationship, with the agent being paid by the principal (can do it for free though, but is still under contract)
- **Dependent Agents:** An agent who acts exclusively or mostly for a single principal
- **Independent Agent:** An agent who carries on an independent business and acts for a number of principals.
 - Not an employee and usually acts on behalf of several principals

➤ **Creation of an Agency Relationship**

- Any person who has the capacity to contract may appoint an agent to contract on his behalf.
- **Agency Agreement:** The agreement between principal and agent whereby the agent undertakes to act on behalf of the principal.
 - Must also consider the relation between the principal and third parties with whom the agent makes contracts on the principal's behalf.
 - Can be oral, written, under seal etc.
 - If it is to extend beyond 1 year it must be written, and it is recommended that everyone get it in writing typically.
 - Agreement should clearly indicate the limits of the agents authority
- **Power of Attorney:** A type of agency agreement authorizing the agent to sign documents on behalf of the principal.

➤ **Duties of an Agent to the Principal**

- **Duty to Comply with the Agency Agreement**
 - Rights and duties are individual to the contract between parties
 - Breach of contract is the same as breach of any contract
- **Duty of Care**
 - An agent owes a duty of care to the principal even when she acts free of charge.
 - Notice to an agent is the same as notice to the principal, so the agent needs to be on top of things.
- **Personal Performance**
 - Agent cannot delegate duties without the principal's agreement
- **Good Faith**
 - Requires that an agent inform the principal of any information coming to her attention that might influence the principal's decisions
 - Money that comes into the agent's possession in respect of contracts made for the principal belongs solely to the principal, although sometimes it can be used partly for commission.

➤ **Duties of the Principal to the Agent**

- In lieu of an express term, the agent is entitled to a reasonable fee.

➤ **Contracts with Third Parties**

○ **The Authority of the Agent**

- The whole point is to allow the agent to bring about a contract on behalf of the principal with a third party. Whether a contract actually forms is based on an agent's authority which may come in two forms:

□ **Actual Authority**

- ◆ The authority given expressly or impliedly to the agent by the principal.
- ◆ May be set out in the agency agreement
- ◆ Has implied and express terms
- ◆ Can be inferred from the previous actions made by the agent.

□ **Apparent Authority**

- ◆ The authority that a third party is entitled to assume that the agent possesses.
- ◆ The third party doesn't know exactly what the agent is allowed to do
- ◆ A contract is valid and enforceable even when the agent had no actual authority to enter into it if she had the apparent authority to do so.
- ◆ If it is clearly outside of what they're allowed to do, the agent is breaching her contract.

◆ **Usual Authority (Commercial Usage)**

- ◇ Act in the way that is usual for that type of agent in that type of business, unless the third party should/knows any restrictions upon the authority.
- ◇ If the third party is aware that restrictions apply on the authority, they cannot claim that there is apparent authority.

◆ **Holding Out**

- ◇ Representing by words or conduct that a person is one's agent or has a particular authority.
- ◇ If authority is implied, and the third party doesn't know any better, the contract will be enforceable even if no agency relationship existed.

□ **Ratification**

- ◆ Sometimes a person acts as an agent falsely knowing that she has no authority, but hopes that the proposed principal will later adopt the contract.
- ◆ Adoption by the proposed principal is known as **ratification**.
- ◆ The principal needs to accept the entire contract that the agent made for them if they want to accept any of it, they can't just accept what is beneficial to them.
- ◆ Principal must ratify within a reasonable time as well to be able to claim the benefit of a contract.
- ◆ A principal cannot ratify a contract if at the time the contract was made he would have been unable to enter the contract himself.
- ◆ A principal cannot ratify when the rights of an outsider are

affected.

- ◆ A principal cannot ratify if at the time the agent made the contract she failed to name the intended principal or at least mention the existence of a principal whose identity could then be ascertained.
- ◆ BASICALLY, an agent's contract with a third party may be ratified :
 - ◇ Expressly or impliedly
 - ◇ Within a reasonable time
 - ◇ By a named principal
 - ◇ If the rights of an outsider are not affected
 - ◇ If at the time of creation and ratification the principal was capable of making the contract.

➤ **Rights and Liability of Principal and Agent**

- When an agent makes a contract on behalf of her principal with a third party, the question arises as to who is liable on the contract- the agent or the principal.
 - **Either:**
 - ***The principal alone is liable on the contract***
 - ◆ If the agency relationship is normal, the principal alone is liable
 - ◆ After the contract is made, the agent ceases, and the principal is liable for performance and enforcing the contract against the third party.
 - ◆ Agent has no liability to the third party even if she acts outside of her actual authority, as long as she acts within her apparent authority.
 - ◇ May be liable to the principal though
 - ◆ To absolutely avoid liability, agents should indicate they are an agent through a special signature stating so.
 - ◆ The principal doesn't even have to be specifically named if they want to remain anonymous
 - ***The agent alone is liable***
 - ◆ When an agent contracts on terms that she is the real contracting party, even if she is actually acting as an agent, she alone has rights and liabilities to the third party.
 - ◆ Principal can neither sue nor be sued.
 - ***Either the principal or the agent may be held liable***
 - ◆ Sometimes agents do not mention their status, and deals with a third party without it being clear she is an agent.
 - ◇ Third party is entitled to sue the agent
 - ◆ Once the third party discovers the identity of the principal, if the contract was one that the principal had authority to make, the third party has the option of holding the principal or the agent liable.
 - ◇ Unless they have already sued and gotten a decision about the agent, they can't change their mind and now sue the principal.
 - ***Rights of the Undisclosed Principal***
 - An undisclosed principal can generally enforce a contract made on his behalf with his authority.

- ◆ Must show the contract was made on their authority.
- ◆ If the agent had no authority, he cannot ratify the contract, cause this would give him way too much power

- **Liability for Torts**

- If an agent misrepresents the contract, the third party may rescind it just as if the principal had committed the misrepresentation.
- If the agent was acting within authority, the third party can sue the agent AND the agent for tort.
- The principal is vicariously liable for torts committed by his agent while acting within the scope of her actual or apparent authority.

- **Breach of Warranty of Authority**

- There is no contract when a person makes themselves seem like an agent, but they have no authority at all (actual or apparent), and the principal does not ratify.
- Agents can act negligently and pretend they have authority when they don't, but sometimes agents think that they have authority when they do not, and they innocently act incorrectly as an agent.
- **Warranty of Authority:** A person who purports to act as an agent represents that she has authority to contract on behalf of the principal.
 - ◆ Can sue for damages that are necessary to put the third party in the position she would be in if the contract were true.

- **Terminating an Agency Relationship**

- Agents authority can be terminated when:
 - At the end of the time specified in the agency agreement
 - At the completion of the particular project for which the agency was formed
 - On notice by either the principal or the agent that he or she wishes to end the agency
 - On the death or insanity of either the principal or the agent
 - On the bankruptcy of the principal
 - On an event that makes performance of the agency agreement impossible
- If no given time of the contract is given, an agent or principal may cancel the relationship whenever they want. If there is a specified time though, and one pulls out, it is breach of contract.
- If an agency relationship ever ends, the principal should tell all third parties or else the agent could keep going under apparent authority.

Lecture 16: Agency Relationships

Monday, November 28, 2011

11:54 AM

➤ **Agency**

- **Principal** aka your client
 - Gives you as the agent to work on your behalf
 - They will authorize you as the agent to act on their behalf in a business transaction
 - Ex. To buy or sell stocks on their behalf, sell their house, etc.
- **Agent** aka you
 - Facilitates a contract between principle and the third party
 - Not a part of the contract
 - Relationship between principal and the agent is referred to as the agency relationship
 - Automatically characterizes as a fiduciary duty from the agent to the principal
- **Third Party** aka the outside contracting party
 - Will have a contract with the principal

➤ **Agency Relationship**

- Created by:
 - **Express Agreement (oral or preferably written)**
 - Retained agreement between a lawyer and a contract
 - Listing agreement between a lawyer and a contract
 - **Principal gives agent Express/Actual authority- this authority is delineated**
 - If the agent acts within ACTUAL authority then the Principal and third party are liable on the contract.
 - ◆ Agent is not a party and is not liable.
 - **Agency by Conduct/ by estoppel**
 - Agent has no actual authority but:
 - ◆ The **principal** makes some sort of representation or creates the impression to the third party that the agent does in fact have some authority
 - ◆ Ex. Employee working for a corporation, corporation can create the impression to third parties that you have more authority by maybe giving you a really fancy title that makes you look way more involved and important than you are in the company.
 - ◆ Third party then relies on this authority and representation
 - ◇ Is induced to enter into the contract, but they are unaware of any restrictions on the power of the agent.
 - The perspective of the third part is the perspective the court will take.
 - ◆ If agent has apparent authority, the principal and the third party are bound in contract and the agent is not liable on the contract.
 - ◇ They may be sued on breach of fiduciary duty however as they may have acted unlawfully.
 - As long as the agent is acting within actual/apparent authority the principal is jointly liable for negligence of agent
 -
 -

➤ **Example**

- Petunia (Principal) asks Rose (Employee/Agent) to go and buy a variety of flowers for her, so Rose goes to the flower shop (supplier) and gets the flowers, shop bills petunia, petunia pays.
 - Now petunia has established the idea that it is okay for rose to buy flowers for her.
 - Next time, she asks Rose to go and just buy roses.
 - Rose doesn't like the look of the roses, and buys tulips instead
 - ◆ Rose doesn't have the authority to buy tulips though... and she is acting outside of that authority in buying the tulips.
 - ◆ The supplier sends the bill for the tulips to petunia, but petunia didn't want tulips, so shes not gonna pay. She only gave rose the authority to buy roses, and rose has no actual authority to buy tulips.
 - ◆ Supplier will now say that Rose has apparent authority.
 - ◇ Prove 4 part test
 - ▶ Did petunia through words or conduct create an impression to the supplier that Rose had some authority?
 - Yes. Sent Rose last time to buy a variety of flowers, and paid for it.
 - Precedent is set that Rose is allowed to buy whatever flowers for Petunia that she wants.
 - ▶ Supplier was unaware of Rose's restrictions.
 - Petunia should have called the store beforehand and say Rose is coming to get roses, don't let her buy anything else.
 - ▶ Supplier was induced to enter into the contract
 - ▶

➤ Example 2

- Pemberton Benchlands vs. Sabre

Reading 8C: Partnerships

Friday, December 02, 2011
2:48 PM

➤ **Sole Proprietorships and Partnerships**

➤ **Choosing the Appropriate Form of Business Organization**

➤ **Sole Proprietorship**

- Can come into formation simply by the actions of the individual
- An unincorporated business owned by a single individual
- Subject to many regulations that apply to all forms of business
 - Public health, zoning and taxation laws all apply

➤ **Partnerships**

- The relationship between 2 or more persons carrying on a business with a view to profit
- Members can pool skills and knowledge and physical/financial resources
- Disagreements, dishonesty or incompetence can hinder them though.
- **The Partnership Act**
 - May be established without formality, but their ways are still governed by law.
 - The Partnership Act brings together the numerous cases under more general principles and codified the law
- **The Nature of Partnerships**
 - **The Definition of Partnership**
 - **The Partnership Relationship**
 - ◆ Consensual and contractual relationship
 - ◆ Normally a formal written contract is drawn up and signed by all partners
 - ◇ People can be found to be partners even if no actual contract exists though based on their actions.
 - **The Business Nature of Partnership**
 - ◆ Does not apply to associations such as charitable enterprises, public boards, etc. Things that don't make profit don't count.
 - ◆ The joint ownership of property does not in itself make the owners partners though...
 - ◆ Not every business relationship makes the parties to the relationship partners with each other.
 - ◇ Isolated transactions undertaken jointly do not by themselves make the parties partners, the two people need to actually be carrying on a business together.
 - **The Profit Motive**
 - ◆ The business must be carried on in view to profit
 - ◇ A sharing of profit is an essential element of partnership therefore.
 - ◇ Commissions or sharings of gross receipts doesn't count
 - ▶ Ex. A theatre rents out its hall to a drama club in account that they make 10% of the profit... not a partnership.
 - ◇ Forms of splitting profit that do not alone account to a partnership are sharing profits to:
 - ▶ Repay a debt owed
 - ▶ Pay an employee or agent of the business as part of his remuneration
 - ▶ Pay an annuity to a widow, widower or child of a deceased partner
 - ▶ Repay a loan under which the lender is to receive a rate of interest varying with the profits
 - ▶ Pay the seller of a business an amount for good will that varies according to the profits (s. 4)
 - ◇ Other than these reasons, a person sharing the profits has typically contributed a large portion of their own capital into the business, and is a strong evidence of partnership.
 - ◇ Also, it matters whether the person receiving the profits has taken part in the management of the business
 - ▶ If they have made an active part in making decisions on important matters, especially if they've also shared in the profits, its probably a partnership for sure.
 - **The Legal Nature of a Partnership**
 - **Legal Personality**
 - Partnerships have no independent existence and merely represent the collective rights and duties of

- all the partners.
 - Whenever a partner dies or is replaced, a totally new partnership is formed
 - A partnership is also treated as a separate entity with its own assets, liabilities, and financial statements.
- **The Continuing Relationship Between Partners**
 - Recognize the concept of a firm
 - ◆ **Firm:** collective reference to the partners in a partnership
 - If a partner dies, the partnership is dissolved, unless explicitly stated in the contract when the partnership was formed. (s. 36)
- **Partnership Property**
 - A partnership may have property that is distinct from the property of the individual partners.
 - Ex. Real property is owned by the partnership as any real property would, but in the eyes of the partners individually, they should look at it as personal property that they don't OWN itself, but rather an interest in that property.
- **Creditors of the firm**
 - Partnership creditors have first call against partnership assets before the personal creditors of an individual partner.
 - A deceased partner's personal creditors have first call against the personal assets of her estate (s. 11)
- **Legal Proceedings**
 - A partnership is treated as a separate entity in court actions.
 - They may bring an action in the name of the firm without naming all the partners as plaintiffs, an outside party may sue a partnership in it's firm name without naming the partners as defendants.
- **The Creation of a Partnership**
 - **Partnership Agreement:** An agreement between persons to create a partnership and usually setting out the terms of the relationship
 - ◆ Written is a better idea
 - Agreement, explicit or implied.
 - Easily dissolveable, so many partnerships break up after a short time.
 - ◆ Unprofitable?
 - ◆ Partners have gone on to form a corporation?
 - ◆ Conflict of personalities?
 - Agreement includes:
 - ◆ Identity of partners
 - ◆ Name of firm
 - ◆ Nature of business
 - ◆ Duration of relationship
 - ◆ Method of ending partnership
 - ◆ Rules for new partners
 - ◆ What happens if someone dies
 - ◆ Participation in management
 - ◆ Contribution of each partner
 - ◆ Capital contribution of each partner
 - ◆ Ownership of property
 - ◆ Sharing of profits and losses
 - ◆ Procedure for resolving disputes.
 - If parties don't cover everything, there are basic rules in the partnership act.
 - Wise for a professional to make the agreement so wording doesn't get misunderstood.
 - **Registration**
 - Filing in a local registration office
 - ◆ Must be remade if partnership dissolves, or a partner is replaced
 - Some don't even have to register though
 - Registration is open to the public
- **The Liability of a Partner**
 - **Contractual Liability**
 - A person who is held to be a partner becomes personally responsible for the debts and liabilities of the

- partnership
- **Agency Principles**
 - ◆ Greatest risk is the contractual obligations of the partnership
 - ◆ Any agreements made by one partner bind the entire partnership, even if you as a partner didn't even know about it (s. 7)
 - ◇ Unless the authority of that partner has been somewhat restricted, and the third party knows of the restriction. (s.10)
- **Joint Liability**
 - ◆ The situation where everyone is personally liable for the full amount of debt. (s. 11)
 - ◆ When the liabilities of the partnership exceed their assets, a creditor may look to the personal assets of the partners to satisfy their debt.
 - ◆ This also means that a plaintiff can only sue a partnership once though, so if they sue one of the partners and they made a mistake and should have sued the other, they can't re sue the other, or the entire partnership.
 - ◇ Best idea is to sue the entire partnership and not just one, so you cover everyone.
 - ◆ If a partner pays the firms debts in full, he is entitled to the other partners share of the debt to be paid back to him by each partner (s. 27b).
 - ◇ If the other partners are insolvent, then debt still has to be paid, and one partner may just have to pay the brunt of it all!
- **Apparent Partners**
 - ◆ A person is only liable for the obligations of a partnership incurred while he is a direct partner of the firm. (s. 19)
 - ◆ Additionally, if a person is a partner in a firm, they don't lose all obligations simply by quitting the partnership unless there is novation- the partners agree and the firm's creditors agree to let them out.
 - ◆ A person who is not actually a partner but has let it be presumed he is, he is liable to any person who has given credit to the firm based on that representation.
 - ◆ If a member of the partnership retires, its in his best interest to inform third parties he has done so, seeing as if after he retires other people make contracts with the partnership under the assumption he is still there, he can be held liable.(s.39)
- **Retirement Steps**
 - ◆ Ensure that all existing clients of the firm are notified
 - ◆ Place notice in the paper
 - ◆ Remove name from register
 - ◆ Any letterheads with his name on it must be destroyed or altered to remove name
- **Tort and Breach of Trust**
 - The liability of a firm and its partners is not restricted to contracts.
 - All partners and the firm are liable for injuries or damages caused by a partner when driving on the firm's business, negligence or defamatory statements.
 - Firm is also liable for any breach of fiduciary duty breach by any of the partners at all (s.13)
- **The Relation of Partners to One Another**
 - May be implied by conduct, or in the partnership act.
 - If a partner acts off, they breach the partnership act, and may be liable to compensate any damages
 - **Implied Terms**
 - **Partnership Property**
 - ◆ All property and rights in property originally brought into the partnership or acquired are called 'partnership property' and must be held and applied by the partners exclusively for the purpose of the partnership. (s. 23)
 - ◆ All property bought with money belonging to the firm is deemed to have been bought on account of the firm and is available only for the use of the firm (s. 24)
 - **Financial Arrangements**
 - ◆ (1) All the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses sustained.
 - ◆ (2) If a partner incurs expenses to keep the business running and to preserve the business, the

- Losses are to be paid first out of profits, next out of capital, and if necessary then out of individual partners assets.
- Losses must be paid in this order:
 - Payment of debts to non-partners
 - Payment of loans made by partners
 - Payment of capital contributed by partners

➤ **Limited Partnerships**

- **Limited Partnership:** A partnership in which some of the partners limit their liability to the amount of their capital contributions
 - **General Partners:** A partner whose liability is not limited
 - **Limited Partner:** A partner whose liability is limited to the amount of his contribution
 - Can't really take a huge role in the decision making in an LP, and if she does, she will become a general partner.
- Scary! Rarely used
- Different from Limited liability partnerships!!

➤ **Limited Liability Partnerships**

- **Limited Liability Partnership:** A partnership in which non negligent partners are not personally liable for losses caused by the negligence of a partner.
- Partners are still liable for their own negligence, as does the firm itself remain liable.
 - An injured person though may not look past the assets of the firm and the negligent individual to be compensated.
- LLPs require written designation
- LLPs may only carry on business for the purpose of practicing and "eligible profession"
- Different from Limited partnerships:
 - Limited partnership needs at least one general partner who has unlimited liability
 - Limited partners lose their limited liability if they participate in management
 - Limited partners are not restricted to the professions

➤ **Joint Ventures**

- **Joint Venture:** A business venture undertaken jointly by 2 or more parties
 - Spread the risk among the participants
 - Simplest form, is simply a contractual joint venture
 - A joint venture affected by agreement without the creation of any separate legal entity.
 - Also, equity joint ventures
 - A corporation formed and jointly owned by the parties to a joint venture for the purpose of carrying on the venture.
- Typically seen as an extension of their own operations, and not a totally separate company.
 - Typically of limited duration
 - Profits are not retained for investments in other projects, but are immediately distributed to each of the participants

Case: Lanz vs. Lanz

Friday, December 16, 2011
5:30 PM

Facts:

-

The plaintiff (Robert Lanz) associated himself with the business of his father, the defendant. After fifteen years working together, the pair had a falling out and left the business. The son's interest in the firm was a claim to 40% of the profits, with no obligation for debts and no clear title to assets. The son charges in this action that, since their arrangement was a partnership, he is entitled to an equal share in the returns of the business upon its dissolution in 1990. As a cause of action, he refers to income tax returns claiming the business as a partnership, and his father's reluctant acknowledgment that he "though it was a partnership."

Issues:

1. Should the firm be considered a partnership as described in "the Partnership Act?"
2. Is the plaintiff entitled to any past proceeds in the firm?

Decisions:

1. The firm will not be considered a partnership, as it does not meet the definition as described in "the Partnership Act."
2. Since the son is not considered a partner to the firm, he has no claim to the firm's past proceeds.

Reasons:

1. The plaintiff did not actively engage in any management of the firm, and made no more contribution than the driving of a truck in exchange for 40% profit compensation. As well, the plaintiff assumed no liability for the risks of the business and could not establish any title to any of the firm's assets. As such, the courts cannot imply that the plaintiff is a partner, as that would not meet the criteria of one who "carries on the business 'in common' with a view of making a profit."
2. The son received his fair share in compensation for his contributions to the business. Accounting records do not indicate that he made any financial contributions to the success of the firm, or roll back any of his earnings into its operations. As such, his compensation will be limited to that which he has received from the defendant.

Legal Principles:

- A partnership is essentially two or more persons acting in common for a business purpose with a view of making a profit
- The fact that owners of the business alone make comments indicating an individual is a partner will not make them a partner in the eyes of the court
- "The Partnership Act" incorporates not only profit sharing, but also joint risk taking (in debt obligations) and degree of managerial influence in its assessment of whether the firm is indeed a partnership

Reading 8D: Corporations

Saturday, December 10, 2011

3:20 PM

➤ **The Nature of a Corporation**

○ **The Corporation as a Legal Person**

- An entity recognized at law as having its own legal rights, duties and responsibilities.
- Entirely creation of the state
- **Corporation:** A legal person formed by incorporation according to a prescribed legal procedure
 - Separate and distinct from its members

○ **Characteristics of Corporations and Partnerships**

▪ **Liability**

- A corporation is liable for its own debts, so a shareholder can lose no more than the shares he has in the company.
 - ◆ **Limited Liability**
 - ◇ Sometimes though small corporations share holders need to give personal guarantees of their own property should the corporation fail, so they really don't have limited liability.

▪ **Transfer of Ownership**

- Since a shareholder has no liability for corporate debts even while he retains his shares, creditors of the corporation have no interest and no say in what he does with his shares.

▪ **Management**

- The separation of ownership and management is crucial for corporations.

▪ **Duty of Good Faith**

- A shareholder owes no such duty to not be in a competing industry to the corporation, he may deal with whatever businesses he wants.

▪ **Continuity**

- A corporation exists independently of its shareholders, so even if someone dies, their shares are passed on in the will, and the corporation keeps functioning as per usual.
- A corporation goes on forever unless it is dissolved by a court order or by voluntary resolution of all the shareholders.

▪ **Taxation**

- It is a taxable entity
- Income of the corporation is taxed first in the corporation and again in the hands of the shareholders.

○ **Consequences of Separate Corporate Personality**

▪ **Capacity**

- A corporation has the capacity and all the rights, powers, privileges of a natural person.
- However since the corporation works through their people, the people need to have necessary authority like in any agency relationship.

▪ **Separate Existence**

- A corporation exists as a separate entity than the shareholders

▪ **Limitations on the Principle of Separate Corporate Existence**

□ **Exceptions to Limited Liability**

- ◆ If shareholders have received unfair distribution of corporate assets, ex. Where a dividend has been paid although the corporation had made no profits, they are liable for the corporations debts to that extent.
- ◆ Limited liability does not protect the shareholders from PERSONAL liability.
 - ◇ Ex. If a director was driving dangerously and caused an accident while on company business, they are not absolved from liability (corporation may also be vicariously liable)

▪ **Other Statutory Provisions**

- Many instances where the separate identity of corporations needs to be disregarded.
 - ◆ **Associated Corporations:** Corporations that are related either a) vertically as where one

corporation controls the other or b) horizontally, where both corporations are controlled by the same person.

- ◇ Only entitled to a single concession between them
 - ▶ Ex. The first \$400,000 of a corporation's profit gets taxed less than the rest... so these two associated corporations only get one \$400,000, they don't each get \$400,000 taxed less.
- ◇ They are not however liable for each other's debts.

▪ **Lifting the Corporate Veil**

- Sometimes courts entirely disregard the separate entity idea, and impose liability on those who control it.
- Three conditions must be met though:
 - ◆ The individual must control the corporation
 - ◆ That control must have been exercised to commit a fraud, or wrong doing.
 - ◆ The misconduct must be the cause of the plaintiff's injury.

➤ **Methods of Incorporation**

○ **Incorporation Statutes**

- Almost all corporations for profit are incorporated under general incorporation statutes.
- Any group of persons that complies with its requirements may form a corporation
- **Incorporation Roots: The Memorandum and Letters Patent Systems**
 - Gets a **certificate of incorporation** issued to them that states that a corporation has formed.
- **Articles of Incorporation System**
 - Most commonly used in Canada now
 - People who want to make a corporation sign and deliver articles of incorporation to a government office and in turn are issued with a certificate of incorporation.

○ **The Choice of Jurisdiction**

- Incorporate federally or provincially?
- The activities of provincial corporations are not restricted to that province.
 - However corporations not incorporated in the province must comply with certain registration requirements in order to carry on business there.

Considerations	Federal	Provincial
Type of business activity	Mandatory for federal activities (like banking)	Anything
Location of business activity	Anywhere in Canada	One province
Registered office	In Canada	In the province
Name selections	Pre-screened	variation
Name use	Throughout Canada	Within Province
Prestige value	Increased	nada
Initial fees	\$200	\$300
Directors Canadian residency	25%	0-25%
Annual filings	Multiple separate	Combined

➤ **The Constitution of a Corporation**

○ **Articles of Incorporation**

- Founding corporate document, often referred to as the charter or constitution of the corporation
 - Name of corporation
 - Place where registered office is
 - Classes and any maximum amount of shares that the corporation is authorized to issue
 - Any restriction on the transfer of shares
 - Rights and restrictions associated to each class
 - Number of directors
 - Any restrictions on type of business
 - Other.

- **The Corporate Name**
 - Name must be approved before being registered as a corporation
 - Cannot replicate another name
- **By Laws**
 - **Nature of By Laws**
 - Incorporating documents are kept as short as possible to gain flexibility in the operation of the corporation
 - **By Laws:** The internal working rules of a corporation
- **Types of Business Corporations**
 - **Public and Private Corporations**
 - **Private Companies**
 - A corporation with a restricted number of shareholders prohibited from issuing its shares to the general public.
 - **Widely Held Corporations**
 - A corporation that issues its securities to the public, also referred to as issuing corporations, reporting issuers and publicly traded corporations.
 - **Closely Held Corporations**
 - Incorporates small and medium sized business enterprises where the number of participants is small.
 - A true limited company with the same legal significance and corporate independence as the widely held corporations.
 - All shares are held by the parent corporation
 - Over 90% of Canadian corporations are closely held
 - Work rather privately.
 - **Corporate Groups**
 - Groups of corporations, one or more of which is widely held, with shares held by the public and listed on one or more stock markets.
 - **Professional Corporations**
 - Leading professionals are often prohibited from incorporating their practices, and are left being a sole proprietor or partner.
 - **Professional Corporation:** A special type of business corporation that may be formed by members of a profession.
 - The letters PC must be in the title
 - Liability of a member of a PC are no different, and they are still responsible for their own negligence, but still have limited liability in regards to overall corporation.
 - Principal advantage is a number of tax advantages
- **Corporate Capital**
 - **Equity and Debt**
 - Corporations raise funds by either issuing shares (equity) or by borrowing (debt).
 - Borrowing increases the funds that are at their disposal, but it increases both assets and liabilities, and their capital is hence broken down into Share Capital.
 - **Share Capital**
 - Every business corporation must have a share capital
 - **Authorized Capital:** The maximum number of shares that a corporation may issue.
 - ◆ **Issued Capital:** The shares that have been issued
 - ◆ **Paid-up Capital:** the shares that have been issued and fully paid for.
 - To become a share holder, a person can:
 - ◆ Be one of the original applicants for incorporation
 - ◆ Buy shares issued by the corporation
 - ◆ Acquire previously issued shares from another share holder.
 - **The Transfer of Corporate Securities**

- **Negotiability**
 - Shares and bonds are often treated as negotiable instruments
 - **Restrictions on Share Transfer**
 - Shares are almost always freely transferable, and if they are not, the shares will not be accepted for listing on a stock exchange.
 - ◆ Assuming its not a closely held corporation of course
- **What is Corporate Governance?**
 - The rules governing the organization and management of the business and affairs of a corporation in order to meets its internal objectives and external responsibilities.
 - Found in the incorporating documents
 - Directors shall manage and supervise the business or affairs of a corporation
 - Affairs are the relationships amongst a corporation and the shareholders and does not include the business carried on by the corporation
 - Business is the external relations between a corporation and those who deal with it as a business enterprise- its customers, suppliers, and employees, as well as relations with the government as a whole.
- **The Structure of the Modern Business Corporation**
 - Common to all corporations are that they have shareholders, a board or directors, and officers.
 - Public companies are required to have an **audit committee**
 - A group of directors responsible for overseeing the corporate audit and the preparation of financial statements. The committee has wider responsibilities in a distributing corporation.
 - **Compensation Committee:** Committee responsible for setting director and officer pay
 - **Nominating Committee :** Committee responsible for proposing and recruiting new directors.
- **Directors**
 - **The Role of the Directors**
 - Directors supervise and manage the management of the business and affairs of the corporation... they:
 - Issue shares
 - Declare dividends
 - Adapt by laws governing day-to-day activities of the corporation
 - Call meetings of shareholders
 - Delegate responsibilities
 - Corporation must have at least one director
 - **Officers**
 - Responsible for day-to-day hands on management of the corporation.
- **Duties of Directors and Officers**
 - Every director and officer must act honestly and in good faith to the best interests of the corporation, and exercise the care, diligence and skill that a reasonable prudent person would exercise in similar situations.
 - Every director and officer must comply with the act of the corporation
 - **What Duties are Owed?**
 - **Fiduciary Duties (sec. 122(1)(a))**
 - High standard of conduct on directors and officers involving loyalty, integrity and trust.
 - Addresses their motives, considerations and factors that influence decision making separately from the decisions themselves.
 - They are expected to avoid and conflict of interests with their corporations.
 - **Duty of Care, Diligence and Skill (s. 122(1)(b))**
 - No greater diligence is required of a director than is required of the average person.
 - ◆ Unless they are a professional
 - Directors are not expected to give continuous attention to the affairs of the corporation and unless there are suspicious circumstances, they are entitled to rely on information received from the officers of the corporation.
 - ◆ May not willfully look away from mistakes and misconduct.

- **To Whom are Directors' and Officers' Duties Owed?**
 - **To the Corporation**
 - The directors and officers owe a duty to their corporation.
 - The interests of the corporations legal entity both future and present.
 - **To the Shareholders and other Stakeholders**
 - The duty of the director is to the corporation as a whole, not simply the stakeholders who elected them.
 - **To the Public**
 - Directors must manage their corporations in conformity with the law, and they may incur personal liability if they fail to do so.
 - It may be in the best interest of the corporation to consider the best interests of the public.
 - ◆ Companies who are seen as corporately socially responsible are perceived better in the eyes of the consumers, and the corporation may experience greater success this way.
- **Defences to Breach of Duty**
 - Directors and officers are personally liable for breach of duty if the corporation fails.
 - Defences and risk management strategies that the directors and officers can use are:
 - **Due Diligence Defence**
 - ◆ Establishing that an acceptable standard of care and skill was exercised by a director or officer.
 - Good faith reliance
 - ◆ The director/officer relied on the accurateness of financial statements or experts reports
 - Corporate Indemnity
 - ◆ An agreement with the corporation to reimburse a director or officer for any costs associated with liability for breach of duty is fair assuming the director acted honestly, reasonably and in good faith.
 - Directors/Officers liability insurance
 - ◆ Corporation can purchase director/officer liability insurance on behalf of its board.
 - ★ □ **Business Judgment Rule**
 - ◆ Courts will defer to the business decisions of directors and officers provided they are arrived at using an appropriate degree of prudence and diligence.
 - ◆ Judges realize they are not business experts, and even excellent decisions can sometimes be unsuccessful.
- **Strict Liability**
 - Directors can be subject to strict liability where no breach of duty need be established.
 - Directors are liable to their corporation when they vote at meetings of the board on specified matters that cause financial losses to the corporation.
 - If the corporation becomes insolvent, the director is liable to all employees for unpaid debts and services provided while they were directors up to the amount of 6 months wages.
- **Specific Conduct Involving Conflicts of Interest**
 - **Contracts with the Corporation**
 - The duty to disclose any interest that the director may have in contracts made with the corporation.
 - ◆ If the director negotiates the sale of his own property to the corporation, or purchase of the corporations property.
 - ◆ Director cannot vote on matters involving these things.
 - Failure of a director to mention his interest gives the other company the ability to rescind the contract should they later find out about it.
 - **Interception of Corporate Opportunity**
 - When it's a director's duty to acquire particular items of property for the corporation, and instead she acquires it for herself.
 - ◆ Breach of duty
 - The property is deemed to be held in trust for the corporation as is any profit made.

- **Corporate Information**
 - When the director receives information about a profitable venture or a great opportunity.
 - It is her duty to give the corporation first chance of acquiring an interest in the venture if the information is received in her capacity as director.
 - ◆ If the corporation doesn't want it, she may do it individually if she wishes.
 - ◇ Best bet to always offer everything to the corporation, even if you think there's no way they'll want it.
- **Competing with the Corporation**
 - A director may not carry on a business competing with that of her corporation, except with permission from the corporation.
 - If she does without permission, the corporation is entitled to claim all the profit made by the director and to obtain an injunction prohibiting the director from any future competition.
- **Related Party Transactions**
 - When large corporations work together, there is potential for conflicts of interest.
 - Some intergroup contracts or arrangements are practically inevitable.
- **Insider Trading**
 - Attracts all three types of liability
 - Civil
 - Regulatory
 - Criminal
 - Liable to:
 - Compensate the seller or purchaser for any loss suffered as a result of the transaction and,
 - Account to the corporation for any benefit or advantage obtained.

➤ **Shareholders**

- **The Role of Shareholders**
 - **Publicly Traded Corporations**
 - In large publicly traded companies, shareholdings may be widely distributed with no single shareholder or group holding more than 5% of the voting stock.
 - Sometimes though, one entity can hold almost all of the stocks.
 - If you don't like the board of directors, don't buy shares here...
 - **Private Corporations**
 - Shareholders problems are radically different
 - ◆ Serious disagreement among the principal shareholders, who are frequently also directors and senior employees of the corporation.
 - Minority shareholders may be "locked in" in the sense that they probably cannot sell his shares except at a fraction of what they're worth.
 - ◆ Because,
 - ◇ In most private corporation transfer of shares is restricted.
 - ◇ Its hard to find someone else who wants to be a minority shareholder in a private corporation.
 - Minority shareholder may be frozen out in that the majority holders may fire him from his job with the corporation. Or they may remove him from the board of directors or increase salaries to themselves so that the corporation itself earns no apparent profit.
- **Rights Attached to Shares**
 - Rights attached to their shares by the articles of the corporation
 - Rights conferred on them by the relevant corporate legislation
 - Rights of the shareholders include the right to:
 - Vote at any meeting of the shareholders
 - Receive any dividend that is declared
 - Receive the remaining property of the corporation (after payment of its debts) on dissolution.

- **Meetings and Voting**
 - **Notice and Attendance at Meetings**
 - **General Meeting of the Shareholders:** A formal meeting of shareholders at which they are able to vote on matters concerning the corporation
 - ◆ Corporation is required to hold at least one per year.
 - ◆ Shareholders are entitled to advanced notice and copies of financial statements before the meetings.
 - **Requirement to Requisition Meetings**
 - Shareholders themselves may call a meeting, however a ton of shareholders need to want to have the meeting.
 - ◆ Rarely used in huge corporations since its hard to get the majority of shareholders to petition for one. More often used in smaller corporations
 - **The Right to Vote**
 - The collective power of the shareholders is exercised through the passing (or defeating) or resolutions:
 - ◆ **Ordinary Resolution:** A resolution by the general meeting and passed by a simple majority.
 - ◆ **Special Resolution:** A resolution of the general meeting required to be passed by a special (usually two thirds) majority.
 - Certain matters must be approved by either ordinary or special resolution:
 - ◆ Approval of alterations to the articles of the corporation (special)
 - ◆ Approval of certain other fundamental changes such as amalgamation with another corporation (special)
 - ◆ Approval of any amendments made by the directors to the by-laws (ordinary)
 - ◆ Election of the auditor (ordinary)
 - ◆ Election or removal of directors (ordinary)
 - **Class Voting rights**
 - Not all shareholders have the right to vote
 - ◆ There can be different classes of shares with different voting rights
 - ◇ Common shares often carry the right to vote only in specified circumstances
 - ▶ Typically one vote per share
 - ▶ Within a particular class, all shares must weigh the same in terms of vote worth.
 - ◆ **Class Rights:** Special rights attached to a particular class of shares
 - ◇ Must be set out in the articles of incorporation
 - **Proxies**
 - In most publicly traded companies, only a small proportion of shareholders actually attend general meetings.
 - All corporate statutes permit a shareholder to nominate a proxy though
 - ◆ **Proxy:** A person appointed to attend a general meeting of shareholders and to cast the votes of the shareholder appointing them.
 - ◆ Must name the proxy, sign a form, and submit it to the corporation before the meeting.
- **Financial Rights**
 - **Dividends**
 - A distribution to shareholders of a share of the profits of the corporation
 - Distribution is entirely within the discretion of the board of directors.
 - No discrimination of payment of dividends to individual members of a class.
 - **Distribution of Surplus**
 - On the dissolution of a corporation, provided it has assets remaining after paying off the creditors and investors, shareholders are entitled to a share of the remaining net assets.
 - **Pre-emptive Rights**
 - Directors can issue new shares whenever, and this can reduce the portion of shares that existing holders have, and they are also open to the risk of "Stock watering" if the new shares are issued

for a cheaper price than the value of the existing stocks.

- **Pre-emptive Rights:** A right to have the first opportunity to purchase a proportionate part of any new shares issued.
 - ◆ If an existing shareholder owns 50% of the existing shares, they have the option to purchase 50% of the newly issued ones.
- **The Right to Information**
 - **The Financial Statements**
 - Must be presented prior to the annual general meeting
 - ◆ Income statement
 - ◆ Balance sheets
 - ◆ Statement of changes in financial position
 - ◆ Statement of retained earnings, including paid dividends
 - ◆ Statement of contributed surplus
 - **Documents of Record**
 - A corporation must maintain certain documents of record at its head office, which may be inspected by any shareholder during regular business hours:
 - ◆ Minutes of shareholders meetings
 - ◆ Register of all transfers of shares
 - ◆ Copy of the corporations charter, by laws and special resolutions including a list of all shareholders.
 - ◆ Register of the directors
 - Can be useful to a minority group attempting to gain evidence of misconduct on the part of the directors.
 - **The Auditor**
 - There is the option to appoint an independent auditor by the shareholders to ensure accuracy of the statements.
 - Not employed by the corporation
 - Only the auditor and the directors have access to the books of account
 - ◆ If a shareholder thinks something is wrong, they can only ask the auditor to check it out, and even then the auditor has no duty that they have to
 - **Appointment of Inspector**
 - Shareholders appoint an inspector to investigate the affairs of the corporation and to audit its books.
 - ◆ Lots of power
- **Duties of Shareholders**
 - Controlling shareholders owe a duty to the corporation
 - No obligation to attend meetings, free to exercise vote however he pleases, can use the shares however he wants

➤ **The Protection of Minority Shareholders**

- **Majority Rule**
 - A controlling group of shareholders cannot only elect the board, approve actions or decline actions based on their majority can even ensure the affairs of the corporation were managed entirely for their own benefit and to the detriment of the minority.
 -
- **The Appraisal Remedy**
 - The right to have one's shares bought by the corporation at a fair price
- **The Derivative Action**
 - Proceedings brought by one or more shareholders in the name of the corporation in respect of a wrong done to the corporation.
 - The minority can make an action against the directors

- **Winding Up**
 - Minority partners have better protection than most minority shareholders.
 - Entitled to accounting of profits and to receive their share of them regularly
 - Corporation law gives the courts discretion to make an order **winding up**
 - ◆ The dissolution of a corporation
 - Drastic, so very rare
 - Usually only used when the corporation is really small
 - ◆ The mere threat of a winding down though kind of convinces a decision to be made.
- **Oppression Remedy**
 - A statutory procedure allowing individual shareholders to seek a personal remedy if they have been unfairly treated.
 - To justify the making of an order under section 241, a complaint must show that the action complained of has been oppressive or unfairly prejudicial
- The most common remedy ordered by courts is to require the majority to buy out the minority interest at a fair price, but a wide range other orders may be made.

➤ **Shareholders Agreements**

- **Advantages**
 - **Shareholder Agreement:** An agreement between two or more shareholders that is distinct from the corporation's charter and by-laws.
 - Directors still owe their best interests to the corporation, and they must not compromise their duty to work in the best interests of the shareholders.
 - Any agreement among shareholders must be restricted to their role as shareholders and must not infringe on their role as directors.
 - **Right to Participate in Management**
 - The shareholders promise to elect each other to the board of directors at each annual meeting and not to nominate or vote for any other person.
 - They may promise not to vote for any major change in the corporation's capital structure.
 - **Right to a Fair Price for a Share Interest**
 - The shareholders may agree to a regular method of valuation of their shares
 - ◆ They may agree not to sell their shares to outsiders without giving the right of first refusal to the remaining shareholders.
 - If someone commits a major breach of the shareholder agreement and remains unwilling to remedy it, they can be required to sell all their shares to the others at the appraised value.
- **Unanimous Shareholder Agreement**
 - A shareholder agreement to which all shareholders are parties
 - An agreement among all the shareholders that restricts in whole or in part the powers of the directors to manage the business and affairs of the corporation is valid..
 - Share holders who are given the power to manage have all the rights, powers and duties and liabilities of a director
 - Only unanimous agreements have special status under the act.
 - Treats unanimous stakeholder agreements almost as if they were part of the corporate constitution rather like by-laws
 - ◆ Provided the opportunity to develop a new flexible device for business planning in private CORPORATIONS!

Case: Universal Property Management vs. Westmount

Friday, December 16, 2011
5:33 PM

Facts:

A third party to this action, Centennial Management Ltd., maintained a debt obligation outstanding with the defendant that had yet to be repaid. Patrick Copeland (a co-defendant) owned a majority stake in the defendant firm (Westmount Windows and Door Ltd.) At one meeting between managers of these two firms, Copeland was offered a sum from a third party (the plaintiff, Universal Property) as an assignment of the debt owed by Centennial. The reason that this offer was made was in large part due to the closeness of Universal and Centennial, with the owners of both firms being from the same family. The defendant declined to accept this offer, and continued to hold Centennial's debts on its ledger without conducting any business with the plaintiff. By mistake, the plaintiff sent a cheque to the defendant meant for another firm, "Westmount Draperies", totaling \$30,635.41. The defendant's accountants immediately applied the funds to the credit of Centennial's account (which at that time stood at \$20,154.46) for which they assumed the funds were meant for. When the plaintiff firm informed Copeland that the funds were sent in error, Copeland refused to repay the funds to Universal. This action is brought by Universal to seek remittance of funds by Westmount for the \$30,635.41, along with punitive damages to Copeland for his disregard in refusing to repay the balance.

Issues:

1. Is Westmount liable to return the funds to Universal?
2. Should Copeland be held liable for punitive damages based on his actions?

Decisions:

1. Westmount is liable, and is ordered to remit the funds to Universal.
2. Copeland reacted in a reasonable manner, and thus should not be charged with punitive damages.

Reasons:

1. The offer to extinguish Centennial's debt by the plaintiff was never accepted by the defendant, and thus the defendant should not have expected that funds sent by the plaintiff should be applied to the Centennial account. Furthermore, since the amount of the cheque bore no resemblance to the balance owing from Centennial, the courts will not imply a claim by the defendant to the balance of the funds. As such, Westmount is liable to remit all funds to the plaintiff.
2. A reasonable bystander would expect (given the extenuating circumstances of the case) that Copeland would react in a similar manner to that which he had. Given the poor credit quality of Centennial, and the request of the plaintiff's management to provide funds on Centennial's behalf, Mr. Copeland should be expected to hold onto the funds until the matter was formerly determined. As such, the courts will not charge Copeland with any counts of fraud or unconscionability, and accordingly no punitive damages are awarded.

Legal Principles:

- Shareholders of a corporation are not liable for the company's debts or obligations, with the exception that shareholders may be ordered to repay the firm's obligations (known as "lifting the corporate veil") where some form of fraud or unconscionability is committed by this shareholder

Lecture 17: Partnerships and Corporations

Wednesday, November 30, 2011

11:38 AM

➤ **Types of Businesses**

○ **Sole Proprietorship**

- One owner
- Not a separate legal entity
- Owner and sole proprietorship are one in the same
- Owner has unlimited liability
 - If the assets of the business are insufficient to cover the debts of creditors, then the creditors can go after your personal assets.
 - No division between what you own and what your business owns.
- Business licenses are cheap, so there are lots of them, but 89% fail in the first year because they are undercapitalized
- Comprise 78% of the Canadian Economy though
- NO NAME PROTECTION at all
- TAXES- taxed at a personal rate which could be much higher than a corporate rate depending on which income you are making

○ **Partnership**

▪ **General Partnership**

- Express
 - ◆ Where the parties agree orally or in writing to be partners
 - ◇ "Partnership agreement"
 - Implied
 - ◆ Lang case is an example
 - ◆ Court can deem a partnership exists IF factors in supplement are present.
 - ◆ Even if you have absolutely no intent to be a partner, the court can decide you are based on:
 - ◇ A contribution by the parties of money, property, skill, effort, knowledge, or another asset to a common undertaking.
 - ◇ A joint property interest in the subject matter of the adventure
 - ◇ The expectation of profit or the presence of adventure
 - ◇ **The right to participate in profits if any are generated**
 - ▶ Has most weight on deciding if a person is a partner
 - ▶ Pretty much guarantees you're a partner...
 - ◇ Joint participation in management
 - ◆ Court doesn't need to establish all of these, just enough to be important
 - ◆ Everyone in the partnership manages the company, everyone has a voice.
 - Apparent
 - ◆ Court can deem a partner to be a partner if he/she represents him/herself as a partner or knowingly allows him/herself to be represented as a partner
- S. 16
- Once a partnership is formed, there are rules that apply to all three types of general partnerships.

- ◆ Partners are all agents of each other- the acts of 1 bind the other in usual course of business.
- ◆ Partners are FIDUCIARIES of each other
 - ◇ Agency law applies
- ◆ Partners are jointly liable for debts of the firm
 - ◇ Can't escape liability by dying... or retiring
- ◆ Partners are liable for each others fraud and negligence, wrongful conduct, breach of fiduciary duty... etc.
- ◆ Liability is unlimited
- ◆ NO NAME PROTECTION
- **Limited Partnership**
 - Must be created expressly by filing documents in Victoria, again it'll cost about \$300.00.
 - Name must end in "Limited Partnership" no abbreviation
 - At least one limited partner
 - ◆ Must be clear who is who
 - ◆ Limited liability
 - ◆ No say in management
 - ◆ Limited partners sometimes try and weasel their way into being a little general partner... in this case they gain full liability as well though, stay on your side of the fence.
 - At least one general partner
 - ◆ Must be clear who is who
 - ◆ Unlimited liability
 - ◆ All the say in management
- **Limited Liability Partnership (LLP)**
 - Must be created expressly, must file documents in VICTORIA (\$300.00 to do this) Name of the partnership must end in LLP
 - ◆ So far being used by lawyers/accountants
 - ◆ Name is protected
 - All laws are the same as partnerships, except the partners are jointly liable for debts up to their capital contribution, so whatever they have put into the partnership, that is the maximum they are to be liable for.
 - Partners are liable for their own negligence only
- **Corporation**
 - Chellenor Case
 - Date Business Case
 - Universal Case