

Chapters 2 + 3

Wednesday, September 22, 2010

11:52 PM

Law:

is the body of rules made by government that can be enforced by the courts or by other government agencies

Natural law: what is right and moral

Utilitarian's: Laws of measured by the degree of social usefulness. Goodness or happiness

Legal realist: subjective and bias and with the wind

Where do we get our law?

CONSTITUTION

The charter of rights and freedoms

Government is subject to the law

Paramount - it trumps everything else

BNA (British North American Act) section (91+92)

91- List a of what within of federal jurisdiction

Immigration

Fishing

Defense

Banking

Criminal code

Taxation

Telecommunication

Communication

Currency

Transportation

92- Provincial jurisdiction

Health care

Education

Highways and byways

Property and civil rights

License, marriage, divorce

History lesson: hundreds of years ago in England. Their entire constitution is completely unwritten, all based on tradition, customs, things that they've been doing the same way for hundreds of years. These tradition have embodied the constitution. In England the law is based on how things have been.

Not written: tradition, the party that wins the most votes gets parliament

Tradition that priminister will alternate between Anglophone and francophone

Charter contains o number of rights and freedoms that pertain to anyone that is in Canada

Fundamental freedoms

Expression

Religion

Legal rights

- Right not to be searched
- Not have things taken from you
- Right to be presume innocent
- Right to be represented by an order
- Right to vote and run for office
- Mobility
- Right to receive government services in English or French

Equality rights

- Right not to be discriminated against on
 - Age
 - Race
 - Language

These freedoms are not absolute

There are three

- 1) Charter of rights and freedoms only applies only as against government
- 2) Section 33, the notwithstanding
 - Gov can override most of the charter if they say that's what they are doing
 - Quebec's French language laws- require French first
- 3) None of these rights and freedoms are absolute.
 - If I have the right to swing my arm where ever I want and punch people
 - What if its my religion to drink and drive

Freedoms and rights can't be unconditional

Section 1) the rights and freedoms guaranteed by this charter are reasonable that can be justified in a civil and democratic society. There is a balance between social and individual freedoms.

Human rights codes- every province has them to make sure that no one gets discriminated
are laws which say you can not discriminate against people on these various grounds and you can not permit sexual harassment

These codes are administered by the panel

- They investigate complaints
- Conducting hearing
- Resolving those complaints

Why do we have these separate system to deal with human rights

Concern was in three areas

- 1) Government services
- 2) Housing
- 3) Employment

Concern for discrimination was for these areas

The human rights commissions is easier, more accesable and quicker and more administrative and less cumbersome, but unfortunately the human rights commision have become bloated with cases and files and now are no better than the court system. Complaints take years. Its free to the complainent, but it isnt free to the person who been complained about. Do they still serve a valid purpose

Now to make it more controversial, they have expanded their grounds. They are going outside, government services, housing, and employment.

These unelected, government elected bureaucrats are ... creating laws... is that right?

Esra Levon, published Danish cartoons, depicting Muhammad,

Where else do we get laws from

Case Law/ Common Law/ Precedent
Legislation or Statutes

Statute trumps

Thursday September 30, 2010

Law: is the body of rules made by government that can be enforced by the courts or by other government agencies.

Categories of Law

1) Substantive

Establishes rights that an individual has in society and also puts limits on conduct
The right to vote, own property, travel are guaranteed and the prohibition of murder, theft and other actions that harm our neighbours. These are all examples of Substantive law

2) Procedural

Determines how the substantive law will be enforced
- Arrest, investigation, pre-trial and court processes both criminal and civil cases

3) Public Law

Includes constitutional law that determines how the country is governed and the laws that affect an individual's relationship with government

4) Private Law

Rules that govern our personal, social and business relations which are enforced by one person suing another in a private or civil action

Common Law legal system uses precedent from other past cases. It allows the parties to predict the outcome of the litigation and sometimes even avoid going to court. Judges try to avoid applying precedent decisions by finding essential differences between the facts of the two cases if they feel that the prior decision will create an injustice in the present case.

Chapters 4 - 5

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Chapter 4 - Intentional Torts and Torts Impacting Business

A **tort** is committed when one person causes injury to another, harming them, their property, or reputation. It is inherently wrong and falls below a minimal social standard. **This is a fault based scheme of compensation where the plaintiff must prove the fault.**

The law of torts involves **private disputes** decided in the civil courts

Criminal offenses are pose a threat to society and **are different than torts**

- Wrongful conduct is often both a crime and a tort

Breach of contract also needs distinguishing from torts. This **may not** be inherently wrong, but it does violates contractual relationships and is unacceptable.

Intentional Torts

Conduct involved was intended or deliberate

1) Assault and Battery (Trespass to Person)

Assault: fear of contact

Battery: actual contact

Concern to business who's employees serve the public. This tort is to recognize the right of each person to control their body and who touches it. **VICARIOUS LIABILITY**

A person who expressly or implicitly consents to conduct that would otherwise constitute an assault or battery **or tort in general** loses the right to sue.

There are cases in sports where there is consent to physical bodily contact, but **excessive violence** constituted as battery. Mike Tyson, Todd Bertuzzi

The consent must be informed consent.

2) Trespass to Land- going onto another person's property without having either the lawful right or the owner's permission to do so.

Provincial Occupiers Liability legislation is a case where there is a duty of care owed to anyone who is on the property (to minors who knowingly disregard signs of caution). Frisbee over the fence around the electrical facility.

3) Trespass to Chattels, Conversion, and Detinue (ALL TAKING SOMEONE ELSE'S STUFF)

The three torts that deal with the wrongful interference with goods

- **Trespass to chattels:** direct intentional interference causing damage to the goods of another
 - Vandals smashing windshields of cars. They may also face criminal charges
- **Conversion:** when one person intentionally appropriating the goods of another person for their own purposes.
 - Theft of goods or acquiring possession of goods through deceit are actionable under the tort of conversion
 - Selling something that belongs to someone else
 - The wrongdoer would pay the market value of the good to the wronged
- **Detinue:** refusal to return goods. Borrowing your neighbours lawnmower and refusing to give it back. **DETAINING.** Since detaining is a continuing tort, damages are calculated as at the date of the trial.

4) False Imprisonment - when people are intentionally restrained against their will **and** the person doing the restraining has no lawful authority to do so.

5) **Malicious Prosecution**

- When the defendant of the prosecution is acquitted of the charge, AND the plaintiff establishes that the prosecution was motivated by malice and there was no reasonable grounds to proceed with the criminal action in the first place.
 - Prosecutors who ignore importance evidence
 - Complainants who have lied or manufactured fake evidence

6) **Private Nuisance**- when an individual or business uses property in such a way that it interferes with a neighbour's use or enjoyment of his or her property. "when property is used in such a way as to unreasonably interfere with a neighbour's interest in the beneficial use of his or her land" - *case summary 4.6*

- Only when property is being used in an unusual or unreasonable way, and the problem caused is a direct consequence of this unusual activity
 - It is a disturbance created far beyond reasonable
- PUBLIC NUISANCE** -" any activity which unreasonably interferes with the public's interest in question of health, safety, morality, comfort or convenience"

7) **Defamation** - is a published false statement that is to a person's detriment. "derogatory, false, and published".

If the statement can be shown to be true by the defendant then it is an absolute defense

A person could be a corporation as well.

- It is possible to defame a product.

False statement must be published

Published: the statement had to be communicated to a third party

Libel, is written defamation

Slander, is spoken defamation

DEFENSE?

If the statement is the truth or...

The defense of **Absolute privilege** - which is anything discussed as part of government debate.

For business people the best defense is called, **qualified privilege**:

When a statement is made pursuant to a duty or special interest, there is no action for defamation so long as the statement was made honestly and without malice, and was circulated only to those having a right to know

The defense of **Fair comment**. When people put their work before the public, they invite public criticism. If a comment is made by a critic or editorial writer, they must be able to show that what was said was a matter of opinion, drawn from true facts that were before the public and not motivated by malice.

Case summary 4.9

Media may act to serve public interest.

8) **Product Defamation (Injurious Falsehood)** - deals with the reputation and value of a person's property as oppose to the individual themselves

TABLE 4.1 on page 127 is an amazing resource!

9) **Inducing Breach of Contract**

Involves an employer persuading an employee of another business to leave that employment and work for him or her

- Must establish that there was a contract being breached that the person being sued knew about the contract and intentionally induced to breach it

10) **Interference with Economic Relations**

There has been no breach of contract, but some other unlawful conduct associated with the complaint has occurred. Things such as bribery, or defamation. The unlawful conduct must have intended to cause harm, and in fact cause harm

11) **Intimidation**

The threat of an illegal activity

12) **Deceit (Fraudulent Misrepresentation)**

Involves the fraudulent and intentional misleading of another person, causing damage.

13) **Conspiracy**

When two or more persons act together using unlawful means to injure the business interests of another.

14) **Passing off**

When a business or product is present to the public in such ways as to lead the public to believe that the product is being provided by another. Knock offs

15) **Misuse of Confidential Information**

Wrongful disclosure of _____. Examples are... Company trade secrets, customer lists, future plans- and these disclosures to competitors can cause harm.

- 1) Information was of confidential nature
- 2) It was given in confidence
- 3) It was misused by the person whom it was conveyed

16) **Privacy**

May take the form of a physical intrusion, surveillance, misuse of image or name, or access to information.

Consent of the claimant operates as a defence

Chapter 5 - Negligence, Professional Liability, and Insurance

Negligence involves inadvertent conduct causing harm to others.

Unlike intentional torts, **negligence requires that some sort of loss to person or property be suffered.**

All four elements must be established by the plaintiff to succeed in a negligence action.

Element	Tests Used
A duty of care is owed to the plaintiff	<p>1) <i>Foreseeable Plaintiff Test</i>- based on the proximity of the parties, it were reasonably foreseeable that the conduct complained of would cause harm to the plaintiff</p> <p>2) Policy considerations - may negate existence of a duty A policy consideration is usually when there is a new situation and it allows the system to look at cases specially instead of blindly using case law. Policy considerations may unbind or bind someone to a duty of care depending on courts decision.</p> <p>This policy consideration comes from the second part of Anns test, where once asks, "was there any reason that the duty should not be imposed?"</p> <p>Misfeasance - is an unacceptable action which will probably result in you getting in shit. Nonfeasance- when you fail to act. Unless you have a specific relationship with an individual (life guard) then you are not required to save the life of a drowning individual near by</p>
Breach of that duty; breach of the standard of care	<p>Reasonable person test The reasonable person test will vary with whom the individual is that is in question. A doctor is expected to function, at least as far as medical matter are</p>

	<p>concerned, at a higher standard of reasonability.</p> <p>"was the persons conduct up to the standard expected of a reasonable person in that same circumstance?"</p> <p>Parents are not vicariously liable for the torts of their children. BUT, if it can be established that by being negligent to properly train, control or supervise their children, the parents may be held liable</p>
Causation	<p>1) Physical: "but for" test Where this test is unworkable, as where multiple causes bring about a single harm. In this case, the courts will look for material causation.</p> <p>2) Legal: remoteness test Our courts will impose liability only when the defendant could have reasonably anticipated the general nature of the injury suffered. Liability is avoided if the damage is too remote or too unforeseeable.</p> <p>** the duty of care test is used to determine whether danger to the plaintiff should have been anticipated, whereas with remoteness it is the type of injury itself that must have been foreseen.</p>
Damage	<p>Refer to precedents - has this type been recognized by courts as compensable? The thin skull rule- is that it doesn't matter the extent of the injury, the one liable is still fully responsible. The crumbling skull rule is where the court recognizes the pre-existing frailties and the award of damages aims at restoring the plaintiff to that (original) position.</p>

Liability may be established by circumstantial evidence. Known once as "res ipsa loquitur" (the thing speaks for itself). In this case it is up to the defendant to prove that they weren't negligent.

DEFENSES

Contributory negligence

If it can be proven, both parties are held responsible

Voluntary assumption of risk

The person assumes the physical and legal risk. The person assuming the risk (getting into a vehicle with a drunk driver), makes it very clear that he or she is completely absolving the other party of any responsibility. This is very difficult to do, and these claims are rare

The person who caused the danger must pay compensation to both the victim and the injured rescuer

Illegality

The courts should refuse to entertain a lawsuit brought by a party who engaged in unlawful activity.

SPECIAL SITUATIONS

Strict liability

The liability of food handlers, for example, approaches strict liability because extreme care is demanded by law in light of the potential for illness of contamination
Example) digging a well and not knowingly having that well leak into a nearby located coal mine shaft and flooding neighbour's property. Having that dangerous substance - large amounts of water/explosives/rabid animals... makes one "strictly liable"

The use of the property must be **unusual** to be claimed as a strict liability.

Occupiers Liability

People who occupy a property have a special obligation to people who are injured on their property.

OCCUPIER, not OWNER. So the tenant, no the landlord.

Invitee: person coming on property for a business purpose

Licensee: person coming on property with permission but not for business

Trespasser: person without permission to come onto property

The duty owed to these people is high, medium, low respectively.

Children who trespass are owed a duty because they are fucking stupid...

An innkeeper can avoid liability by complying with the statute by placing notices at designated locations

Product Liability

The manufacturer, repairer, assembler all may owe a duty of care to the consumer.

If the product was designed in such a way as to get into the hands of the consumer without intervening inspection or modification, then the manufacturer will be held liable, according to the snail - beverage case.

Businesses that conduct inspections had best be knowledgeable and vigilant.

Product liability cases use circumstantial evidence and it is up to the defendant to prove that there was no negligence

Liability of Professionals and other experts

You should probably get liability insurance.

Liability must be based on contract, fiduciary duty, or tort

Contract

The professional will provide a reasonable level of performance given his or her claimed expertise. Professional liabilities are based on the contracts that they have with their clients

Negligence

STANDARD OF CARE. A professional must live up to the standard *of a reasonable person in that situation*.

Accountants for example have created GAAP so as to set the standards for their practice - and if these standards aren't met then the shitty accountant will be liable.

The level of skill required to be practicing
How that skill is exercised

The standard of care is easily defined by ones peers.

Tort law says that third parties can sue because of a fuck up, even though the professional had a contract with one other. Is the architect of a collapsed building. The accountant who reported the financial statements that were way off to the shareholders?

Yep

Negligent Misstatement

Negligent words may create liability

Example) negligent words causing economic loss is actionable. False financial statements...

To determine if there was "reasonable reliance" on the words of a professional...

- 1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made
- 2) The defendant was a professional or someone who possessed a special skill, judgment or knowledge
- 3) The advice or information was provided in the course of the defendant's business
- 4) The information was given deliberately and not on social occasion
- 5) The information was given in response to a specific inquiry or request

Basically, a duty to be careful exists not only towards one's clients, but also towards others who may reasonably rely on the advice or service given. The liability may result from careless words or conduct.

Fiduciary duty and breach of trust

When someone is placed with a valuable asset of a clients' in good faith. DON'T ABUSE THIS.

Professional insurance: may be necessary for one to practice their practice. This will cover negligence but not fraud or breach of trust.

INSURANCE

The industry is regulated by statutes

Designed to spread the risk of loss

Insurance can be acquired the brokers or agents

Adjusters: individuals who investigate insurance claims- usually working for the insurance company

Types of insurance

Liability insurance

- Closely related with torts
- Insurance doesn't cover willful acts (intentional torts?) such as fraud, theft, arson, or assault.
- Covers only when insured is at fault

Property insurance

- Covers losses to building and their contents due to fire or other named perils

Business interruption insurance

- Covers the losses the business suffers during the period it is closed down for repairs

Life and Health insurance

- Provides security for a family or business against the death of the insured

YOU NEED INSURABLE INTEREST> you can only collect back the interest you had in whatever it is that was damaged.

Life insurance is an exception

Shareholders now have insurance interest in assets of corporation

LIMITATION CLAUSES

Ambiguities resolved in favour of the insured

Courts will apply an interpretation that favours the insured since it was the insurer that chose that language to use

Contract of utmost good faith

Insured has duty to disclose change in risk to insurer.

Failure to notify change has voided policies

Insurer also has a duty to process claims fairly and can be held liable for withholding payouts without evidence of suspicion.

Insurers also provide legal backup with their policies, but they do not have to provide that legal support for irrelevant causes, or criminal activities.

Subrogation

The right of subrogation gives the insurance corporation, once its paid out a claim, the right to take over the rights of the insured in relation to whoever caused the injury or loss. So your insurer will go and sue whoever and collect money from them. And if you've done the wrong don't expect that because the person who's been wronged has insurance that you wont pay. Their insurance company will come after you...

And lastly, the insured can not profit from willful misconduct. Cant burn their house down, collect fire insurance, and then collect life insurance from his dead wife.

BONDING

Where a business can take a policy out on their own employees misconduct. (fidelity bond)
Or to provide assurance that one will upkeep their side of the contract. (surety bond)

Tort law - compensation - not criminal law- CIVILLAW

It's a fault based compensation scheme- not ot be confused with our no fault -compensation- workers comp and auto insurance

A few years ago a woman went into MacDonalds and ordered a large coffee and spilt it on her lap and burned herself. She sued MacDonalds and got 2.9 million dollars

Lawsuits turn on evidence, not on opinions or what someone thinks something is right. Unless you know what evidence is In play it is hard to make a comment

TODAY IS COURT LAW

Compensates for you losses and damages. The people who have to compensate the victims are the wrong doers.

A form of social policy, but primarily compensation. Wealth redistribution. Take money from the bad and give it to the victims who were damaged

It comes almost exclusively from common law/ case law.

Court law started 100s of years ago in england from the rich folk. They stated,

- 17) Don't touch me
- 18) Or my stuff (property)

You had to fit any case within these two torts

Then someone said, "I've been wronged"

Tort law expanded over time and we have cases where plaintiffs were awarded damages for other torts, False imprisonment, malicious prosecution, deceit, theft, fraud

All these torts needed to be "intentional" to be considered.

The tort of negligence was born. Holds defendant to the standard of not being careless or wreck-less. By far negligence occupies a lot of all court cases.

The laws reflect social change, judges are members of society so when social values and norms change, the law changes with it.

A couple concepts we need to understand

Tort law rests on, is that it's always the wrong doer that has to compensate, a sense of blame and fault. If we were going to order that someone pay damages to an innocent victim, it's gonna be the guys to blame.

TORT LAW IS FAULT BASED. Requires that you find someone to blame
WE HAVE A FAULT BASED compensation for most things.

No fault divorce

No fault auto insurance- the imbalance of power between plaintiffs and large powerful auto insurance companies

Workers compensation is another no fault scheme. If you're injured all you have to prove is that you were injured at work. - 75% of work place injuries happen to people who have been working for less than 24 months.

It is better because more money goes to accident victim

No more battles between big insurance companies and injured victims

In place of that system

Instead of a judge decided, it is government bureaucrats with formulas

So what is the compensation for future lost income?

Abuse is inevitable

Bi curious liability is when an employer is legally responsible by wrongs committed by its employees.

Who makes the money when economically things are going well.

The business

How about when things are shitty?

Who pays the freight when shit goes wrong

The business

Deep pockets theory

Risk management is when you have to think about all the measures you will take to avoid getting sued, and raising your costs because. Trade off between becoming uncompetitive because prices are too high and paying millions of dollars for a broken neck

Can you sue in tort law if there are no damages?

The answer is no for the most part. Because tort law is about compensation. So you if you don't have damages.

- 1) Trespassing
 - a. Trespass according to the law. Defamation- we allow people to sue for defamation. Nominal damages are paid.

Battery in the intentional tort of touching without consent.

TORT LAW -

Tort law comes from cases and the burden of proof is on the plaintiff.

1) Intentional --- look at these torts. Understand that the elements are the need to be proven to get compensation.

Wrongful imprisonment

Trespassing

Slander - defamation

Nuisance

Fraud

Deceit

Conversion

Intentional interfering with economic relations

- All require that the defendant's actions are intended. Not that they are meaning to cause harm, but they meant to do whatever it was that caused the harm

What would the world be like if manufacturers if big companies didn't need to care about the safety of their consumers.

The famous Pinto case

They had actually carefully considered moving the gas tanks - the price of recalling and moving. But they also looked at settling with all the people from their losses of families and maimed limbs. They assessed the cost of both settling and recalling and chose to settle because it was cheaper.

THE BALANCE IS REASONABILITY

Tort Law

- o About compensation
 - Fault based
 - Unlike no-fault (e.g. Auto insurance)
- consequences to conduct
- the people who have to pay are the people who caused the injuries
- comes from common law and case law
- the history
 - o a few hundred years ago in England
 - o two tier: rich landowning aristocrats and then the peasants
 - o rich people make the law
 - o 2 torts: trespass to person and trespass to property
 - o Law was rigid in precedents
 - o A judge finally listened and eventually expanded torts
 - o It was intentional torts - the person had to intend to do the thing that caused the harm
 - o Careless and recklessness, they should've known better so it developed the negligence tort
 - o Social value and norms change, the law changes with it
- it's always the wrongdoer that has to compensate
 - o fault based liability scheme

- no fault auto insurance
- in order to determine the present value of your future lost income, the apply a formula that is a multiple of current income
- no fault workers compensation
- tort law is fault based
- require you to find someone to blame
- vicarious liability
 - that an employer is legally responsible for wrongs committed by its employees
 - risk management
- damages
 - it has to be about money
 - figure out an amount of money that you feel is adequate compensation
 - even with physical or emotional cases, only write a cheque
- you cannot sue if you do not have damages because then you don't need compensation
 - however, tort law should be available where there are no damages
 - actionable per se, regardless if there are damages
 - you can sue for defamation; nominal damages
 - they express that they recognize that there was a wrongdoing but there is no need to compensation because there were no damages
- battery: things done without consent
- it is not to punish, just compensate victims for their injuries
- all torts are made up of:
 - intentional torts
 - negligence
- if you want to find out what you need to prove in any tort law case,
 - find out what they proved in previous successful cases
- the burden of proof is on the plaintiff
 - if the plaintiff doesn't prove their case, then there's no case
 - the defendant doesn't have to do anything
 - Contributory: you can be negligent to yourself ex. Not wearing a seatbelt
 - drunk driving
 - as society changed, the laws changed
 - the host of a party has never been liable in a drunk driving case yet

Chapter 6 - 7

October-07-10
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Contract Law

- Many things rely on contract law, so in order to look at more specific areas of law, it is assumed that you have a basic knowledge of contractual relationships
- For Contract law statute trumps case law

What is a contract

- A contract is an exchange that is binding (enforced by the law)
 - An exchange of valuable promises that is enforced by the law
- Assumptions for contracts
 1. People will not enter into a contract without a benefit
 2. Contracts voluntarily entered into are fair
 - i. More important that you voluntarily entered into it (not by fairness)
- **Elements of a contract** (test to see if there is a contract, but need all 5)
 1. Consensus
 - i. Did parties come to mutual terms
 - 1) Offer and acceptance
 2. Consideration
 - i. Value exchanged
 3. Capacity
 - i. Did the parties have the ability to enter into a contract
 4. Legality
 - i. Is the object or consideration legal
 5. Intention
 - i. Did they intend to enter a contract
 - 1) e.g. By clicking below you agree to enter a contract
 - 2) Is there a signature
- Barter economies have no contracts, because the law will not enforce contracts
- Governments facilitate contracts because they boost the economy
 - Contract law is the foundation of our capitalistic economy
 - We need contract law for when promises have yet to be performed
- Options are contracts
 - Options are the right to buy certain things at a certain time at a certain price

Important Terms

- **Formal contract** is sealed by the party to be bound (wax or paper wafer on document)
- **Parol contracts** or simple contracts may be verbal or written (no seal)
- **Express contract** - parties have expressly stated their agreement (verbally or in writing)
- **Implied contract** - inferred from conduct.
 - e.g. Depositing coins into a vending machine
- **Valid contract** - legally binding on both parties. Enforceable or not enforceable
- **Void contract** - when an essential element is missing in a contract
 - e.g. No intent
 - Not enforceable
- **Voidable contract** - exists and has legal effect but can be ended by one of the parties.
 - Sometimes enforceable
- **Unenforceable contract** - required to be in writing but is not
- **Illegal contract** - not a contract because it performs an unlawful activity.
- **Unilateral contract**

- The offer is made to the world and acceptance is performance
- e.g. Lost dog, \$50 for return of the dog.
- Frequently invitations to treat
- **Bilateral contract**
 - More common
 - Courts lean towards this type of contracts
- **Subject-to clause** - conditions
 - e.g. This offer is subject-to certain terms and conditions...
- **Quasi-contracts** - exception for service
- **Standard form contracts** - one sided contracts because of bargaining power (e.g. Your phone plan)

- **Others Terms**
 - Gratuitous
 - Abscond
 - Affidavit
 - Prerogative
 - Pecuniary
 - Injunction
 - Overzealous
 - Innuendo
 - Bigot
 - A **fiduciary** duty is a [legal](#) or ethical relationship of confidence or [trust](#) regarding the management of money or property between two or more [parties](#)
 - indemnity

Consensus

- How to courts determine consensus?
 - **Offer and acceptance**
 - Was there an offer and was the offer accepted? You have a consensus if this is true.
 - Terms must be clear and unambiguous
 - Offers
 - Must be communicated, received and understood to be accepted
 - Need not be in writing
 - Sometimes offer can be implied by conduct
 - ◆ "TAXI"
 - An ad for a TV for \$49.99 is not an offer, it is an **invitation to treat**.
 - ◆ Because they don't have to sell because they could be out of TVs
 - ◆ e.g. you pick up shampoo at a store if it was a contract you couldn't choose to buy a cheaper shampoo
 - ◆ Offer takes place when you get to the till, but not before
 - ◆ Clicking confirm order is an offer and then they send you a confirmation email is an acceptance
 - Interim agreement - agreement of purchase and sale
 - Is binding even though more formal document will follow
 - Offers can come to an end if:
 - Accepted (consensus)
 - Rejected (must be made anew to do again)
 - Could be a plain rejection
 - Could be a counter offer (still a reject and creates a new offer)
 - Death or insanity
 - Estate is the legal persona of the former you. Contract is not terminated, your estate will perform.
 - **Contracts are not terminated by death, but offers are**
 - Revocation
 - Must be communicated
 - Can be done any time before acceptance
 - Must have an expiry date or be within a reasonable time
 - What if you promise to leave my offer open?

- To leave the offer open is a contract?
 - **NO. because there was no consideration. There was no value to be gained.**
- DISTINGUISH BETWEEN PROMISES AND CONTRACTS

Acceptance

- Acceptance
 - Silence cannot constitute acceptance
 - Negative option billing does constitute acceptance
 - It's allowed because you already had a contract
 - Must have a mechanism for determining the price
- How do you make the acceptance?
 - Unilateral contracts are accepted by completion of performance
 - **Postbox rule**
 - Mailed acceptance effective when and where dropped in postbox
 - Suppose your offer says that you have to email me to accept my offer. We don't know why and we don't care. THE OFFER
- Norton anti virus. Try to cancel that. You'll need your order number.
- What if I say - I agree to buy your thing at the price that will be determined at this date.
 - Its an agreement to agree. Which MEANS NOTHING

Consideration

- **Consideration**
 - The price one is willing to pay for a promise (not necessarily money)
- Something of value needs to be exchanged.
- Past consideration is no consideration
 - Must be exchanged when the contract is entered into
 - Also an example of a gratuitous promise
 - It is after the act
- Consideration must be exchanged when the contract is entered into
 - No consideration where extra pay to do same work
 - e.g. You already have a washed car.
 - If someone owes you 1000\$ and then they say that they'll pay you 500\$ today if you release them from the other 500\$. Is that a contract?
 - NO, because you already have that \$1000
 - Also, common law states that agreement to take less to satisfy debt is not binding
- **Gratuitous promises** are not binding
- There is consideration in out of court settlements
- **Quantum meruit**
 - Must pay reasonable amount for service
 - Used for paying for incomplete services like painting
- Sealed documents do not require consideration

The doctrine of Promissory estoppels. When three things are satisfied then it is binding. Well accepted in Canadian law.

- Landlord and tenant example

- 1) **Legal relationships** between to parties
- 2) **Promise** by one party to not enforce their legal rights
- 3) **Detrimental reliance** on the other party
 - What is detrimental reliance. Where a party makes a promise and the other party relies on that promise to its detrimental.
- 4) Doctrine of Detrimental reliance - not as well accepted
 1. Promise - cheque to dr president

2. D.R.
 3. Knowledge
 - i. The person that was relied upon ought to have known it would be detrimentally relied on
- Repairs are required + landlord
 - Landlord would require to not kick out tenants because of not repairing because of promise
 - Sort of an exception to consideration

Capacity

Minors/Infants (age)

- Not bound by their contracts, but adults are
- Minors bound by contracts for necessities
 - Food, clothing, lodging and transportation
 - If a minor is married or living on his/her own then there is a broader scope for necessities.
- Minors must repay money borrowed and used for necessities
- Minors bound by contracts of service that substantially benefit them
- Note B.C. Exception
 - Infants act says necessities + beneficial contracts of service are unenforceable against an infant
- Minor can ratify contract at age of majority
- **Executory contract**
 - A contract that has been entered into but the minor has yet to receive any benefit from it and has yet to pay
 - An example of a partially executed contract
- Where contracts give no benefit minors can escape even executed contracts
- Parents not responsible for minor's contracts
- Parents may be responsible where there is agency or guarantee or where goods are necessities.
- Guarantee
 - Written commitment whereby the guarantor agrees to pay the debt if the debtor does not
- Minor may be liable in tort
- Adults cannot avoid protection given to minors protection given to minors under contract law by suing in tort.
- Except where tort arises independent of contract

Insanity and Drunkenness (competence)

- To qualify for this protection it must be shown that the person could not understand the nature of the act being performed.
- Insanity or mental incompetence applies if a persons did not understand **and** if the **other party knew or ought to have known of incapacity**
- Provincial legislation applies to people who are mentally incompetent
- Drunkenness treated like insanity
 - Must repudiate upon becoming sober
 - Hesitation to repudiate makes the contract binding
 - Don't wait to get rid of the drunken shares you purchased!!!!
- Corporate capacity
 - Capacity of crown corporations and government bodies limited by legislation
- Capacity of enemy aliens limited in times of war
- Contracts with foreign governments may or may not be enforceable
- Foreign diplomats have immunity
- Trade unions have capacity to contract for union activities
- Indians protected under Indian Act

Legality

Contracts Performed Illegally

- This can also include things that are against public policy
- Difference between contracts formed illegally and contracts performed illegally
- Lawful contracts performed illegally may be enforced
- Several possible results when performance breaches regulatory legislation
- Illegal contracts are illegal when formed
 - Void and courts will not assist parties
 - An agreement involving immoral conduct is an illegal contract
 - Examples
 - Contracts to commit a crime
 - Contracts to commit a tort
 - Contracts involving immoral acts
 - e.g. Courts could not enforce an agreement made with a client and a prostitute because it is against public policy and considered immoral
 - Contracts that are bets and wagers
 - Insurance contract is valid when there is an insurable interest
 - Contracts in restraint of marriage
 - Can't make a contract that says I can't marry your sister Stuart, it's illegal (just making sure you're paying attention.....)
 - Contracts that promote litigation
 - Contingency fee agreements permissible because they make courts accessible
 - Can't make a contract to tell someone else to sue
 - Contracts that obstruct justice
 - e.g. Paying criminals in jail
 - Contracts that injure the state
 - Selling military stuff
 - Contracts that injure public service
 - Contracts between businesses to fix prices or otherwise reduce competition
 - Contracts that unduly restrain trade
 - Restrictive covenants must be reasonable

Intention

- Parties must have intended legal consequences from agreements
 - Gold standard = signing
- Courts will enforce reasonable expectations
- Examples
 - Stated intention of the parties
 - Courts will enforce stated intentions
 - Commercial relations
 - Courts will presume intention in commercial transactions
 - Domestic and social relations
 - Courts will presume no intention in domestic and social relations
 - Social and business relations
 - Reasonable person test applied when social and business relations mix
 - Exaggerated claims
 - Reasonable person test also applied

Form of Contract

- Verbal contracts binding but writing advised

Where writing is required

- Statute of frauds
 - Requires writing enforcement of some contracts
 - In force in some provinces
- Contracts that require writing
 - Not to be performed within one year
 - Land dealings

- Guarantees and indemnities
 - If a third party incurs a secondary liability for the debt he has given a guarantee
 - An indemnity describes a relationship in which a third party assumes a primary obligation for the repayment of the debt along with the debtor.
- When goods sold over specific value
- Difference between valid and void contracts
 - Valid contract that is unenforceable
 - e.g. Said verbally that you would buy a house and you did it becomes enforceable
 - Void contract
 - With same situation and a void contract you would have to give back the house
 - Voidable
 - Sometimes enforceable

What constitutes evidence in Writing

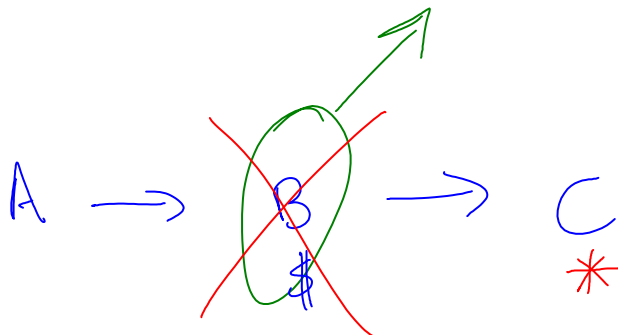
- Needs to be proof in writing only of all essential terms of the contract.
 - And may arise after agreement
 - And may be in more than one document
 - And must be signed by party to be charged

Effect of Statute Frauds

- Contract valid when no writing, but unenforceable
 - Courts will not assist someone who has already performed in a contract they could have gotten out of

Part Performance

- When part performance consistent with contract, writing not required



Chapters 8-9

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Factors Affecting the Contractual Relationship

Reasons for Exiting a Contract

- Mistake
- Misrepresentation
- Undue influence and duress

Mistake

Term

- 100 mac's, vs. 100 pc's
 - Mutually mistaken through no fault of their own therefore no contract
 - Similar to no consensus
- If it is a one sided mistake or the mistake is the fault of one party we still have a contract
- Must be an essential term that is being argued
- If its identity
 - We have a contract if it is not an essential term of the contract then we have a contract. If it is then no contract
- If the terms of a written document do not reflect the terms that were agreed upon by the parties the courts can rectify the contract.

Assumptions

- We enter into a contract for a house sale
 - House burned to the ground at the time we entered into the contract
 - No contract because we are both mistaken that the house exists

Misrepresentation

- Can be a statement of opinion if made by an expert
- The innocent party has the remedy of rescission if it is available
 - Could have put a term in your contract instead of relying on rescission
 - Could go ahead with the contract and sue for damages
- There is a difference between misrepresentation that is a term of the contract and those that aren't
 - If it is a term you can sue for damages or take rescission
 - If it is not a term you can rescission
- You can bring tort Law into contract law (in addition to contract claims) from fraud or false statements (intentional torts or negligence)
 - Fraudulent if you lie about the paint
 - Negligent if there was a letter saying paint wasn't original but you didn't read it
 - DON'T MIX UP CONTRACT AND TORT LAW!!!!

Side note

- Tort law looks backwards while contract damages look forward (you must choose what will give you

more!!!!)

Undue Influence

- Goes against the assumption that contracts voluntarily entered into are fair
- Duress

Privity

- Only a party to a contract can have rights or obligations under a contract

How contracts come to an end

1. Performed or completed
2. agreement
3. Frustration
 - a. Death in a service contract (the impossibility of performance)
4. Operation of law
5. Breach of contract

Performance

- e.g. Suppost to deliver 5000 goldfish but only delivered 1100.
 - Have not performed
 - 4900 goldfish does mean performed because it is substantially performed, but you can sue for damages
- Where warranty breached contract still considered performed

Tender

- If a person is ready, willing and able to perform a contractual obligation and attempts to do so but the other party refuses to accept it or prevents it the first party is taken to have completed its obligation and the other party is then required to perform.
- Tendering performance
 - Ends obligation
- When paying using coins there is a limit to how much you can pay using coins
- Payment must be in legal tender
- Delivery must be as specified or at a reasonable time and place also some obligations continue after discharge

Breach

- Failure to perform or repudiation
- Not every breach of contract results in the right by the other party to discharge a contract
- Contracts consist of Conditions (major terms) and warranties (minor terms).
 - Breach of warranty = performance required. Breach of condition = party relieved.
 - If a warranties is breached then you may still keep the object but usually deduct cost of warranty.
 - If a breached condition is accepted (e.g. You want to keep the car despite the non-original paint) then it becomes a breach of warranty (then you can sue for damages).
 - Contracts discharged when contract substantially performed
 - Some contracts must be performed exactly. Act allows specified warranty to be treated as a condition.
- A fundamental breach
 - Has to be really substantial and a major breach of a major term

- Exemption clauses usually ineffective in cases of fundamental breach
- Legal
 - Damages
- Equitable
 - Injunction
 - Order someone not to do something
 - Specific Performance
 - Quantum meruit
 - Rescission

Exemption Clauses

- Contracts that seek to exclude or limit someone's liability
 - Clear and unambiguous
 - Must be known
- Strictly interpreted

Repudiation

- Repudiation is an indication of refusal to perform by one party
- Anticipatory breach
 - One party says they will breach the contract
- Options with a fundamental breach
 - Go ahead with the contract and sue for damages
 - Or terminate by the innocent party
- By affirming a contract you lose your right to treat the contract as over
 - The victim (party that did not repudiate for example) is bound by its choice
 - e.g. You have the right to demand performance or to sue for breach, but if you do demand performance, you had better be prepared to perform your side of the agreement.
- Changing circumstances may affect repudiation
 - May result in frustration instead of repudiation
- Repudiation can be implied from conduct

Agreement

- Contract itself says when it comes to an end.
- Clause on termination
- Can change terms in a contract
 - Bilateral discharge involves valid consideration on both sides to support the change
 - **Accord and satisfaction overcomes consideration problems**
 - Novation involves new party but all must agree to the change.
 - Cancels old contract and substitutes new one, but must have consensus
- New agree could terminate old agreement
 - Called substitution where a new agreement replaces an old.
- Different from rescission because we say that there is a contract but it is now impossible to perform or terminated etc....

Contractual Terms

- Usually contracts say how they can be discharge by specifying a particular period of notice that must be given
- *Conditions precedent* determine when a contract starts
- *Conditions subsequent* determine when a contract ends.

Frustration

- Must ask the what if questions
 - What if the green house burns down
 - What if someone dies

- Contemplate what to do if something happens
- Risk management
 - Make sure you have insurance
 - Don't have insurance if you don't have any risk of loss
- A shared mistake is not the same as frustration, because with shared mistake there is no contract
- For frustration
 - Performance is impossible because the subject matter of the agreement is destroyed
 - An event that forms the basis of a contract fails to occur
 - Acts of the government interfere with performance

Not Frustration

- There is no frustration if it is induced by a party
- You cannot anticipate that frustration will occur, it just happens
- Increased cost and difficulty are not frustration

Effects of Frustration

- The whole deposit or nothing has to be returned depending on whether any benefit was received.
- Courts can split deposits to cover expenses or enable the party to keep the deposit to pay for the benefit the party who made the deposit had already received.

Remedies for Breach of Contract

Damages

Limitations on Recoverable Damages

Equitable Remedies

- Damages not adequate
- Prove you acted immediately
- Clean hands
- No prejudice

Operation of Law

- Judge says contract is terminated
- A law is passed
 - e.g. Day-cares can only be operated by non-profit corporations
- Bankruptcy
 - Renders contract
- Most law suits must be brought to court within 2 years of the breach
 - Similar to a valid but unenforceable contract