

CHAPTER 5: MISCELLANEOUS TORTS AFFECTING BUSINESS

- It is important for business students to be aware of certain torts affecting the normal course of business operations

- Tort Law mediates a compromise of competing values and interests

- aggressive competition vs. fair play

- market forces vs. legal intervention

- **8 miscellaneous torts grouped by themes in this chapter:**

1. Morality in the Marketplace:

- torts of **conspiracy, intimidation, interference with contractual relations, unlawful interference with economic relations, and deceit**
- regulate how business person can gain an advantage over competitors or customers; morality in the marketplace

2. Torts Related to Land:

- business people affected by use and occupation of land
- torts of **occupiers' liability** and **Rylands v Fletcher**

3. Defamation:

- concerned with the need to strike balance between protecting plaintiff's reputation and respecting defendants freedom of speech

Conspiracy (PG. 101-102)

- occurs when 2 or more defendants agree to act together with the primary purpose of causing the plaintiff to suffer a financial loss
- magic in numbers: no tort if 1 person hurts another economically
 - the laws sense of fair play may be offended if several people conspire against another
- tort is hard to prove ; need to show that defendants *primary* purpose was hurting the plaintiff
- easier to prove if defendants conspired to commit unlawful act; only need to show that defendants *should have known* that actions may hurt plaintiff
- plaintiff must prove:
 - if conspiracy to commit *lawful act* - defendants' primary purpose is to financially harm plaintiff
 - if conspiracy to commit *unlawful act* - defendants liable since should have known risk of harm

Intimidation (PG. 102-104)

- concerned with unethical business practices
- occurs when plaintiff suffers a loss as a result of defendants threat to commit unlawful act against plaintiff or 3rd party
- plaintiff must prove:
 - threat to break duty in tort, contract, or crime
 - intimidated party submitted to threat
 - plaintiff suffered loss (plaintiff does not need to prove this)
- two-party intimidation: defendant pressured plaintiff directly
- three-party intimidation: defendant pressured third party to hurt plaintiff

Interference with Contractual Relations (PG. 104-105)

- one way to get an advantage is to hire away best workers
- tort occurs when defendant disrupts a contract that exists between the plaintiff and a third-party
- Risk Management:
 - danger in luring away competitor's customers
 - danger in luring away competitor's workers
- Direct Inducement to Breach:
 - convince customer to break agreement
 - convince employee to quit job
 - Plaintiff must prove:
 - i) defendant knew about contract
 - ii) defendant intended to cause breach of contract
 - iii) defendant actually caused breach of contract (encouraged the breach)
 - iv) plaintiff suffered loss
- Indirect Inducement to Breach:
 - steal worker's tools to prevent performance
 - need to also show that defendant's acts were unlawful

Unlawful Interference with Economic Relations (PG. 106-107)

- occurs if defendant commits an unlawful act for the purpose of causing the plaintiff to suffer economic loss; general tort
- even if can't satisfy the requirements of the other torts, defendant can still be liable
- Plaintiff must prove:
- intent to injure plaintiff
 - sufficient that act directed toward plaintiff
- unlawful or illegal act
 - sufficient that act not authorized
- economic loss

Deceit (PG. 107-108)

- occurs if defendant makes false statement which it knows is untrue, which it intends to mislead plaintiff and cause plaintiff to suffer a loss
 - i) false statement – positively untrue, half-truth, failure to update information
 - ii) defendant knew that statement was false
 - iii) defendant made statement with intention of misleading
 - iv) plaintiff suffers a loss by reasonably relying on statement
- business people avoid lying and creating wrong perception

Occupiers' Liability (PG. 109-112)

- requires occupier to protect visitors from harm
 - occupier = person with substantial control of premises
 - premises = land, ships, trains, planes, elevators, etc.
- common law used to deal with each type of "visitor" differently
- now several criteria are assessed (ie. age of trespasser, reason for trespass, nature of the danger, occupiers knowledge of danger, cost of removing danger)
- most provinces have now enacted legislation to govern occupiers liability

statutory changes:

- duty for condition of premises and activities
 - common law applied to condition only (rotted tree on campsite vs. drunken guest)
- duty of reasonable care for all visitors (regardless of classification)
 - specific requirements reflect circumstances of case
 - some exceptions for adult trespassers
- duty can be modified by warning signs (ie. ski resort sign – assume all risk etc.)

Nuisance (involves land) (PG. 112-115)

- occurs when defendant unreasonably interferes with plaintiff's use and enjoyment of its own land

Forms of nuisance:

- physical damage* to land or property (ie. vibrations cause foundation to crack)
 - impaired enjoyment* of property (ie. blaring music from nightclub, smell from pig farm)
 - non-intrusive nuisance* without causing anything to travel to property (ie. casino attracts criminals and late night traffic)
- nuisance occurs only if interference is *unreasonable* (ie. physical damage always unreasonable; no impaired enjoyment from neighbour listening to Kenny G)
 - court looks at several factors and criteria (ie. nature of neighbourhood, time and day, intensity and duration of interference etc.)
 - defences to nuisance include: consent, statutory authority
 - consent to activity (not just a failure to complain)
 - statutory authority:
 - defendant acted pursuant to legislation
 - nuisance *inevitable* result of statutory action

Remedies for nuisance:

- compensatory damages to repair losses
- injunction to prevent future losses
 - likely if physical damage
 - unlikely if huge loss to defendant or community
 - *eg* town's single factory may not be closed down

The Rule in *Rylands vs Fletcher* (PG. 115-116)

- states that defendant can be held strictly liable for a non-natural use of land if something escapes from its property and injures plaintiff
- plaintiff must prove:
 - defendant's non-natural use of land (ie. building a reservoir on ppty)
 - creation of special or unusual danger
 - escape from defendant's land (ie. water breaks through reservoir and floods neighbours ppty)
 - loss or injury to plaintiff
- strict liability – defendant may be held liable even if it acted carefully and with reasonable care
- defences:
 - plaintiff consented to the unnatural use of defendant's land
 - escape may have been caused by 3rd party or a natural force
- Risk Management: use special precautions whenever using land in a non-natural way

Defamation (PG. 116-120)

- is a false statement that may damage reputation
- the tort is concerned with protecting reputations !
- plaintiff must prove the following:
 - statement reasonably refers to plaintiff
 - statement could hurt plaintiff's reputation
 - statement was published to third party (private statement wont hurt rep)
- defences to defamation:
 - **justification** (truth):
 - occurs if defendant's statement is true
 - must be true; honest and reasonable belief in truth is insufficient
 - **privilege:**
 - absolute privilege – complete immunity; even if statements made in bad faith for malicious purpose
 - used in limited circumstances (ie. during parliamentary proceedings)
 - qualified privilege – statement must be made in good faith
 - Defendant has legal, moral, social obligation to make statement to person with duty to receive it
 - legal, moral or social obligation to make a statement to someone with a similar duty or interest in receiving it
 - Only liable if statement made in bad faith
 - **fair comment:**
 - expression of an informed opinion on a matter of public importance
 - defence applies as long as the opinion in question could honestly be held by some person, and Defendant did not act maliciously
 - used in order to encourage useful debate on social issues (ie. newspaper column, mayoral debate)
 - defence applies as long as the opinion in question *could honestly be held by some person* – even if the person is prejudiced or opinionated
- Remedies: usually in form of monetary compensation
 - compensatory damages to repair losses
 - injunction to prevent defamation
 - rarely awarded due to concern for free speech

Injurious Falsehood (PG 120-123)

- defamation protects personal reputations
- injurious falsehood occurs when defendant makes a false statement , out of malice, about the plaintiff's business that causes a loss (not about a person)
- forms of injurious falsehood:
- **slander of title**
 - statement that plaintiff does not own land for sale (makes it difficult to sell for full market value)
- **slander of quality**
 - statement that plaintiff's products are shoddy (results in customers taking their business elsewhere)
 - not committed if defendant merely suggests that its products are better
- **other situations** - ie. statement that house for sale is haunted

CHAPTER 6: NEGLIGENCE

- introduction – most common tort
- *Carelessness*
 - Includes professional negligence
- four stages of negligence analysis (3 for Plaintiff, 1 for Defendant)
- plaintiff must prove:
 1. duty of care
 2. breach of standard of care
 3. causation of harm
- defendant may prove:
 1. defences

Duty of Care (PG. 130-136)

- **duty of care**
 - exists if defendant is required to use reasonable care to avoid harm to plaintiff
(*Donoghue v Stevenson*)
- **mechanism to control scope of liability**
 - duty of care: liability possible
 - no duty of care: liability not possible
- **criteria for duty of care (decide whether a duty of care *should* exist)**
 - reasonable foreseeability
 - proximity
 - policy
- 1. **Reasonable Foreseeability:**
 - objective test
 - “would reasonable person have foreseen that its activities might injure plaintiff?”
 - broad concept usually satisfied
 - sufficient if not far-fetched (even if not probable)
 - purpose - fairness
 - unfair to hold defendant liable for *every* loss
 - unfair to deny liability for *subjective* deficiencies
- 2. **Proximity:**
 - must be a close and direct connection between the parties
 - ie. defendant careless in swinging bat while standing next to plaintiff
 - ie. tavern may be responsible for drunken customer causing accident
 - proximity may arise in various ways
 - physical (*eg* hit by swung baseball bat)
 - social (*eg* bond between parent and child)
 - commercial (*eg* alcohol sold by tavern to driver)
 - causal (*eg* loss occurred that are reasonably foreseeable)
 - reliance (*eg* relied on statement or advice)
 - negligent statement: common business risk
 - economy increasingly based on information

- acts vs words
 - need for precaution less obvious with words
 - words can spread like gossip and remain
 - words more likely to cause pure economic loss
 - careless statements are different from careless actions (careless statements usually result in pure economic loss versus property damage and physical injury)
 - special rules for careless statements
 - defendant knew that plaintiff might rely on statement
 - plaintiff relied upon the statement for its intended purpose
- liability more likely if
 - defendant claimed *special knowledge*
 - statement communicated on *serious occasion*
 - statement made in response to *inquiry*
 - defendant received *financial benefit*
 - statement of *fact* rather than pure opinion
- liability less likely if
 - statement accompanied by *disclaimer*

3. Policy:

- policy = overriding considerations
 - proximity: focus on parties' relationship
 - policy: focus on legal, social, political concerns
- effect of policy
 - even if reasonable foreseeability...
 - even if close proximity...
 - duty of care rejected for policy reasons
- examples where policy limits liability
 - no general duty to rescue
 - no duty of care on mother to unborn child
- duty of care not necessarily exist even if foreseeability and proximity
- court can deny liability on policy grounds (open floodgates, politics etc)

Breach of Standard of Care (PG. 137-142)

- if first element established (that the defendant owed a duty of care to the plaintiff), move to second element
- plaintiff needs to prove that the defendant breached the standard of care
- standard of care = tells the defendant how it should act
- it is based on a reasonable person test (same way that a reasonable person acts in a similar situation); objective test
 - reasonable person takes precautions against reasonably foreseeable risks (could be reasonable even if unlikely to occur)
 - greater care if injury could be extremely serious vs. a light bruise

Standard of care - Professional Negligence (what is their standard of care):

- must act as the reasonable professional would act in similar circum.
- upon information available at the time of accident
- carelessness is different than error in judgement (ie. surgeon)
- usually met if followed established requirements (courts do not have expertise)
- no allowance for inexperience

- enhanced standard for specialist or expert
- compliance with approved practice or statutory standard - generally evidence of reasonable care

Standard of care – Product Liability

- losses caused by manufactured products
 - American approach = strict liability
 - manufacturer liable for *any* defects
 - Canadian approach = negligence
 - manufacturer liable only for *careless* defects
- **may occur if person is injured by a product**
- **in Canada liability for defective products is *not strict***
 - manufacturer liable only for careless defects (plaintiff needs to prove carelessness)
- **in U.S. liability for defective products *is strict***
 - manufacturer liable for any defects
- types of product liability
 - careless manufacture of specific item
 - isolated incident: broad scope of liability
 - careless design of product line
 - widespread problem: narrower scope of liability
 - careless failure to warn of risk of harm
 - even if product was properly designed and manufactured, in some cases, there is a duty to warn of special risks

Causation of Harm (PG. 143-147)

- liability only if breach *caused* loss
- general approach: but-for test
 - Q: would loss have occurred but-for breach?
 - if yes, it would have occurred in any case, then not liable
 - if no, it would not have occurred, then liable because caused the loss
- Even if: **i)** it owed a duty of care **and ii)** breached the standard of care defendant will not be held liable unless its carelessness caused plaintiff to suffer a loss
- tough to put in place risk management techniques at this stage
- decided by the *but-for test*:
 - requires the plaintiff to prove that it would not have suffered a loss *but-for* the defendant's carelessness
 - needs to be proved on balance of probabilities
 - only has to be a cause of the loss, (not necessary to be the only cause)
 - if diff't defendants caused diff't injuries to plaintiff then each one is responsible accordingly
 - however if diff't defendants caused a single injury: joint and several liability
 - plaintiff can recover all of the damages from either or some from each
 - liability will not be imposed if loss was too remote (unfair to hold D responsible)
 - basic issue is whether the type of harm was *reasonably foreseeable*

- **remoteness principle is used to resolve *thin skull* cases**
 - occurs if plaintiff was unusually vulnerable to injury
 - not responsible at all if normal person would not have suffered any harm
 - but fully responsible for *all* losses if it was reasonably foreseeable that a normal person would have suffered *some* damage
- **thin skull** = unusual vulnerability to loss
- **the rule:** “in for a buck – in for a bundle”
 - if *some* harm reasonably foreseeable
 - plaintiff can recover for *entire* injury
 - if *no* harm reasonably foreseeable
 - plaintiff cannot recover for any part of injury
- **remoteness principle also used to deal with *intervening acts***
 - is second injury too *remote* from the carelessness; is it reasonably foreseeable that the initial carelessness would cause the later injury
 - did original negligence increase the risk of subsequent injury
- **intervening cause** = subsequent harm
- **the rule:** liable if foreseeable chain of events
 - *eg* patient infected while in hospital for surgery
 - defendant liable for injury requiring surgery
 - defendant also liable for foreseeable infection
 - *eg* patient struck by lightning in hospital lot
 - defendant liable for injury requiring hospitalization
 - defendant not liable for unforeseeable accident

Defences (PG. 147-149)

- duty + breach + loss = presume liability
- occasionally the defendant can avoid liability (at least in part) by proving a defence. **3 Defences:**
- 1. **Contributory Negligence:**
 - the loss is caused partly by the defendant’s carelessness and partly by the plaintiff’s own carelessness
 - this is a partial defence ; apportionment of damages
- plaintiff’s *careless contribution* to own loss
- forms of contributory negligence
 - *enter into dangerous situation*
 - contribute to *creation of accident*
 - contribute to *extent of injury*
- effect of defence
 - *apportionment* of responsibility
 - damages reduced to reflect plaintiff’s contribution

2. Voluntary Assumption of Risk:

- applies if plaintiff freely agreed to accept a risk of injury
- this is a complete defence; court interprets very narrowly
- defendant must prove that agreed to accept both the physical and legal risk of injury; (plaintiff gives up the right to sue for negligence) ie. handgliding
- from risk management: make plaintiff sign an exclusion clause
- plaintiff *accepted risk* of loss
- elements of defence
 - voluntary assumption of *physical* risk of injury
 - voluntary assumption of *legal* risk of injury
 - plaintiff *gave up right to sue* for injury
- effect of defence
 - *complete defence* (not merely apportionment)
 - generally confined to effective *exclusion clauses*

3. Illegality

- may apply if plaintiff suffered a loss while participating in illegal act
- unpopular with courts because it is complete defence
- ie. knowingly purchased knock off electronics
- plaintiff injured while engaged in *illegal* activity
- elements of defence
 - plaintiff's claim *undermines integrity* of legal system
- effect of defence
 - *complete defence* (not merely apportionment)
 - limited in practice because of harsh result

CHAPTER 7: THE NATURE AND CREATION OF CONTRACTS

- contract = legally enforceable agreement
- “Who” “What” “When” “Where” and “How” questions should be addressed in contract
- promises and contracts
 - simple promise is not legally enforceable
 - contractual promise is legally enforceable
- elements of a contract
 1. intention to create legal relations
 2. meeting of the minds (offer and acceptance)
 3. exchange of value (consideration)

1. Intention to Create Legal Relations (PG. 156-157)

Intention To Create Legal Relations:

- parties must intend to create legal relations
- objective test of intention
 - what would a reasonable person believe?
 - test applied at time of purported contract
- commercial context: presume intent
- social and family context: presume no intent

2. Meeting of the minds

Meeting of the Minds:

- contract requires *offer* and *acceptance*
- this is known as a meeting of the minds
- parties must mutually agree to terms
 - one party proposes terms through an offer
 - other party agree to terms through an acceptance
- what constitutes offer ? Offer = “willingness to act on certain terms”
 - offeror = party making offer
 - offeree = party receiving offer
- offeror is the master of the offer
 - offeror can set (almost) any terms desired
- Risk Management:
 - contract created as soon as offer is accepted
 - mechanism required to reduce risk of liability

Offers (PG. 158-164)

- contract requires more than an *intention to create a legal relationship*
- parties must enter into mutual agreement through process of *offer & acceptance*
- offer = an indication of a willingness to enter into a contract on certain terms
- offeror = party who offers to enter into contract
- offeree = party who receives an offer to enter into a contract
- presents a risk because a contract can come into existence as soon as an offer is accepted

What Qualifies As Offer ?

- courts recognize that it would be impractical if every *proposal* could be classified as an offer that can be transformed into a contract
- 1. **invitation to treat** = willingness to receive offer
 - some statements are not offers, but rather an invitation to treat
 - it is an invitation for others to make an offer (ie. real estate listing)
 - offers vs invitations to treat ? Distinction ?
 - objective reasonable person test (would reasonable person believe that person making the statement was prepared to receive offer)
 - advertisements + catalogues: presumed to be invitations
 - reason ? protects businesses from overexposing themselves (can't be liable to fulfill 10 contracts if don't have inventory)
 - an ad can be considered an offer if reasonable person would read it that way (ie. "while supplies last")
- 2. **Communication of Offer:**
 - requirement of communication
 1. offer must be communicated
 2. ie. offer contained in undelivered letter ineffective
 - offer must be communicated as offer
 1. ie. offer received as typing assignment ineffective
 - communication may take many forms
 1. written document (ie. written offer for car)
 2. oral statement (ie. ordering food at restaurant)
 3. conduct (ie. sit in barber chair, fill up tank with gas)
- 3. **Life of an Offer:**
 - offer turned into contract by acceptance
 - offer can cease to exist:
 1. revocation
 2. lapse of time
 3. death
 4. rejection
 5. counter offer
- i) **Revocation:**
 - occurs if party who made an offer withdraws it
 - generally the offeror is master of offer and can revoke at any time
 - revocation needs to be reasonably communicated to the offeree; otherwise it remains open
 - **Firm Offers:**
 - holding an offer open for acceptance for a certain period of time
 - most firm offers are not so firm because they are not contained in a contract yet and therefore are not enforceable in law ; it is *gratuitous* and unenforceable
 - firm offer cannot be revoked if the offeree paid for the right to accept within a certain period
 - called an option = paying in exchange to hold an offer open for specific time
 - **Tenders:**
 - tender is an offer to undertake a project on particular terms (ie. gov't calls for tenders to build new stadium and promises to award project to company that submits best offer)
 - offers need to remain open and not revoked while the offers are considered

- bidding process creates special contract: 2 types of contracts result
- Contract "A" for each company that submits a tender and Contract "B" between gov't and the winning tender

ii) Lapse of Time:

- offer lapses by passage of time; offeror can set termination date
- reasonable time if no termination date set (ie. many factors considered – volatility of market, usual practice in industry etc.)

iii) Death / Insanity:

- dead person does not have capacity to enter into a contract; no *meeting of the minds* if only one person is alive (or sane)
- exception if the proposed contract does not call upon the deceased party to personally perform (ie. sale of land vs. performance at concert)

iii) Rejection:

- occurs when the offeree refuses an offer; rejection *terminates* offer
- offeree cannot subsequently revive offeror's offer

iv) Counter Offer:

- offeree responds by indicating a willingness to enter into contract but on different terms (ie. different price; payment terms etc.)
- any attempt to accept in modified terms constitutes a counter offer
- counter offer rejects old offer and creates new offer; parties change roles

Acceptance (PG. 164-171)

- acceptance = agreement to offeror's terms ; terms entirely accepted
- forms of acceptance: i) acceptance by promise *or* ii) acceptance by performance

1. Acceptance by Promise:

- in essence, a promise is exchanged for a promise
- typically known as a bilateral contract
- ie. Avi offers to sell his car for \$10,000; Dana accepts and promises to pay the \$10,000 in exchange for ownership of the vehicle
- the acceptance has to be communicated to the person who made the offer
- offeror (master of offer) can impose conditions
 - set rules for time, place, and form of acceptance (ie. in writing at my office)
- forms of acceptance by promise:
 - **words:** most common; can be written or spoken
 - **conduct:** conduct can signify acceptance (ie. handshake)
 - **silence:** silence *alone* cannot be acceptance; silence *plus prior agreement* may indicate acceptance (did you do something in past that allows company to treat silence as acceptance ?) (ie. joining book club and accepting books)
 - **acceptance at a distance:**
 - business people often deal with each other across vast distance
 - consumers are increasingly entering into transactions through internet, mail etc.
 - when does acceptance have effect?
 - when *sent* or when *received*?
 - where does acceptance have effect?
 - where *sent* or where *received*?
 - what if communication never arrives?
 - *offeror's problem* or *offeree's problem*?

- situations involving acceptance at distance
 - instantaneous communications vs. non-instantaneous communications
- General Rule:
- acceptance by *instantaneous communication* is effective when and where it is **received** (rule was conceived when things done face to face)
- courts hold today that telephone, fax are also instantaneous (BBM ??)
- communication effective **when received**
- communication effective **where received**
- communication effective **only if received**
- non-instantaneous communication = substantial delay (ie. postal/courier)
- Postal Rule: an acceptance that is communicated in a non-instantaneous way is effective *where and when the offeree sends it*
- communication effective **when sent**
- communication effective **where sent**
- communication effective **even if not received**
- ie. Avi, in Toronto, receives offer from school in Vancouver to lecture. If Avi accepts via mail, the contract is formed and acceptance is effective as soon as I drop letter in mailbox.
- postal rule prevents revocation of offer while letter is in postal system (as I already accepted the offer)
- rule applies only to acceptance; not to an offer, revocation, rejection, or counter-offer

2. Acceptance By Performance:

- we discussed bilateral contract = promise exchanged for promise
- unilateral contracts have different rules
- unilateral contract = contract occurs when an **act** is exchanged for a promise
- obligations exist on one side when contract created
 - ie. I will pay \$1000 to anyone who finds my dog
 - contract *may be* created if and when you bring me the dog; I will be obligated to pay the reward
 - person needed to act with the intention of accepting my offer (ie. neighbour was not aware of my offer)
- courts prefer bilateral contracts to unilateral ones; provide more protection
 - offeror can revoke the offer at any time before full acceptance

CHAPTER 8: CONSIDERATION AND PRIVITY

Consideration

- contract = bargain supported by consideration
 - promise is (generally) not enforceable if gratuitous (i.e. it is a gift or free)
 - promise is enforceable if purchased
- contract = legally enforceable agreement
- elements of a contract
 1. intention to create legal relations
 2. meeting of the minds (offer and acceptance)
 3. exchange of value (consideration)
- contract = bargain supported by consideration
- from business perspective, a bargain involves more than offer & acceptance
 - also involves a mutual *exchange of value*
- promise is (generally) unenforceable if gratuitous
- promise is enforceable if purchased (therefore exchange of value)
- consideration = benefit or detriment
- each party must either...
 - provide benefit to someone (ie. transfer car and ownership of car)
 - suffer detriment to self (ie. pay the \$30,000 for car)

Sufficient and Adequate Consideration:

- consideration must be sufficient
 - sufficient = *any* value from a legal perspective
 - money, goods, land, or services
 - but not “love and affection” within family
- consideration need not be *adequate*
 - adequate = exchange of *equal* value
 - A peppercorn can be used
- concept of *sufficient* vs. *adequate* consideration
- contract must be supported by *sufficient* consideration
- what is sufficient ?
- sufficient = any value from a legal perspective
 - money, goods, land, or services, even give up something of personal value ie. smoking and drinking
 - but not “love and affection”
- although consideration must be sufficient it does not need to be adequate
- adequate = exchange of *equal* value
- courts presume that individuals/businesses look after their own interests, it generally allows them to decide what price (consideration) they will demand
- peppercorn theory: peppercorn exchanged for a horse
 - peppercorn has some value (*sufficient*) but not nearly as much as horse (*not adequate*)

Sufficient Consideration – Forbearance to Sue

- for business people the difference between sufficient and adequate consideration is particularly important in this context
- forbearance to sue = a promise to not pursue a lawsuit
- party A promises not to bring matter to court and party B agrees to pay less money than it allegedly owes

- forbearance agreements as consideration ?
- if underlying claim was valid
 - consideration = sacrifice right to sue for full amount
- if party knew that underlying claim was not valid
 - no actual right of action to be sacrificed therefore no consideration (ie. lawyer knew that store would have no claim against mother)

Past Consideration

- consideration must be provided by both sides; more specifically however there must be *mutuality of consideration*
 - each party must provide consideration *in return* for the other party's value
 - consideration must be exchanged under contract (ie. promise to give bike for promise of service)
- this concept is important to the idea of *past consideration*
- past consideration = consideration given before contract contemplated
- no mutuality and therefore no consideration
 - ie. promise to give the bike given after service provided
- sometimes difficult to determine whether it is past consideration
- lawn care company example: a) co. works without asking you yet you are happy and promise to pay (no contract) b) you ask, and after they finish you promise to pay (contract)
- new "promise" quantifies old consideration; becomes subsequent promise sufficient mutuality and therefore consideration
 - no consideration if already completed performance
 - "I want \$500 extra for the contract I performed"
 - but what if new promise to perform old obligation?
 - "I'll perform the contract if you pay me \$500 extra"
 - Cannot threaten to breach in order to get extra pay

Pre-Existing Obligation Third Party

- past consideration: not valid consideration
 - act was *actually* performed before a contract was even proposed cannot provide consideration for that agreement
 - can contract be supported by *pre-existing obligation* ?
 - but what if new promise to perform old obligation?
 - "I'll perform the contract if you pay me \$500 extra"
 - pre-existing obligation = obligation existed but was not actually performed before the contract was contemplated
 - situations involving pre-existing obligation
 - pre-existing public duty
 - pre-existing obligation owed to third party
 - pre-existing obligation owed to same party
- 1. Pre-existing public duty:**
- promise to perform pre-existing public duty
 - public officer promises to perform for extra pay police: "I'll investigate if you promise to pay \$500"
 - no consideration ; public official gives nothing new (police already obligated to investigate)

2. **Pre-existing contractual obligation owed to 3rd party:**

- a promise to perform a pre-existing obligation that previously arose under a contract with a different third party can be good consideration for a *new* contract
- Case Brief 8.2: plaintiff's promise to perform its contractual obligation that it already owed to a third party was good and sufficient consideration for its later contract
- using same consideration for 2 different contracts:
- advantage: only promising to do one thing, you may be able to extract valuable promises from 2 diff't parties
- disadvantage: can be potentially liable to both parties even though you essentially failed/breached to do only 1 thing
 - ie. promise to perform concert for \$15K, and then promise to let publisher record concert for \$20K. if you refuse to perform the concert you will be held liable to both the promoter and the publisher

3. **Pre-existing Contractual Obligation Owed to Same Party:**

- what if pre-existing obligation arose under an earlier contract with the *same* party that is on the other side of the new contract
- courts hold that if a promise is merely repeated it does not provide anything new; there is no consideration
- no new benefit for same party (ie. Gilbert Steel Case)
 - you already have right to enforce my performance
- against policy to enforce agreement
 - avoid incentive to threaten breach to get extra pay
- What about promise to forgive existing debt??
- promise to discharge debt upon part payment
 - "You owe me \$500...pay \$200 and forget the rest"
- generally unenforceable because no new consideration
- there are several exceptions

Promise to Forgive Existing Debt

- promise to discharge debt upon part payment
 - "You owe me \$500...pay \$200 and forget the rest"
- unenforceable because no new consideration
- exceptions
 - promise under seal (below)
 - promise exchanged for new benefit
 - payment early (\$200 in June instead of July)
 - payment in different form (cash instead of cheque)
 - payment and new benefit (\$200 *plus* a book)
 - statute (not all jurisdictions)
 - promise enforceable if part payment actually received
- Exceptions to general rule:
- promise under seal (discussed shortly)
- promise exchanged for new benefit
 - payment early (\$200 in June instead of July)
- payment in different form (cash instead of cheque)
- payment and new benefit (\$200 plus a book)
- statute (not all jurisdictions)

Promises Enforceable Without Consideration

- general rule:
- promise unenforceable without consideration
- exceptions:
- promise made under seal
- promissory estoppel

1. Seals:

seal = special mark on document

- must be applied when contract signed
- need not take any particular form

significance of seal:

- symbolizes seriousness of promise
 - promise enforceable even without consideration
 - party agrees to give something for nothing
 - commonly used in connection with guarantees

