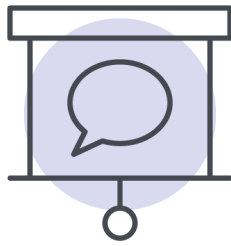

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MCS 3040
FINAL EXAM
STUDY GUIDE



Lecture Notes

Monday, September 12, 2016

Introductions to the Law

MCS 3040

Chapters 1,2

Intro & Terminology:

What is Law?

- set of rules we have to follow
- established by government
- to protect, discipline, organize or control a group of people
- framework of how to conduct ourselves and others in a civilized society
- mechanism to provide a solution

Rule of Law: no-one is above the law, everyone is equal before the law

- provides you with freedoms (solutions to conflict, disputes, rights)
- “In theory”
- Exceptions - diplomats (subject to their own laws), thoughts unless acted upon

ex. Removing a judge as a judge

- made very horrible comments during a course of a trial
- But he is still subject to the law, he may be removed from his position

Substantive Law: What is at the heart of the issues

- public law - our relationship with the state/government
 - ex. tax law, criminal law, immigration law
- private law - our relationship with each other (individuals & corporations)
 - ex. family law, contract law, tort law (unintentional cause of harm), business law
- some laws can have aspects of both private and public law
 - ex. I punch you in the nose (criminal law & tort law)

Procedural Law: The mechanism or process to deal with the situation. Gives the steps to bring your case forward in a proper legal manner.

Liability: Who is responsible, who is at fault when something goes wrong

- Criminal Liability - responsible for your criminal actions, determined by the crown (state), criminally responsible *beyond reasonable doubt* (approaching absolute certainty)
- less than 5-10% of people charged go to trial
- Civil Liability** - anything not criminal in nature (contract law, tort law, family law), determined by you. You are responsible to show that there was a wrong doing. *Balance of probabilities*.
 - ex. contract violation - you must show Joe owes you money
- Regulatory Liability - imposed by crown, but not criminal in nature.

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- ex. speeding (private traffic act), polluting (environmental protection act)

Origins of Canadian Law:

1. English Common Law
 - Courts of Common Law and Courts of Equity merged in 1865
 - People found that courts of common law were too rigid, you couldn't get the remedy that you were seeking. When we sue, we sue for money (damages). So when the remedy didn't fit the damages... we had a problem! So they created courts of equity, with a remedy of specific performance (eg. do your end of the bargain).
 - Now we have one court, called the Ontario Superior Court of Justice, which is a court of common law and equity.
2. French Civil Law/Code
 - Quebec Civil Code - non-criminal law is unique in Quebec, like a master-plan. It has disadvantages (might not answer everything) and advantages (precedent)
3. Aboriginal Law

Common Law: A combination of all judges ruling over time. A collection of all decisions over-time since 1200 AD. Every new decision becomes part of this, we rely on it.

- Magna Carta - Rule of Law originated from this document
- Precedent - Past court decisions that become referral for future courts. Following precedent is called "Stare Decisis" in latin. There is some flexibility though, if they can distinguish their case they can not follow precedent.
- You must follow precedents that are from courts above yours, but if it is from a court at your level, you don't have to follow it.
- Advantage - provides uniform procedures, you know what you can rely on.

Who Makes Law?:

1. Government
2. Courts
3. Administrative Tribunals/Boards/Bodies
 - like courts, but are created by gov't and usually only have one purpose
 - ex. immigration board

Government: Legislation, act, code, bill, statute, can all be used as terms for gov't laws

- Acts create the framework of law, but how it actually works on the law is elsewhere
- Regulations relate to the acts, that flush out how the laws will work.
- By-law
- **The Constitution Act of 1867** — document that created Canada's Nation. Constitution reflects the morals and values that we wish to have to govern ourselves. Reflects the values of the society through the document. Constitution is entrenched, meaning it is rooted and can't be easily changed. Municipal Government and territorial governments did not exist when this was created, so provincial governments create them.
 - There is a **division of powers**, federally and provincially
 - Provincial - property, civil rights, health care etc. (section 92 & 93)
 - Federal - criminal, military, immigration etc. (section 91)

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- **residual powers** — Things not covered under the act, it defaults under federal
- **Concurrent Powers** — co-exist, as long as they don't conflict (ex. environment). We run into problems when they contrast each other. (ex. ontario vs. federal fishing law, one saying you can fish and one saying you can't). When there is a collision, the federal will win because it has more power and takes priority.
- **Paramountcy** — when federal law passes a law within its jurisdiction then it wins, if there is a collision with a provincial law.
- **Ultra Vires** — When you make a law outside your jurisdiction
- **Intra Vires** — Pass a law within your jurisdiction
- When there is conflict within the division of powers that can't be resolved amongst themselves, they turn to the courts.
- **Canadian Charter of Rights and Freedom**
 - is part of our constitution so gov't must follow this
 - our rights as people that belong to us, protects us from government
 - does not protect us from individual action (ie. discrimination)! IT protects us from how the government treats us. (this would be the ontario human rights code and ontario human right commission job to protect us from)

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Managing Legal Risks & Dispute Resolution

MCS 3040

Chapters 3,4

Review - Who makes law?:

- 1. Government**
 - can make law by jurisdiction
- 2. Courts**
 - by decisions that they make
- 3. Administrative Tribunals/Boards**
 - decisions they make, policies they pass/create
 - created by government, but are independent of government
 - make laws in one specific area
- 4. Canadian Charter of Rights and Freedoms (1982)**

Canadian Charter of Rights and Freedoms

S1 — Reasonable Limits

- these rights are guaranteed up to the point that law says in permissible determined by government
- gov't can limit your rights as long as they have justification
- part of our constitution (entrenched law of the land, it can't easily be changed, supreme law — all laws must abide by it)

ex. Irwin Toy vs. Quebec

- Gov't of Quebec passed law (consumer protection legislation)
- limited ability to advertise to children of a certain age at a time of day
- Irwin Toy challenged the law — freedom of expression
- does charter of rights and freedoms apply to corporations? — Supreme Court
 - yes — because corporations are equivalent to people (at law they are an individual)
- does Quebec's legislation amount to a charter violation? — Supreme Court
 - prima facie — on it's face, when you look at it
 - does it limit freedom of expression?
 - On it's face, it is being limited because it is not a full freedom of expression... it has been suppressed
- Is that limitation reasonable? — Supreme Court
 - When is it ok for gov't to limit our rights
 - test for S.1 (gov't to limit rights) — (i) Law must show good purpose/goal, (ii) did the law passed minimize impact to right? (iii) Is the law balanced/proportional?
 - They decided that law is of good purpose, they tried to limit the impact and that the law was balanced so the law was saved

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S2 — Fundamental Freedoms

- Expression/Speech
- Religion — practice or to not
- Peaceful Assembly/Protest
- Association — you can be part of an association (except one that spreads hate)

S3 — Democratic Rights

- Right to vote

S6 — Mobility Rights

- enter/leave Canada
- moving between provinces/territories

S7-14 — Legal Rights

- Our rights within the context of prosecution (criminal law)
- Protections in place against that government action
- doesn't apply to any circumstance where someone other than the gov't is coming after you
- **S7 — right to life, liberty & security of the person**
 - includes "*innocent until proven guilty*"
 - "*right to remain silent*"
 - disclosure of evidence to be used against you
 - ex. abortion law created by infringement of a women's right to choose and security of person
 - ex. man vs. quebec on medical procedure, took to long so went to US to have it done, made gov't pay (supreme court decision)
- **S8 — Search & Seizure**
 - need warrant by judge, unless consent is given
 - privacy component
 - ex. Police had gun stolen, thought it was this one boy so they searched his house with permission from mom. They found nothing. They came back again later and she said they couldn't come in. They then told her she had to leave the house for 72 hrs and her son was charged. There was no case, gun was not found. So mom sued the police for violation of search & seizure. Did she win? — yes! She was entitled to compensation. The Waterloo Regional Police appealed the decision b/c compensation was too high. They lost.
- **S9 — Unlawful Detention**
 - can't be put in jail without reasonable cause, you have a right to challenge the detention... make them show cause because of presumption of innocence
- **S10 — Right to Counsel**
 - right to have a lawyer upon being charged with an offence)
- **S11 — Trial within a reasonable time**
 - stay your charges (suspend) indefinitely if gov takes too long
 - usually felt with within 9 months, now more looked at by a case by case basis (look for who is making the case take so long).
 - Supreme Court has made it 18-30months
 - If longer than this, and if the delay is because of the gov't you have the right to ask for a stay of charges (suspend charges indefinitely)

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- **S12 — Cruel and Unusual Punishment**
 - therefore the death penalty can not exist, no torture
 - in some circumstances, overcapacity lockdown can be considered this and can stay your charges or diminish your charges (because of poor conditions while waiting for trial)
- **S13 — Self Incrimination**
 - at a trial, you don't have to take the stand against yourself
 - you don't have to testify against yourself
 - tied in with right of silence (S.7)
 - ex. You robbed a bank with your friend. Your friend is charge and you are subpoenaed to a court (you have to go) as a witness against him. You take an oath to tell the truth. The police didn't know that you were involved. You are asked how you know that he robbed, you tell them it was because you participated. The police can't charge you on accounts of the testimony. They could use other evidence but it might be difficult.
- **S14 — Interpreter**
 - translate to language you understand in court proceedings

S15 — Equality Rights

- every individual equal before and under the law, right to equal protection under the law, without discrimination
- sexuality wasn't included when it was written, but courts read it in because they say that it is an open ended list

S16 — Language Rights

- provide services in French & English in QE and NB

S33 — Notwithstanding Clause

- despite the fact that you have this right... we can take it away
- The gov't (federal & provincial) can pass their own laws to take away some of your rights even though you have these rights
- Rights that are subject to this include...
 - S2 — fundamental freedoms
 - S7-14 — legal rights
 - S15 — equality rights
- created because Quebec was worried that corporations may threaten their french culture because of these rights and reduce language rights
- Quebec never signed onto the charter, but they are still included in it
- Even though Quebec didn't sign on they still kept it in
- No government has ever used this clause (it has been threatened though)
 - because if one person did it, then it would open the flood gates and would set the precedent to get rid of all of these rights

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Lecture 3

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Courts Make Law:

Structure of Court System:

Supreme Court of Canada (S.C.C)

- 9 justices
 - appointed from different regions of the nation
 - by constitutional convention Quebec needs to have 3 justices (because of french, founding province & their civil code)
 - by constitutional convention Ontario needs to have 3 justices (because of size, & founding province)
- chief justice is Beverly McLachlin
- decisions are binding in all courts
- doesn't hear trials, it's purpose is to look at lower court decisions through appeals
- primarily an appeal court, can be a court of reference (gov't asking if a law they are passing is legally valid)
 - ex. last quebec referendum, Canada created a clarity act to create rules about how a province can leave Canada. They asked the S.C.C to take a look and see if the law they created was valid, they said that it was constitutionally valid.
- They can hear any type of case, but they won't hear all cases that are appealed.
 - standard before they will look at your case is that it has to have some sort of societal impact or national significance
- Leave = permission
 - you must get this from the S.C.C. to have them hear your case
 - if denied you can go nowhere else

Federal Court System:

- deals with matters to come within the federal systems jurisdiction
- Federal Court of Appeal (highest court)
- Federal Court Trial Division
- Tax Court
 - deals with federal income tax issues

Provincial Court System:

- Ontario Court of Appeal (highest ontario court)
- Ontario Superior Court of Justice
 - all provinces/territories have a superior court (created by kings/queens of England)
 - trial court & appeal court
 - can hear almost any kind of case
 - murder can only be finally felt here
- Ontario Court of Justice

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- inferior court
- can only hear cases in two areas — family law & criminal law (but there are some restrictions even here, can't hear divorce trials)
- primarily trial court, also appeal court
- Provincial Courts
 - only trial courts
 - hear cases that deal with bylaw infractions
 - held by a justice of the peace, all the other courts are dealt with by judges

Litigation Process:

Overtime a court renders a judgement (order, decision, reason) how does that impact the law?

- it gives a reference point for future cases to be referenced to, may set precedent

Introduction:

- looking at civil cases
- Rules of Civil Procedure
 - provide the parties involved in the case with the group rules of the steps you need to take to proceed through the legal process
- Do resolve a dispute you can...
 - Sue, Lawsuit, court action, court case litigation
- Our litigation process is designed as winner vs. loser
 - it is an Adversarial Model
- parties, litigants — the people involved in the process
- **plaintiff** — the person suing (sometimes represented with symbol π)
- **defendant** — the person being sued (sometimes represented with symbol Δ)

Phases:

1. Pleading Phase
2. Discovery
3. Pre-trial
4. Trial Phase
5. Appeal Phase

Phase One: Pleadings Phase

- separated into Stages/Phases
- the plaintiff is responsible for bringing the course to court, need to hire lawyer

Pleadings Phase: the legal documents that need to be filed

Scenario 1:

- **Prepare a statement of claim**, you include...
 - **remedy/relief:** what solution you want from the court (most commonly people sue for damages=\$\$\$)
 - **costs:** lawyers fees, expenses incurred in advancing your case
 - **prejudgment interest:** the money the defendant should have paid in damages a long time ago

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- Include their story about what happened according to the plaintiff (allegations)
- **Issue Statement of Claim**
 - go to court clerk to register claim
 - your court case (lawsuit) has commenced after this step
 - **personal service** — you need go out and notify the defendant that they have been served
 - you can use a personal service
 - if the defendant has identified their name, then they are served
 - to establish that they have been served, the person who served them has to complete an affidavit of service
 - Prepare & Issue Statement of Defence
- **Prepare & Issue Statement of Defence**
 - defendant prepares a statement of defence
 - address the paragraphs in the statement of claim, and then explain their side of it
 - then ask the court to dismiss the case
 - then ask for their legal costs to be covered
 - serve the document to the plaintiff (does not be submitted personally)
 - file the statement of defence and an affidavit of service
- The court now has 4 documents
 - Statement of claim, Affidavit of defence (x2), Statement of Defence

Scenario 2: Two people get into car crash

- plaintiff submits statement of Claim
- then defence submits statement of defence and a counter claim
- the the plaintiff needs to also file a statement of defence
- you both are plaintiff and defence in respects to the other

Scenario 3: Three people get into a car crash, plaintiff is hit by both vehicles

- plaintiff submits statement of Claim to 2 defendants
- both defendants with complete a statement of defence
 - defendant one and two will cross claim — shift the blame back to the other defendant

Scenario 4: student slips on ice that was covered in snow, broke leg. University is sued, but they have a contract with a snow removal company that if any injures themselves as a result of them not removing the snow... the company has to pay

- plaintiff submits a statement of Claim
- Defendant submits statement of defence and a third party claim (who then puts in a statement of defence)
- If the court concludes that the University of Guelph is liable for damages, then the court with hear the third party claim to see if the snow company needs to indemnify (pay) the plaintiff
- If the main claim loses, the third party claim is not heard

Terms:

Class Action: one representative plaintiff representing multiple plaintiffs (class of people)

- so we only have one lawsuit not multiple
- ex. Volkswagen
- must be certified to be part of the class action

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Standing to Sue: Who has the right to participate in a class action

- plaintiff, defendant
- sometimes there is a larger societal impact, so other interest groups ask to intervene because it has other implications (want this to be determined early on)

Intervenor: want to be part of the class action

Phase Two: Discovery Phase

- obligation to provide the other side all the information that pertains to your case, and they have the obligation to do the same
- Starts with a notice of Examination for Discovery
 - send us all the stuff you have that is relevant to the case by ____ date, so we can prepare ourselves
- each party will prepare and serve an Affidavit for Discover
 - document that contains all the stuff that you have in your possession that pertains to the case (list of what you possess and what you know of that you don't possess)
- make a claim for litigation privilege — my right to keep confidential my communications with my lawyer (attorney client privilege)
- no judge/court involved in the process, but it is mandatory
- the plaintiff & their lawyer, and the defendant's lawyer attends, and the reporter attends
- any information provided can be evidence
- purpose is to find out more about each other's case
- this is likely the first time the lawyers have met either side
- credibility, believability, likability of the parties and their witnesses are assessed
 - if the plaintiff is all of the above, the lawyer may suggest that their client settles

Undertake = promise

- for example, providing relevant medical documents at the askers expense
- When it is done,
 - that's the end, but I reserve my rights to ask more questions about the undertakes
 - sometimes a settlement can be achieved because the parties have a good understanding of the parties strengths and weaknesses of their respective cases

Phase 3: Pre-Trial

- who attends the pre-trial?
 - judge, lawyers
 - rarely are the parties present (unless family law)
- judges use this opportunity to work with the parties to try to get the case settled

purpose:

- try to get the judges opinion on the strengths and weaknesses of the case
- try to figure out the main issues to shorten the trial

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Plaintiff Needs to prove:

- liability vs. defendant
 - must prove on balance of probability that the defendant is liable
- must remedy on balance of probability
- The judge can help narrow the main issues, maybe the defendant will admit to liability or agree at the remedy so those aspects of the case can be left out
- The pretrial judge will not be the trial judge — because they have already heard both sides of the case and may have a predetermine analysis/conclusion in their mind (bias)

[next phases continued in next lecture](#)

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Lecture 4: Litigation Process

MCS 3040

[previous stages in last lecture](#)

Phase 4: Trial Phase

- Judge that hears pre-trial is different from judge that hears the trial, because the pre-trial judge will have a bias
- trial by **judge alone** vs. **judge & jury** is decided by the two parties, plaintiff has first move on decision
 - this is signalled by serving or not serving a jury notice
 - if neither serve a jury notice, it will be a judge alone
 - if either serves a jury notice it will be judge & jury
- judges will have the statement of claims only at the beginning of the case

Judge only Trial:

1. Opening Statements
2. Examination
3. Submissions/Argument
4. Make judgment about liability and damages
 - may take time to make decision and request summaries
 - judgement must state...
 - liability, remedy
 - need to say why based on the facts/law
 - needs to then assign costs — winner gets costs in Canada

Judge & Jury Trial:

1. the selection of the jury
 - responsible for the facts, they assess and determine the facts
 - the jurors are the **“trier of fact”**
2. Opening statements are made the the jury
 - plaintiff goes first
 - gives them an outline of what the plaintiff hopes to prove
 - try to build a relationship with the jury
 - then the defendant makes an opening statement and want to achieve the same things
3. Questioning/Examination
4. Closing Statement
 - convince the jury that based on the evidence they've heard and the balance of probabilities that the liabilities lie with the plaintiff/defendant
 - *****plaintiff bears the burden of proof*****
 - plaintiff needs to prove that on the balance of probabilities the defendant is liable
 - defendant needs to prove that the plaintiff has not established the balance of probabilities
 - walk them through the law and the facts

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- then you go through the damages with them, saying now that the liability is decided, ____ remedies are deserved
- 5. Judge has to give instructions/charge to the jury
 - give instructions on what the law/legislation is with respect to the case they are dealing with
 - go over the highlighted evidence they heard
 - now you know the law that applies to the facts that were summarize
 - has the plaintiff prove on balance of probabilities that the defendant is liable
 - if no — case ends
 - if yes — do they deserve damages (the jury must decide how much)
 - liability, remedy & costs must be determined
- **Plaintiff goes first because?**
 - they are the ones who started the lawsuit
- **What must Plaintiff prove in a civil case?**
 - prove on balance of probabilities that the defendant is liable
 - prove the remedy

Types/Categories of Questioning:

- examination-in-chiefs
 - you are being asked questions from your lawyer (on your side)
 - can't ask leading questions, must ask *open ended questions*
 - can present physical evidence/documentation — labelled exhibits
- cross-examination
 - you are being asked questions from the opposing lawyer (on opposite side)
 - test the truthfulness of the testimony
 - closed ended questions are permissible, as long as they are relevant and not rude
- re-examination
 - you are being asked questions again from your lawyer (on your side)
 - can't go back and re-ask questions in a new way
 - can be permitted to clarify new areas that were asked about in cross-examination
 - if the client did well in cross examination, you will not need re-examination
- each examination follows the same format
- What drives a case, what is at the core of of any legal dispute? facts or the law?
 - the facts ultimately determine the case

contingency fee: lawyer is only paid if they win

- there is a cap on how much a lawyer can charge, 30% of the winnings

Costs:

1. party-and-party costs
 - partial indemnity costs
 - entitled to costs on a partial scale, generally half
 - general rule
 - every litigant has a right to have their case heard, shouldn't be penalize for participating in that process

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2. Solicitor-and-Client Costs

- substantial indemnity costs
- entitled to costs on a dollar for dollar scale
- entitled to all costs
- exception to rule
- get if you made an offer that was declined, and at the judgement you were rewarded what your offer was and more... then you get dollar for dollar costs
- up until you make the offer you make party-and-party costs, but once you make the offer any money your spot you will be awarded the dollar for dollar scale

ex. claim \$500 K, after discovery... offer made for \$250 K, counter offer made of \$100 K, both offers were rejected. Go to trial, plaintiff wins and is entitled to damages. Damages are awarded at \$40 K. They did worse than both settlements, so for costs the plaintiff would either get no costs or get partial costs from before offers.... OR could even have to pay the costs of the defendants.

ex. claim \$500 K, after discovery... offer made for \$250 K, counter offer made of \$100 K, both offers were rejected. Go to trial, plaintiff wins and is entitled to damages. Damages are awarded at \$400 K. They spend \$10K before the offers were made and \$40K after the offers were made. So if the interest is \$50, and the costs are \$45 (\$40 K from after and \$5K from before offer @partial costs)... then the total damages awarded would be \$495 K.

Phase 5: Appeal Phase

- may or may not get to this phase
 - in most cases, once the trial phase is done it is over
 - in some cases, parties appeal the decision to a higher court
- if you appeal from the Ontario Court of Superior Justice... then you are appealing to the Ontario Court of the Appeal
- Difficult process because it is very expensive, and they have a lot of respect for the trial court (because they actually hear the evidence that is provided)

You can Appeal by:

- Error in Law
- Error in Fact
 - hard to do
- Error in Fact and Law

- It is Appellant Vs. Respondent

Options Appeal Court Has (Civil Case):

1. Uphold the trial decision
2. Overturn and remit back to trial
3. Overturn in part
4. Overturn entirely

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Alternative Dispute Resolution (ADR):

1. Negotiation

- informal
- least expensive & time consuming
- simplest & best way to resolve disputes
- saves relationships

2. Mediation

- little more involved
- neutral third party (mediator)— solution facilitator
- parties make final decision
- mediator is hired & paid for by the parties (provided by court in family law)
- mediator can't be called to testify at trial
- mediator will say “this mediation with *without prejudice* to the rights of the parties”
 - what happens in mediation stays in mediation, whatever you discuss and reveal in mediation stays within the context of the mediation
 - confidentiality on both sides is key!
- minutes of settlement
 - includes the solution that the parties have arrived at
- if the confidentiality is breached, then back to square one... damages will need to be returned

3. Arbitration

- natural third party (arbitrator) is the decision maker
- legislation may dictate the formality of arbitration
- the parties determine if the decision will be final and binding
- the parties are giving up their right to have a court review the decision
- confidential, time-effective, less costly can maintain relationships, can choose arbitrator with expertise etc.
- Arbitration Act
 - provides the parties with a framework of how to structure their arbitration

Tort Law:

Chapter 10,11,12

Tort Law: someone has committed a wrong against someone else

- can be intentional or unintentional
- branch of *civil law*
- aims to compensate the victim of the wrong
- has no function of punishing people for their wrong (that is criminal law)
- attempts to put the victim back into the place that they should have been in had the wrong not been committed
 - does this by compensating them
- defendant is called the tortfeasor of wrongdoer

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1. Strict Liability Approach

- the plaintiff needs to establish a prima facie case, that the act occurred
 - all you need to establish is that the act happened, and as the wrongdoer you need to show that you acted diligently to avoid the scenario
 - this time the defendant bears the responsibility to prove that you aren't liable (exception to general rule)
- Applied in...
 - Employer-Employee, Parent-Child, *Rylands vs. Fletcher*, *Dog Owner's Liability Act*

2. Fault Based Approach

- Reynolds vs. Clarke
- plaintiff must prove liability against the defendant on balance of probabilities
- the proof rests on the plaintiff that is seeking compensation
- the standard of proof is that the plaintiff bears the responsibility of proof based not the balance of probabilities
- most of court laws face this approach now

3. No Fault Approach

- Gov't has stepped in past legislation that has changed tort law
- it doesn't matter who is at fault, what matters is that something happened that entitles someone to compensation
- Applied in...
 - Worker's Compensation, Auto-Insurance

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Lecture 5: Tort Law

MCS 3040

1,2,3,4,10,11,12

Three Approaches to Tort Law:

1. Strict Liability:

2. Fault:

- most of tort law is this
- most is based in judge made law
- the plaintiff has the burden of proof to prove that the defendant is liable on a balance of probabilities

Three categories of Torts:

1. Intentional
 - wrongs committed purposefully
2. Unintentional
 - wrongs your commit not on purpose — negligently or carelessly
3. Hybrid
 - depending on circumstances it can be intentional or unintentional

- plaintiff has burden of proof

Remedies in Tort law:

- **Damages (most common)**
- you can ask for any or all of the following damages (as long as they apply)...
 1. **General Pecuniary Damages** — deals with money, can be calculated, relate to future costs (care costs, income costs etc.)
 2. **General Non-pecuniary Damages** — not easily calculated, for pain & suffering (max. \$340,000), and the loss of enjoyment of life
 3. **Special Damages** — past losses, the costs you've incurred since the tort (ex. past income loss, past medical costs).
 4. **Aggravated Damages** — actions of the defendant aggravated the situation making there be a need for extra damages (ex. guy buys a lightbulb and is mistaken for stealing it, he is charged for theft and was cleared. But he suffered during the trial and the accusation so he went after the company for aggravated damages)
 5. **Punitive/Exemplary Damages** — Set an example by you by punishing you by making you pay money, so that you and others don't do this again. Point is no to compensate the plaintiff, but to deter the behaviour of the defendant.

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- **Injunction**
 - court orders party to stop a certain action or behaviour
- **Restitution**
 - ask court to restore to you what is rightfully yours
 - mostly related to contract law
- **Declaration**
 - ask court to declare a certain fact or conclusion

Intentional Tort:

- **battery(tort law)**— assault (criminal law)
 - not authorized, non-consensual, physical contact
 - ex. only entrance to room is a door with mistletoe and when you go in the prof kisses you
- **assault (tort law)** — uttering threats (criminal law)
 - uttering a threat of harm or violence to you
 - ex. I'm going to kill you, your family and your dog
- **false imprisonment (tort law)** — forcible confinement (criminal law)
 - hold or detain someone against their will without reason
 - ex. you are trying to exit the classroom but your prof is blocking your way, moving from side to side as you move.
- **deceit/fraud/fraudulent misrepresentation**
 - deceit or fraud — purposeful/knowingly deceive someone for your own benefit
 - misrepresenting a fact that you know to be true
 - ex. signing someone else's name on your sheet, showing a fake certificate of "no termites" to home buyers and them buying the house and it having permits
- **Trespass**
 - trespass to land (real property)
 - go onto someone's land without their authority or consent
 - trespass to goods
 - only defence is you had implicit or explicit consent
 - if someone is on your property...
 - legally permitted to ask them to get off
 - legally permitted to physically remove the person if the above doesn't work (within reasonable limits, use force that is equal to force they are using to stay)
 - you can also call the police — preferable
 - trespass property act
 - you can have written notice sent to a person you don't want on your property.
 - tells them that you don't want them there and ask them not to come, if they do come they can get fined or sent to jail.
 - you can also go to court to get an injunction to get the court to tell them they can't come on your property
- **Defamation**
 - purposefully trying to ruin someone's reputation
 - Libel Defamation — written (online, newspaper, media, radio etc.)

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- Slander Defamation — speak untruth
- must be publicized in order to count as slander (someone other than you and the person need to be there so that your reputation is damaged!)
- Defences:
 - **defence of truth** — if what you said is true, then its permissible
 - **fair comment** — as long as what has been said is their honest held belief and opinion, and it is not done to hurt someone, then it is fair game
 - **qualified privilege** — more so used in business, if you are writing from a place of authority and you are critiquing an employee or something than it is okay! as long as what you are saying is what you really believe and you have no ulterior motives for saying it.
 - **Absolute Privilege** — parliament, government, legislative body. If they are debating issues and they speak an untruth about another member of government, they are given absolute privilege (as long as it was said in a context of being in government). This is a thing because we want our government to be able to participate in a debate without looking over their shoulders! We don't want them to feel threatened by a lawsuit and diminish the intense debate we need.) Also applies in court pleadings (statement of claims or statement of defence — can't be sued for what you put in there)

Unintentional Tort:

- **Negligence**
 - negligent misrepresentation
 - you make an accusation carelessly
 - negligent hiring
 - you hired an employee and didn't train or supervise them properly
 - product liability
 - a manufacturer created a good carelessly that has caused a defect in the good that has caused harm to a user
 - occupier's liability
 - host liability
 - acted in a way that is reasonably appropriate to ensure the people you are hosting are safe (ie. consume alcohol... don't let them drive)
- **test for negligence**
 - plaintiff must prove on a balance of probabilities that...
 1. defendant owed the plaintiff a duty of care
 2. defendant breached the duty of care
 3. such breach has resulted in harm/loss/injury/damage
 - if you can't prove one of these, then your case is over

Negligence (were the events...)

- reasonable foreseeability
 - reasonable person/objective
- standard of care
 - did anyone fall below the standard of care that is expected of them
 - difference between doctor's standard of care and a regular person's
- proximate cause/causal connection or remoteness

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- needs to be connection between what the defendant has done and the harm caused

ex. Wagon Mound 1 (too much disconnection) and Wagon Mound 2 (there is a connection)

- Welder's and ship with oil spill
- wagon mound 1 negligent welder on not checking their surroundings to ensure they are safe from a spark catching something on fire... but it is too remote (too much of disconnections)
- but in Wagon Mound 2 it is reasonably foreseeable that oil can catch on fire, there is a causal connection between the two events
 - court found liability against the welder and the ship who spilt the oil
- controversy among common wealth countries as to which court got it right

ex. Intersection close to motel and unprotected gas meter

- red car runs red light, green car goes through light... they collide and the green car runs into the gas meter and the motel catches on fire and burns down "public utility act"
- gas meter is legally required to be protected — municipally monitored and required!
- was it reasonably foreseeable?
 - yes — if you run a red light bad things can happen!
- was a standard of care owed?
- was there a causal connection between the events or was it too remote?
- case ended up being settled, municipality and the red car guys said that the events were too disconnected
- don't know who would've been right!

Contributory Negligence

- defence for the defendant
- plaintiff has contributed to their own injuries!
- their actions may be the full reason they are injured or at least partially the reason
- if so, their recovery is reduced to the extent of their contribution
- negligence can also be split between both defendants 50%-50%!
- if one half can't pay, can the plaintiff collect the full damages from one half (and that half must chase the other half for the money)
 - YES
- concept of "joint and several liability"
 - if a plaintiff can show that two or more plaintiffs are collectively responsible for their losses, they can collect their losses from one or more than them! The one who pays all, has to chase the other for their half of the payment.

Voluntary Assumption:

- you the plaintiff, you assumed the risk of that activity and so you bare the responsibility! You can't come after use, you willingly took on the risk
- ex. Crocker & Sundance Case
 - limited to a point where it is hardly ever used
 - Mr. Crocker (age 19-20) went to Sundance (a ski resort) to participate in a snow tubing race. Alcohol and food was served. He went up and down the slope, drinking and eating etc. An employee advised him against going back up, but he went. He went down a route that actually wasn't a snow tube route but there was no warning. He broke his spine on that route. One of the defences on this case was voluntary assumption of risk! He

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assumed the activity and therefore he was at fault. The supreme court of Canada said you have to prove these two elements to rely on this defence...

- the defendant must establish that the plaintiff voluntarily assumed physical risk of the activity (they knew what they were getting into)
- the plaintiff also voluntarily assumed the legal risk of the activity
- supreme court said that they couldn't prove the above
 - because they gave him alcohol (so he didn't assume physical risk), and he wouldn't know the legal risk!
 - who actually reads the lift tickets (the signed waiver)

ex. Donoghue vs. Stevenson

- product liability
- she got ginger beer from a restaurant
- she opened it up and there was a decomposing snail in her beer
- Can she sue the manufacturer?
- there is no contract between her and the manufacturer because she did not buy it from them
- privity of contract
- "who is my neighbour"
 - when you make this product, your responsibility isn't just to who buys it but also to who actually drinks it
 - reasonably foreseeable
- manufacturer needs to make sure the product is useable and consumable (safe!)
- Court said that Stevenson failed in their duty of care to Donoghue and is therefore liable for the product produced

Thin Skull Plaintiff Rule — Subjective test

- there are situations where different people can walk away from the same circumstance with different injuries (severe or none)
- more susceptible to injury
- you are stuck with the plaintiff you hit and you have to compensate them for injuries you caused... no matter how susceptible they are to injury
- this was rejected in the Mustafa vs. Mulligan case
 - Mustafa had a psychological reaction to seeing flies in his water which made him unable to look at, cook with or drink water!
 - they applied **ordinary person test — objective test**
 - how would an ordinary person react to the situation
 - critique over this case

Hybrid Torts:

• Nuisance

- interference with your lawful use or enjoyment of your property
- private nuisance
 - between private property owners
 - ex. farm & factory noise that damages farm business (killing product)
 - doesn't matter who was there first
- public nuisance
 - interference of use of public space

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- factory has released contaminant that has flooded into the park so you can no longer use it
- **Occupiers Liability**
 - usually unintentional
 - you as a property owner (rent property or live there) have an obligation to the people on your property to ensure that they are reasonably safe while on your premises
 - you even owe a common duty of humanity to trespassers (ie. you can't set up a trap)
 - in rare circumstances it can be intentional
 - someone sets up a trap

3. No Fault:

eg. worker's compensation

- doesn't matter who caused your injury, you are prevented by law to sue them, but you are entitled to worker's compensation

eg. automobile insurance

- no fault and fault approach
- if you get in a car accident and it was not your fault...
 - you are entitled under fault to sue person who hit who and you are entitled under no fault to get benefits from your insurance company
- even if you caused the accident you can claim benefits from your insurance company
- based in judge made decisions
- government sometimes steps in and modifies court decisions
- they did that for the above example

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Lecture 6: Tort Law, Introduction to Contract Law

MCS 3040

Tort Law Cont'd:

Misrepresentation:

Misrepresentation: statement that is untrue

- two types — main difference is if it was done on purpose!
- **fraudulent** — intentional (hard to prove)
 - need very convincing and compelling evidence that person has committed fraud
 - if you can't prove it may face costs on exceptional scale (dollar-for-dollar, solicitor-client scale)
- **negligent** — unintentional
 - did it carelessly, didn't mean to mislead the person
 - type of damages entitled to are economic damages
 - financial or economic loss because of this misrepresentation
 - not entitled to pain and suffering damages
 - often arises in when you are getting professional advice/information
 - **definition of professional** — legislated, government created profession, legislation creates profession itself, profession is self governing (what are criteria to enter professional and remain in profession?)
 - ex. Lawyer giving you false information (not telling you how long you have to sue), that you followed, makes you miss your chance to sue person who torted you! Now you have the right to sue the lawyer for negligent misrepresentation of facts

ex. stockbroker gives bad advice at party (which they believed to be good) someone overheard the conversation and took the advice. The stock failed and they want to sue the broker. Do you owe them a duty of care? No you didn't volunteer the information to them, you weren't directing the information at them!

limitations act — you must start tort claim within 2 years of the incident occurring

Negligent Misrepresentation:

- can you owe a duty of care to a third party?

ex. Hadley Byrne vs. Heller & Partners

- HB—>HB's Bank —>HP—>EP—>HB
- Hedley Byrne goes to own bank to see if EP is financially viable to extend credit to. HB's Bank goes and finds out who EP's bank it with is HP. HB's bank ask HP if EP's credit is viable. HP writes back saying "information contained within is only for use of HB's bank, thanks for inquiry HB's bank about EP, we aren't used to a request of this size, they say that EP is in good financial state and that it can repay its obligations"

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- HB asks its bank if EP is in good position to pay loans, HB's bank says they are, and they extend credit to EP.
- EP is actually in bad state and loan falls through.
- So instead of suing EP, HB sues HP.
 - you owed us a duty of care "who's your neighbour"
 - even though HP didn't know about HB
 - reasonable foreseeable that this financial information would be for extending credit to the EP
 - you needed to ensure information was reliable and accurate
 - therefore even though we don't have a direct relationship, you owed us a duty of care
- **Does HP owe HB a duty of care?**
 - disclaimer saying that the information was only for the bank
 - the court said that this disclaimer eliminates the duty of care
 - court said, had disclaimer not been there, HP would owe a duty of care to the HB
 - if you make a statement, and it is reasonably foreseeable that it will be used for someone else, you do have a duty of care

ex. Stock broker again

- client comes to office and asks what stock to buy
- broker says which and why in package
- client asks if they can have package for sister, broker says yes
- client says they won't invest, sister decides to invest
- sister loses investment
- information provided wasn't entirely accurate
 - company was suffering
- did broker owe duty of care to client sister
 - YES — broker knew sister may invest, knew intended audience
 - had duty of care to ensure information was correct
- Hedley Byrne Principles are applied in Canada — precedent
 - Idea of third party duty of care (as long as there is no disclaimer)

ex. Haig vs. Bamford

- one of first cases to apply Hedley Byrne Principles
- Bamford is accounting firm used by S
- Company S, asks Bamford to prepare financial statements for them because they have some investors that need the information
- Bamford therefore knows the financial statements will be used by the investors
- Haig invests in company — it fails
- the financial statements didn't properly assess the financial viability of S
- So Haig sues Bamford
- did Bamford owe duty of care to Haig?
 - YES — they knew that an investor was going to use the statements for an investment

ex. Hercules Management vs. Ernst & Young

- HM is interested in investing in company C
- EY are accountants to company C
- corporations are required to have annual shareholder meeting where financial statements are required (made by EY)

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- HM got hold on financial statements for C that were prepared for the shareholders
- They decided to invest, went badly
- HM sued EY
- Did EY owe duty of care the HM?
 - HM was not intended audience, so they were owed no duty of care

To prove Negligent Misrepresentation, must establish:

1. that an untrue statement was made
2. That untrue statement was made negligently
3. Duty of Care was owed to party relying on the statement
 - “they were intended audience”
4. It was reasonable for the party that relied on statement to rely on statement

Contract Law:

Chpt. 5,6,7,8,9

Contract Law:

“past consideration is no consideration”

ex. Grandma gives \$10000 to you on condition that you pay it back in 5 years interest free. You agree to these terms.

- not a contract — lacks exchange of value
- you get value, but grandma doesn't get anything back from that
- to make sure this agreement is upheld, grandma has option of restitution to uphold this agreement
- restitution is own area of law — related to contract law but not part of it
- if she made you provide her with a service (ie. shovel driveway, mow lawn) as well as the above agreement it would be a contract! There is an exchange of value.

Key Ingredients of Contract:

1. Offer is made
 - person who makes offer is called the offerer
 - person receiving the offer is the offeree
2. Acceptance
3. Consideration
 - value paid for the promise made
 - exchange of value
 - doesn't have to be money
4. Legal Capacity
 - the ability in terms of contract to understand the consequences and significance of legal agreement you are entering into
 - ie. under age of majority (under judge is age less than 21, in ON=18), mental disability
5. Intention to create Legal Relationship
 - you must establish evidence
 - courts presume you want to enter contract, so you have to prove it wasn't your actual intent

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- contract law is foundation of our market economy
- courts assume you were in an equal bargaining position

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Lecture 7: Contract Law Cont'd

MCS 3040

ex. Your basement is flooding and you call the plumber to fix it. He fixes it and asks for money. There is an understanding that there was a service and someone needs to be paid. But there was no agreement before hand...

Quantum Merait: you deserve to be paid for a service at a fair market value

- terms may not have been discussed before hand, but the person who performed the service must be paid market price of the service

Enforcing Contract Terms:

- limiting terms — terms that limit ones exposure under contract (limits liability)

Limitation of Liability Term:

- make term of contract to limit their exposure to liability
- ex. moving belongings from one location to another, if damages happen to belongings the moving company will limit their liability (eg. pay for a portion of every pound they moved)
- based on circumstance or formula, varies

Exemption Clause:

- Purpose is for one party, through contract clause, to absolve themselves of all responsibility.
- ex. when you ski or snowboard you “ski at own risk”. If you get injured, regardless of who's fault it is, the fault is on you.
- interpreted quite strictly through courts
 - if you want to rely on the exemption clause, you have to bring clause to attention of other party

Liquidated Damages Clause: parties of a contract agree that they are going to limit the maximum amount that they are going to be liable for

- amount is fixed (most have to paid if contract is breached)
- so even if damages are lower, they have to pay fixed amount! And even if damages are higher, they will only get fixed amount.

Non-Enforceable Contracts:

- when a contract shouldn't be enforceable because of some legal reason

Void, Voidable & Illegal:

Void: not enforceable because it doesn't exist

- may be a portion of the contract or the entire thing

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- ex. two spouses separate and enter into separation agreement (to deal with property & money issues), one of the clauses states that neither spouse will make a claim on either's canada pensions. Would be void because you can't promise to seek benefits according to law.

Voidable: Contract is in place, it is on its face enforceable. May be set aside and deemed unenforceable because some legal reason.

- ex. I'll buy your horse for \$10,000 if it is lucky. voidable because it is vague (term lucky is vague)
- If one party states that they are victim to below factors, contract can be set aside as voidable
- but if they act as it is enforceable, but then after an extended period of time, it may be too late to make claim to have contract set aside as voidable
- Legal reasons...
 - **undue influence**
 - **unconscionability**
 - **duress**

Illegal: Law prohibits this kind of contract to exist

- ex. pay someone to steal diamond from neighbour. This is illegal, so it is void.
- All illegal contracts are void, but not all contracts that are void are illegal.

Example:

- A has a car and decides to sell the car to B for \$20 000
- B uses personal cheque to buy A's car
- Then B sells C the car for \$30 000
- B requests a certified cheque from C
- C pays cheque to B, B gives car C
- A deposits B's cheque and the cheque bounces!
- B is a scam artist! And runs off with the \$30 000
- Who owns the car?
 - A owns the car because the contract with B wasn't fulfilled. A didn't receive consideration, so ownership never passed to B or to C. The contract between A and B is void because it doesn't exist and law because it lacks consideration.
 - Under common law, contract between A and B is considered void
 - So sucks to be C, because can't own what B never owned. C is out \$30 000.
 - If C is an "*innocent purchaser for good value*"
 - dealt with B honestly and thought they owned it
 - under law of equity, C may be considered this. If that is the case, C can treat the contract between B and C as voidable. And C has to keep car, and courts will say A should've insisted on a certified cheque.
 - If he wasn't, then common law so C has to give car back to A.

Legal Voidable Reasons:

Undue Influence: you are putting pressure on someone, so one of the parties didn't have free will going into the contract

- ex. Spouse passes away, spouse was the one who took care of all the money issues. The remaining spouse asks lawyer what to do. Lawyer suggests they put it in investment account. What lawyer doesn't tell client is that the investment is a client of the lawyer and

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that the lawyer has money put in it. The investment isn't doing well right now. The spouse is pressured by relationship they've had with lawyer for so long that they use undue influence to get them into this contract. If client acts promptly once out of influence, can have contract set aside as voidable.

Unconscionability: Unfair contract form when one party takes advantage of the other parties weakness.

- “shocks our conscience”
- similar to undue influence
- ex. Lloyds Bank v. Bundy
 - Mr Bundy's nephew asks him to certify a loan that he wants. Mr. Bundy has no real business experience and was older and vulnerable. Nephew signs loan contract and Mr. Bundy signs Contract of Guarantee (if Nephew defaults on loan, then Bundy is required to pay amount). The bank never told Bundy to seek outside legal advice. Loan defaults and bank goes after Bundy to get rest of money. The case was seen as so unfair (unconscionable) that the contract should be void! Bundy had to show that he should've been told these things.

Duress: Someone threatens you or your family with violence. Threat of economic harm to coerce will of other party to enter contract.

- feel as though there are consequences if you don't sign contract
- once out of duress can go and try to have contract set aside as voidable

Misrepresentation:

Misrepresentation: False, untrue or inaccurate statement.

- innocent, negligent and fraudulent misrepresentation

Innocent: rescind contract, put us back in original position as if the contract had never been signed in the first place.

- had I known truthfulness of statement, I would have never entered into it.
- ex. property owner says I own this much space, and buyer buys it. When buyer starts to make development, they realize that original owner owned less than what they thought they did. Owner truly believed he owned all the property. Developer would want sale/contract to be rescinded because owner said they owned all property when they didn't. Owner countered this with concept of [caveat emptor](#). This means that as a buyer you must beware “buyer beware, take care”. You as a buyer need to make sure you know what you are buying. In this case, court agreed with purchaser.

Negligent: If you can prove that the party made a statement that you believed to be true carelessly, and you entered a contract because of it... then you can seek both rescission and/or damages.

Fraudulent: You have to prove that the other party intentionally made a fraudulent statement that made you enter a contract. They purposefully tried to deceive you with inaccurate statement. You can also seek both rescission and/or damages.

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Mistake:

Mistake: the parties don't have a meeting of the minds. They may be mistaken about terms of the contract or certain assumptions that they made. If mistake can be proven, we can terminate/void the contract.

- ex. Make a mistake when writing out monetary agreement. For example, you write you are charging \$300 for 10hrs of work when you actually meant to write \$3000. Both parties understand that there was a mistake so you can fix it.

Common Mistake: Both parties share same fundamental mistake

- ex. Buyer and seller who buy/sell corn. They entered into a contract where the seller will sell corn to the buyer on this day for this amount. But they made the mistake that the corn existed, as it was dumped for because it was spoiled a week before. So contract would be void.

Statute of Fraud:

Statute of Fraud: Requires certain types of contracts to be in writing, and if they aren't, then they aren't enforceable

- purpose is to avoid fraud
- oral contracts, nothing is written down, harder to prove what is said
- sometimes it creates more frauds than it prevented, so courts in some jurisdictions they try to limit the statute of fraud

When loaning out money...

Contract of Guarantee: A particular party is going to guarantee a particular parties debt

- must be in writing and under seal (consideration)
- ex. Bank loans money to student that they have to repay in 5 years + interest
 - bank enters contract of guarantee (mom guarantees it) — separate second contract
 - since mom isn't getting anything out of contract must be under seal
 - must first exhaust debtor before it can go after mother

or banks can choose...

Contracts of Indemnity

- indemnity — to be paid back or reimbursed
- can be oral contracts and not offend statute of fraud
- ex. bank, student and mom
 - bank agrees to loan money to student, and mom says that if student doesn't repay you I will pay you (primary debtor along with student, indemnifier)
 - both student and mom are primary debtor, so they can go after either!

Another contract that has to be in writing...

Contract for Greater than 1 year in duration:

- need to be in writing
- because if oral... people may forget what they said
- for a fixed period need to be in writing** (was added by courts)

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- if you enter into a contract for an indefinite period (eg. employment contracts) then it doesn't have to be in writing (can be oral)

ex. If you enter an oral contract that was in a fixed period longer than a year... and then the person says they don't have to be paid because statute of frauds...

- Can you get paid?
 - if you do work, you should be paid at a fair value
 - quantum merait

Contracts Dealing with an Interest in Land:

- interest in land — you have a right to use that land (owner, leaser, licensee)
- contracts dealing with giving you a right to use that land must be in writing
- month-to-month rental agreement can be oral because of Ontario's tenant agreement

A Contract Can be Terminated By...

1. Performance
2. Agreement
3. Frustration
4. By Operation of Law
5. By Breach

By Performance:

- both ends of the contract have been performed
- **Privity of Contract**
 - you are a party of the contract
 - you have rights and obligations in regards to the contract
- **Vicarious Performance**
 - exception to privity of contract
 - can contract agreed work to other businesses, but original contracted person is responsible for performance

By Agreement:

- a) **Novation** — the parties to the contract either...
 - replace subject matter (still want to maintain contractual relationship)
 - replace party (One party takes over another's portion of the contract)
- b) **Accord Satisfaction**
 - purpose is to bring contract to end, exchange of consideration still occurs
- c) **Waiver**
 - waive agreement
 - accept lesser amount to finish contract (in writing and under seal)
- d) **its own dissolution**

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- condition precedent
 - contract is entered into as long as certain condition happens
 - ex. I will buy your house if i get a mortgage, if I don't get a mortgage then I won't follow through with contract
- condition subsequent
 - contract entered into, but if this subsequent issue occurs, contract ends

By Frustration:

- **Frustrated Contracts Act**
 - because of an unforeseen event, something prevents you from doing your end of the contract
 - ex. Delivery service is supposed to deliver packages, but a tornado comes along and throws the truck off course and destroys the package
 - they are unable to deliver the packages because of an unforeseeable event
 - limited approach taken historically
 - act of nature
 - overtime this has been expanded

By Operation of Law:

- government legislation says contract comes to an end if “this” occurs
- a) **Limitations Act**
 - if someone has breached the contract, you must sue within two years of date of breach or else you may lose your right to sue.
- b) **Bankruptcy & Insolvency Act**
 - contracts you have with creditors may come to an end, and whatever money you may have to pay those debts will be distributed to creditors equitably. Then your debt will come to an end, and the creditors will be out the rest of the money they were owed.

By Breach:

- where a party breaks their contractual obligations
- if **minor breach**, you can sue but you still have to hold up your end of the bargain
 - you need to mitigate your loses
 - reduce your loses, from the minor breach in contract
- if **major breach**, that permits you to treat contract at and end
 - there has been a major breach in the obligation. Contract is terminated and you don't have to hold up your end of the bargain.
- **fundamental breach**— goes to root of contract
 - if that is breached, contract ends.
- courts have made a distinction between Warranty terms and Conditions
- **warranty** — minor term

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- breached — can't treat contract at an end, can sue for damages though. Need to reduce losses and hold up your end of the bargain.
- **condition** — major term
 - breached — may permit you to end contract. Don't have to hold up your end.

Innominate Term— terms that fall in between warranty and condition

- need to hear evidence to determine if it is major or minor term
- if you said it was major, and treated it as one, and the court determines that it was minor... you didn't have there right to end the contract! So you may have caused damages to the other party, causing you more consequences.
 - need to be careful, try to make terms as clear as possible when making contracts!

Remedies of Breach of Contract:

Damages:

- common law remedy (\$\$\$\$\$\$\$\$\$)
- precedent for this was set by....

Hadley vs. Baxendale

- Hadley owned factory that required a crank to operate it.
- Hadley needed to repair crank, asked Baxendale to deliver it to the repair company and bring it back.
- Hadley doesn't tell Baxendale how crucial it is to the operation of the factory.
- Hadley lost a lot of money because of how long it took Baxendale to deliver the crank.
- Hadley sought after Baxendale for damages, but they lost because they didn't tell Baxendale how important it is.
- SO if you are going to sue for damages, you have to prove that the damages were *reasonably foreseeable* (natural flow of breach).
- Court also said that Hadley had a duty to mitigate while waiting for the crank (ie. renting one or buying another one)

Equitable Remedies:

- when money doesn't cut it
- court of equity

Rescission: right to have contract undone, and put parties back to where they were before the contract

Injunction: you ask the court to tell the other party to stop their behaviour

Specific Performance: you ask the court to order the other party to complete their contractual obligation (undo breach)

- rare remedy

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Restitution: Right to sue to get back what is rightfully yours

- own area of law (according to Joe), related to contract law but stands on its own.

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Law Lecture 8

MCS 3040

Chapter 20-21 +22

Employment Law:

affected by...

- contract law (common law / judge made law)
- tort law (common law / judge made law)
- government legislation

Independent Contractor vs. Employee:

Independent Contractor

- self-employed
- there for a specific task or project, time-limited
- owns own equipment
- criteria comes from judge made law:
 - degree of control exercised by employer — limited to no degree of control
 - ownership of tools, chance of profit
 - responsible for damages caused by work (no vicarious liability)
 - degree of integration — how much is individual part of employer, they stand apart

Employee

- degree of control exercised by employer — full control
- employer is vicariously liable for employee
 - as long as actions arise out of employee actions
 - not absolute — if employee acts outside scope of employment, then employer may have argument that they aren't vicariously liable for employee
 - but if because of negligent hiring (aka did not vet the employee properly), then employer may be responsible through tort of negligent hiring

Government Legislation Related to Employment Law:

- impact on relationship between employer and employee

Ontario Human Rights Code

- deals with issues of discrimination that may occur in the province
- protect citizens of Ontario from discrimination
- applies to private relationships (as opposed to the Canadian Charter of Rights and Freedom — deals with relationship with gov't)
- bring complaints to Ontario Human Rights Commission
- **remedies**
 - seek damages

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- reinstatement of job
- can require employer that discriminated to take actions to get rid of discrimination so that it doesn't affect others
- deals with harassment
- there are differences provincially

Employment Standards Act

- sets minimum statutory criteria that deals with criteria such as...
 - wages, vacation pay, hours of work before overtime must be paid, what you are entitled to if you lose your job without justification
- differences in how this deals with you when you are fired vs. how common law deals with you

Workplace Safety and Insurance Act

- get hurt on job, no fault, make claim to this
- if you get injured at work in course of doing job, you are entitled to compensation
 - loss of earnings, pain and suffering, retraining, medical/rehab benefits etc.

Occupational Health and Safety Act

- also deals with workplace harassment
- employers obligation to ensure that employees are working in a safe environment
- if they breach this they can be...
 - fined, charged, required to take actions to make it safe

Ontario Labour Relations Act

- primarily deals with relationship between employer and union
- union represents employees and their interests
- not every employer has one
- governs any disputes that arise within the relationship
- employees have a right to unionize, but need to meet criteria as dictated by this
- once union is formed, you have right to collective bargaining, to make a collective agreement between the employer and the union
- if there is a difference between an employer and employee, the union represents the employee
- if they can't resolve it, they may take the disagreement to the Ontario Labour Relations Board, to get it resolved

Ontario Human Rights Code:

Adverse Effect Discrimination: where on its face, the precise is being implemented is discriminatory but attempts to be neutral

Systemic Discrimination: multiple rules, that when looked at collectively, create a discriminatory environment

Bona Fide Occupational Requirement (BFOR):

- Bona Fide — means in good faith
- employers may argue that we need this particular feature, it is a requirement of the job

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- its' not that we are trying to discriminate, but this feature is necessary for the safe and full completion of the job! It is a requirement of the job.

Duty to Accommodate: employers have to accommodate, within reason, certain aspects that may arise within relationship with employee

- ex. you can't determinate a employee because they are an alcoholic (considered a condition), need to take steps to accommodate the employee

ex. Meiorin Case

- female forest firefighter had job terminated because she could not meet new aerobic standard
- complained to human rights commission
- eventually making its way to Supreme Court of Canada
- Did aerobic standard, requirement for all firefighters, discriminate on basis of sex?
 - on its face — yes
 - most women have lower aerobic standard then men
- employer argued BOFR, so must show...
 - standard was adopted for a purpose rationally connected to purpose of job
 - adopted in honest and good faith that standard was needed for job competition
 - standard reasonably necessary to complete work
 - must show that any accommodations would be harmful to employee
- failed to show these tests
- passing aerobic standard was not reasonably necessary for safe work as forest firefighter
- BC human rights code gives remedy of reinstatement
 - meiorin got job back

Making Employment Contract:

Specify....

- names of parties
- fixed vs. indefinite contract
 - **fixed** — specified period of time
 - **indefinite** — no set period of time
- problems...
 - ex. hired by Linamar by oral contract for 2 years
 - problem — if over 1 year, contract must be in writing
 - statute of frauds

Termination of Employee:

Just Cause Dismissal:

- need to establish **just cause** to fire employee
 - need good reason to terminate them
 - employer on its face is breaching the contract between employer and employee
- if employees actions are just cause, they are in themselves breaching the contract

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What justifies just cause:

- serious misconduct
- habitual neglect of duty
 - important to show that you warned them in advance that there would be consequences to their actions (write them up)
- incompetence
- conduct incompatible of duties you owe employer
- prove any one of these
- if you do, only have to pay them until day fired

Wrongful Dismissal ESA:

- If employer doesn't have just cause, it is a wrongful termination
- obligated to compensate you for firing you without cause

ex. Changing workload without changing pay, did they technically "fire you"

- you work for Linamar, you originally had a department of 20, with a pay of \$100,000. Then they one day just made your department 80 people and didn't change your pay.
- They arbitrarily changed your workload, without changing your pay
- "You effectively fired me", because there is no way I can get all the work done without living here full time
- they breached the contract without your agreement, they have illegally changed your contract
- because employment is based on contract, and contract has been extremely breached, they have effectively fired you

Constructive Dismissal: Employer has breached contract, changing terms so radically, that they have in effect fired you

- you can seek compensation under the employment standard act if you have been wrongfully terminated
 - sets out a minimum that they have to pay you
- Both common law, judge made law and employment standard act deal with being fired wrongfully

Employment Standards Act Minimum:

- the minimum that employer must pay if you have been wrongfully terminated
- Two categories of compensation
 - **Notice** — Must be working for employer for at least three months, entitled to 1 week of pay for every year you have worked, up to 8 weeks max.
 - **Severance** — Must be working for 5 years or more, employer must be of certain size (50+ employees, or payroll of \$2.5 million), then you are entitled to severance which is one weeks pay for every year worked, up to 26 weeks. In addition to notice.

ex. working for Linamar (who has 200) employees for 10 years. They terminated you wrongfully.

- as per ESA...

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- notice — entitled to 8 weeks
- severance — entitled to 10 weeks (1 week per year worked, $1 \times 10 = 10$)
- So in total, you are entitled to 18 weeks pay

Options to Collect:

- you can either pursue entitlement through the minister of labour, through a ESA officer, which is free (can only go as far as what the ESA provides)
- you could also sue employer under contract law
- you can't do both

Wrongful Dismissal Under Common Law:

- tends to be more generous than the Employment Standard Act
- they consider the minimums set out by the ESA and add to it

Factors that effect the compensation you should be given:

- length of the position
- how much you were paid
- your age (agism)
- ability to find another job

ex. Bardal vs. Globe & Mail

- Chapter 21, pg. 547
- precedent setting case for above factors

Will also look at...

- if you were lured by the company (head hunted) that fired you
- what steps have you taken to mitigate your losses
 - are you looking for a new job?

Compensation:

- depending on the position you held, you are entitled to about a month of pay for every year you worked there (if you are in middle employment)
- Under common law — notice and severance are often used interchangeable, both general remedies
- if you are a senior executive, they have clauses in their contracts laying out how much money they are owed upon they termination “golden parachute”
- not only will you seek compensation for a period of time, you may also sue for benefits you have been receiving (ie. pension benefits sick leave benefits, profit sharing, health care etc.). May want some of these to continue for a certain period of time.
- may also look for reference letter upon termination
- manner of how employer terminates you can have an impact on how you are treated
 - if they treated you in bad faith... (treated you really badly in termination process)
 - may be entitled to additional compensation — **bad faith damages** “wallace damages or wallace bump”

Wallace v. United Grain Growers

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- Wallace was sales rep for grain company for number of years
- United Grain Growers enticed him to work for them for more money for less work and until you retire
- Wallace leaves steady good job to start working at United Grain Growers
- Works there for 14 years, very good sales rep, kept getting promoted, pay kept increasing
- all of a sudden, employer started making allegation that he wasn't competent and not doing his job well
- impacted Wallace negatively (depression)
- eventually they fire him
- leading up to termination — employer made an effort to mistreat him and talk badly about him
- he sued them for compensation (notice) and sued for bad faith
- Supreme Court of Canada agreed with him
- entitled to Wallace bump up if they were terminated in bad faith
- He got 14 months of pay (because there for 14 years) plus 10 months pay (wallace bump)

Honda vs. Keayes:

- pg. 554-556
- Keayes working at Honda for approx. 10 years
- health deteriorated, applied for disability benefits
- after 2 years of being on disability benefits, those benefits came to an end
- started having to bring doctor's notes for his absences
- they wanted him to have a second medical assessment from an internal doctor, he refused, they fired him
- when he sued, he was given 15 months of notice to reflect pay he was making, plus additional 9 months for bad faith in Wallace Damages, plus \$500 000 in punitive damages.
- this was appealed, they held up the notice and bad faith damages, the punitive damages were reduced to \$200 000
- This was appealed again, went to Supreme Court of Canada
 - agreed with notice, wiped out bad faith wallace damages AND punitive damages (only get these in exceptional circumstances — and these aren't them)
- Damages for bad faith dismissal, to equal bad faith must prove that the termination process affected employee mentally
- in order to be entitled to bad faith damages from breach of contract, must show you suffered mental distress and that it was reasonably foreseeable that you would suffer mental distress from this (show that upset is out of ordinary because termination was done in really bad way)
- bad faith damages don't have to have anything to do with how much money you make, it is a separate form of compensation all together
- because of Keayes case, it is rare to get bad faith damages

If you are in Unionized situation...

- you can't go and sue employer in court
- must follow process set out in collective agreement (contract that exists between the employer and union)
- collective agreement dictates steps to take if you are terminated
 - if you get fired, and you think it was wrongful, you must complain to your union rep
 - union rep will file a grievance (complaint) with employer, saying you didn't have the right to fire them and you need to reinstate them (or bump them up to new position if they deserve it)

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- If they don't agree, you will go into Arbitration by Ontario Labour Relations Board
- the board will look at collective agreement, did employer have justification to terminate?
 - yes — job is gone, can be appealed through union for judicial review
 - no — reinstatement with lost pay
- Only way to get job back
 - if you work for employer with union
 - victim of discrimination under Ontario Human Rights Code
- You can in non-union environment, sue employer if terminated on basis of discrimination. You don't have to go through Ontario Human Rights Commission.

Professional Services:

Chapter 22:

- professionals liability at law

Professional:

- government legislation must recognize that it is a profession (legislatively recognized)
- self-governing “gate-keepers”
 - who gets in, education criteria, work criteria etc.
 - criteria to remain in profession

As a professional you have potential exposure and liability under

1. Contract Law — duty to fulfill obligations
2. Tort Law — duty to not be negligent in services you provide
3. Fiduciary (trust, faithfulness) Duty — relationships based on trust and faith, act in best interest of client

ex. Accountant filing late income tax return

- You hire an accountant to prepare your income tax return
- filing deadline is April 30th
- accountant says they will do it, and charges \$500
- Accountant files return on June 30th
- have they breached contract?
 - do they have contract? yes
 - consideration? Client gets return prepared for them (by april 30th), Accountant gets \$500
 - so contract has been breached! Return not filed on time. Damages will occur because of filing late.
- have they breached tort?
 - yes — negligence, didn't file on time.
- have they breached fiduciary duty?
 - yes

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Must establish Three Criteria to prove professional owed you a fiduciary duty that they breached:

1. Professional (Fiduciary) has decision making authority
2. Professional (Fiduciary) can make decisions unilaterally (can make decision on behalf of client without getting approval of client)
3. Client (Beneficiary) is a vulnerable/at mercy type of client. (at mercy of fiduciary)

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Lecture 10:

MCS 3040

Midterm: Chapters 5,6,7,8,9, and 20,21,22

Law of Agency (Chapter 13):

Law of Agency:

- origins in contract law and in tort law
- we are talking about the relationship between a principal and their agent
 - **principal** — individual who gets **agent** to work on their behalf
 - depending on the amount of power given to the agent, the agent can make binding decisions on the principal's behalf

ex. principal = home owner, agent = real estate agent

- you hire the real estate agent to sell your home
- **primarily contract**
 - principal pays agent to work on their behalf
 - obligations on both sides
- **tort law**
 - the principal may be responsible for the actions of the agent
- **fiduciary element**
 - trust like duty
 - relationship between the principal and agent is based on trust
 - agent needs to put principal issues first, act in principal's best interest
- the agent, on behalf of the principal, is communicating with 3rd parties

What power does the agent have to act on the principal's behalf?

Actual Authority: Agent is explicitly told what they can do

Apparent/Implied Authority:

- third party may reasonable assume that the agent does have the power to bind the principal, but maybe in fact they don't, but the agent holds themselves out to say they have the power
- so even if principal didn't give agent to enter into a binding contract, they could be held to it

ex. principal hires joe to get 3 quotes. He ends up signing a contract even though the 3rd party knows that his actual authority doesn't permit him to do so. The principal isn't bound to the contract because the 3rd party knew his authority. But the contract still exists, and Joe is liable for it.

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ex. principal hires joe to get 3 quotes. He ends up signing a contract with 3rd party. He didn't disclose the restriction of authority. On the assumption of apparent/implied authority, the principal is bound by the contract, because it was reasonable for the 3rd party to assume that Joe had the authority.

Mercantile Credit Union vs. Garrod

- Garrod and Perkins are partners and they own a auto shop
- In their partnership contract, it states that all they do is fix cars, and they are not permitted to sell used cars
- Perkins sells a car to a customer, who then sells it to Mercantile Credit Union
- Perkins sold knowingly a stolen car to the customer
- Mercantile Credit Union wants the value for that car, so sues remaining partner for it
- Garrod knew nothing of the car!
- Court said it was reasonable for Mercantile Credit Union to assume that auto shops sometimes sell cars, it was reasonable for them to come to the conclusion that Perkins had the power to sell the car. Because of Apparent authority, Garrod was stuck to that obligation.

Agency by Estoppel:

- estoppel — you are prevented from (you can rely on a statement you made)
- individual acts as agent, even though they weren't given explicit authority to do so, but it was reasonable of them to assume they could. If principal didn't take steps to stop them, they may be stuck with that agents representations

Agency by Ratification:

Agency by Ratification: principal accepts agents action after the fact (that they didn't have technical authority to make)

ex. agent put offer house on behalf of principal, because it was the last one in the area fitting the criteria that the principal set out. The principal can then ratify the contract.

Business Organizations (Chapter 14):

Types of Business Organizations:

1. Sole Proprietorship
2. Partnership
3. Corporation

Sole Proprietorship:

Sole Proprietorship:

- they are the owner
- they have all the liability on them
- the business and individual aren't divisible
- the law governing creating a sole proprietorship is created by judge made law (common law) as well as gov't legislation... but there is nothing specific outlining it

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- simplest, easiest, least expensive way to start a business

What you need:

- a permit
- license to do it
- make sure what you are selling is up to required standards
- need to do a names check

Advantages:

- easiest and least expensive
- no formal gov't legislation on how to start it and maintain it
- taxation may be an advantage
 - you are going to be taxed personally, and in the lowest tax bracket (if you really aren't making any money)
 - but if you start making a lot of money → then it becomes a disadvantage
- you make all the decisions
- profit is all yours

Disadvantages:

- you are vicariously liable for the action on your employees
- you make all the decisions
- you have unlimited liability (you are personally exposed)
- if you are profitable, the more money you make the more you are taxed
- how do you raise money to start up? All comes out of your pocket.

Partnership

Partnership:

- two or more owners (partners)
- contract between owners → Partnership Act (specifies partnership must be created through an agreement, can be oral or written)
- two or more individuals carrying on business with the view to make profit
- you owe a duty of good faith and obligation to your partner(s)
- You own it collectively, you have to make decisions collectively
- business must be carried on, it is not a one time interaction
- you have an obligation to inform your partner of any profits you are making outside of the partnership

ex. Co-ownership

- two or more individuals buy land with goal of making profit
- each individual can do with the land as they see fit
- you each own half, you can sell your half if you want
- different form partnership

Advantages:

- gaining capital (still less than corporation)
- share decision making and problem solving
- spread workload around

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- taxed at personal tax rate still, if you aren't making a lot of money yet then pro
- you get to share liability (unless limited liability partnership)

Disadvantages:

- joint and several liability (as per partnership act and common law)
 - you are liable individually and collectively
 - you are responsible for the actions of your partners
 - you can recover the damages from any partners
 - this can be limited by...
 - limited liability partnership (LLP) — you can't go after all partners, just whoever was negligent to you
- taxation if you are making a lot of money
- you have to share profit

You need:

- a proper agreement
- a proper name
- informing if partners can be equal or unequal (also indicates how liability is split up)
- mechanism of how many partners the partnership will have, how you can add and remove partners
- how partnership can end (dissolve), how to kick out a partner, how to buy out a partner
- brings it to end — what happens in death, criminal convictions, bankruptcy

Corporations:**Ontario Business Corporation Act (OBCA)**

- regulates our provincial level
- sets up framework to create corporation, you have articles of incorporation (constitutional documents)
 - purpose, you

Canadian Business Corporations Act (CBCA)

- regulates our federal level

Salomon vs. Saloman

- pg. 353-354
- READ ME!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!
- provides essential principles for the creation of a corporation
 - established limited liability, corporation is own legal entity, you can have a sole shareholder owning company, shareholder can be secured creditor of that corporation
- Erin loaned money to the company. Attached loans to company to all assets, so if company couldn't repay the loan then he could take the assets
- he basically became a secure creditor
- company went into bankruptcy
- was Erin the individual liable for the debts of his corporation? Was Erin a legitimate creditor of the company, and could he rank ahead of the other creditors?

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- Court said...
 - Corporations are a separate legal entity, no matter if they are big or small
 - corporation itself is responsible for its own obligations
 - you as an owner are therefor not liable
 - so your only exposure is what you put into the company! your personal assets aren't at stake **Limited Liability**
 - a corporation can have one owner
 - the remaining company assets were sold to pay of Erin himself because he tied his loan to them

Advantages:

- own legal entity
- can live forever
- has limited liability*
- largest access to capital through stock market
 - can issue shares and bonds
- more people to share problem solving with
- taxation is lower generally

Disadvantages:

- greater costs (incorporation costs for startup, ongoing costs)
- sharing profits (if more than one shareholder)

Who makes up a Corporation:

- **Shareholders** — own corporation
 - have an annual general meeting for shareholders
 - you are an owner, depends on type of corporation
 - **dividends** — pay-out of portion of profit to shareholders (not obligated to do this)
 - **closely held = private**
 - privately owned, not on public stock exchanged
 - advantage — more control, not answerable to anyone
 - **widely held corporation = public**
 - anybody can purchase a share
 - you can be a...
 - **common shareholder** — entitled to dividends (not first though), have voting rights (voting in and out directors, or strategic directions) one vote per share.
 - **preferred shareholder** — paid dividends first, sometimes only preferred shareholders are paid dividends
- **Officers** — run organization on a day to day basis
 - ex. CEO, CFO
 - hired and fired by directors
- **Directors** — individuals who are ultimately responsible for the running of the company (answerable to the shareholders)
 - they are voted in or out by shareholders
 - tasked with responsibility to make sure that the organization is meeting its goals
 - responsible for making major decisions

How to raise money for Corporation:

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- **bond** owners are lenders, the corporation has to pay them back plus interest (secured)
 - low interest = less risky investment
- **debentures** — loans, unsecured, so if company goes bankrupt you may not get money back

Shareholders Agreement:

- there typically is a mechanism that I can buy out the other (shareholders clause)

Chapter 16: Corporations form a Liability point of view

Corporations have liability to...

- **contract law**
- **tort law** — can be help to account in the law of tor
- **regulatory responsibility**
 - environmental protection acts
 - If corporation violates acts, it can be charged
 - its possible that the officer who okayed dumping a contaminant into the lake, that they gov't would fine or jail the officer as well as charge the corporation
- **criminal liability**
 - corporation tries to defraud shareholders, which leads to investigative.
 - if CEO or board of directors tried to withhold information or prop up shares when they knew it wasn't doing as well.. then that is fraud and they could be jailed

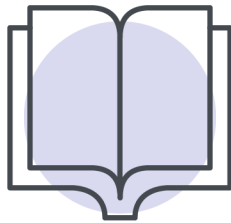
Piercing the Corporate Veil:

- can potentially go after actual owners of a corporation personally despite protection of limited liability through
- if you are a operating mind for corporation
- if you intentionally deceive or defraud someone, you can go through the veil of the corporation and go after them

ex. Family enlists contractor to build a house who bragged that he specializes in making awesome foundations. Seven years later, owner notices that the plywood that was on top of the foundation was rotten (for interior structural wall). The contractor used concrete foundation for 22in and 22in of wood instead of 44in of concrete. They went after the builder of the home not the corporation (which was no longer operating). Sued corporation for breach of contract and negligence, also went after corporations owners personally in fraud (because knew what they were doing and trying to cut costs). That allowed them to break through the corporate veil.

Officer and Director of Corporations have...

- trust like duty to corporation to act in its best interest
- can't take advantage of corporate opportunities that go to your own advantages
- duty of competency
 - diligent and competent in your skill set
- part of the fiduciary duty you owe your corporation



Textbook Notes

Friday, September 16, 2016

Chapter 1: Knowledge of Law as a Business Asset

MCS 3040

Law in the Business Environment:

Business Law: a set of established rules governing commercial relationships, including the enforcement of rights

- defines general rules of commerce
- protects ideas & property
- provides mechanisms that permit business people to select their desired level of participation and exposure to risk
- ensures losses are borne by those responsible for them
- facilitates planning by ensuring compliance with commitments

Rules & Principles:

Law: the set of rules and principle guiding conduct in society

- protects persons & their property
 - ex. legal requirement to protect customer information
- Protect people by....
 - setting rules with penalties to encourage compliance
 - seeks to hold those who break the rules accountable for their misconduct

Its purpose:

- facilitates relationships

Contract Law: Rules that make agreements binding and, therefore, facilitate planning and the enforcement of expectations.

- allows businesses to plan for the future and enforce their expectations
- functions to prevent disputes and to facilitate relationships

Litigation: the process involved when one person sues another.

- provides mechanism for dispute resolution
 - when one party fails to keep a contractual commitment... you have options
 - start with formalized settlement agreement (maintain business relationship). If that doesn't work move to mediation or arbitration to avoid litigation (lawsuit)

Mediation: The process through which the parties to a dispute endeavour to reach a resolution with the assistance of a neutral person

Arbitration: a process through which a neutral party makes a decision (usually binding) that resolves a dispute

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Liability: legal responsibility for the event or loss that has occurred

Legal Risk Management Plan: a comprehensive action plan for dealing with the legal risks involved in operating a business

- identify legal risk and implementing measures to manage them
- plan for risks before they occur

Why it works:

- determine liability
- rules/laws that are applied in that process are fair, objective and free from bias
- has limitations
- Rule of law is the same for everyone

Law and Business Ethics:

Business Ethics: moral principles and values that seek to determine right and wrong in the business world

- ethics demand more than just complying with the law
- commercial morality, fairness, honesty
- Business to Consumer, Business to Society, Business to Employee, Business to Business

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Chapter 2: The Canadian Legal System

MCS 3040

Introduction:

Government is divided into three branches:

1. the legislative branch creates law in form of statutes and regulations
2. the executive branch formulates and implements government policy and law
3. the judicial branch adjudicates on disputes

Government Policy: the central ideas or principles that guide government in its work, including the kind of laws it passes.

Constitutional Law: the supreme law of Canada that constrains and controls how the branches of the government exercise power.

- charged with upholding the values of the nation (ie. liberalism)

Liberalism: a political philosophy that emphasizes individual freedom as its key organizing value

- any interference with freedom must be justified according to the principles of constitutional law

Canadian Legal System: the machinery that comprises and governs the legislative, executive, and judicial branches of government

- Basic knowledge is important for business owners/managers
 - the legislative branch of the gov't passes laws that impact business operations
 - the executive branch implement and generates police that may be directed at business
 - the judicial branch provides ruling that not only resolve existing legal conflicts but also impact on future disputes

The Canadian Constitution:

- not contained in one document
 - both legislative and political, written and unwritten
 - can easily and grow to relieve questions or issues related to government
- The written aspects include:
 - The Constitution Act (1867) — part of which divides legislative power between federal and provincial governments
 - Canadian Charter of rights and Freedoms — which identifies the rights and freedoms that are guaranteed in Canada
 - Relevant decisions made by judges (precedent)

Constitutional Conventions: important rules that are not enforceable by a court of law but that practically determine how a given power is exercised by government

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- code of ethics that governs our political processes
- not binding, but politicians have historically agreed to follow them

Legislative Branch of Government:

Legislative Branch: the branch of Government that creates statute law

- ex. Criminal Code of Canada — created a federal level, prohibits offences such as assault, theft and fraud
- ex. Tobacco Access Act — created a provincial level, to prevent the showing of tobacco products on shelves
- for legislation to become law, it must be passed by the House of Commons and then approved by the Senate.
- There are three levels of government — federal, provincial and municipal (who's powers are delegated to them by the province in which they are situated)

Constitution Act, 1867

- Lists two powers of government who then doll out power to two others
- Their law-making jurisdiction is provided by sections of the act
- Federal Government (section 91) —> (Territorial Governments)
- Provincial Government (section 92) —> (Municipal Government)

Statute Law and Jurisdiction:

Jurisdiction: the power that a given level of government has to enact laws

- governmental power is split between the central national authority (federal) and regional authorities (provincial). (as per constitution act)

Federal:

- interprovincial/international trade
- postal service
- navigation and shipping
- seacoast and inland fisheries
- currency
- national defence
- criminal law
- banking
- anything else not given to provinces

Provincial:

- hospitals
- property and civil rights in province
- administration of justice (court system)
- local matters (ie. highways)
- incorporation of provincial companies

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** Municipalities have no constitutionally recognized powers, their law making powers are delegated to them by provincial governments***

Exclusive Jurisdiction: Jurisdiction that one level of government holds entirely on its own and not on a shared basis with another level

- ex. federal government's jurisdiction of criminal law

Concurrent Jurisdiction: Jurisdiction that is shared between levels of government

- ex. public health, environment

Paramountcy: a doctrine that provides that federal laws prevail when there are conflicting or inconsistent federal and provincial laws

- federal trumps provincial when there is a conflict

Ratify: To authorize or approve

Treaty: an agreement between two or more states that is governed by international law

ByLaws: laws made by the municipal level of government

Executive Branch of Government:

- has formal, ceremonial function, as well as political function
 - ex. supplies the head of the Canadian state, the Queen (formal/ceremonial)

Formal Executive: the branch of government responsible for the ceremonial features of the government

- significant role in legislative process
- represented by governor general (Queen's federal representative) or lieutenant governor (Queen's provincial representative)

Political Executive: the branch of government responsible for day-to-day operations, including formulation and executing government policy, as well as administering all departments of government

- prime minister, premier
- cabinet ministers, civil servants, agencies, commissions, tribunals
- all perform governmental functions

Cabinet: a body composed of all ministers heading government departments, as well as the prime minister or premier

- often passes regulations — Rules created by the political executive that have the force of law
- provides details to what the statute has enacted

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Judicial Branch of Government:

Judiciary: a collective reference to judges

- branch of government
- but supposed to be independent of the government (rule of law)
- is to be independent from the legislative and executive branches of government

Judges: those appointed by federal or provincial governments to adjudicate on a variety of disputes, as well as preside of criminal proceedings

System of Courts:

- judges operate within a system of courts
- somewhat vary from province to province

Three basic levels:

- trial, intermediate appeal and final appeal

Trial Courts:

1. **Inferior Court:** a court with limited financial jurisdiction whose judges are appointed by the provincial government
 - organized by type of case; civil court (deals with claims up to specified amount, \$25 00 in ON), family court, criminal court.
2. **Superior Court:** courts with unlimited financial jurisdiction whose judges are appointed by the federal government
 - entry level for more serious criminal matters
 - more formal and technical procedure
 - parties usually represented by lawyers

Supreme Court of Canada: The final court for appeals in the country

- litigation usually ends in provincial courts of appeal because supreme court is only available after special permission from the court itself

Federal Court of Canada: the court that deals with some types of litigation involving federal government

The Canadian Charter of Rights and Freedoms:

The Canadian Charter of Rights and Freedoms: a guarantee of specific rights and freedoms enshrined in the Constitution and enforceable by judiciary

- created in 1982
- made to guarantee that the government will act consistently with the values associated with a liberal democratic state
- ex. freedom of expression and of religion, right to a fair & speedy trial, equality rights, right to vote etc.

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Sources of Law:

Four Sources of Law in Canada:

1. Constitutional Convention (Constitution Act of 1867)
2. Statue Law (Gov't)
3. Royal Prerogative
4. Common Law

Royal Prerogative: historical rights and privileges of the Crown, including the right to conduct foreign affairs and to declare ware

Common Law: Rules that are formulated in judgements

- judge-made law
- the end product disputes that come before the judiciary
- Judge's judgements are referred to cumulatively as common law

Precedent: an earlier case used to resolve a current case because of its similarity

- a lower court must follow a relevant precedent created by a higher court in the same jurisdiction
- not all precedents are of equal value — higher the court created, the more valued the decision is
- the Supreme Court of Canada is entitle to decide a case any way it sees fit

Sometimes judges apply another set of rule...

Equity: rules that focus on what would be fair given the specific circumstance of the case, as opposed to what the strict rules of common law might dictate.

- originated in England
- provides assistance to those who would not receive adequate help under common law

Classifications of Law:

Domestic Law: the internal law of a given country, which includes both statue and common law vs.

International Law: Law that governs relations between states and other entities with international legal status

Substantive Law: law that defines rights, duties, and liabilities vs.

Procedural Law: law governing the procedures to enforce rights, duties and liabilities

Public Law: areas of the law that relate to or regulate the relationship between persons and government at all levels

- criminal law, tax law, constitutional law, administrative law

vs.

Private Law: areas of law that concern dealings between persons

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- contract law, tort law (legal wrongs of person vs. person that are intentional like assault or unintentional like negligent driving), property law, company law

Common Law vs. Civil Law:

- common law is a judge-made law
- but it is also used to describe a private law that is in place in all provinces except for Quebec
- Common law system is one that bases its private law on judicial decisions that if relevant and binding must be applied to the case at issue
- this is different in Quebec

Civil Code in Quebec: the rules of private law that govern Quebec

- common law and civil law are similar
- judges in Quebec look Civil Code for general principles to be applied to the case at hand. They are not bound to other judge's decisions,

Administrative Law and Business:

Administrative Law: rules created and applied by those having governmental powers

- primary area in which business and government interact

For Summary of Constitutional Law see figure 2.8 on page 39

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Chapter 3: Managing Legal Risks

MCS 3040

Assessing the Legal Environment:

- businesses need to deal effectively with the legal environment to reduce the likelihood and impact of mistakes that are...
 - costly in terms of the expense of legal services and damage claims
 - distracting in terms of time and effort
 - harmful in terms of relationships and reputation in the industry

Two Basic approaches to how businesses can manage its interaction with the law and legal issues:

1. preventative — thorough evaluation of risks in order to minimize their impact
 - emphasizes compliance with legal requirements and anticipation of changes in legal environment
 2. reactive — recognizes that legal problems may still materialize, so the firm needs a strategy in place to deal with such a development
- both are combined in a management plan to reduce legal risk on the organization

legal risk: a business risk with legal implications

Legal Risk Management Plan:

Enterprise risk management: the process of identifying and managing all business risks

- contains completing a comprehensive assessment of legal risk exposure and developing a legal risk management plan

Legal Risk management: attempts to identify and then manage threats that could generate negative legal consequences such as fines, penalties, compliance orders, license suspensions, and liability for the payment of money.

Four Step Process:

1. identify legal risks
2. evaluate risks
3. devise a risk management plan
4. implement the plan

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Applying the Four Step Process:

Step one: Identify the Legal Risks

- most critical step, if not identified it can't be managed

You need to ...

- assess the organization's functional areas
 - Marketing and Sales, HR, Finance & Accounting, Information Systems etc.
- review the organization's business decisions
- examine the organization's business relationships
- analyze the organization's operations and transactions

Step two: Evaluate the Risks

You need to...

- assess the probability of loss
- assess the severity of loss

- The above can offset each other

Step three: Devise a Risk Management Plan

You need to...

- avoid or eliminate the risk
- reduce the risk
- transfer the risk
- retain the risk

Risk Avoidance: ceasing a business activity because the legal risk is too great

Risk Reduction: implementing practices in a business to lower the probability of loss and its severity

Risk Transference: shifting the risk to someone else through a contract

- thought of in terms of insurance

Risk Retention: absorbing the loss if a legal risk materializes

- self-insurance — establish a funded reserve
- insurance policy deductibles — retain risks to a certain dollar amount
- non-insurance — can charge losses as an expense item

Step four: Implement the Plan

You need to...

- carry out the plan

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- monitor and revise the plan

Interacting with the Legal Environment:

Reacting when prevention fails:

- prevention of loss is the primary goal of a risk management plan
- sometimes an event may occur that has not been contemplated by the Risk Management Plan
 - we would then move to crisis management

Managing Legal Services:

- Lawyers may be part of the risk management team or consulted by the team
- They can help create the legal risk management plan
- Legal services may be provided in-house, or outside house

When to Seek Legal Advice:

- too soon & often can be too expensive
- too infrequently can save money in short-term but cost more in long run
- legal advice is important in negotiations, exploring options, understanding regulatory matters etc.
- There should be someone in the org that decides when legal advice is needed

Lawyer: a person who is legally qualified to practice law

Law Firm: a partnership formed by lawyers

How to Choose a Lawyer:

- use your sources — friends, relatives, business associates
- consult those who have had similar legal problems and needs, ask about their service
- consider meeting each lawyer/firm to discuss the needs of the business (legal advice in general or for specific problem)
- discuss alternative fee structures with prosper
- evaluate the prospects according to a predetermined list of criteria

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Chapter 4: Dispute Resolution

MCS 3040

Introduction:

- it is not in the best interest of a business to avoid all legal conflict at all costs
 - sometimes the legal fees are not worth the loss
- Businesses should seek to manage disputes with express goals of...
 - avoiding time-consuming and expensive litigation
 - preserving desirable long-term commercial relationships

Business Activities and Legal Disputes

ex. The Delinquent Customer

- customer's refusal to pay its account
- maybe this means that the company has failed in its procedures to extend credit — should explore this possibility to prevent recurrences
- must decide if they should give customer a chance to recover financially before demanding payment, or accept less than full amount, or write off debt altogether
- or they could take steps to be paid
 - selling debt to collecting agency at discount
 - suing for debt
 - filing claim if customer is involved in bankruptcy
- if debt is small, writing it off or coming up with a negotiated payment may be more reasonable (saves relationship & no legal dispute arises)

ex. The Hacking Attempt

- anticipated by plan — firewalls in place
 - therefore minimal damage and no data loss
- could go other way... can be quite costly
 - liability for loss of sensitive customer/employee data or loss of revenue from interruption of computer system
- unlikely to result in legal dispute if loss is minimal
 - could sue for trespass to property

ex. The Pollution Incident

- operations have resulted in discharge of small amount of pollutant into the environment
- pollution must be reported
 - agency may impose a fine, clean-up order or some other type of admin penalty
- unlikely to result in legal dispute — in risk management plan
- must report incident to insurer
 - must be done in timely manner to have insurance cover the matter
- If a pollutant landed on nearby farmer or town it could result in legal dispute

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- problem occurs if there is a disagreement about damages \$\$ between the farmer and the insurance company

ex. The Equipment Breakdown

- machine breakdown caused converter belt to catch on fire
 - CFO estimates loss profits at \$3 million
 - insurer denies coverage because “not due to accidental event, but due to their failure to maintain the equipment”
 - money owed is too large to write off... so legal dispute

Alternative Dispute Resolution:

Alternative Dispute Resolution: a range of options for resolving disputes as an alternative to litigation

Negotiation:

Negotiation: a process of deliberation and discussion intended to reach mutually acceptable resolution to dispute

- can be used to resolve almost any type of dispute (sometimes it may jeopardize the chance of getting \$)
- parties and/or their representatives are involved
- used by consent or contract
- ends if successful and there is a settlement

Advantages:

- quick, cheap, controllable, private, helps persevere relationships, may produce final decision

Disadvantages:

- require agreement to proceed, no precedent, may fail

Release: an agreement where a party agrees to relinquish past, present, and future claims arising from a certain event

- what happens when negotiations are successful and the parties reach a settlement
- if an impasse occurs, must choose
 - contend and cut its losses
 - risk expenditure of more time and money and may need to sue

Mediation:

Mediator: a person who helps the parties resolve their dispute

Mediation: A mediator is present to help parties resolve their dispute

- parties and mediator are involve
- used by consent or contract or statute
- mediator assists the parties to come to an agreement

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- end if successful and there is a settlement

Advantages:

- quick, cheaper than arbitration & litigation, controllable, private, helps preserve relationships, may produce final decision

Disadvantages:

- may require agreement to proceed, no precedent, may fail

Arbitration:

Arbitrator: a person who listens to the parties to a dispute and makes a ruling that is usually binding on the parties

Arbitration: a third person (arbitrator) is appointed by the parties to make a decision

- parties, their lawyers (usually), and arbitrator(s) are involved
- used by consent, contract or statute
- arbitrator makes decision after submissions
- ends with a binding decision (usually)

Advantages:

- can be quicker and less costly than litigation
- can be private
- choice of process and arbitrator
- decision may be binding

Disadvantages:

- may require agreement
- can be as slow and expensive as litigation
- imposed decision
- no precedent
- may destroy relationships

Binding: final and enforceable in the courts

- result of arbitration
- it is final unless overturned or varied on appeal

Litigation:

Terms:

Plaintiff: the party that initiates a lawsuit against another party

Defendant: the party being sued

- should only be employed when all other feasible methods have failed and when the claim can not be reasonably abandoned

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Limitation period: the time period specified by legislation for commencing legal action

- can vary widely depending on type of lawsuit and in which province the lawsuit occurs in

Class Action: a lawsuit launched by one person who represents a class of persons having similar claims against same defendant

- allows to be certified or approved by court if...
 - pleadings disclose a cause of action
 - there is an identifiable class of two or more persons
 - the claims of the class raise issues that are common to all class members
 - the class proceedings is the preferable procedure for the result on of the common issues
 - there is a representative plaintiff who fairly and adequately represent the interests of the class and who does not have conflicting interests with other class members

Litigation:

Litigation: if parties are unable to compromise, they seek court's answer

- parties, lawyers, a judge and occasionally a jury are involved
- used by one party suing the other
- judge makes decision after trial
- end by judgment by the court

Advantages:

- no agreement to proceed required
- sets precedent
- final decision

Disadvantages:

- slow
- expensive
- stressful
- imposed decision
- no choice over process and decision maker
- public
- usually destroys relationships

Stages of a Lawsuit:

Pleadings: the formal documents concerning the basis of a lawsuit

- plaintiff initiates the action by preparing a document that contains the allegations supporting the claim
- doesn't yet include evidence, it just outlines key points that the plaintiff needs to prove at trial in order to succeed
- defendant has short period of time (20 days in ON) to respond to complaint
- failing to respond = admitting to claim
- if they have no defence, they can let the plaintiff "win"

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- defendant can seek legal advice and file defence or they can also file a counterclaim

Claim: the formal document that initiates litigation by setting out the plaintiff's allegations against the defendant

Defence: the defendant's formal response to the plaintiff's allegations

Counterclaim: a claim by the defendant against the plaintiff

Discovery: the process of disclosing evidence to support the claims in a lawsuit

- both parties must reveal & demonstrate the facts that support their allegations
- timeframe is undefined, depends on complexity of the case
- usually parties are required to have a formal attempt to resolve their dispute before going to court (ie. mediation)
- parties are required to participate in a settlement and pre-trial conference
 - narrow issues and make time as short as possible

Trial & Decision:

Trial: a formal hearing before a judge that results in a binding decision

- timing depends on availability of courts and on how long it takes the parties to prepare for the formalities of trial

Burden of Proof: the obligation of the plaintiff to prove its case

- plaintiff must formally introduce evidence to prove version of events that is more likely true than not
- "proving the case on the balance of probabilities"
- must prove that there is a better than 50% chance that the circumstances of the dispute are true and that it deserves the sought remedy

Decision: the judgement of the court that specifies which party is successful and why

- who must pay whom (not always money)
- monetary awards include basic part of claim and interest, and usually the legal costs of the successful party

Costs: legal expense that judge orders the loser to pay the winner

- usually falls short of fully compensating the winning party for all its legal expenses

Enforcement:

- winner of suit must enforce the judgment with the assistance of the court

Judgment Debtor: the party ordered by the court to pay a specified amount to the winner of a lawsuit

- if they fail to voluntarily pay the judgement, court officials or other designated persons will assist in seizing and selling assets of the debtor
- winner only gets the extent that the loser's assets provide

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Contingency Fee: a fee based on percentage of the judgement awarded, and paid by client to the lawyer only if the action is successful.

Appeals:

Appeal: the process of arguing to higher court that a court decision was wrong

- must be initiated within a certain period of time
- should be done with careful consideration (time, limited successes)
- at higher level, conducted by a panel of three judges
- the lawyers representing the appellant and respondent make written/oral submissions to appeal judge, who then decide to confirm original decision, vary it or reverse it
- when court of appeals rules, the appellant can consider a further appeal to the Supreme Court of Canada (they have to give leave to proceed with appeal)

Appellant: the party who begins or files an appeal

Respondent: the party against whom an appeal is filed

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Chapter 5: An Introduction to Contracts

MCS 3040

Introduction to Contract Law:

Contract: an agreement between two parties that is enforceable in a court of law

- deliberate and complete agreement
- not necessarily in writing
- an agreement, complete, deliberate, voluntary, between two or more competent persons, supported by mutual consideration, not necessarily in writing
- once created, permits both parties to rely on the terms that they have negotiated and plan their business affairs accordingly
- if dispute arises, they have various options for dispute resolution
- ensures that parties get what they bargained for
- rules governing contracts are based on common law
 - judge-made laws
- legal cornerstone of any commercial operation
- come in a wide variety

Legal Factors in their Business Context: Creating the Contract

Communication:

- most contractual relationships begin with communication
 - informal contact between individuals who have common need, or general inquiries
- communication is automatically laden with legal meaning
- contract law concerns itself with what the negotiations say and do

Objective Standard test: a test based on how a reasonable person would view the matter

- contract law is governed by this

Bargaining Power:

Equal Bargaining Power: the legal assumption that parties to a contract are able to look out for their own interests

- business reality is that two negotiating parties rarely have this
- the greater your bargaining power, the more favourable the terms will be for you
- contract law, however, is constructed on the basic assumption that those who negotiate and enter contracts do have equal bargaining power

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- therefore courts are normally not entitled to assess the fairness or reasonableness of the contractual terms the business parties have chosen

Business Context: Performing or Enforcing the Contract

Business Relationships:

- business people rarely breach contracts
- contract law is a narrow scope
 - its emphasis is often on a specific transaction and isn't really concerned with long-term business relationships
- you need to consider if a small breach in contract is worth going to court for, you might just want to take or split the loss in order to preserve the business relationship
- expense and uncertainty of litigation is also reason to avoid it

Economic Reality:

- contract law exists to create legally binding commitments, but it might not be the best economic decision for party to keep that commitment
- sometimes, price of compensation is acceptable to be released from the commitment

Reputation Management:

- business that breaches contracts often due to bad planning or to pursue a better opportunity is likely to acquire a reputation for being an unreliable company

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Chapter 6: Forming Contractual Relationships

MCS 3040

The Contract:

Contract:

- an agreement
 - complete
 - deliberate
 - supported by mutual considerations
 - transforms a simple agreement into an enforceable contract
-
- before a contract can take place, the parties must be in agreement (consensus as to their rights and obligations)
 - form of offer and acceptance

Offer:

Offer: a promise to perform specified acts on certain terms

- only a complete offer can form basis of a contract
- all essential terms must be set out or else it may fail because of uncertainty
- can still achieve a standard of certainty even if it leaves matters to be decided in the future

Invitation to Treat:

Invitation to Treat: an expression of willingness to do business

- no legal consequences
- different from an offer
- merely expresses wish to do business

Rules to distinguish Offer vs. Invitation to treat (according to Common Law):

- advertisements are not generally considered offers
 - if they were, they seller could be in breach of contract if they ran out of the item they advertised
- display of product in store is not an offer to sell
 - simply indication that product is available
 - can refuse to complete transaction at register

ex. Retail Purchase

- display of goods = invitation to treat
- customer takes good to cash register = offer to purchase at sticker price
- clerk takes payment = acceptance of offer

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Standard form contract: a “take it or leave it” contract, where the customer agrees to a standard set of terms that favours the other side

- sales and rental business frequently require customers to consent to standard of terms
- such contracts heavily favour the businesses

- when negotiations are complicated, it is important for the parties to know when an offer has been made
- fundamental rule is that a contract is formed only when a complete offer is unconditionally accepted by the other side

Offeror: person who makes an offer

Offeree: person to whom an offer is made

Termination of Offer

Offer can be terminated by...

1. Revocation
2. Lapse
3. Rejection
4. Counteroffer
5. Death or Insanity

Revocation:

Revocation: the withdrawal of an offer

- can occur at anytime before acceptance
- simply notify offeree of withdrawal

- law permits offers to revoke their offers despite a promise to leave the offer open for a period of time (firm offer)
- promise is enforceable only if the other party has purchased it or others given the offeror something in return for the commitment

Option Agreement: an agreement where, in exchange for payment, an offeror is obligated to keep an offer open for a specified time

- a separate contract
- common found in real estate developments

- offer does not have to be directly revoked by the offeror, revocation can take place through a reliable third party source

In context of Tendering Contract:

- when an owner wishes to secure competitive bids to build a large project
- contractors submit tenders (offers) that set out a price for the work to be done
- call for tenders could be construed as an offer of a preliminary contract (Contract A)

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- everyone who submits a tender is accepting the offer of a Contract A to govern the relationship as well as offering to enter into Contract B if chosen to do so (Contract B is the larger contract to perform work in question)

Lapse:

Lapse: the expiration of an offer after a specified or reasonable period

- reasonable period is speculative, judge has to decide
- offeror should consider specifying an expired date for the offer and thereby avoid debate

Rejection:

Rejection: the refusal to accept an offer

- offeree terminates offer
- can one be accepted if the offeror devices it by offering it anew or if offeree presents new offer

Counteroffer:

Counteroffer: the rejection of one offer and the proposal of a new one

- a form of rejection

Death or Insanity:

- offer generally dies if offeror or offeree dies
- someone who makes an offer and then becomes insane would not be bound to the offer

Acceptance:

Acceptance: an unqualified willingness to enter into a contract on the terms of the offer

Communication of Acceptance:

- in order to effect legal acceptance, offeree must communicate an unconditional assent to the offer in its entirety
- can communicate this by...
 - in person, in writing, by mail, by fax, by email, by telephone and by other actions
- the law determine that the offer is effective only when it has been communicated to the offeree
- if the letter gets lost in the mail or email goes astray, or fax is going to wrong number... generally this means there is no acceptance, in order for there to be acceptance there needs to be communication (**ordinary rule**)

“Postbox rule” Exception

- if it is clear that the offeror intends the postbox rule to apply to her offer, then acceptance is effective at the time of the mailing of acceptance, rather than time of delivery

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- when ordinary rule is applied vs with postbox rule is applied is determined by the facts of the case
- ordinary rule is more common

Consideration

Nature of Consideration:

Consideration: the price paid for a promise

- exchange of value
- key ingredient that distinguishes a legally enforceable promise from one that is not legally enforceable

Gratuitous promise: a promise for which no consideration is given

- unsupported by consideration
- promise can be broken with legal impunity because it has not been “purchased”
- price must be paid for a promise before a party can sue when it is broken
- consideration doesn't have to be monetary
- requirement of consideration is strongly linked to the idea of freedom of bargaining
- the parties decide what is a fair and reasonable price
- adequacy of consideration is not normally open to challenge

Pre-Existing Legal Duty:

- contract can also be viewed as a set of duties (like it is viewed as a set of promises)

Pre-existing legal duty: legal obligation that a person already owes

Variation of Contracts:

- there are two lines of authority in Canada regarding the enforceability of gratuitous contractual variations
- when consideration is present the difference between two jurisdictions is no longer relevant — variation is most certainly enforceable

Premises Enforceable without Consideration

- consideration is not always necessary for contract or contractual variation to be enforceable

Promise Under Seal:

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- authenticate written agreements by putting hot wax beside the signature on a document and placing an imprint in the wax, unique to the person who signed
- today this still takes place of red gummed circle or wafer beside a signature
- if document contains a promise signed and sealed, the fact that there is no consideration is irrelevant

Promissory Estoppel:

Promissory Estoppel: a doctrine whereby someone who relies on a gratuitous promise may be able to enforce it

- focuses on idea of fairness (subjective) so courts are reluctant to stray too far

Party seeking to rely on the doctrine must show that a number of distinct factors exist in relation to promises made by Party B

- Party B has, by words or conduct, made a promise or an assurance to Party A that was intended to affect their legal relationship and to be acted on
- in reliance on the representation, Party A acted on it or in some way changed its position
- Party A's own conduct has been above reproach and, in this way, Party A is deserving of the courts' assistance
- can only be used as a defense to legal claims made by a promise breaker

Partial Payment of a Debt:

- common that customer can not pay its account, but offers a smaller amount to settle the debt in full
- creditor can go back on promise to accept a lesser sum in full satisfaction of the debt has been reversed
- creditor can no longer claim full amount
- creditor can not sue for the balance once they have received the smaller promised amount

Intention of Contract

- in order for one party to enforce the promise of another, the promise at issue must have been intended to be a contractual one (enforceable by court of law)

Business Agreements:

- most agreements in commercial world are intended to be contractual
- common law recognizes this
- intention to contract is presumed

Rebuttable presumption: legal presumption in favour of one party that the other side can seek to rebut or dislodge by leading evidence of the contrary

- court assumes intention was present, but you can try to show otherwise

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Family agreements:

- agreements between family members are regarded differently in law because they are personal in nature
- common law presumes that promises between family members are non-contractual

Hanging the Risks of Contract Formation

- risk of misunderstanding when statements and conduct have legal consequences
- risk of failing to anticipate and plan for contingencies that might occur after the contract has been formed

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Chapter 7: The terms of Contract

MCS 3040

Content of a Contract:

Terms:

- contractual terms can be express or implied

Express Term: a provision of a contract that states a promise explicitly

- important so that each party knows obligations

Judicial Interpretation of Express Terms:

- vague or ambiguous language
 - assign as reasonable meaning as possible to vague or ambiguous terms
 - drafter bears the risk of unclear language
 - if language is so ambiguous it can't be understood, contract will fail for uncertainty and non of the promises it contains are enforceable
- Rules of Construction: guiding principles for interpreting or "constructing" terms of a contract
 - ask how a reasonable person would regard the term in question

Implied Term: a provision that is not expressly included in a contract but that is necessary to give effect to the parties' intention

- judge will do so if not all all terms that parties intended to include in the contract were included
- plaintiff carries burden of proof, must show on demonstrate on balance of probabilities that the terms were intended on being included

Business Efficacy:

- permits judges to imply terms necessary to make contract workable

Customs in the Trade of the Transaction:

- relying on trade customs to imply a term is rarely successful

Previous Dealings between parties:

- if parties have contracted in the past, it may be possible to imply that their current contract contains same terms

Statutory requirements:

- important source of terms implied by statute
- found in sale-of-good legislation
- provides mandatory parts of contract for sale of goods

Entire Contract Clause: a term in a contract in which the parties agree that their contract is complete as written

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Contractual Quantum Meruit: awarding one party a reasonable sum for the goods or services provided under a contract

Parol Evidence Rule:

Contracts can take three possible forms:

1. Entirely Oral
2. Entirely Written
3. Both oral and written

- the form that it takes does not affect its enforceability (few exceptions in chapter.8)

Parol Evidence Rule: a rule that limits the evidence a party can introduce concerning the contents of the contract

- used when court is asked to determine - according to party intentions - what a contract means and includes
- entire contract clauses are used to ensure application of the parol evidence rule

Situations when outside evidence should be considered:

- if there is alleged problem with formation of contract
- if contract is intended to be partly oral and partly written
- if the promise to be enforced is contained in a separate agreement that happens to be oral
- if the language in the contract is ambiguous

Using Contractual Terms to Manage Risks:

- planning function of law permits business person to use conjectural terms as a bugger against future, uncertain events
 - limit liability

Changed Circumstances:

- numerous situations can arise that will prevent a party from completing their contractual obligations
- terms of contract are settled at time of acceptance, so if a disaster strikes, the obligations are still enforceable, unless a clause to contrary is included
- legal doctrine of "frustration" occasionally relieve parties from obligations (chapter 9)
- important to evaluate risks in longer-term contracts, provide flexibility in agreements

Conditional Agreements:

- essential when one party wants to incur contractual obligations but only under certain circumstances
- ex. buy this only if you secure financial backing from bank

Condition Subsequent: an event of circumstance that, when it occurs, brings and existing contract to an end

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Condition Precedent: an event or circumstance that, until it occurs, suspends the parties' obligations to perform their contractual obligations

Limitation to Liability Clause:

- when party fails to meet its contractual obligations, it is liable for breach of contract and responsible for other side and any reasonably foreseeable damages the breach may have caused

Limitation of Liability Clause: a term in a contract that limits liability for breach to something less than would otherwise be recoverable

Exemption Clause:

Exemption Clause: a term of a contract that identifies events causing loss for which there is no liability

Liquidated Damages Clause:

Liquidated Damages Clause: a term of a contract that specifies how much one party must pay to the other in the event of breach

- parties themselves decide before a breach has even happened what that breach would be worth by way of compensation
- will not be enforceable if it sets an unreasonable amount

Penalty Clause: a term which is not enforceable because it sets an exorbitant amount that one party must pay to the other in event of a breach

- because contract law is only interested in compensating innocent party, not punishing breaching party

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Chapter 8: Non-Enforcement of Contracts

MCS 3040

Importance of Enforcing Contracts:

- preserve integrity, reliability, and predictability of contractual relationships
- unjust to enforce contracts under exceptional circumstances

Legal Doctrines that are exceptions to enforceable rule of contract:

- these doctrines have been developed by common law and statute

1. an unequal relationship between the two parties
2. misrepresentation or important mistakes concerning the contract
3. a defect within the contract itself

Options for when party finds themselves within legal doctrines:

Voidable Contract: a contract that, in certain circumstances, an aggrieved party can choose to keep in force or bring to an end

Void Contract: a contract involving a defect so substantial that it is of no force or effect

Contracts Based on Unequal Relationships

Legal capacity

Legal Capacity: the ability to make binding contracts

Minors:

- age of majority is age at which person is recognized as an adult for legal purposes
- if under age, you are in different position to enter contracts
- age of majority and accountability act sets age of majority at 18
- **general rule** that minors are not obligated to the contracts they make
 - exceptions
 - contracts for essentials or “necessaries”, such as food, shelter, and clothing
 - must legally determine: 1) is item necessary to minor? 2) does minor already have adequate supply of item?
 - beneficial contracts binding if considered for benefit of minor
- when they reach age of majority, there is no impacts on contracts made while underage
 - exception
 - contract is permanent or continuous in nature

Mental Incapacity:

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- in order to form contract, both parties must be able to understand the nature and consequences of agreement
- if one party unfairly exploits the other party who is lacking capacity, then contract isn't enforceable

Duress:

- contract made as a result of one party being threatened are not enforceable

Economic Duress: the threat of economic harm that coerces the will of the other party and results in a contract

- when determined, contract is voidable at option to party who was under duress

Undue Influence:

Undue Influence: unfair manipulation that compromises someone's free will or choice

- if determined, then contract is voidable

Traditionally operates in two circumstances:

- 1) **actual pressure** — in transaction someone exerts unfair influence on another (ie. elderly pressured by caregivers to sign over estate)
- 2) **presumed pressure based on a special relationship** — contract between family and lawyer, or patient and doctor. The titles held presumes undue influence.

Certificate of Independent legal advice:

- way of proving contract was freely chosen
- weaker party seeks independent legal advice concerning transaction they are about to enter into
- includes that...
 - lawyer explained proposed transaction to weaker party
 - they understand the transaction
 - they are proceeding with transaction on free and informed basis

Unconscionability:

Unconscionable Contract: an unfair contract formed when one party takes advantage of the weakness of another

Proof of Unconscionability Two-step Process:

- 1) proof of inequality between the parties
 - arises from one party being... compared to other party
 - unsophisticated, poorly educated, lacks language skills, lower economic standing
 - generally speaking, parties are never really on equal levels
- 2) proof of an improvident bargain or proof of exploitation
 - terms greatly advantage one party over the other

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- if transaction is sufficiently divergent from community standards of commercial morality, this is a strong indication of exploitation

Misrepresentation and Important Mistakes:

Misrepresentation of Relevant Facts:

- Basic rule is that both parties are to look out for own interests and if they want info, they should ask for it

Some parties owe a duty of information

- one party only provides partial information to other side
- one party actively conceals truth
- one party negates to correct an earlier assertion, when stated, was correct but is no longer so
- the parties are in a relationship requiring upmost good faith (ie. insurance law)
- a statute imposes a positive obligation to disclose information

Misrepresentation: a false statement of fact that causes someone to enter a contract

Rescission: the remedy that results in the parties being returned to their pre-contractual positions

- contract cancellation
- equitable remedy

To count as misrepresentation, must be proven that statement is:

- false
- clear and unambiguous
- material to the contract (significant decision factor)
- one that actually induces the aggrieved party to enter contract
- concerned with fact and not opinion, unless speaker claims to have special knowledge

Categories of Actionable Misrepresentation:

- **fraudulent misrepresentation** — speaker has deliberate intent to mislead or makes statement recklessly without knowing or believing that it is true
- **negligent misrepresentation** — speaker makes statement carelessly
- **innocent misrepresentation** — speaker has not been fraudulent or negligent, but has misrepresented a fact. By process of elimination, the misrepresentation was innocent.

Remedies:

- if fraudulent or negligent, damages in tort can be awarded
- if fraudulent, negligent or innocent, rescission can happen

Mistake:

Mistake: an error made by one or both parties that seriously undermines a contract

- most difficult aspect of contract law

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- rarely proven in practice
- examples
 - mistake in common understanding of a word by both parties
 - both parties make same error (**common mistake** — both parties to the agreement share the same fundamental mistake)
 - ex. think car is worth nothing, sells at low price. Turns out car was actually a fancy antique. Car was something totally different from what the parties thought it was. (still hard to prove)

Contracts Based on Defects:

Illegality:

- under classic model of illegality, even freely chosen contract will be unenforceable if it
 - is contrary to specific statute
 - violates public policy

Illegal Contract: a contract that cannot be enforced because it is contrary to legislation or public policy

- may or may not be criminal

Illegal by Statute

- Criminal code
- the federal competition act
- Ontario's Real Estate and Business Brokers Act

Contrary to Public Policy:

- public policy — the community's common sense and common conscious

Two kinds of restrictive covenants (restricting business activity):

Non-Solicitation Clause: a clause forbidding contract with the business's customers

Non-Competition Clause: a clause forbidding competition for a certain period of time

Writing as a Requirement:

- general rule — contracts do not have to be in writing in order to be enforceable

Statute of Frauds

- requires certain criteria of contracts to be written
- [contracts of guarantee](#)
 - promise to pay debt of someone else, should that person default in their obligation
- [contracts not to be performed within a year](#)
 - hard to hold promises that were made in distant past
- [contracts dealing with land](#)

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- leases and sales
- exception — in case of ‘part performance’
- [contracts for sale of goods](#)
 - sale of goods act, sale of goods above specified amount must be in writing
 - very broad exceptions
 - not often used

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Chapter 9: Termination and Enforcement of Contracts

MCS 3040

Termination of Contracts: Overview:

Termination of Contract:

- 1) **Through Performance** — both parties fulfill contractual obligations to each other, so it ends
- 2) **Through Agreement** — parties always free to voluntarily bring contract to end, if they both want to
- 3) **Through Frustration** — doctrine of frustration applies when an unforeseen event “frustration” occurs, bringing contract to end
- 4) **Through Breach** — a serious breach of contract can release the innocent party from having to continue with the contract if they wish. Less significant breaches generally just give innocent party damages.

Termination Through Performance:

- contract performed when all its implied and express promises have been fulfilled
- then it ends

Performance by others:

- law easily distinguishes between those who have the contractual obligation to perform and those who actually do the work
- you can contract another party to do your work

Vicarious Performance: performance of contractual obligations through others

Termination by Agreement:

By agreement between parties:

- best way to deal with events that make contract disadvantageous in some respect
- parties enter contract that becomes unfavourable to one or both of them
- they decide to...
 - **novation**: enter into a whole new contract, replace one contract with another
 - vary certain terms of the contract
 - end the contract
 - **substitute a party** — more limited form of novation, where rights and obligations of one party are transferred to another.

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Transfer of Contractual Rights

- party who wants to end involvement in contract can transfer it to someone else

assignment: the transfer of a right by an assignor to an assignee

Step 1: A and B have contract

Step 2: A notifies B they want to transfer contract, A assigns contract to C

Step 3: B and C have contract

Termination by Frustration

Frustration: termination of a contract upon the occurrence of an unforeseen catastrophic event which makes contractual performance impossible or prevents the contract from being performed in a manner at all similar to what the parties envisioned when they entered the contract

Event must:

- be unforeseen
- not arise due to fault of parties
- make the purpose of the contract either impossible or drastically more difficult to receive
- not be a risk the occurrence of which was contractually allocated to either of the parties

Examples:

- death of employee
- enactment of new legislation

Force Majeure and other clauses:

- rather than leaving it to a judge to decide whether occurrence of given event amounts to frustration, the parties contractually define it themselves - in advance - what events would frustrate the contract and bring it to an end

Enforcement of Contracts:

- when one party fails to reform contractual obligation, it is a breach of contract that is subject to a lawsuit
- plaintiff is obligated to demonstrate, on a balance of probabilities, that...
 - [privity of contract](#) — there is a contract
 - [breach of contract](#) — party failed to complete their promise
 - [entitlement to remedy](#)

Privity of Contract:

- privity means that those who are parties to a contract can enforce the rights and obligations that it contains

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- strict application of doctrine of privity
- courts have recently shown willingness to allow third parties to rely on contractual clauses place in contract for their benefit

Statutory Modifications of the Doctrine:

- common law of privity has been modified by statute in two important areas
 - consumer purchases and insurance

Breach of Contract:

- breach = right to remedy
- contractual term classified as a condition or warranty, depending on parties intentions.
- Parties can choose terms before hand, or they can be assigned in court.
- language is considered by courts

Condition: an important term that, if breached, gives the innocent party the right to terminate the contract and claim damages

Warranty: a minor term that, if breached, gives the innocent party the right to claim damages only

Innominate Term: a term that cannot easily be classified as either a condition or warranty

Exemption and Limitation of Liability Clause:

- parties are free to include a clause in their contract that limits or excludes liability for breach

Fundamental Breach: a breach of contract that affects the foundation of the contract

- may not rely on above clause if breach affects the entire contract

Timing of the Breach:

- can occur at time of specified performance or before

Anticipatory Breach: a breach that occurs before the date for performance

- actionable because each party in a contract is entitled to continuous expectation that the other will perform during the entire period between the contract formation and time of performance
- if sufficiently serious, innocent party is not just entitled to damages, but also to treat contract as at an end (terminated)

Entitlement to a Remedy:

- usually, damages are awarded
- sometimes, in specific circumstances, entitled to equitable remedy

Ways to measure plaintiff's loss:

- **expectation damages** — provide plaintiff with the monetary equivalent of contractual performance (most common), can be pecuniary (tangible \$ loss) or non-pecuniary (intangible loss)

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- **Punitive damages** — award to plaintiff to punish defendant for malicious, oppressive and high-handed conduct ‘

Test for remoteness:

- used to determine kinds of damages recoverable
- states that the damages claimed are recoverable provided (must pass one)...
 - damages could have been anticipated from breach
 - damages are reasonably foreseeable

Duty to Mitigate: the obligation to take reasonable steps to minimize the losses resulting from a breach of contract or other wrong

Equitable Remedies:

- rare situations
- **specific performance** — do what contract obligated you to do
 - can be refused by court in following circumstances
 - improper plaintiff behaviour
 - delay of prompt complaint from plaintiff
 - impossibility
 - severe hardship to party
 - employment contract, force employee to do something they don't want to do
- **Injunction** — court requires defendant to cease an action
 - interlocutory injunction — order to refrain from doing something for a limited period of time
- **Rescission** — restore parties to situation they were in before contract was formed

Restitutionary Remedies:

- gives recourse to a plaintiff who has conferred benefits on the defendant in reliance on contract that can't be enforced due to noncompliance with Statute of Frauds
- complex area of law
- main objective is remedy of unjust enrichment
- **unjust enrichment** — occurs when one party has undeservedly secured a benefit at the other party's expense'
- In response to unjust enrichment , court order defendant to...
 - **pay a restitutionary quantum meruit** — amount reasonable given the benefit plaintiff has conferred
 - **pay compensation** — allowance of money to put plaintiff in as good as position as they were prior to conferring the benefit

Friday, September 30, 2016

Chapter 10: Introduction to Tort Law

MCS 3040

Defining Tort Law

Tort: a harm caused by one person to another, other than through breach of contract, and for which the law provides a remedy

- provides a means whereby compensation may be paid for “injuries suffered by a party as a result of wrongful conduct of others”
- broken down into distinct categories:
 - **Trespass to land** — wrongful interference with someone’s possession of land
 - Ex. park in lot without paying
 - **Deceit or Fraud** — a false representation intentionally or recklessly made by one person to another that causes damage
 - Ex. customer purchases a vehicle based on the vendor’s intentional representation that the vehicle has a new engine when in fact, it doesn’t
 - **Negligence** — unreasonable conduct, including a careless act or omission, that causes harm to another
 - Ex. taxi driver injured due to an unsafe lane change by another driver, when lawyers/accountants/etc. give incompetent advice that causes loss, consumers purchase a defective product, bar over serves customer

How Torts are Categorized

Two types of Torts:

- those done intentionally and those committed through negligence

Intentional Tort:

Intentional tort: a harmful act that is committed deliberately or on purpose

False imprisonment: unlawful detention or physical restraint or coercion by psychological means

- intentionally preventing someone from them going where they have a right to be

Battery: intentional infliction of harmful or offensive physical contact

Negligence Tort:

- if negligent, you are liable for damages even though he did not intentionally cause the event in question

Friday, September 30, 2016

Tort Law and Criminal Law

Case: Gretchen works on the installation crew of tour-Allure. Gretchen's boss — Ross Dirk — provided his crew members with beer once the installation was close to complete. He did not restrict how much any of them could drink. Gretchen drank a substantial amount of beer, and then insisted on driving herself home. She collided with another car, causing a 25 year old to become paraplegic.

Negligence tort would hold Tour-Allure accountable for the accident as they are obligated to take reasonable care to see that Gretchen is not harmed. Dirk should never have permitted alcohol or allowed Gretchen to drive.

This same event can rise to distinct legal consequences

- one in tort law, one in criminal law

Type of action	Commencing the Action	Proving the Action	Outcome
Negligence (tort action)	The injured driver files a claim against Gretchen based on the tort of negligence	the injured driver must prove his case on the balance of probabilities	a court orders Gretchen to pay the injured driver compensation for his injuries
impaired driving causing bodily harm (criminal action)	The Crown prosecutes Gretchen based on section 253 of the Criminal Code	The Crown must prove its case beyond a reasonable doubt	a court orders Gretchen to be imprisoned, fined or both

Liability in Tort

Primary and Vicarious Liability:

Vicarious Liability: the liability that an employer has for the tortious acts of an employee committed in the ordinary course or scope of employment

An Employee's wrongful conduct is within the ordinary course or scope of employment if it is...

- authorized by the employer
- unauthorized mode of doing something that is, in fact, authorized by the employer

Liability and Joint Tort-Feasors:

Tort-feasor: person who commits a tort

Joint tort-teasers: two or more persons whom a court has held to be jointly responsible for the plaintiff's loss or injuries

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Liability and Contributory Negligence:

- tort victims may be at least partially responsible for their own injuries

Contributory Negligence: a defence calling that the plaintiff is at least partially responsible for the harm that has occurred

- the amount of damages that the plaintiff is awarded is reduced but the proportion for which the plaintiff is responsible
- common defence in lawsuits involving car accidents
 - eg. driver in Gretchen's accident wasn't wearing a seatbelt. This would allow the argument that he sustained worse injuries than otherwise would have been.

Damages in Tort

The purpose of Damages:

- primary goal of a tort remedy is to compensate the victims for loss caused by the defendant
- compensates not only for physical injury/loss but also for mental pain/suffering and other forms of emotional distress

Pecuniary and Non-Pecuniary Damages:

Non-pecuniary damages: compensation for pain and suffering, loss of enjoyment of life, and loss of life expectancy

- "general damages"

Pecuniary Damages: compensation for out-of-pocket expense, loss of future income, and cost of future care

Punitive or Exemplary Damages:

Punitive Damages: awarded to punish the defendant for malicious, oppressive, and high-handed conduct or where the defendant might otherwise profit from behaviour

- exception to general rule that damages are intended only to compensate the plaintiff.
- ex. Had Gretchen intentionally driven her car into the path of an oncoming car

Aggravated Damages:

aggravated damages: compensation for intangible injuries such as distress and humiliation caused by the defendant's reprehensible conduct

- ex. store detectives unlawfully restrain a customer, they have committed tort of false imprisonment. If while restraining the customer, they treated them in a humiliating or degrading way, the court may award aggravated damages.

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Tort Law and Contract:

- sometimes the same set of facts can give rise to liability in tort and in contract
 - ex. club bouncer punches a patron, the bouncer's tortious behaviour is attributed to his employer (vicarious liability), AND the nightclub is in breach which its contract with the patron (providing reasonably safe environment for their consumption)
 - ex professionally gives incompetent advice to client, they have made a professional breach of contract and a tort of negligence

Managing Tort Risk:

- no business can eliminate all risk, however we assume active measures to minimize it
- ignoring the risk can result in...
 - incurring losses that could have been avoided
 - losing insurance coverage because of poor claims history
 - losing a hard-earned business reputation

Friday, October 7, 2016

Chapter 11: The Tort of Negligence

MCS 3040

The Law of Negligence

What is Negligence?:

Reasonable Care: the care that a reasonable person would exhibit in a similar situation

- negligence is a very common tort action in the commercial world

ex. Negligence action can be brought by someone...

- who was injured by a dangerous driving of a delivery truck driver
 - who has suffered loss by relying on poor advice provided by an accountant, lawyer, architect, or engineer
 - whose furniture has been damaged in transit by a moving company
- plaintiff doesn't need to show that the defendant intended to cause damage, they just need to show that they are liable for failing to act reasonably

Negligence Law:

- like tort law
- seeks to compensate victims for their loss or injury

Establishing a Negligence Action:

- tort action lacks certain specificity to describe general standards that help a court assess where the defendant in any case has been negligent

Elements in a Negligence Action:

1. Does the defendant owe the plaintiff a duty of care? If yes, proceed to the next element.
2. Did the defendant breach the standard of care? if yes, proceed to the next element.
3. Did the defendant's careless act (or omission) cause the plaintiff's injury? If yes, proceed to the next element.
4. Was the injury suffered by the plaintiff too remote? If not, the plaintiff has proven negligence.

1: Does the Defendant Owe the Plaintiff a Duty of Care?

Duty of Care: the responsibility owed to avoid carelessness that causes harm to others

Neighbour: anyone who might reasonably be affected by the defendant's conduct

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- if the case is comparable to a previous case in which a duty of care was recognized... then Stage One is skipped and plaintiff proceeds right to Stage Two

Stage 1: In the relationship between the plaintiff and defendant, is there a prima facie duty of care?

- to fulfill this stage the plaintiff must demonstrate two things
 1. Reasonable Foreseeability — harm that occurred was reasonably foreseeable consequence of the defendants act
 2. Proximity — there is a relationship of sufficient proximity between the parties such that it would be unjust or unfair to impose a duty of care on the defendant

Stage 2: Are there residual policy considerations outside the relationship of the parties that may negate the imposition of a duty of care?

- stage of inquiry no longer considers the relationship between the parties
- asks questions more generally

2: Did the Defendant Breach the Standard of Care?

Reasonable Person: the standard used to judge whether a person's conduct in a particular situation is negligent

- law does not demand that the reasonable person be perfect
- where the defendant exercises specialized skills (professionals like doctors, accountants, engineers, lawyers etc.) the standard of the reasonable person described above is not applied. It is the standard of the Reasonable "specialized training"
- higher the risk, higher the standard of care required by law

3: Did the Defendant's Careless Act (or Omission) cause the Plaintiff injury?

Causation: the relationship that exists between the defendant's conduct and the plaintiff's loss or injury

Legal test for causation generally asks:

- would the harm not have occurred but for the defendant's actions?

4: Was the Injury Suffered by the Plaintiff too Remote?

- court asks "even if there is an obligation to take reasonable care and it was breached, how far will the legal liability of the defendant stretch?"
 - there must be some limit on the defendant's responsibility for the consequences of his negligence

Remoteness of Damages: the absence of a sufficiently close relationship between the defendant's action and the plaintiff's injury

Thin Skull Rule: the principle that a defendant is liable for the full extent of a plaintiff's injury even where a prior vulnerability makes the harm more serious than it otherwise might be

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- protects the plaintiff who has an inherent weakness that makes a given jury more serious than one might otherwise anticipate
- ex. if someone has a weak immune system that makes healing from a bacterial infection from bad meat take longer... than their damages wouldn't be reduced because of that

Pure Economic Loss: financial loss that results from a negligent act where there has been no accompanying property or personal injury damage to the person claiming the loss

- tort law is traditionally reluctant to permit this
 - this rule prevents defendants from being overwhelmed with liability
- the law requires the plaintiff to prove each and every element in a negligence action
 - plaintiff must show that the defendant owed a duty of care and breached the standard of care associated with that duty

Defences to a Negligence Action

- though a court may find a defendant to be negligent, the plaintiff may not be automatically entitled to recover all of her damages
- defendant may raise defence against plaintiff in order to place at least some responsibility for the loss on the party
 - explore two defences... contributory negligence and and defence of *volenti non fit injuria*

Contributory Negligence:

- introduced in chapter 10
- unreasonable conduct by the plaintiff that contributed - or partially caused - the injuries that were suffered
- it recognizes that both defendant and plaintiff may have been negligent
- if they are found to be partly negligent than provincial legislation comes into play
 - responsibility for tortious event must be apportioned between or among the respective parties

Voluntary Assumption of Risk:

Voluntary Assumption of Risk: the defence that no liability exists as the plaintiff agreed to accept the risk inherent in the activity

- also called *volenti non fit injuria*
- defence to the lawsuit, plaintiff will be awarded nothing by judge even if the defendant has been negligent
- must show that the plaintiff released his right to sue for injuries incurred as a result of any negligence on the defendant's part

Negligent Misstatement (or Negligent Misrepresentation)

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Negligent Misstatement or Negligent Misrepresentation: an incorrect statement made carelessly

- loss arises from defendant's careless written or oral statements
- plaintiff must first show that the defendant owed a duty of care based on there being a special relationship between the parties

Professional: someone engaged in an occupation requiring the exercise of special knowledge, education, and skill

- likely to commit the tort of negligent misstatement by giving bad advice or providing the client with an incompetent report

Third Party: one who is not a party to an agreement

- if incompetent advice or report is given to third party, lawsuit may not be as justifiable
- professional didn't deal directly with them so hard to place liability

Negligence and Product Liability:

Product Liability: liability relating to the design, manufacture, or sale of the product

- often involve contract law as well

Negligence and the Service of Alcohol:

- duty of care to impaired patrons to assist them or prevent them from being injured
- also liable to members of the public who are injured by the conduct of one of their drunken customers (drunk driving)

The Negligence Standard vs. Strict Liability

Strict Liability: the principle that liability will be imposed irrespective of proof of negligence

- makes the defendant liable for the plaintiff's loss even though the defendant was not negligent and had exercised reasonable care
- scope of it is limited, rare
- ex. liabilities of fires, dangerous animals or escape of dangerous substances
- wrong to conclude that businesses rarely face strict liability (eg. liability of contract, vicarious liability)

Saturday, October 8, 2016

Chapter 12: Other Torts

MCS 3040

Torts and Property Use:

Occupier: someone who has some degree of control over land or buildings on that land

- ex. enterprise conducting business on property
- there can be more than one
- torts that arise in relation to property commonly arise when the occupier of the property harms others

Occupiers' Liability:

Occupiers' Liability: liability that occupiers have to anyone who enters onto their land or property

- varies by jurisdiction

Liability at Common Law:

- liability of occupier mishaps on property is not determined by ordinary principles of negligence
- determined by clarifying visitor as trespasser, licensee, invitee or contractual entrant
 - each class being owed a different standard of care

Contractual Entrant: any person who has paid (contracted) for the right to enter the premises

- owed: "the premises are as safe as reasonable care and skill on the party of anyone can make them"

Invitee: any person who comes onto the property to provide the occupier with a benefit

- slightly lower duty is owed
- must warn them of any unusual danger which he knows or ought to know of (don't need to warn them of danger that a reasonable person can expect to know)

Licensee: any person whose presence is not a benefit to the occupier but to which the occupier has no object

- occupiers are responsible to licensee for any unusual danger if which they are aware or that they have reason to know about

Trespasser: any person who is not invited onto the property and whose presence is either unknown to the occupier or is objected to by the occupier

- occupier still owes some responsibility to a trespasser, can't do them harm deliberately
- owed the duty of "acting within common humanity towards him"

Liability under Occupiers' Liability Legislation:

- purpose was to replace the somewhat obtuse common law of occupiers' liability by a generalized duty of care based on the 'neighbour' principle set down in Donoghue v Stevenson

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- high duty of care owed to those on property with permission
- occupier must not create deliberate harm or danger

The Tort of Nuisance:

Nuisance: an activity on an occupier's property that unreasonably and substantially interferes with the neighbour's rights to enjoyment of the neighbour's own property

- addresses conflicts between neighbours stemming from land use
- **ex.** noise from still fabricator affecting a neighbour's sleep, ashes & unpleasant odours that are carried onto neighbouring properties because of old tech
- focus is on one's right to enjoy the benefits of the land/property uninterrupted by the actions of neighbours
- test for if the activity has resulted in an unreasonable and substantial interference with the use and enjoyment of land

Guidelines:

- interference must be substantial and unreasonable
- nuisance typically does not arise where the interference is only temporary
- not all interests are protected by tort of nuisance (ex. right to sunlight is unprotected interest)
- courts will consider tradeoffs of interest (ex. if noise is reasonable and for public good, nuisance will fail)

Tort of Trespass to Land:

Trespass to land: wrongful interference with someone's possession of land

- important for boundary/title disputes and protecting property rights
- protects privacy rights and right to peaceful use of land
- actionable without proof of harm or damage
-

Arises...

- person comes onto property without occupier's express/implied permission
- person comes onto property with the occupier's express/implied consent but is then asked to leave
- person leaves an object on the property without the occupier's express/implied permission

Torts from Business Operations

Torts Involving Customers:

- most important tort in this context would be negligence (chapter 11)
- we will look at additional torts now

Assault: threat of imminent physical harm by disturbing someone's sense of security

Battery: intentional infliction of harmful or offensive physical contact

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- not common in a business or professional context, but can happen
- section 494 and 25 of Canada's Criminal Code can show defence

False Imprisonment: unlawful detention, physical restraint, or coercion by psychological means

- often occurs in retail selling, when person detain another without justification
- occurs when victim is prevented from going where they have a lawful right to be

Legal Authority: the authority by law to detain under section 494 of the Criminal code:

- you can arrest without warrant if...
 - person is committing an indictable offence or you believe to have committed a criminal offence/is escaping from having committed one

Deceit: a false representation intentionally or recklessly made by one person to another that causes damage

- arises from misrepresentations, causing loss, that are made either fraudulently or with reckless disregard for the truth
- remedy available is to be released from contract and/or damages

Business-To-Business Tort:

Passing Off: presenting another's goods or services as one's own

- to prove must establish...
 - goodwill or a reputation is attached to his product
 - a misrepresentation by the maker of the cheap replica has led or is likely to lead members of the public into believing that the product is the real thing (or name is real thing)
 - likelihood to suffer or has suffered damages because of this

Interference with Contractual Relations: incitement to breach the contractual obligation of another

- also known as interference with contract, inducement of breach of contract and procuring a breach of contract

Defamation: the public utterance of a false statement of fact or opinion that harms another's reputation

- seeks to protect reputation of individuals against unfounded and unjustified attacks
- also known as slander and libel
- key ingredients:
 - defendant's words were defamatory in that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person
 - the statement did in fact refer to the plaintiff
 - the words were communicated to at least one other person beyond the plaintiff

Defamation Defences:

- **Justification:** a defence to defamation based on the defamatory statement being substantially true
 - if this can not be proved by the defendant, the plaintiff will win

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- **Qualified Privilege:** a defence to defamation based on the defamatory statement being relevant, without malice, and communicated only to a party who has legitimate interest in receiving it
- **Fair Comment:** a defence to defamation that is established when the plaintiff cannot show malice and the defendant can show that the comment concerned a matter of public interest, was factually based, and expressed a view that could honestly be held by anyone
- **Responsible communication on matters of public interest:** defence that applies where some facts are incorrectly reported but (1) the publication is on a matter of “public interest” and (2) the publisher was diligent in trying to verify the allegation
- **Absolute Privilege:** a defence in relation to parliamentary or judicial proceedings
 - notion that freedom of expression is so vital in such venues that no successful defamation action can be brought

Injurious or Malicious Falsehood: the utterance of a false statement about another’s goods or services that is harmful to the reputation of those goods or services

- distinction between injurious falsehood and defamation are subtle
- requires plaintiff to establish that the statement made about the good/service was false and was published with malice or improper motive

Managing the Risk of Diverse Commercial Torts

- a risk management analysis should address the fundamental problems that may arise
- include the following questions
 - are there dangers on the property? Are there adequate warnings and protections given to visitors?
 - are there known trespassers, in particular children, who come onto the property?
 - What could be done to eliminate or reduce the risk flowing from the dangers?
 - has the occupier complied with all legislative obligations?
 - is adequate insurance in place?

See summary of Chapter 12 figure 12.1 page 287!

Thursday, November 17, 2016

Chapter 20: The Employment Relationship

MCS 3040

Employment Law:

- employment law is rooted in common law and legislation (except Quebec)
- both federal and provincial have jurisdiction

Employment Relationship:

Employment Relationship: a contractual relationship whereby an employer provides remuneration to an employee in exchange for work or services

Independent Contractor: a person who is in a working relationship that does not meet the criteria of employment

- benefits of tax savings, flexibility, and independence in arranging work schedule

Dependent Contractor: a person who is an independent contractor but has a relationship of economic dependency with the employer as a result of working exclusively or nearly exclusively for the employer for a long time

Employee vs. Independent Contractor:

Tests to Distinguish:

- the degree of control exercised over the individual by the employer
 - more control = employment
- the ownership of tools, chance of profit, and the risk of loss from performance of the requested services
 - sharing profit and losses and ownership of tools = independent contractor
- the degree of integration
 - more work in integrated (integral) to company activities = employee

Implications of an Employment vs. Independent Contractor Relationship:

- consequence of incorrectly characterizing a work relationship as independent contractor
 - retroactive responsibility for paying benefits
 - liability for penalties and interest charges
- employer responsible for torts of employees, but not usually those of independent contractors

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Risks in Hiring:

Vicarious Liability

- employer liable for torts of employee that are committed in the ordinary course or scope of employment
- doesn't relieve employee completely of liability, may be breach of employment contract

Justification for this:

- employers...
 - have the ability to control employees and therefore should be liable for their conduct
 - benefit from work of employees and therefore should be responsible for employee liabilities
 - are usually in a better position than employees to pay damages
 - have an incentive to try to prevent torts in the first place

Negligent Hiring:

- employer has a duty to use skill and care when hiring employees
- so if employees injures another employee or causes harm to third party, they may be action against employer or hiring that employee

Hiring Process:

Process:

- develop job descriptions
 - advertise the positions
 - have candidates complete an application for or submit a resume
 - short-list candidates
 - check backgrounds or references
 - interview selected applicants
- all aspects of employment are affected by human rights legislation, and sometimes employment equity legislation

Human Rights Requirements:

- enacted by federal, provincial and territorial governments to provide equal access to employment opportunities to all

Human Rights Commission: an administrative body that oversees the implementation and enforcement of human rights legislation

- in charge of administering the legislation, and investigating and hearing complaints

Prohibited Grounds of Discrimination:

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- marital status, race, colour, physical or mental disability, religion or creed, sex and sexual orientation, age
- if a particular ground isn't listed, can be challenged as a violation of equity provisions of the Charter of Rights and Freedoms, so may be "read in"

Discrimination: the act of treating someone differently on the basis of a prohibited ground

Adverse Effects Discrimination: discrimination that occurs as a result of a rule that appears neutral but in its effects is discriminatory

- ex. rule that requires worker to wear hard hats appears neutral, but may be discriminatory against those whose religion requires them to wear a turban

Systemic Discrimination: discrimination that results from the combined effects of many rules, practices, and policies

- ex. workforce mainly made of men → may be systemic discrimination

Bona Fide Occupational Requirement (BFOR): a defence excuse for discrimination on a prohibited ground when it is done in good faith and for a legitimate business reason

- controversial

Precedent Setting (Meiorin case) Three-Step Test for determining if discriminatory standard qualifies as BFOR:

1. standard was adopted for a purpose rationally connected to the performance of the job
2. the standard was adopted in an honest and good-faith belief that it was necessary to fulfill legitimate work-related purpose
3. the standard was reasonably necessary to the accomplishment of that purpose

Duty to Accommodate: the duty of an employer to modify work rules, practices, and requirements to meet the needs of individuals who would otherwise be subjected to unlawful discrimination

Penalties:

- failure to avoid/eliminate discriminatory practices can result in complaint to human rights commission
- can order employer to...
 - stop its practices, hire individual, pay compensation, write letter of apology, reinstate employee, institute action plan

Employment Equity:

Employment Equity Legislation: laws designed to improve the status of certain designated groups

Employment Equity Act:

- target underrepresentation of women, aboriginal peoples, people with disabilities and visible minorities in the workforce
- administered by human rights commission
- applies to businesses with 100+ employees

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Requires employers to...

- consult with employee representative regarding the implementation of employment equity
- identify and eliminate barriers to the employment of designated groups
- institute policies and practices and make reasonable efforts at accommodation to ensure that the designated groups have a degree of representation in proportion to the workforce from which the employer can reasonably be expected to draw employees
- prepare a plan that sets out the goals to be achieved and a timeline for implementation

Formation of the Employment Contract:

Offer of Employment:

- statements of offer must be reasonably complete and certain
- capable of accepting offer until it is terminated
- before making offer, must determine if candidate has obligations to recent employer that could impede upon her ability to complete the job
 - inducing breach of contract
 - restrictive covenants — restriction of participation in competitive industries
 - fiduciary obligations

Employment Contract:

Fixed or Definite Term Contract: a contract for a specified period of time, which automatically ends on the expiry date

Indefinite-Term Contract: a contract with no fixed period, which can end on giving reasonable notice

- most common historically

Express and Implied Terms:

Express terms — those that have actually been agreed upon by parties

Implied terms — have not been specifically agreed upon, but courts would expect that they would agree to them had they need to

Content of the Contract:

- most employers and employees see need to certainty in contract by putting relationship in writing
- written offers advantages
 - certainty
 - forum for negotiating terms and conditions

Terms and Conditions:

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- negotiation of contract has been abrogated to some extent by legislation designed to protect employee

Employee Welfare Issue:

Employment Standards Legislation: laws that specify minimum standards in the workplace

- hours of work and overtime
 - minimum wage
 - vacations and vacation pay
 - termination and severance
 - statutory (paid) holidays
 - bereavement and sick leave
 - maternity and parental leave
-
- also provides mechanism for enforcing employment standards
 - in Ontario, employment standards officers investigate complaints, carry general investigations and issue orders requiring compliance

Worker's Compensation Legislation

- design to address accidents and injuries in the workplace
- no-fault insurance
- covers lost wages, medical aid and rehabilitation

Employment Insurance Act:

- employee economic safety
- applies federally and provincially
- employer and employee contribute to a fund that provides insurance against loss of income

Canadian Pension Plan:

- employee economic safety
- insurance plan designed to provide pensions or financial assistance in case of retirement, disability or death
- both employer and employee contribute to plan

Workplace Discrimination:

Workplace Harassment:

- unwanted physical or verbal behaviour that offends or humiliates the victim and detrimentally affects the work environment or leads to adverse job-related consequences for the victim
- Canadian Human Rights Act and Criminal Code provide legislation against this
- prohibition against harassment extends to employers and employees
- employers must develop and implement workplace harassment policy

Pay Equity:

- discrimination in pay scales between men and women has led to legislation designed to ensure fair compensation for same performance of work
- designed to refresh systemic discrimination in compensation for work performed

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Drug and Alcohol Testing:

- employers have legitimate interest in having safe workplace
- this goal is sometimes attempted to be reached through drug and alcohol testing
- it is prima facie discriminatory

Workplace Privacy:**Collection and Dissemination of Information:**

- wide array of legislation in public sector, gives individuals right to control personal information
- [Privacy Act](#) — regulates collection and use of personal information held by federal gov't
- [The Personal Information Protections and Electronic Documents Act \(PIPEDA\)](#) — applies to private sectors
 - personal information should not be collected, used, or disclosed without the prior knowledge and consent of the individual concerned
 - consent is not required for business contract information, for purpose of communicating in the relation to employment

Surveillance and Searches:

- surveillance and monitoring of employees may infringe the privacy rights of employees
- depends on large amounts of factors
- intrusive searches of employees and their belongings are carefully looked at by courts

Monitoring of Communications:

- employers have interest in ensuring that employees are not spending excessive time on personal communications using company equipment and time
- criminal code provides that it is an offence to intercept a private communication

Union Context:

- negotiating and entering into employment contract in unionized employment environment is different

Certification: the process by which a union is recognized as a bargaining agent for a group of employees

Labour relations board: a body that administers labour relations legislation

Collective Bargaining: a mechanism by which parties enter a collective agreement or contract

Collective Agreement: the employment agreement reached between the union and employer setting out the bargaining unit employees' terms and condition of employment

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Chapter 21: Terminating the Employment Relationship

MCS 3040

Ending the Relationship

- can end amicably
- can end unpleasantly when employer...
 - dismisses or fires employee
 - give employee notice of termination
 - acts in a manner that the employment relationship becomes untenable
- an employer can terminate an employee at any time for “just cause”, as per clause in employment contract
 - subject to collective agreements and individual employment contract

Dismissals for Just Cause:

Just Cause: employee conduct that amounts to a fundamental breach of the employment contract

- employee guilty of...
 - serious misconduct
 - habitual neglect of duty
 - incompetence
 - conduct incompatible with duties or prejudicial to the employer's business
 - willful disobedience in a matter of substance
- risky, because just cause dismissals don't have any compensation so the employee may file a suit against employer

Serious Misconduct:

Serious Misconduct: intentional, harmful conduct of the employee that permits the employer to dismiss without notice

- minor infraction is not enough, but cumulative effect of many minor infractions is
- major single infraction is sufficient for termination

Progressive Discipline Policy: a system that follows a sequence of employee discipline from less to more severe punishment

- each step carries more serious penalty

Condonation: employer behaviour that indicates to the employee that misconduct is being overlooked

- when you aren't using a progressive discipline policy

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Habitual Neglect of Duty:

Habitual Neglect of Duty: persistent failure to perform employment duties

- eg. chronic lateness or absenteeism
- important that warnings are issued before termination

Incompetence:

Incompetence: lack of ability, knowledge, or qualification to perform employment obligations

- must give warning and opportunity to improve
- must establish fair and reasonable performance standards
- must be cumulative acts of incompetence

Conduct Incompatible:

Conduct Incompatible: personal behaviour that is irreconcilable with employment duties or prejudicial to the employer's business

- ex. accepting lavish and inappropriate gifts from the employer's clients

Willful Disobedience:

Willful Disobedience: deliberate failure to carry out lawful and reasonable orders

- single act not usually enough unless very serious

Other Causes:

- **general category of misconduct**
 - harassment, disruption of corporate culture, consumption of alcohol and drugs in workplace, and drug abuse

Non-Cause and Near Cause:

- sometimes you need to terminate employee when there is not necessarily a case
- economic cut backs may cause you do reduce workforce

In absence of cause, employer required to...

- given employee notice or pay in lieu of notice
- period of notice agreed upon in employment contract or by employment standard legislation, or reasonable notice

reasonable notice: a period of time for an employee to find alternative employment prior to dismissal

- near-cause does not justify a shorter notice period

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Dismissal with Notice:

- an employee who has been hired for indefinite period of time may be dismissed at any time and without cause as long as employer gives notice of termination (or pay in lieu of notice)
- period of notice determined by considering employment standards legislation, contract and common law

Reasonable Not Periods:

In determining how much notice, Four Factors considered

1. **Character of Employment**
 - refers to status position in organization
 - higher status employees entitled to more notice
2. **Length of Service**
 - longer-term employee entitled to more notice
3. **Age**
 - older employees entitled to more notice
4. **Availability of Similar Employment**
 - more employment opportunities = shorter notice period

Developments in Notice:

Other factors that tend to lengthen notice period...

- high degree of specialization
- inducement to join an organization
- company policy
- custom and industry practice
- personal characteristics
- economic climate

Risks in Dismissal with Notice:

- uncertain
- notice periods have generally increased

Constructive Dismissal

Constructive Dismissal: unilateral employer conduct that amounts to a fundamental or substantial change to an employee's contract

- an employer has no entitlement to make fundamental changes to employment contract without consent of employee
- so if they do, the employee can either refuse to accept the change, quit, or sue for constructive dismissal

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Fundamental or Substantial Changes:

Fundamental term: a term that is considered to be essential to the contract

- constructive dismissal occurs when employer changes these type of terms
- generally, these terms are changes to...
 - salaries or benefits
 - job content or function
 - responsibly, status or prestige
 - power/reporting structures
- negative changes usually trigger constructive dismissal

“Bad” Behaviour:

- most constructive dismissal cases involve demotions and pay cuts
- unacceptable or unethical practices by employer may amount to constructive dismissal
- ex. humiliating or abusive behaviour, boss handing out fraudulent bills, intolerable working conditions, unfair performance appraisals, poisonous work environment

Risks:

- making big changes effect employees
- need to watch for this and contemplate changes
- consider “try-out” period

Wrongful Dismissal Suit:

Can arise from...

- employee being terminated for cause and saying there was no just cause
- employee given notice of dismissal which they believe to be inadequate

- don't have to bring it to court, can bring claim to employment standards tribunal
 - but this would limit compensation amount
 - but route low-level employees often take because it is less expensive

Wrongful Dismissal Damages:

- entitled to ___ month's pay (see lecture 8 for full explanation)
- also may be entitled to special damages
 - out-of-pocket losses associated with termination
- deductions to this sum may be made from...
 - any money earned from new job or employment insurance
 - failure to mitigate damages

- additional damages may be rewarded for manner of dismissal
 - aggravated damages (ie. mental distress damages and punitive damages)

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- if dismissal was conducted in “bad faith” or unfair manner, employer may be responsible for these damages
- **Wallace Damages**
 - a “bump-up” of reasonable notice damages where employer has breached the duty of good faith in terminating an employee
 - type of punitive damages
 - this is now much harder to prove after Honda vs. Keays case

Termination Settlements:

Negotiation of Settlement:

- packaged offer should contain all monies due to employee at time of termination including statutory entitlements like severance pay

Severance Pay: an amount owed to a terminated employee under employment standards legislation

- package may also include pension benefits, medical or dental coverage, disability insurance, tax-sheltered income, stock options, and financial or career counselling
- consider providing a factual letter of reference to assist employee as well
- period of time (2 weeks) should be given to consider termination settlement, consider seeking independent advice

The Release:

Release: a written or oral statement discharging another from an existing duty

- usually signed when termination package is accepted
- may include...
 - agreement that employee won't pursue wrongful dismissal action
 - statement that they have not been discriminated against
 - confidentiality provisions
- normally binding provided settlement was fair and reasonable

Union Context:

- collective agreement provides process for settling disputes arising from the agreement
- usually only route for employee's if they challenge employer's dismissal decision
- usually have specific provisions relating to termination

Grievance and Arbitration:

Grievance Process: a procedure for resolving disputes contained in union contracts

- vary widely from org to org
- time limits usually attached to each step of process

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- usually start with informal consolation
- usually end with third-party binding arbitration, if can't be solved in less formal means

Seniority:

- most collective agreement contain extensive clause dealing with seniority (length of time with org)
- provide that employer can't promote, demote, transfer, lay off, or recall without giving consideration to seniority of employee
- don't affect ability to terminate employee

Discipline and Discharge:

- general rule in union is that employer can't discipline or discharge an employee without justification or cause
- this is largest category of grievances carried to arbitration
- arbitrator will consider...
 - the record and service of employee
 - provocation
 - any special economic hardships
 - seriousness of offence
 - premeditation
 - uniform enforcement of policies an rules
 - circumstance negating intent
 - condonation

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Chapter 22: Professional Services

MCS 3040

Businesses and Professional Services:

Relationship and Legal Obligations:

- businesses depend on professional services

Professional: someone engaged in an occupation, usually governed by a professional body, requiring the exercise of specialized knowledge, education and skill

- professionals who are employees are governed by basic principles of employment
- relationships with external professional service providers are defined by contract law
- professional-client relationship is a special relationship of trust and loyalty

Ethical Obligations:

- professionals have ethical obligations that other employees and service providers don't
- professionals are bound by rules of professional conduct and codes of ethics
- ethical issues tend to arise when a business is under stress
- professionals may find themselves in conflicts of interests, where their obligations to one client are in conflict with obligations to another

Hiring Professionals In-House:

- cost of outside professional services can become significant
- when hiring in-house professional, consider...
 - what level of expertise is required?
 - is there need for specialization?
 - to what extent will firm still need to obtain outside services?
 - will there be enough work to justify hiring one?
- employed professionals owe same legal obligations to their employer as to their outside professionals

Responsibilities of Professionals to clients and Others who rely on their work

Three categories of Professional responsibilities:

1. contractual duties
2. tort duties
3. fiduciary duties

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Responsibilities in Contract:

Retainer: an advance pain requested by a professional form a client to fund services to be provided to the client

- clients should treat contracts with professionals in same careful and questioning manner as other contracts for goods and services
- both professional and client must agree to terms
- most professional governing bodies have mechanisms for investigating complaints and resolving disputes

Responsibilities in Tort:

- duties to torts similar to service providers
- negligence is most common
 - careless or negligent advice most common

Claimant must establish basic elements of negligence action:

1. professional owes claimant a duty of care
2. that duty of care was breached
3. professional's conduct caused claimant's loss
4. claimant's loss is not too remote from the professional's actions

Negligent Misrepresentation elements of proof:

1. duty of care based on special relationship between professional and recipient of advice
2. representation made by professional was untrue, inaccurate or misleading
3. professional must have been negligent in making the representation
4. the recipient must have reasonably relied on the misrepresentation
5. the reliance of recipient on representation must have resulted in damages to the recipient

Responsibility to Third Parties:

- potential for third-parties claims for economic loss resulting from negligent misrepresentations was first recognized in 1964
- Haig vs. Bamford key case
- Hercules vs. Young addressed issues left by Haig vs. Bamford

Fiduciary Responsibilities:

- the professional-client relationship is fiduciary
- Professionals act in a fiduciary capacity and, as such, owe their clients duties of loyalty, trust and confidence that goes beyond contractual or tort responsibilities

Professionals must...

- avoid any conflict of interest between the client's affairs and those of the professional or the firm
- refrain from using the relationship for personal profit beyond charging a reasonable fee for services provided

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- disclose all relevant information to client
- act honestly and in good faith
- maintain confidentiality of client information

Duty of Confidentiality: the obligation of a professional not to disclose any information provided by the client without the client's consent

Lawyer-Client Privilege: the right of a client not to have communications between lawyer and client divulged to third parties

Professionals' Risk Management Practices

Incorporation and Limited Liability Partnerships:

- historically, businesses have managed risk through corporations that provide limited liability for shareholders
- professional service providers have been required to assume liability personally

Professional Corporation: a corporation authorized by statute to carry on a specific profession

- way for professionals to incorporate
- must be permitted to by government legislation
- does not typically protect the professional from liability of greatest concern (ie. negligent liability)
- partnerships may register as a limited liability partnerships

Insurance:

- professions generally carry some minimum amount of professional liability insurance

Governance Structures of Professions:

Legislation:

- professions are self-regulating
 - provincial statutes establish rights of professionals to govern themselves

Legal Profession Act (BC)

- provides a detailed definition of the "practice of law"
- defends members of Law society as those lawyers who hold a practising certificate for current year
- states that only members of Law Society in good standing are allowed to practice
- provides that the Law Society is governed by elected members, who determine whether or not a member is in good standing, and establish and maintain legal education and training

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Professional Practice:

- professionals must belong to a provincial governing body in order to practice within a particular province
- some professionals are licensed to practice in more than one jurisdiction
- increasingly professional firms are choosing to operate internationally

Disciplining Professionals:

- each profession has established rules of professional conduct or codes of conduct
- critical for protection of public
- disciplinary and investigatory practices keep them effective
- also subject to criminal prosecution
-