

1. The Law of Contracts

Contract = an *agreement* between two or more parties under which legal rights and obligations are created which can be enforced in the courts, if necessary- distinguishing it from other kinds of agreements

The function of contracts:

- To facilitate planning by offering certainty and stability- who does what and when
- To allocate the risk of things changing during the life of the contract (e.g. property and investments)
- Tool for transfer of ownership (car, land, shares) → legal rights over the object

Purpose of contracts:

- A breach will give the innocent party a remedy: when trust is broken between parties → fall back
- Types of civil remedies: damages, termination, specific performance, injunction
- Businesses will do everything to avoid court → save money, reputation

Life cycle: formation, performance, completion/termination

Formation: Essential elements of a Contract

In the absence of one or more elements, the agreement between parties does not constitute a contract → will not be enforced by the courts

1. **Offer and acceptance**: an offer by one party and its acceptance by the other indicating the parties have reached agreement
2. **Intention** of the parties to create legal relations
3. **Valuable consideration** (unless the promise is made by a deed)
4. **Legal capacity** of the parties to act
5. **Genuine consent** by the parties
6. **Legality of the objects** of the agreement

To note:

- The core of all contracts is the notion of agreement or consensus
- If there is dispute as to whether an agreement has occurred → courts apply offer and acceptance analysis
- Offer: whether there has been a clear indication from one party of a willingness to enter into a contract with another without further negotiation
- Acceptance: in response, an unqualified statement/act that indicates that the other party accepts the terms of the offer
- Not all agreements are enforceable by law → must have intent to create legal relations (e.g. agreeing to play cards at a certain house on a certain night)
- Factors affecting genuine consent: mistake, misinterpretation, duress
- If one of the essential elements is lacking → courts will not enforce the agreement

Classification of Contracts

Type 1

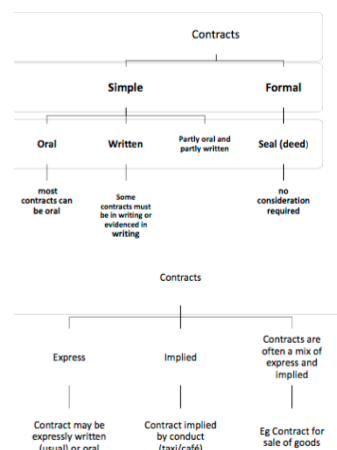
Simple contracts: may be oral, wholly or partly in writing, or may be implied by the conduct of the parties (any contract not under seal)- needs consideration

Under seal (formal): a formal contract referred to as a deed that must be in writing and signed, sealed and delivered- it does not need consideration

Type 2

Express contracts: the intentions of the parties are stated in explicit terms (written or oral). Example: signed to buy a car and pay instalments over the next 12 months

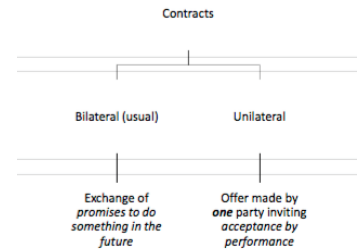
Implied contracts: the terms of the contract are inferred from the conduct of the parties and the surrounding circumstances (e.g. hailing a taxi)



Type 3

Bilateral contracts: each party has made a promise to the other to do something at a future date (promise for a promise)

Unilateral contracts: an offer is made inviting acceptance by actual performance rather than by a promise → performance of the act is acceptance (e.g. finding a lost dog and claiming a reward)

Type 4

Valid: all the essential elements are present → enforceable against both parties

Voidable: one party can leave the contract if they wish to do so

Void: a contract, in which the law is concerned, never existed at all → no legal effect between parties

Unenforceable: a valid contract that cannot be enforced for some reason

Spot contract: one-off

Relational contract: long-term, continuing

1. Offer and Acceptance

- The first question may be whether there is an offer and an acceptance of that offer
- Offer and acceptance = agreement → need other elements to make a contract to take to court
- Intention- person making the offer must intend that it can be converted into a binding contract if the offeree accepts

According to the traditional analysis a legally binding agreement requires three elements:

- a. At least two parties
- b. An offer
- c. An acceptance

Offers

Offer = a proposal by one party to enter into a legally binding contract with one or more other parties

- Can be made in writing, orally or implied by conduct
- Can only exist if the terms are clear
- The party making the offer must intend that it can be converted into a binding obligation by an acceptance

Rules of Offer

1. *May be made to one or more people*
2. *All major terms must be included*
3. *May specify conditions to be followed*
4. *Must be communicated to offeree*
5. *May be revoked or lapse*

Distinguishing an offer from other statements

Courts distinguish offers from other commonly occurring categories of statements such as:

- Puffs = statements no reasonable person would take seriously (most advertisements)
- Invitations to treat = an indication of willingness to trade and negotiate → not an actual offer
- Supplying information

Gibson v Manchester City Council (1979)

- Manchester city “may be prepared to sell” flats to their tenants if they fill out a form- “if you would like to make a formal application”
- Gibson filled in the form too late and the council’s policy changed
- Council’s letter was an invitation to treat, not an offer → no enforceable agreement

Harvey v Facey (1893)

- Harvey “will you sell us” and then asked for lowest cash price, Facey responded £900
- Harvey agreed to buy at £900, Facey refused
- No contract → Facey simply gave an answer to a question- the lowest price, never extended an offer
- Harvey’s “acceptance” was in fact an offer to buy at that price

a. Shop displays, catalogues and advertisements- generally invitations to treat

- Prospective buyer makes an offer which the shopkeeper may either accept or reject → issuing an invitation to transact with the business
- In many cases, advertisements and brochures will be regarded as invitations to treat → in each case the question is whether there was an intention to enter into a contract if the response from the person receiving the communication is positive

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) LTD (1952)

- First large self-service pharmacy
- Pharmaceutical society argued that putting the drugs on the shelf was an offer and the customer putting it in the bag was an agreement
- Boots argued the shelf was an invitation, placing it in the basket is an offer and cashier accepted under the watch of a registered pharmacist

Partridge v Crittenden (1968)

- Man placed an advertisement selling birds (illegal to sell birds)
- The ad was viewed as an invitation to treat- people responding to the ad may make an offer that could be accepted or rejected by man

b. Auction sales

Typical case the auctioneer’s call for bids is an invitation to treat and where the bid is made is an offer to which the auctioneer can either accept or reject on behalf of the principle

- In Australia, there is no sale until the property is knocked down to a bidder → an auctioneer can withdraw goods or property from the auction any time before a bid is accepted

Harris v Nickerson (1872-1873)

- Auctioneer placed advertisement in the paper for an auction of certain goods
- Harris drove all the way to find the items he was interested in were withdrawn
- Harris claimed the advertisement constituted an offer and his travelling to the auction an acceptance by conduct
- Court held the advertisement was an invitation to treat

c. Online auctions

Smyth v Thomas (2007)

- Seller listed a plane on eBay for \$150,000 and there was a bidder, but the seller did not want to sell
- Seller argued there was only a contract between him and eBay and the buyer and eBay
- Court ruled that meant there is a contract directly between seller and buyer

Rule 1: Persons to whom an offer may be made

- An offer can be made to a specific person or persons, a particular class of people or to the world at large
- The offer can only be accepted by the person/s that it was intended
- If an advertisement is made to the entire world, anyone who reads the advertisement can accept (unilateral)

Carlill v Carbolic Smoke Ball Co (1893)

- Carbolic Smoke Ball Co advertised medication that would prevent the user from contracting influenza and promised any customer who uses the ball as directed and still catches influenza can claim a £100 prize
- Carbolic Smoke Ball Co deposited £1000 to show their “sincerity” (intention) → ruled as offer
- Carlill used the ball, contracted influenza and wanted to claim the money
- Judge ruled it was more than a “mere puff” and that they made a serious offer to the world and therefore it was a contract

Leonard v PepsiCo: decision- puff

Example

- Facts, decisions, reasons
- Issues: offer to world, mere puff or offer, acceptance by performance valid?
- Explain what a unilateral contract is
- Compare to other case: Leonard v PepsiCo

Rule 4: Communication of an offer

- The offer must be communicated, that is, brought to the attention of the person to whom it is made
- Unless an offer is communicated there can be no acceptance and therefore no contract
- The word “agreement” presupposes that the parties were aware of the fact that what they were doing would lead to an agreement

Rule 5: Revocation of an offer

When the offeror formally withdraws the offer → the offer comes to an end and cannot subsequently be accepted (can give notice anytime before acceptance)

- To be effective, the revocation of an offer must be communicated → until the offeree becomes aware of the revocation, he or she can accept the offer and create a valid and binding contract
- The law doesn't require a specific method for revocation, just that the offeree be made aware the offer has been withdrawn
- Can revoke before completion (Mobil)

a. Options

Consideration paid in order to keep an offer open that is neither refundable nor included in the sale price → if not paid, no enforceable contract

Goldsbrough, Mort & Co Ltd v Quinn (1910)

- Offered the right to purchase a property within one week at a stated price
- Plaintiff paid the defendant consideration for this option
- Before the week had ended, the defendant repudiated the offer but the plaintiff had accepted within the week
- The acceptance of consideration constituted a binding contract which was enforceable by specific performance → the acceptance of the offer

Bryne & Co v Leon Van Tienhoven & Co (1880)

- Revocation must be communicated
- Offer made to Bryne on Oct 1 mailed, received Oct 11 and accepted Oct 11
- Offer withdrawn Oct 8, but only received Oct 20
- Offer must stand as withdrawal was only communicated Oct 20

Mobil Oil Australia LTD v Wellcome International Pty Ltd (1998)

- Mobil offered franchisees rewards free of charge for good customer service
- Franchisees started participating in the program and Mobil withdrew their offer
- Court held Mobil made no unilateral offer → statements were exploratory, no details
- Offeror can revoke offer before completion even if process has begun

b. Lapse of an offer

An offer will lapse:

- i. If not accepted within the time stated
- ii. If not accepted within a reasonable time (who is the reasonable person and where do they live), where no time for acceptance has been stated
- iii. If a counter-offer is made (it changes one or more of the material terms of the offer e.g. price, quantity, quality) → a request for more information is not a counter-offer
- iv. On the death of either party before acceptance
- v. By loss of contractual capacity by either party (e.g. insanity)

Hyde v Wrench (1840)

- Wrench offers to sell land for £1200, Hyde says no, Wrench offers land for £1000, Hyde says no
- Hyde counter offer to buy for £950, Wrench says no
- Hyde says he will buy for £1000, Wrench says no

Court ruled the offer for £1000 had been withdrawn once Hyde made the £950 counter offer

Stevenson Jaques & Co v McLean

- McLean offered to sell Stevenson iron ore for 40 shillings, Stevenson asked if they could pay over time
- In the mean time, McLean sells to someone else without withdrawing the original offer
- Stevenson then accepts the offer and sues for breach of contract
- Court ruled in favor of Stevenson as his request for clarifying terms of the offer not making a counter offer

Acceptance

When the offeree communicates unconditional acceptance of the offer to the offeror that is clear, absolute and unconditional → will vary if it is unilateral or bilateral

Rules as to acceptance

1. Must be communicated to the offeror for there to be a binding contract between parties (words, in writing, by conduct or by performance requested by the offeror)
2. Acceptance can be implied from the conduct of the parties = **implied conduct**

Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988)

- Empirnall hired Machon Paull to act as a project manager, Machon Paull forwarded contract for signature and a progress payment claim → Empirnall did not sign
- Machon sent another contract which was not signed, and proceeded work on the understanding the contract was accepted

Court held: although Empirnall did not expressly accept the offer, it had impliedly accepted the offer by its conduct

3. Cannot be inferred from the silence or inaction of the offeree

Felthouse v Bindley

- Felthouse offered to buy a horse from his nephew in an offer that stated, "if I hear no more, I'll consider the horse mine"
- Nephew instructed auctioneer (Bindley) to withdraw the horse, but it was sold anyway
- Felthouse needed to demonstrate he was the owner of the horse at the time of sale → that is, he had a valid contract with his nephew

Court held: Felthouse could not impose on his nephew a duty to respond if he did not wish to sell → no communication of acceptance → not bound to sell the horse

4. There can be no acceptance if the offeree is unaware of the offer

R v Clarke (1927)

- There was a cash reward for information that would lead to the arrest and conviction of the person who had murdered two policemen
- A and B were arrested and charged with the murder of one policeman
- B volunteered evidence against A and C for the murders and was released and claimed the prize

High Court ruled: because B did not act in reliance upon the offer, there was no acceptance of the offer and therefore no contract

- Clarke (B) did not receive the reward

5. In a unilateral contract the offeror has waived its right to communication of acceptance (e.g. Carlill)

6. Acceptance must be unconditional

- A qualified offer would amount to a counter offer
- Where acceptance is made "subject to contract" or "subject to a formal contract to be drawn up by our solicitors", then in the absence of cogent evidence of a contrary intention → there will be no binding agreement until the formal document has been drafted and signed

Masters v Cameron (1954)

- Had a contract which included a clause that said the agreement is "subject to the preparation of a formal contract"
- Masters paid a deposit when signing the agreement and then refused to proceed with the purchase → Masters wanted his deposit claiming there was no binding agreement

High court ruled: no binding agreement had been made → parties had not intended that a legally binding agreement would exist until or unless a formal contract acceptable to Master's solicitors had been signed

7. Acceptance must follow the conditions, if any, stated in the offer- valid until offer revoked/lapses
8. Acceptance can only be made by the party to whom the offer was made (bilateral), in a unilateral anyone can accept as long as they follow the directions
9. Acceptance can be revoked at any time prior to acceptance being communicated
10. Acceptance must be made within the time prescribed or, if not time has been prescribed, within a reasonable time

11. Communication of acceptance must be made in a regular and authorized manner
12. The postal **acceptance** rule → deemed as accepted as soon as the letter is posted (look at the stamp)
The postal acceptance rule applies only when either:
 - i. The offer was made by post
 - ii. If it agreed upon by both parties
 - iii. If it was faster than the method the original offer was made

Henthorn v Fraser

- Where acceptance by post is contemplated by both parties, acceptance is complete as soon as the letter of acceptance is properly posted

Adam v Lindsell

- Lindsell wool brokers send a letter to Adam manufactures with an offer requiring a reply "in the course of post"
- Letter was sent on the 2nd but was misdirect and was received on the 5th
- Acceptance was posted on the 5th and reached the offeror on the 9th
- On the 8th the offeror sold the wool to a third party

Court held: postal rule applied, the parties expected that the post would be used as a method of acceptance → contract was made on the 5th when offeree posted the letter of acceptance

13. Electronic or instantaneous communications → effective only when communicated to offeror (when received in server)

Section 14 of the Electron Transaction Act → received when entered into their electronic or email system whether or not they have seen it or read it

Situations where actual communication is not required

- Parties have had regular past dealings
 - Industry custom
 - Conduct indicates acceptance
 - Unilateral contracts- offeror waives the need for communication
 - Where postal rule applies
- If the contract is too vague, uncertain or incomplete it will not be enforceable
- Courts will attempt to make the contract work if it senses the parties have agreed on the essential but will not make the contract for the parties

First 2 enforceable, last non-enforceable

Tutorial 3

- Use statutes and common law to answer question
- Postal rule does not apply to offers, only acceptance

2. Intention to create legal relations

- For a contract to exist the parties must intend that their agreement be enforceable in courts, if necessary- in the event of a breach
- Intend to be legally binding
- Usually the parties do not indicate what they intended → objective test

Objective Test

Court looks at the situation in which the parties were placed to determine if a reasonable person would regard the agreement as intended to be binding → doesn't look at the minds of parties

Presumptions assist in determining intention:

- a. Parties who make social or domestic agreements are generally presumed not to intend that the agreement be legally binding
 - b. Where the agreements are commercial in use → presumed to intend legal enforcement
- In situation where it is not clear, onus is on the party seeking to rebut the normal presumption to prove that it should not apply
 - Clarity of terms: are the rights and obligations spelt out clearly (if not, indicates the parties did not think that the agreement was contractual)
 - How much cost and inconvenience did the promisee suffer
 - The flavour of the agreement- is it really a commercial agreement?

Domestic agreements

a. Husbands and wives

In normal circumstances the courts will regard domestic arrangements between a husband and a wife as not intended to give rise to legally enforceable obligations

Balfour v Balfour (1919)

- Husband promised to pay wife monthly while they lived apart
- They then got divorced, and wife claimed she was entitled to continue receiving monthly payments

Court held: that the agreement was an ordinary domestic arrangement which was not intended to give rise to legal relations

- The principle does not apply to agreements made after the de facto relationship has ended
- If agreement falls outside normal domestic arrangements and concerns some essentially commercial matters (e.g. business partnership) → enforceable (e.g. *Todd v Nichol*)
- Agreements as to the disposition of property where the marital relationship has broken down will be enforceable (*Merritt v Merritt*)

Merritt v Merritt (1970)

- Husband left wife and arranged to pay the wife a monthly allowance out of which she was to pay the outstanding balance on the matrimonial house which was in their joint names
- Husband signed a document that in consideration of her paying all mortgage requirements, after completion, he agreed to transfer the house into her sole ownership
- After the mortgage had been repaid, husband refused to transfer the house to her

Court held: since the parties were separated when the agreement was made → it was intended to create legal relations and was binding

b. Other family agreements

Generally not regarded as intended to give rise to enforceable right and obligations → but some circumstances may indicate that parties intended to be legally bound

Todd v Nichol (1957)

- Wife invited her sister-in-law and her sister-in-law's daughter to move from Scotland and live with her on the understanding that they would live with her rent-free and she would leave the house to them once she died
- Sister-in-law and her daughter accepted the offer and uprooted their lives in Scotland and moved to Australia
- Shortly after, the wife sought to remove the sister-in-law and her daughter

Court held: although there would be no intention to create a legal relationship, it was rebutted by evidence of the cost and inconvenience to the plaintiffs to move to Australia

Riches v Hogben (1986)

- A widow persuaded her son and his family to migrate to Australia with her on the promise of buying the son a house in Australia in his name if they would take care of her during her lifetime
- The son and his family gave up their house and possessions at a considerable loss
- On arrival, the widow bought a house in her name and ordered her son and his family to leave after seven days following an argument

Court held: the agreement went beyond a mere family arrangement and was intended to have legal effect. It was further held that the widow was trustee of the house for the benefit of her son and was ordered to transfer it to him subject her right to live in a "granny flat" attached to the house

c. Agreements to participate in competitions and lotteries

While most social arrangements are regarded as too insubstantial to be intended to give rise to legal rights and obligations → competitions and lottery have been held to be enforceable

Trevey v Grubb (1982)

- A Tattsлото entry coupon lodged by one person on behalf of a three-member syndicate won a first prize
- Main issue: domestic agreement- all friends

Court held: in the circumstance that- there was a lot of money at stake, systematic behaviour and statements such as "more chances to win with more people" → there was an enforceable contract → share the winnings in the same proportion as the proportion of costs of the winning entry paid by each party

d. Charitable activities

Participation in the activities of a charitable or other voluntary organisation will not normally give rise to contractual rights and obligations

Teen Rach Pty Ltd v Brown (1995)

- Respondent was injured while working as a volunteer at a camp run by a NFP

Court held: no contract of service existed between the respondent and the NFP organisation since there was no indication that legal relations were contemplated → respondent not entitled to compensation

e. Religious/spiritual work

Ermogenous v Greek Orthodox Community of SA Inc (2002)

- After 20 years of employment, minister made claims for payments for annual and long service leave
- Church refused → employment with the Church was not "contractual"
- Main issue: domestic agreement

Court ruled: difficult and wrong to make a presumption that there was no intention to create legal relations simply because it was a matter concerning the engagement of a minister of religion

- Kirby J: "Contrary to basic principle to suggest that his spiritual calling somehow placed him outside the rights and duties of the law"

Commercial Agreements

a. **Presumption that the parties intended their agreement to be legally enforceable**

- Where a business or land is sold, a contract normally will not be created until a formal contract has been signed → a contract can arise even without the signing of a formal contract even if the parties intended it to be immediately bound

Souter v Shyamaba Pty Ltd (2002)

- After months of negotiations, parties signed a document regarding the sale of a hotel and vendor asked solicitor to draft a formal contract
- Another buyer made a better offer and the vendor argued that he was not bound by the document

Court held: the document constituted a binding contract → parties had intended that the document would conclude the negotiations between them

Review: Masters v Cameron

- Agreement was made subject to the preparation of a formal contract of sale
- No binding agreement has been made – parties had intended that a legally binding agreement would not exist until formal contract had been signed

b. **Rebuttal possible** → often by express exclusion

- Parties do not intend to make legally enforceable obligations → courts will give effect to such provision
- Common in competition, lottery and pools forms to insert a stipulation that entry into the competition is not intended to give rise to legally enforceable obligations

Rose & Frank Co v JR Crompton & Bros Ltd (1925)- Express exclusion

- An agreement between three parties which contained a clause
- Clause explicitly stated that it is “not a formal or legal agreement” and that “parties honourably pledge themselves... carried through with mutual loyalty and friendly co-operation”

Court held: it was not a legally binding contract → clear they did not have intention to create a legally binding agreement

Jones v Vernon's Pools Ltd (1938)

- Plaintiff sent in a completed football coupon to the defendant pools company
- Coupon contained a clause that stated agreements are “binding in honour only”
- Common to insert into competition, lottery and pools forms a stipulation to the effect that entry into the competition is not intended to give rise to legally enforceable obligations

Court held: in view of the clause, the agreement was not intended to give rise to a legally binding contract → plaintiff had no enforceable claim

c. **Government policy proposals**

- Courts reluctant to say the broken promises create contractual obligations between government and citizenry → may have political consequences generally not legal (can't bind a future government)
- However, where government enters into normal commercial agreements to buy or sell goods or services → bound by the rules of normal contract

Australian Woollen Mills Pty Ltd v Commonwealth of Australia (1954)

- Government announced it would pay a subsidy for wool that was bought by manufacturers
- Acting on the policy plaintiff bought wool and received subsidy for one year
- In the next year when plaintiff purchased wool, government announced the scheme was terminated
- Had the Commonwealth entered into a contract to continue the subsidy?

Court held: more in the nature of administrative scheme rather than a contractual obligation to pay a subsidy → Commonwealth expressly reserved the right to vary the amount of the subsidy and there was no formal agreement between the government and the manufacturers

3. Consideration & Promissory Estoppel

Consideration is the bargain element of a contract → the detriment suffered by one party in exchange for the other party's promise = the price paid for the promise

- If nothing of value is given – promise is not enforceable
- Price = anything of value, does not need to be money- to the promisor
- Simple contracts require consideration
- Formal/made under seal contracts do not
- Gratuitous promise = a promise that is supported by consideration
For example: A promising to give B \$100 is not enforceable when A changes her mind because nothing of value has been given or promised in return by B
- Promisor = offeror, promisee = offeree

Main differences between simple contracts and formal contracts:

- A gratuitous promise is binding under seal but is not binding in the case of a simple contract
- A party to a contract under seal is "estopped" (prevented from denying) the facts expressed in it
- The period during which a right of action arising out of a contract under seal can be enforced is 20 years in WA, 15 in VIC and SA, 12 in NSW, NT, QLD, TAS- in the case of simple contract the period is 6 years generally
- The terms of a simple contract will merge in a deed → only when parties are the same of the deed is in respect of the same matters as the simple contract

Doctrine of Privity of Contract

- Privity rule = only parties to the contract can sue or be sued
- Promisee must show they provided consideration to the promisor

Rules of Consideration

1. Consideration must move from the promisee

- Consideration flows from promisor to promisee
- The promise is the party suing the other for breach of promise
- In a bilateral contract each party is both a promisor and a promisee

2. Need not flow to the promisor

- Normally the benefit of the consideration will flow to the promisor
- However, it may flow to a third party if the promisor so directs

3. May be a benefit to the promisor or a detriment to the promisee at the request of the promisor

4. Consideration may be executed or executory but cannot be past consideration

- *Executory*: a promise in exchange for a promise
- *Executed*: consideration performed (act) in exchange for the other party's promise (e.g. buy a TV)
- *Past consideration*: promising to do something in exchange for an act, after the act has already been done → only enforceable if the promise would have been enforceable had it been made before the act
- In the case of interest, payment of a lesser amount is not good consideration

Exception to past consideration: see Pao On v Lau Yiu Long (1973)

- a. An act done on the promisor's request
- b. There is an understanding of remuneration or other benefits
- c. The promise would have been enforceable if it had been made before the act in question

5. Consideration must be sufficient but need not be adequate (at the time)

- Court only concerned that the promisee has received or given up something of value (sufficient) → not concerned that it is adequate (equal to what the promisor got or gave up)
- Courts are not going to investigate if you got a good deal
- Although, inadequate consideration may evidence fraud or duress or undue influence

Sufficiency arises in the following situations

- 5.1 *Where the value is illusory*: cannot be consideration → involves a price which cannot be valued (e.g. love)
- 5.2 *Promises not to sue*: Can be consideration if the person giving up the action believed the claim was reasonable, that is had a reasonable chance of success and that he/she had not concealed from the Promisor any facts that may affect the validity of the claim
- 5.3 *Performance of an existing contractual duty owed to the promisor*: cannot be consideration unless the promisee does something 'extra' → a promise to perform a pre-existing contractual duty is not sufficient consideration
 - Broadened to include: **Practical Benefit Test** (*Williams v Roffey Bros*) in NSW
 - Law has always required that consideration be bargained for → not sufficient to have promisor benefit in an incidental way (problem with *Roffey Bros*)
- 5.4 *Performance of an existing public duty imposed by the law* = cannot be consideration
- 5.5 *Doctrine of Pinnels*: renegotiation an existing debt
 - Payment of a lesser sum on the day cannot be good consideration for a promise by the creditor not to claim the rest of the money due (*Foakes v Beer*)

Cases for rules

White v Bluett (1853)

- Father loaned son money if he promised to stop complaining- after the father died White sued son when he refused to repay the loan

Court held: there was no consideration provided by the son to his father for any discharge of the obligation to repay

Chappell & Co Ltd v Nestle Co Ltd (1960)

- Held that the wrappers formed part of the consideration
- They are so described in the offer and will help get smash hit recordings
- A contracting party can stipulate for what consideration he chooses

Anderson v Glass (1868)

- Promised to give increased wages for the future and for the past period during which wages were at an agreed lower rate

Court held: the promise of pay increased wages for past services was based on past consideration

Pao on v Lau Yiu Long (1973): exception to past consideration

- If share price fell, Pao would be indemnified → Pao would not sign main contract unless he was guaranteed of this agreement
- Share price fell, Lau argued there was no consideration

Court held: the consideration was not "past" so the guarantee could be enforced. "An act done before the giving of a promise to make a payment can sometimes be consideration. The act must have been done in the promisor's request, and parties understood that the act was to be remunerated"

Collins v Godefroy (1831)

- A wanted money that B promised for giving evidence, but he had already been subpoenaed to do so

Court held: A was under legal duty to give evidence → giving the evidence cannot be consideration

Foakes v Beer (1884)

- Defendant would repay in instalments
- Defendant ultimately paid off the principle but plaintiff sought to issue execution for the interest the accrued on the debt
- Went to court of equities → original court did not give a satisfiable remedy

Court held: agreement to pay by instalments did not relieve the defendant from paying interest

Stilk v Myrick (1809)

- Plaintiff was contracted to work as a seaman, Captain promised higher wages when stranded
- Plaintiff sued for the money when Captain refused to pay once ashore

Court held: Stilk was already under a contractual duty to provide his service, including the duty to cover for others in an emergency → had not provided valuable consideration for the Captain's promise

Hartley v Ponsonby (1857)

- Same circumstances as *Stilk v Myrick*, except more crew had left and the boat had become unseaworthy

Court held: because of the circumstances, Hartley was allowed to terminate the contract, if he elected to do so → Hartley had done more than his original contract. By agreeing to sail on, Hartley had provided valuable consideration for the modified contract

Williams v Roffey Bros & Nicholls Ltd (1990)

- Williams was contracted by Roffey Bros to do contractual work for apartments
- He was going to fall behind as he had under quoted Roffey Bros → Roffey Bros promised to pay more
- Roffey paid a little bit and then refused → Williams sued

Court held: Williams could enforce the contractual variation → that the common law rule (*Stilk v Myrick*) does not apply

- What practical benefit had Roffey Bros received? Relieved of finding another subcontractor, avoided paying penalty damages for failing to complete on time, did not have to sue Williams for breach of contract
- Williams did not apply any duress to Roffey

Carlill v Smokeball

- Consideration: buying the product and using it

Promissory Estoppel

General nature

- When it would be unconscionable to reverse a promise as there would be a detriment suffered even if no consideration was given (→ gratuitous promises can be enforceable)
- The trigger for estoppel is detrimental reliance
- A promisor after changing an agreement, can return back to original agreement if given notice (Central London Properties)

Criteria for promissory estoppel

- i. The promisee assumed that a legal relationship existed or would exist
- ii. The promisor induced that assumption
- iii. The promisee acted, or refrained from acting, in reliance on that assumption
- iv. The promisor knew that the promisee intended to act in that way
- v. The promisee will suffer a detriment if the assumption is not fulfilled
- vi. The promisor acted unconscionably in failing to prevent the damage to the promisee

→ if all elements are present you may be estopped from changing your mind even if there is no consideration from the other person (promisee)

→ **must be unconscionable conduct to argue promissory estoppel**

Central London Properties v High Trees (1947)

- Landlord promised to reduce rent for a block of flat during wartime conditions
- When conditions improved, gave notice that rent would be returning to original price that had been agreed on

Court held: entitled to give notice that rent would return to the original price. However, would have been estopped from claiming back rent on the years that rent had decreased

Walton Stores Ltd v Maher (1988)

- Walton stores negotiated with Maher for the lease of premise, where Maher was going to demolish an existing structure and build a new one
- Contracts were drawn up, Maher's solicitors proposed amendments and Walton's said they would let Maher know by the next day if those amendments would be rejected
- Maher didn't hear back, so submitted the contracts "by way of exchange"
- Walton was reconsidering for 2 months, in the mean time Maher began demolishing which Walton became aware of shortly after and when the building was 40% complete, Maher was advised Walton did not want to proceed with the transaction

Court held: Maher assumed the exchange was a formality, but the inaction by Walton constituted inducement → unconscionable of Walton knowing Maher was exposing himself to detriment to adopt inaction → estopped from retreated from implied promises

Promissory Estoppel elements:

- i. The parties had been in negotiations for a long time and clear indication from Waltons were that a lease would be signed
- ii. Waltons' solicitor's statement that "we shall let you know if any amendments are not agreed to" induced the Maher's assumption
- iii. Maher send the executed lease and began the demolition in reliance on the assumption
- iv. Waltons was aware of Maher's actions. They encouraged Maher to act by stressing time was short
- v. Maher's detriment was the reliance loss, the wasted expenditure on the demolition and reconstruction of the building
- vi. When Waltons, knowing that Maher was action on the assumption that a lease had been (or would be executed), decided not to inform him of their change of heart, it was acting unconscionable

Sidhu v Van Dyke (2014)

- Van Dyke had made out detrimental reliance on Sidhu- told her not to get a property made other promises to subdivide land
- Van Dyke made improved and worked on the reliance of his promise

Court held: detrimental reliance → estopped

NOT ESTOPPED: Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989)

- Negotiated for the lease of a supermarket in a shopping centre
- Built to specifications, Franklin ordered equipment → however, no lease was executed
- Franklins learned they negotiated with another super market and argued on bases of WS v M

Court held: parties had equal bargaining power and had engaged in commercial negotiating → Austotel did not behave unconscionably

Giumelli v Guimelli (1999)

- Parents promised son a house and investment if he worked for them and built the house
- After his marriage broke up parents told him to choose between land and the other woman, he chose the other woman
- His brother occupied the house
- Sued his parents that they held the property on trust for him and were obliged to honour their promises

Court held: estoppel arose → criteria from WS v M was established

Remedy: giving the house back would be unfair to the third party (brother) → monetary compensation

Roscorla v Thomas

P purchased a horse from D – D then promised horse was sound – horse was in fact not sound and P sued for breach of contract

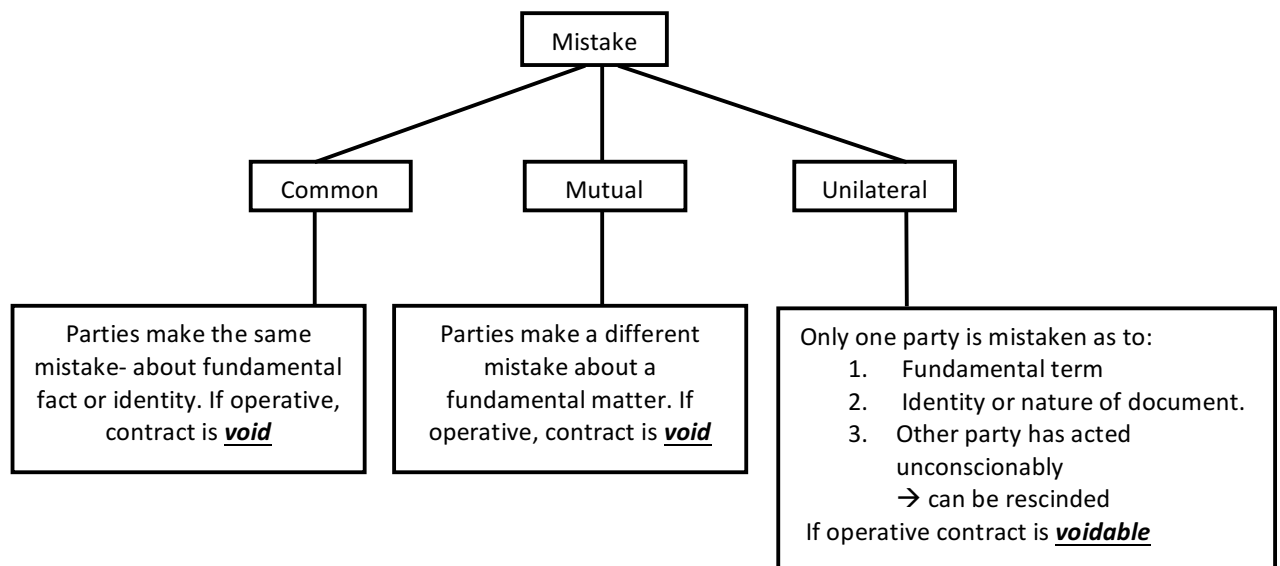
- The only consideration that had been alleged was the contract for the seal of the horse- which preceded the defendants promise → Not given in exchange for promise – not good consideration

Court held: There was no consideration for the promise that the horse was sound

4. Genuine Consent

- Genuine consent must underpin the agreement → cornerstone of contract law
- Contract law is about allowing both parties to enter arrangements on terms they choose (“freedom of contract”) knowing all information, which the courts will then enforce (“sanctity of contract”)
- Generally speaking, courts are reluctant to allow a person to avoid a contract simply because one or both of the parties has entered into the contract on the basis of a mistake
- If one of the following vitiating elements is present, there is no genuine consent and the contract may be rescinded by the innocent party
 - i. Mistake of a fundamental kind
 - ii. Misrepresentation
 - iii. Duress
 - iv. Undue influence
 - v. Unconscionable conduct

4.i. Mistake



a. Common mistake

- Parties have made the same mistake about one or more of the terms
- Only some types of common mistakes invalidate a contract → usually involve mistakes about a fundamental term or about property which neither party is aware no longer exists
- However, if the seller in fact warrants that the goods do exist → there is a valid contract
- Courts reluctant to say a fact is fundamental

Leaf v International Galleries (1950)

- Purchased a painting from a gallery, both seller and buyer thought it was painted by a famous artist
- Buyer attempted to sell and discovered the famous artist did not paint it
- Argued the contract was affected by a common mistake → render it void (too much time had elapsed for a rescission)

Court held: no operative mistake → Leaf had wanted the painting that was hanging and this is what he got, everything else concerned the quality

McRae V Commonwealth Disposals (1951)

- CDC advertised a tanker, McRae was the successful tenderer
- The tanker was in fact never there, McRae sued
- CDC argued that the contract was void for a common mistake

Court held: CDC was liable because it had promised the tanker existed

b. Mutual mistake

- Where both parties are mistaken but their mistakes are not the same
- This type of mistake does not necessarily invalidate

Raffles v Wichelhouse (1864)

- Raffles sold Wichelhouse cotton that arrived by boat
- There were two boats by the same name leaving the same city- one departed in October and the other in December
- Wichelhouse thought the contract was for the October ship while Raffles thought it was for the December ship
- Raffles delivered the December shipment, Wichelhouse refused it
- Raffles sued for breach- arguing the date of the ship was not relevant

Court held: defendant only bought that cotton which was to arrive by a particular ship → therefore no agreement on a fundamental term → contract was void

c. Unilateral mistake

- Where one party is mistaken as to the terms of the contract or the identity of the other party and that mistake is known to the other party
- The mistake must be about:
 - a. A **fundamental term** and an element of unconscionable conduct
 - In the past, where the unilateral mistake involved a fundamental term of the contract → was declared void, however since Taylor v Johnson, the position is that a unilateral contract mistake as to a fundamental term will not render a contract void at common law → instead make it voidable in equity if the unmistaken party has acted unconscionably
 - OR
 - b. The **nature of the document** itself (*non est factum* defence)
 - Defendant must establish that the document they signed was of a fundamentally different or type character from that which they thought it to be
 - OR
 - c. About the **identity** of one of the parties

Lewis v Averay

- Lewis sold his car to a rogue buyer who gave a different name
- The rogue buyer then resold the car before Lewis found out he was a rogue buyer → cheque bounced
- Lewis tracked down the second buyer and sued him

Issue: whether Lewis entered the contract with the rogue as a result of a mistake (as to the identify of the other party) or as a result of misinterpretation

- If it was a mistake = contract would be void → title cannot pass
- If it was misinterpretation = voidable → valid until rescinded by Lewis, Avery bought the car before the contract was rescinded and therefore would get a valid title

Court held: misinterpretation, not an operative mistake (Lewis could sue rogue)

Taylor v Johnson (1983)

- Vendor granted to purchaser an option of purchasing two adjoining blocks of land → option was exercised and they entered into a written contract of sale for the
- In both option and sale agreement price was stipulated at \$15,000, yet the vendor later refused to complete the purchase on the grounds that she mistakenly believed it was agreed at a price of \$15,000 per the vendor was acting under a serious mistake about either the terms (price) or the subject matter (value) of the transaction and deliberately set out to ensure she was not disabused of the mistake
- Induced by purchaser

Court held: contract of sale should be set aside → “will be entitled in equity to an order rescinding the contract if the other party is aware the first party is entering under serious mistake

Petelin v Cullen (1975)

- Petelin owned land Cullen wished to buy and develop
- Through his agent Clements, Cullen obtained a 6 month option to purchase land with \$50 consideration
- After the expiry of the option, a letter was sent to Petelin with another \$50
- Cullen then saw Petelin and asked whether he had received the cheque, Clements then asked if he had a form (holding up an extension), Petelin said yes and signed it thinking it was a receipt
- Petelin did not read English and had signed the document in the belief it was a receipt
- Cullen brought Petelin to court when she refused to sell the land → Petelin used **non est factum**

Court held: Petelin was not careless, his belief that it was a receipt was from Clements and Cullen was responsible

Remedy for unilateral mistake

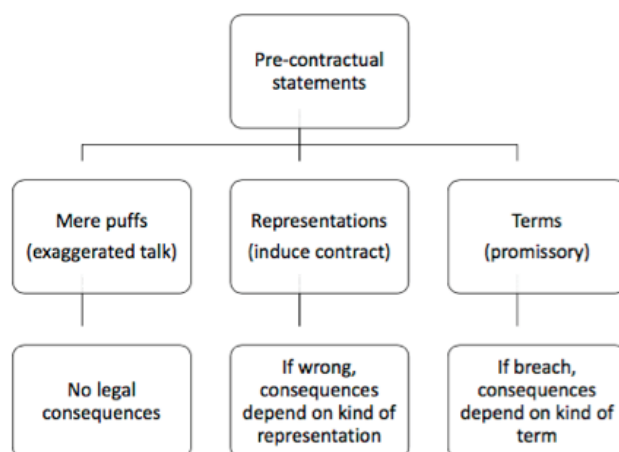
- Contract is voidable i.e. may be rescinded
- Equitable remedy (in the case of both fraudulent and innocent misrepresentation)
- It amounts to setting the contract aside and restoring the parties to the position they occupied before the contract was made
- But if the parties cannot be restored to their pre-contractual positions, then rescission cannot be possible

Rescission is not possible where:

- The representee chooses to affirm the contract after becoming aware of the falsity of the representation (can still sue for damages if fraudulent) – *Clough v London and North Western Railway*
- Return to the pre-contractual positions is not possible (next result: payments)- *Alati v Kruger*
- An innocent 3rd party has acquired interest in the subject-matter of the contract in good faith before the contract was rescinded- *Lewis v Averay*
- Rule is Seddon's case might prevent rescission for innocent misrepresentation of a contract that has been fully performed

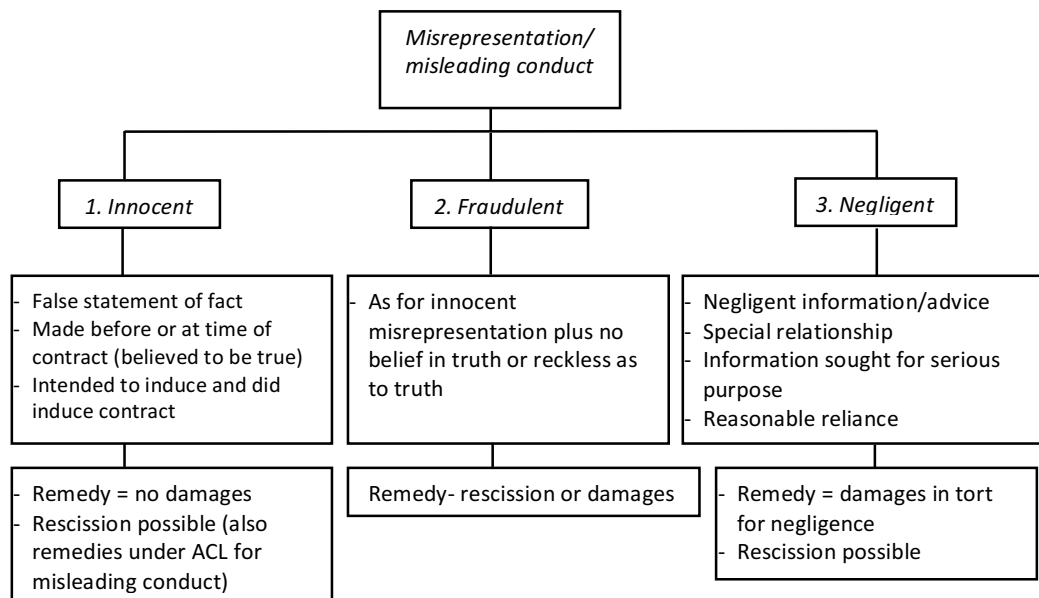
4.ii. Misrepresentation**Statements**

- **Terms = promissory:** If the party making a statement promises truth of that statement in the sense of making it part of the contractual bargain, then it is a term of the contract → non-fulfilment entitles the other party to take action for breach (promissory) = legally binding
- **Representations:** statements that are not promissory → while not contractual, they induce the person to whom they are made to enter into the contract
- **Mere puff** would not persuade someone to enter a contract (e.g. absolute gem)



Types of Misrepresentation

1. Common law:
 - Innocent
 - Fraudulent
 - Negligent
2. Statutory misrepresentation (S 18 ACL)



In the contract

- **Vitiating factor:** may allow the contract to be avoided and must have the 4 elements to be actionable
 - a. A false statement
 - b. A statement of fact
 - c. Addressed to the other party
 - d. Intended to induce the contract
- **Remedy:** damages or rescission of contract
 - Rescission is the equitable remedy which effectively 'undoes' the contract
 - Rescission is available in limited situations and this remedy may also be lost, depending upon the facts

a. Innocent misrepresentation

A false representation made by a person who, at the time of making it, believed it to be true

Remedies

- Common law provides no remedy for innocent misrepresentation (where it was not made a term)
- No damages (unless made a term)
- Very limited right to rescind (equitable remedy)- *South Australian Railways Commissioner v Egan*
- A person induced into a contract has the right to:
 - a. Rescind the contract whereby they can obtain an "indemnity" against expenses incurred because of the obligations of the contract
 - b. To resist successfully an action for specific performance of the contract

Redgrave v Hurd (1881)

- The defendant was induced to enter into a contract to purchase a house from the defendant along with the defendant's practice (solicitor) on the faith of a misstatement as to the value of returns

Court held: no statement made which was false to the knowledge of the defendant- but the plaintiff was refused special performance → contract was rescinded

Oscar Chess v Williams (1957)

- Williams bought a car from Oscar chess (car trader) and traded in his car which he believed was a 1948 model worth \$X amount based on the car's registration which he had unknowingly been forged
- Court held: no damages and rescission not available → no remedy → Mr William's statement was not a term of the contract

b. Fraudulent misrepresentation

Derry v Peek: The representor made the statement either

- a. Knowing it to be untrue
- b. Without belief in it's truth
- c. Recklessly, not caring whether it was true or false

Peek v Gurney: Where there is a partial statement of fact in such a manner that the withholding of what is not stated "makes that which is stated absolutely false"

For an action of fraud to succeed/constitute grounds for action, or for the other party to have the remedies given to a person induced, the following elements must be established:

1. *The representation must be one of fact*
 - Make a representation of a past or present fact
 - Silence may also constitute misrepresentation
 - Although there is no general duty to disclose information there are two situations where there is a positive duty to disclose:
 - i. Where the statement may be literally true, but left alone, creates a false impression
 - ii. When the statement is true at the time it is made but circumstances change so that it becomes untrue
2. *The representation must be false*
 - If the representation is true when made but becomes false to the knowledge of the representor before the contract is concluded and does not disclose → liable (Jones v Dumbrell 1981)
3. *The party who makes such representation must know that what they are stating is false, or they have no belief in its truth, or be reckless about whether it is true or false*
 - Need to actually know that what they are representing is in fact untrue
 - Are liable if they make the false statement when they have no knowledge of whether it is true or false or seek to verify it as true
 - However, if they genuinely believe it was true there is no fraud even though their belief was formed negligently
4. *The party who makes the representation must intend the other party to the contract to act upon such representation*
5. *The representation must, in fact, have been relied upon by the other parties misrepresentation (Redgrave v Hurd)*
6. *The person claiming must have suffered damages*

Remedies

- Rescission
- May take advantage of the contract and retain any benefits while suing for fraud and claiming any damages (affirm contract) → contract is voidable
- May successfully defend any attempts to enforce the contract against them
- Damages for tort of deceit (fraud)
- Void on the grounds of mistake if no true agreement

Misleading or deceptive under the Australian Consumer Law (ACL)

- When it is difficult to prove intention in fraudulent misrepresentation → use ACL

The ACL provides civil remedies where misrepresentations by a person constitute misleading or deceptive conduct

Section 18(1): “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”

To demonstrate breach, must be/have:

- A person = applies to people and persons → applies to any sellers (not consumers)
- Made the misrepresentation during the negotiations
- Common law had problems establishing fraudulent as they must prove intention
- ACL only need prove conduct
- General (section 29 more specific)

Section 29(1): “A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation about the:

- a. Standard, quality, value, grade, composition, style or model or have had a particular previous use
- b. Services are of a particular standard quality value or grade
- c. To n.

Remedies: damages: fines \$1.1mil for corporation and \$220,000 for person

- Applies specifically to supply of goods and services

Section 30(1): “A person must not in trade or commerce in connection with the sale or grant of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land make a false or misleading representation

- See (a)-(g)
- Remedies: damages, fines

c. Negligent misrepresentation

An innocent misrepresentation made negligently

Step 1: did representor owe a duty of care to the representee (*Donoghue v Stevenson*)

Step 2: has the representor failed to exercise the required standard of care

Step 3: where the representee's losses caused by the negligence and were the losses reasonably foreseeable

Remedies

- Rescission if a contract was entered into with the representor- if possible
- Damages for tort of negligence **Hedley Byrne v Heller**

c.i. Undue Influence

- Usually arises in transfers of property for no or inadequate consideration
- The doctrine of undue influence is primarily concerned with gifts but may also apply to contract
- The gift or contract may be set aside where the parties were in a relationship where one has the power to influence the other in an unacceptable way

Where the following special relationships exist undue influence is presumed in dealings and the onus of proving that it was not exercised is on the party denying it:

- Parent and child; until the child has withdrawn from the influence of the parent (*Lancashire Loans v Black*)
- Guardian and ward
- Trustee and beneficiary
- Solicitor and client (*Lloyd v Coote*)
- Religious advisor and devotee (*Allcard v Skinner*)
- Doctor and patient

Where a special relationship exists, the onus is on the person in whom the confidence is reposed to establish the transaction in question was the “pure voluntary and well-understood” act of the person reposing the confidence

→ not subject to undue influence

- Relationships that may give rise to presumptions are not closed
- Husband and wife does not give rise to presumption (are special cases though)

In the absence of a special relationship (giving rise to the presumption) → onus is on the person seeking to avoid the transaction to prove that it was the result of undue influence exerted on her or him by another

Johnson v Buttress (1936)

- Johnson three years before he died gave his land and cottage to Buttress, a woman who he had known for 20 years
- After his death, the administrator of his estate challenged the gift on the basis their relationship was one of trust and confidence
- Administrator held Johnson was illiterate, ignorant of commercial matter and did not understand the nature of what he had done

Court held: agreed with administrator → onus shifted to Buttress to prove that she had not exercised undue influence

Spong v Spong (1914)

- Son brought action against father for rescission of a voluntary transfer of land back to son on the ground that when the transfer was executed son, as father knew, was incapable of knowing or understanding the effect of the transfer and of undue influence

Court held: son was to father knowledge feeble-minded, weak and incapable of transacting business and gave ruled in favour of son

Lloyds Bank v Bundy (1975)- fiduciary

- There was a relationship between defendant and the bank and the court could intervene to prevent the relationship being abused
- Since the effect of the guarantee and charge could have resulted in the defendant being left penniless and had no other independent advice as to what he was doing

Court held: breach by bank of fiduciary duty of care

c.ii. Duress

- Duress is actual or threatened violence to, or the deprivation of liberty of, a person or their immediately family or near relative → to pressure r coerce such a person into entering a contract
- A person under duress has been deprived of their free will and there is no true consent to the agreement
- A contract made under duress is voidable at the option of the party coerced
- Duress need to be the sole reason a party has entered into a contract → is sufficient if only one reason

Barton v Armstrong (1976)

- Executed a deed to buy shares, however was also motivated by business reasons

Court held: even though he would have executed the deed anyway, the threats and unlawful pressure in fact contributed to his decision to sign the documents

Scolio Pty Ltd v Cote (1992)

- Contracted entered into by employee for repayment of money misappropriated from employer was not voidable under ground of duress where the employer had threatened police intervention
- The amount was in fact owing and the employee received consideration by given time to pay

Economic duress

- A situation where one party is induced to enter into a contract because of threats to that party's economic interests
- When established, voidable at the option of the person threatened

Proper approach to determine if there has been economic duress is to ask:

- a. Whether they applied pressure induced the party to enter into the contract
- AND
- b. Whether that pressure went beyond what the law is prepared to countenance as legitimate

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (1979)

- Shipbuilding company threatened to terminate a contract for the building of a tanker unless the owner paid increases payment (following a currency devaluation) → payments not required under contract
- The owner agreed because it required the vessel for a lucrative charter is was negotiating
- Sometime after delivery the owner sought to recover the payment they had been compelled to make

Court held: threat to break contract without legal justification amounted to economic duress → contract would be voidable and moneys prima facie recoverable

HOWEVER

Because there was a delay in seeking recovery, the owners had affirmed the contract and could not recover the payments

Remedies for duress and undue influence

- Rescission (if possible)
- Contract is voidable by the party coerced
- Damages may be available for the tort of intimidation

Consumer contracts s50(1)- prohibits harassment and coercion → rescission and penalties

c.iii. Unconscionable conduct

a. At common law

The general rule is that the court will not grant relief to a party merely because the contract they have entered into operates harshly or oppressively against them

Commercial Bank of Australia v Amadio HCA (1983)

- Old Italian couple, with limited knowledge of English language and education signed a mortgage to the bank over a block of shops as security for payment of its debts by one of their sons companies → they would become liable for the total present and future indebtedness of the company
- Little discussion, couple did not try to read the document and manager did not explain its meaning or fix their misunderstanding and left with the contract signed
- Son's company went into liquidation and couple called to pay \$240,000

Court held: couple was in a position of special disadvantage in that they were mistaken as to the extent of their son's company → ill-informed about the seriousness of their position

- Their age and background and reliance on their son's misleading advice contributed to the special disadvantage
- **Although bank may not have known the full extent of the disability, it knew enough to be put on inquiry as to whether the Amadio's appreciated the nature of the contract**
- Failure to make further inquiry amounted to wilful ignorance = the unconscionable conduct
- Bank should have told them to get a second opinion

Louth v Diprose (1992)

- Diprose made friends with Louth in Tasmania and became infatuated with her however she was indifferent toward him- she was never
- She moved to Adelaide and he followed her and regularly gave her gifts and from time to time paid for household bills and her children school fees
- Louth was living with her sister and told Diprose she was asked to leave and would commit suicide, however she was under no such pressure → Diprose bought a house and put her name on it
- Diprose moved in and their relationship deteriorated and Diprose wanted the house back under his name

Court held: Louth had engaged in unconscionable conduct → Diprose would have a special disability and Louth manipulated it

→ intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness, but to prevent his victimisation

Garcia v National Australia Bank (NAB) (1998)

- Husband and wife executed a deal with NAB, wife signed all guarantees in favour of the bank for loans to a company her husband controlled (she was a director and shareholder)
- They separated and wife sought a declaration that the mortgage and the guarantees she had given were voidable on the grounds of undue influence and unconscionable conduct

Court held: court set aside the guarantee because

- a. Mrs Garcia did not understand the nature and effect of the guarantee, particularly its unlimited nature
- b. The bank had not taken proper steps to inform her → banks assumed to know that a wife may repose "trust and confidence" in her husband need to ensure that they are an independent person

Kakavas v Crown (2013)

- Kakavas lost over \$20 mil while gambling over a period of 14 months at Crown
- He had a compulsion to gamble but could control it

Court held: rejected his unconscionability claim

- Kakavas was wealthy and did not suffer a constant compulsion, he could stay away when he wished
- He had gone to great lengths to persuade the casino his problems were in the past
- Equitable intervention required “proof of a predatory state of mind” which has not been established
- Indifference to the welfare of the other party to an arm’s length commercial transaction was not enough → victimisation/exploitation was required

b. Unconscionable conduct under equity

Requirements:

1. The weaker party must be under a special disability in relation to the stronger party
2. The stronger party must be aware of the special disability
3. It must be unfair for the stronger party to procure an agreement in those circumstances

c. Unconscionable conduct under statute (ACL)

There is a statutory prohibition in ACL against unconscionable conduct in consumer contracts (ss 20-22)

Difference between fraudulent and innocent → **intention** and action (to get the person into the contract) in fraudulent

Difficult to prove → we go to the statute S18 ACCL

Go from innocent → negligent → fraudulent

1. A false statement
2. Made in order to induce other party to enter into the contract
3. Other party entered
4. Other party made a loss

Term (crucial part of the contract) v representation (made to induce)

Legal capacity

Two people enter with a sane mind, above the age of 18

Cannot sue if you have done something illegal

Common law: written and oral → serious contracts in writing (evidence)

Reasonable person = an argument

Reasonable will change depending on the person and their background (e.g. visiting a car park for the first time Thornton)

5. Contents of the Contract- Express and Implied Terms

Content

- Contractual disputes are very often about the rights and obligations that the contract creates
- Such rights and obligations are found in the terms (or contractual promises) of the contract
- Such terms may be express (in writing or oral) or implies (by the courts or parliament)

<i>Express contracts</i>	<i>Implied contracts</i>
- Specifically agreed upon by parties - May be in writing (or partly written, partly oral) - Gym contract - Credit contract with bank - Employment contract - Lease of flat Can only be a condition or warranty - May be entirely oral - Agreement with various tradesmen to do work - Ordinary everyday consumer contracts	- No express contract but contract implied by conduct of the parties - Take your dog to the vet or you visit a medical clinic - Also terms are implied into express contracts - E.g. the computer will last for a reasonable time - Implied by - Courts as a result of conduct, necessity or normal commercial practice - Statute: parliament has prescribed that certain terms must be implied into contracts generally

1. Express Terms (v Representations)

Terms are contractual promises: may be written, oral or implied (= part of the contractual bargain)

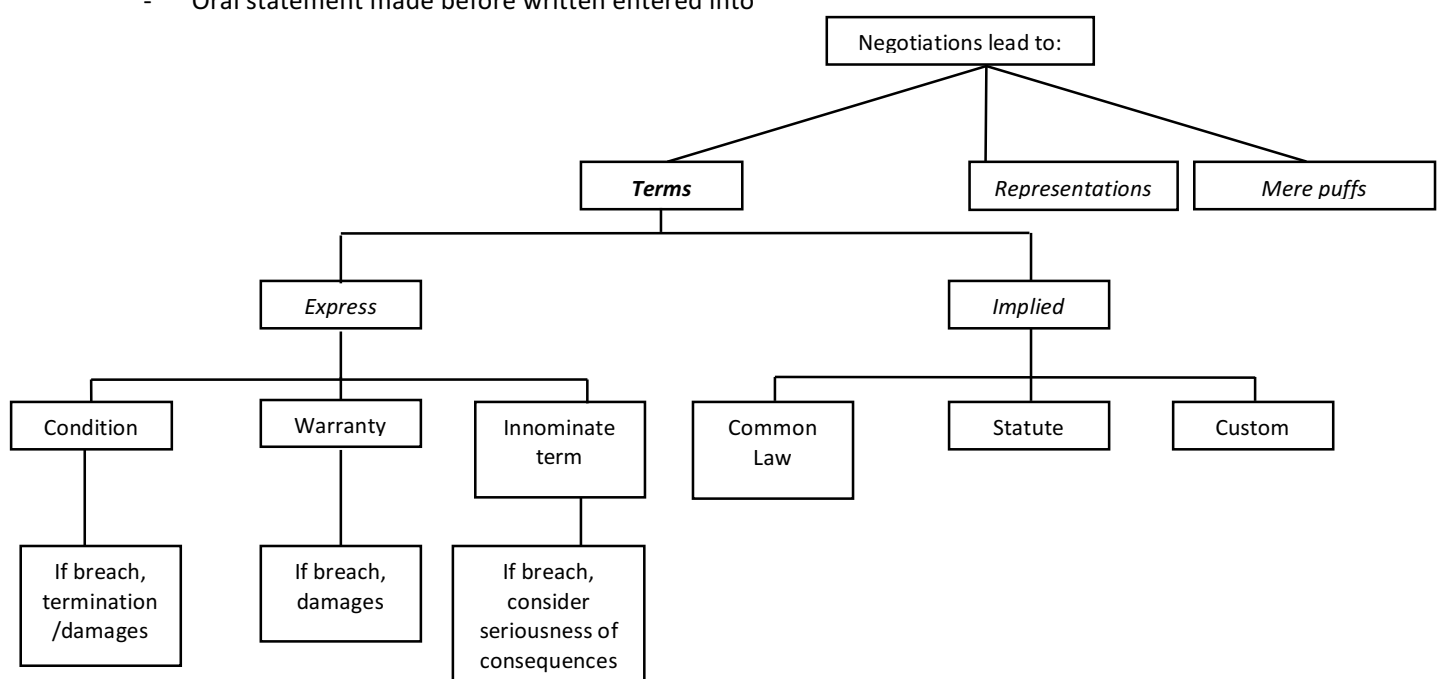
- Contractual promises must be kept or remedy for breach of contract

Representations induce or persuade you to enter a contract (during negotiations) but are not necessarily promises (innocent/fraudulent) and the remedy will vary

- Intended to persuade but is not promissory

Important to **distinguish** between terms/rep/puffs in the event of a breach (remedy)- how to consider:

- The importance of the term to the plaintiff
- The time lapse between the statement made and the time when the contract was made
- Special skill or knowledge of the defendant
- Oral statement made before written entered into



Parol evidence rule

- Gives primacy to the written contract
- If contract is entirely in writing it is presumed that the written document is intended to be a complete record of the agreement and parties cannot introduce evidence which would add to, vary or contradict it (*Mercantile Bank of Sydney v Taylor*)
- So if contract in writing and something else is orally promised by one of the parties the PER would prevent the promisee from being able to rely on that oral promise
- Modern decisions have taken the view that the rule “does not operate until the terms which constitute the contract are determined” (*Nicolazzo v Harb*)

Parol evidence rule is subject to the following exceptions:

1. Will be admissible to assist in the interpretation of the contract if the language of the written contract is “ambiguous or susceptible of more than one meaning” (*Codelfa Construction v State Rail Authority of NSW*)
 - However, may not be used in construction of a contract to contradict unambiguous stipulations (*GMA Garnet v Barton International Inc*)
2. Evidence may be given of the subject matter of the contract or of the identity of the parties to it (*Abram v AV Jennings Ltd*)
 - Such evidence is admissible in explanation of the terms used in the contract but must not alter them (*Giliberto v Kenny*- signed Mrs Kenny and Mr Kenny for land and acted as agent)
3. Parol evidence may always be given to explain a trade custom or local usage applicable to the contract
4. A **collateral oral agreement** relating to the same subject matter and not inconsistent with the writing may be proved (if main contract is breached, collateral contract is also breached)

Van den Esschert v Chappell (1960)

- Vendor promised house was free from termites → it was in fact not, and purchaser could recover costs of treatment and necessary repairs for breach of collateral agreement
- Purchaser bought the house on the assurance there were no termites

Court held: there were two parts of the agreement: a written contract and a collateral contract which consisted of one term (the house was termite free)

Collateral agreements must meet three criteria:

- i. The statement was promissory- the reason the parties entered into the main contract (*Oscar v Williams*) (*Savage v Blakeney*)
 - ii. It was not inconsistent with the main contract
 - iii. There was consideration provided by the purchaser in exchange for the collateral promise (consideration usually consists of entering into the main contract)
5. When the written document was not intended to embody all the terms of the transaction but was intended merely to be a note or receipt
 - Parol evidence is admissible as to whether a document was intended to be operative as a contract (*Nicolazzo v Harb*)
 6. May always be given that the contract is not legally binding because of fraud, duress, undue influence and the like

Contractual terms

Not all terms are equally important

To be promissory → needs all four elements (offer, acceptance, consideration, intention)

Condition	Something without which the party for whom the term was included would not have entered the agreement without an assurance of compliance → <u>that goes into the root of the contract → essential element of the contract</u> (without which the contract would no exist) <u>Associated News v Bancks (1951)</u> - Bancks to draw cartoon to be features on the front page - Was featured on the third page for 3 consecutive weeks Court held: feature on the front page constituted a term → breach entitled him to treat the contract as at an end
Warranty	Regarded as of lesser significance than a condition <u>Bettini v Gye (1876)</u> - Gye was a director of an opera company and contracted B → contract contained a provision that B would be in London 7 days before the show - B became sick and arrived 2 days earlier → G refused to accept his services and treated the contract as at an end Court held: term was not a condition, but a warranty → entitled to damages but not entitled to treat it as terminated (clause did not go to the root of the contract)
Innominate term	Uncertain whether condition or warranty until the result of the breach is known and is determined by the intention of the parties to the contract (e.g. one party thinks a condition, the other thinks warranty → argue → judge determines (distinguish term for appropriate remedy) As established by: <u>Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (1952)</u>

For a statement to constitute a term, the party making the statement must have undertaken or promised that the statement was true in the sense of making it part of the contractual bargain

- It is important to distinguish between representations which induced the contract and statements that are regarded as terms of the contract itself
- The importance of the distinction is so that appropriate remedies can be awarded
 - Damages cannot be awarded for a statement that merely constitutes and innocent misrepresentation
 - Damages and termination may be awarded for breach of contract

Objective test

Courts look objectively at the circumstances to determine whether or not an express pre-contractual statement was a promise or a representation:

- The time that has elapsed from the making of the statement to the formation of the contract (the less time, the more likely it is to be a term)
- The more important the statement in context the more likely it is to be a term → reliance
- If a statement is made during the negotiations and the agreement is subsequently reduced to writing, any statement not included in the written contract will be regarded as a representation
- The relative knowledge and expertise of the parties (if the party making the statement was an expert or had more knowledge → likely to be a term)

Example: *Oscar Chess v Williams*: did not promise the model → innocent misrepresentation → no damages

Collateral contract

- A statement, although not an actual term may be treated by the court as a collateral contract
- Side contract (mini, normally verbal) to main contract (will normally be in writing)
- Damages may be awarded for breach of that collateral contract- cannot be terminated
- Refer to parol evidence rule
- Must be intended to have a contractual effect and must not be inconsistent to terms of the main contract

Hoyt's Pty Ltd v Spencer (1919)

Court held: the defendants verbal agreement not to terminate the sub-lease and the proviso in the written sub-lease giving him an unqualified right to terminate it were inconsistent → verbal agreement was unenforceable

JJ Savage & Sons Pty Ltd v Blakney (1970)

- B recommended engines and a boat in particular to S that could go 15mph
- B bought the boat relying on S's statement
- Contract contained no reference to the capacity of the boat to go a certain speed
- Boat could only go 12mph → S sued for collateral warranty in relation to the estimated speed

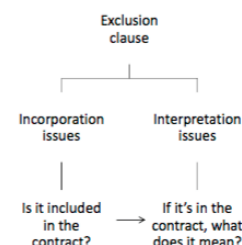
Court held: B's claim failed as S's statement, although inducing B to enter into the contract, constituted a representation only and not a collateral warranty (B could have adopted 3 other courses- attain the speed, sought a promise from S, formed his own judgement) → only a promise by S could have resulted in a collateral warranty

Exclusion Clauses

- Function: to exclude (limit) liability for one or both parties under the contract
- For a range of things including breach of contract and negligence
- Parties who rely on them are often in a dominant position and abuse that dominance by incorporating unreasonably wide clauses into standard form contracts
- Courts and parliament have developed rules to regulate how exclusion clauses may be used in contracts
→ attitude depends on whether it is a commercial or consumer contract
 - Exclusion clauses in consumer contracts is restricted or prohibited (implemented strategies)
 - Where parties have negotiated at arms-length commercial contract → exclusion clauses are regarded as a conscious attempt to allocate risk
- Legislation (ACL) s64(1): prohibits exclusion clauses in consumer contracts (also s18)

Two stages of analysis:

- Incorporation issue:** In order to determine whether an exclusion clause is effective, the courts may consider whether the exclusion clause is, in fact, a part of the contract
- Interpretation issue:** and if so, they may need to consider the meaning of the clause- the extent to which it protects the party seeking to rely on it (does it cover the breach)

**a. The Incorporation Issue**

The person seeking to rely on an exclusion clause must show first that it has in fact become part of the contract. This may be achieved in one of the following ways:

i. Signature rule: written contract signed

An exclusion clause, like any other term, will be incorporated into a contract if it is contained in a signed document → usually binding whether or not it has been read

L'Estrange v Graucob (1934)

- Bought a machine and signed a document headed "sales agreement" which she did not read → contained clauses
- The machine failed to work and she sued for breach of implied term that goods should be fit for their purpose

Court held: exclusion clause was effective because she had signed the contract- the fact that she had not read it was irrelevant

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)

- Purchase vaccines to be stored at a certain temperature, they weren't and the lab refused them
- Rule of L'estrage applies
- It was reasonable of Finemores to treat the signature as a manifestation of assent to the conditions he had been invited to read before signing

Le Mans Grand Prix Circuits Pty Ltd v Illiadis (1998)

- Signed a form so he could do a lap of the go-kart race but was not given enough time to read the form
- He treated the form as a "marketing or registration type of form" and the top did say in bold "TO HELP WITH OUR ADVERTISING"
- In the course of his race he overturned and fractured his arm
- Contractual document containing onerous exceptive provision must be brought to the knowledge of the party against whom they are to be enforced

Court held: that no contract had been made and therefore the exclusion clause was no effect

ii. If there is no signed document, was reasonable notice of the clause made before or at the time of the contract

The party seeking to rely on the clause must show that, in the absence of a signed document, the exclusion clause was brought to the notice of the other party before or at the time the contract was made

- Will form part of the contract if the party seeking to rely on it can show they had taken steps that were reasonably sufficient in the circumstances to give notice
- If notice is given after the contract is made → it will have no effect

Olley v Marlborough Court Ltd (1949)

- Booked a hotel and when they went up there was a notice saying that the hotel will not be responsible for lost items
- Their furs were stolen

Court held: the contract had already been made before the couple went up to their room → hotel liable for the loss

Baltic Shipping Co v Dillion (1991)

- Booked a cruise and the contract of carriage of travel was only available at the time of issue of tickets
- Only given to the Dillion six weeks after full payment and 2 weeks before departure
- Conditions limited the liability for loss of baggage or personal injury
- Dillion lost her luggage and suffered injury due to negligent navigation of the vessel (it sunk)

Court held: defendant could not rely on the ticket since they had not been sufficiently brought to the plaintiff's attention and therefore did not form part of the contract → Dillion did not have reasonable opportunity to see and agree to the terms and conditions

Thornton v Shoe Lane Parking Ltd (1971)

- T visited a car park for the first time and was injured when he returned to the pick up car
- Ticket contained small print saying "issued subject to conditions ... displayed on the premises" → conditions displayed on a panel on a pillar included provision exempting the defendant from liability for injury to a customer
- Issue: was the clause on the post incorporated in the contract by reasonable notice?

Court held: clause did not exempt defendant from liability since they had not done what was reasonably sufficient to bring the clause to Thornton's notice

- Offer made by SL on terms displayed at entrance (price etc) acceptance when T drove up, paid money and light turned from red to green → SL cannot vary or add after that time
- Even if the second exclusion clause is included, the clause was so wide and harsh that SL needed to do more than say it was reasonable notice

iii. What is 'reasonable' when the exclusion clause term is harsh, onerous or unusual?

Interfoto Picture Library Ltd v Stiletto Visual Program Ltd (1989)

- Interfoto lent stiletto photographic transparencies
- Clause that if they were held long than 14 days they would have to pay a fee → would have to sign a new contract if they wanted them for longer
- Stiletto held them for 2 weeks and were fined 3,783 pounds
- Issue: was the penalty clause sufficiently brought to Stiletto's attention

Court held: the clause was a very onerous clause that Stiletto neither knew or could have known that such a harsh rate would be imposed for late return

iv. Is the document "contractual" in nature

If the document containing the clause is one which a reasonable person would not expect to contain contractual terms (i.e. regarded as a receipt or voucher) then an exclusion clause contained in it cannot be relied upon to exclude liability

Causer v Browne (1952)

- C took dress for dry cleaning and received a deposit docket
- Printed conditions on the docket exempted B from liability for loss or injury → dress was returned damaged

Court held: B was liable for damages and had not discharged the onus of providing that the printed conditions modified the contract (a reasonable person might understand the docket just to be a receipt/voucher → had to be made aware)

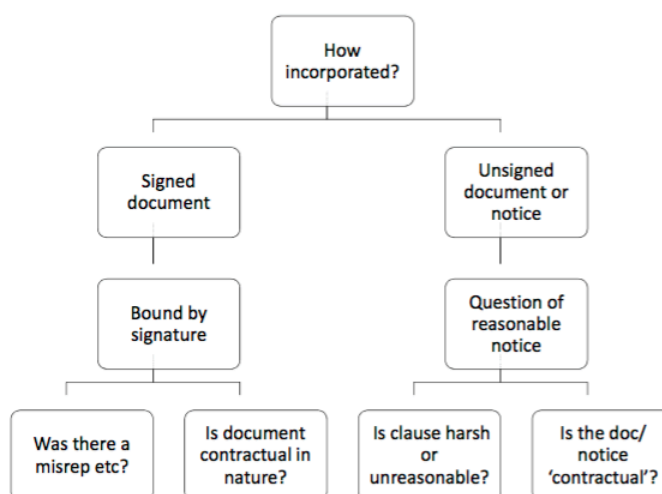
v. If the scope of the clause is misrepresented, its effects will be limited

Curtis v Chemical Cleaning & Dying Co Ltd (1951)

- B took a dress to A to be cleaned and was asked to sign a clause that exempted B from any liability for any damage howsoever arising
- B asked why she had to sign and A said it was for damage to beads or sequins → B signed
- Dress was returned stained

Court held: A could not rely on the exclusion clause because the signature was obtained by misrepresentation as to the effect of the document

Henry Kendall & Sons v William Lillico & Sons Ltd (1969)



b. The Interpretation issue: does the clause cover the breach?

If the clause is properly incorporated into the contract, the second stage for the court is to interpret or construe the clause in an effort to ascertain whether its scope is sufficient to protect the person seeking to rely on it from the loss or injury suffered by the plaintiff (as a result of the breach)

Courts have developed some general rules of interpretation:

1. Four basic principles as established in *Electricity Generation Corp v Woodside Energy (2014)* that are adopted in determining the rights and obligations of the parties to a commercial contract:

- a. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean
- b. It will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract
- c. Appreciation of the commercial purpose or objects is facilitated by an understanding of the genesis of the transaction, the background, the content and the market in which the parties are operating
- d. A court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption that the parties intended to produce a commercial result

2. An exclusion clause will be construed strictly and any ambiguity resolved against the person seeking to rely on it

- Courts interpret clauses “contra proferentun” (against the party relying on it)
- Exclusion of liability for breach of warranty will not exclude liability for breach of condition (*Wallis, Sons & Wells v Pratt 1911*)
- Exclusion of liability for breach of implied conditions and warranties will not protect a party from breach of an express term of the contract (*Andrews Bros Ltd v Singer & Co Ltd 1934*)

Insight Vacations Pty Limited v Young (2011)

- Y was on a tour bus when she got out of her seat to get something from her bag and the coach driver braked suddenly causing her to fall backwards and suffer injury
- There was an exclusion clause → issue of interpretation

Court held: the clause did not protect the defendant → relying on the ordinary meaning of the words, the clause only applied when the passenger was seated

Elder Smith v McBride (1976)

- An auction held that lots were available for inspection and the same would be sold with all faults if any
- All faults → only applied to those which could be revealed by inspection

Court held: did not include hidden defects in the goods purchased

3. A clause can be effective to protect against negligence (if worded correctly)

Davis v Pearce Parking Station Pty Ltd (1954)

4. Four corner rule: exclusion clauses will not normally be construed as limiting or excluding liability for acts done outside the terms/scope of the contract

- Outside the scope (= four corners)
- For a breach of any fundamental terms of the contract

Council of the City of Sydney v West (1965)

- W enters car park. Is handed ticket containing conditions, including exclusion clause. W knew of the clauses though he had never read them
- The attendant gave Robinson, a thief, a duplicate ticket and let him drive off → smashed the car
- Ticket must be presented for time stamping and payment before delivery
- It is a matter of interpretation of the contract as a whole whether or not a particular exclusion clause is wide enough to exclude liability for the alleged breach of contract

Court held: the parties could not have intended the clause to protect the car park in these circumstances → not just a breach of a contractual duty but an unauthorised act that amounted to a fundamental breach

Photo Production Ltd v Securicor Transport Pty Ltd (1980)

- S contracted to provide night patrol service to the plaintiff's factory
- One employee threw a match onto the cartons and the fire ultimately destroyed a large part of the factory
- Exclusion clause stated: 'Under no circumstances shall Security company be responsible for any acts by employee *unless such act or default could have been foreseen and avoided by the exercise of due diligence*.

Court held: although it was a 'fundamental breach' S could rely on the breach because the lighting of a fire could not have been foreseen and avoided by the exercise of due diligence

Exam tip:

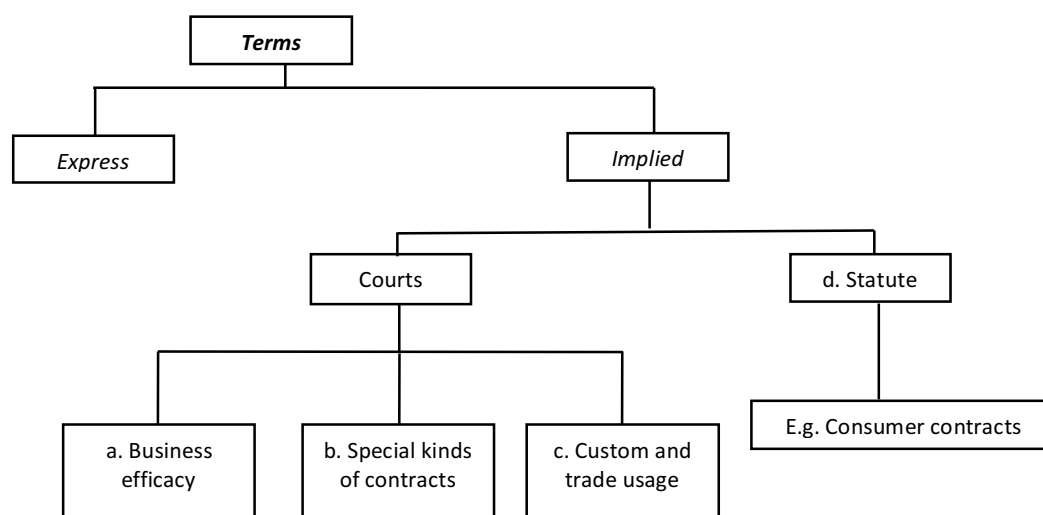
Get rid of exclusion clause first

2. Implied Terms

In addition to the express terms agreed upon by both parties, other terms may be implied in the contract. These terms may be implied by:

The courts, custom or trade usage, statute

Implied terms are as real and as important as express terms → can sue for breach of both an implied and express term → both are breaches of contract

**a. Business Efficacy**

- The courts will readily imply a term that the parties must cooperate to "ensure the performance of their bargain" (*Famestock Pty Ltd v Body Corporate*)
- Occasionally, the parties through inadvertence or poor drafting may have failed to incorporate terms to cover a situation which had they thought about, they would have provided for
- In such a case, the court may imply appropriate terms so as to give "business efficacy" to the contract in accordance with the presumed intention of the parties (principle recognised in *The Moorcock* case)

The power to imply terms is used sparingly by the courts. The implied terms must be:

- Reasonable and equitable
- Necessary to give business efficacy to the contract
- It is so obvious (it goes without saying)
- Capable of clear expression
- Must not contradict any express term of the contract

As in *BP refinery Pty v Hastings Shire Council (1978)*

The Moorcock (1889)

- The defendant contract to allow the plaintiff to use their jetty to unload his ship
- Ship was damaged at low tide

Court held: defendant was liable for damages since the parties must have intended to contract on the basis that the berth would be safe for the ship at low tide → in breach of implied contract

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982)

- Codelfa contracted with the State Rail Authority to build tunnels for a new railway
- Under the agreement Codelfa had to complete the contract in 130 weeks (on assumption the company would be able to work three 8 hour shifts per day, 6 days a week)
- This occurred until an injunction was obtained by a resident restraining the company from working
- Codelfa asked the court to imply a term in the agreement granting a reasonable extension of time

Court held: declined → they had to prove the term was necessary to make the contract work → Codelfa could not prove that it was “so obvious it goes without saying”

b. Specific kinds of contracts

- Certain terms are implied in various types of contract
- In a contract for hire of goods and services implied condition that the goods will be reasonably fit for the purpose for which they are hired (*Derbyshire Building Co Pty Ltd v Becker 1962*)

c. Custom or trade usage

- In order for these to be implied, the custom or usage must be notorious, certain and reasonable and not contrary to the express terms of the contract

The relevant principles have been stated by the High Court:

- The existence of a custom or usage that will justify the implication of a term is a question of fact
- There must be evidence that the custom relied on is so well known in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract (*Nelson v Dahl 1879*)
- A term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement
- A person may be bound by a custom notwithstanding the fact that they had no knowledge of it (*Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance Ltd 1986*)

d. Statute

Implied by a statutory provision

- E.g. the Australian Consumer Law (ACL)

6. Implied Terms and Consumer Protection

Contracts questions:

- Start with common law
- Argue vitiating factors
- Argue implied terms for consumer protection
- Show all possible action that you can take (something can stick)
- Must say: there is a contract (if not about formation) for implied terms to be relevant (ACL) → state which type as below
- For ACL to apply it must be either a:
 - a. Contract for sale of goods
 - b. Contract for provision of services
 - c. Sale of land

ACL: Competition and Consumer Act 2010

- Federal act = federal jurisdiction: all states must follow
- Originally Trade Practices Act (1974) and became Competition and Consumer Act in 2012
- Section: s
- Subsection (1)
- Sub-sub section (1)(2)
- Australian Consumer Law → will now be referred as ACL
- Focus on Schedule 2 of the Act- the Australian Consumer Law
- For sole proprietors, companies etc.

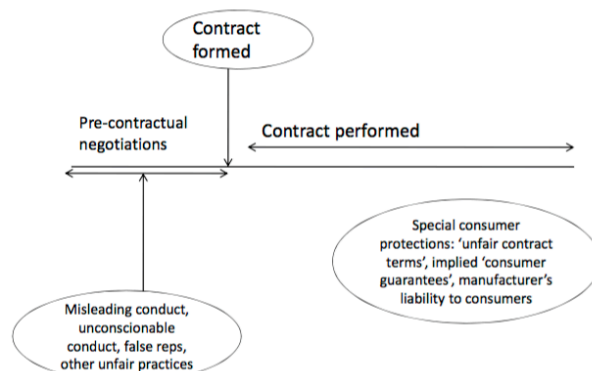
Structure

Chapter 1: Introduction	Definitions and interpretations (still use cases for definitions)
Chapter 2: General Protections	- Misleading conduct and unconscionable conduct - Unfair contract terms
Chapter 3: Specific Protections	- Specific false reps and unfair practices - Consumer guarantees - Manufacturer liability for defective goods
Chapter 4: Offences	- Criminal offences relating to certain conduct
Chapter 5: Enforcement and Remedies	

Broad objectives of the CCA

- Provides protection against misleading and deceptive conduct, unconscionable conduct, unfair contractual terms, false representations and other “unfair practices” in connection with the supply of goods, services and land
- Provides adequate remedies in the event of defective goods or inadequate services being supplied to consumers
- Regulates restrictive trading practices with the aim of preventing monopolistic and anti-competitive activities among traders

The contractual timeline:



Consumer Guarantees

- ACL provides the statutory guarantees in contracts for the supply of goods and services to consumers
- These are guarantees imposed by the legislation and remedies for breach are not contractual but are to be found in the ACL
- Implied terms of a contract (terms of the act implied in the contract)

There are nine guarantees regarding the supply of goods (s18-37). We look at

1. Guarantee as to acceptable quality: s54
2. Guarantee as to fitness for any disclosed purpose: s55
3. Consumer guarantees regarding services: s60-64

Test for a Consumer Contract

1. **Supply: s2(1)**

- Not just sale- exchange, lease, hire or hire purchase

2. **Consumers: s3(1)**

- a. PRICE: Amount of goods/services is ≤\$40,000
If >\$40,000 then either:
- b. Goods/services are of a kind ordinarily (normally) acquired for personal, domestic or household use or consumption; **or**
- c. The goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads

MUST ALWAYS CONSIDER

S3(2): not acquired for re-supply or for the using up in production or in the repair of other goods

Has to be a contract for sale of goods, services or purchase of land → then becomes a consumer contract after the test is applied

i. Contracts for Supply of Goods

Acceptable quality

1. **Title: s51(1):** guarantee that seller has the right to dispose of goods (page 343)
2. **Acceptable quality: s54(1),(2):** seller 'supplies' goods to a 'consumer' in trade or commerce is a guarantee that the goods are of 'acceptable quality' (not by way of auction)
 - **S54(2):** Goods are of acceptable quality if they are:
 - a. Fit for all purposes for which goods are commonly supplied
 - b. Acceptable in appearance and finish
 - c. Free from defects
 - d. Safe
 - e. Durable
 - **S54(3):** As a reasonable consumer, fully acquainted with the state and condition of the goods would regard as acceptable having regards to:
 - a. The nature of the goods
 - b. Price
 - c. Statements on labels or packaging
 - d. Representation by supplier or manufacturer
 - e. Any other relevant circumstances

To answer questions:

- Start with sale of goods contract
- Is it a consumer contract?
- **Go through and apply test**
- If price not specified → "if it is less than \$40,000" and then "if greater than \$40,000" and continue

Fitness for Disclosed Purpose: s55(1)

Guarantee that goods are reasonably fit for a disclosed purpose and for any purpose for which the supplier represents that they are reasonably fit

A disclosed purpose is:

- Particular purpose made known to supplier by consumer, expressly or by implication in pre-contractual negotiations
- Particular purpose made known to manufacturer directly or by supplier in pre-contractual negotiations
- **s55(1)**: There is a guarantee that the goods are reasonably fit for any disclosed purpose, and for any purpose for which the supplier represents that they are reasonably fit
- **s55(3)**: Where consumer shows it relied on supplier's skill and judgement

Merke, Sharpe & Dohme v Peterson (2011)

- A pharmacist supplied a prescription drug to a patient
- Use of the drug increased the risk of a heart attack in some patients

Federal Court held: the increased risk did not show unfitness for the disclosed purpose of using the drug for managing arthritic pain without gastrointestinal side effect

- Patient had not expressly or impliedly made known a purpose that the drug be absolutely safe or completely free from side effects

Example:

Ed intends to go trekking in New Zealand during the winter. He visits the Kathmandu Adventure Store and asks for advice from the Tenzin, the expert on trekking, on an appropriate tent, sleeping bag and hiking boots. After discussing at some length the conditions he was likely to encounter in NZ (-20 degrees centigrade with risks of blizzard) Tenzin advised Ed who took his advice and purchased the recommended equipment. The tent was not appropriate in blizzards, the sleeping bag was not warm enough and the boots fell apart in the wet snow. Advise Ed whether KAS has breached any of the consumer guarantees and what remedy he may have.

- Break up into issues:
 1. Consumer contract: presume that in all 3 cases it is under \$40,000- not for re-sale etc.
 2. Tent:
 - 54(1): was tent of acceptable quality? Not a breach of quality
 - 55(1): was the tent reasonably fit? Yes- Consumer made intention obvious, the seller recommended, consumer relied on sellers advice → breach
 3. Sleeping bag is the same (go through the same as above)
 4. Boots:
 - 54(1): were the boots of acceptable quality? Yes- a boot should stay together for a reasonable period
 - 55(1): were the boots reasonably fit? Consumer made intention obvious, the seller recommended, consumer relied on sellers advice → breach

Correspondence with description: s56(2)

- Goods must be the same as those described on packing or in print
- Goods must comply with sample or demo model: s57(1)
- Repair and spare parts: s58(2)
- Express warranties must be complied with: s59(1)
- Auction sales are excluded from guarantees

Guarantees and supply of services

Contracts for provision of 'services'

- Definition of services s2(1):
- Same definition of 'consumer' s3(1)
- **S60:** Must be rendered with due care and skill
- **S61(1):** Consumer makes known the result he or she wishes to achieve, guarantees that the services will be reasonably fit for the purpose
- **S61(2):** and will be of such a nature and quality, state or condition that they might reasonably be expected to achieve that results
- **S61(3):** Guarantee does not apply where consumer does not rely or it is unreasonable on sellers skill and judgement

Example question:

Alex is concerned about the bushfire risk at his home in the bush outside Melbourne. He consults Bob the Waterman about installing a pump on his dam that can pump water up to his house with sufficient force to enable him to run a 'ring sprinkler system' spraying water on his roof, the walls of his house and his garden. Bob indicates that it can be done. The price is agreed and Bob installs the system. After the system is installed and Alex flicks the switch it is clear that there is insufficient water to put out a barbeque, let alone a bushfire. Does Alex have a remedy under the ACL?

- Split as there is a sale of service and a sale of goods contract (2 contracts)
- Sale of goods: do not know price etc. → consumer contract
 - S52: acceptable quality: it did sprinkle
- Sale of service:
 - S60: it was done with due care and skill
 - S61(1): fit for purpose- was made known, relied on recommendation → breaches

These are implied terms only when it is a consumer contract

Limitation of liability (consumer guarantees)

S64(1): general rule- cannot exclude the guarantees or limit liability for 'consequential losses' in contract for supply of goods and services (basically voids exclusion clauses when there is a consumer contract)

- ACL does not allow exclusion clauses but does allow limitation clauses

Two exceptions

1. **S64(1):** Where goods are not of a kind 'ordinarily acquired for personal, domestic or household use' the seller can limit its liability as follows:
 - Contract for goods: supplier can limit liability to 'replacement or repair cost'
 - Contract for services: supplier can limit liability to 'supplying the service again'

"A term of a contract is void to the extent that it purports to exclude, restrict or modify the application of statutory guarantees": s64(1)

S64(3): Provided it is fair and reasonable- factors:

- Relative strength of the bargaining position
- Were there alternative sources that did not have the term
- Did the buyer know of the term?
- Special order of the buyer

2. Recreational Service exception: **CCA s139A(1),(3)**- high risk activities: supplier can limit liability for death or injury

For questions: getting rid of exclusion clause

- Make it a consumer contract and use s64
- Or use common law

Remedies for breach of Consumer Guarantees: ACL Part 5-4

- Broadly similar for goods (**s259**) and services (**s267-8**)
- Distinguish between major and minor failures

Minor failure: consumer may require seller to remedy to failure within a reasonable time or if seller doesn't then reject the goods (**s259(1)(2)**)

Major failure: criteria

- Goods would not have been acquired if buyer knew of the failure
- Goods don't match the description
- Goods substantially unfit for purpose- either common or disclosed and can't easily be remedies to fit that purpose
- Goods not of acceptable quality because they are unsafe (s260)

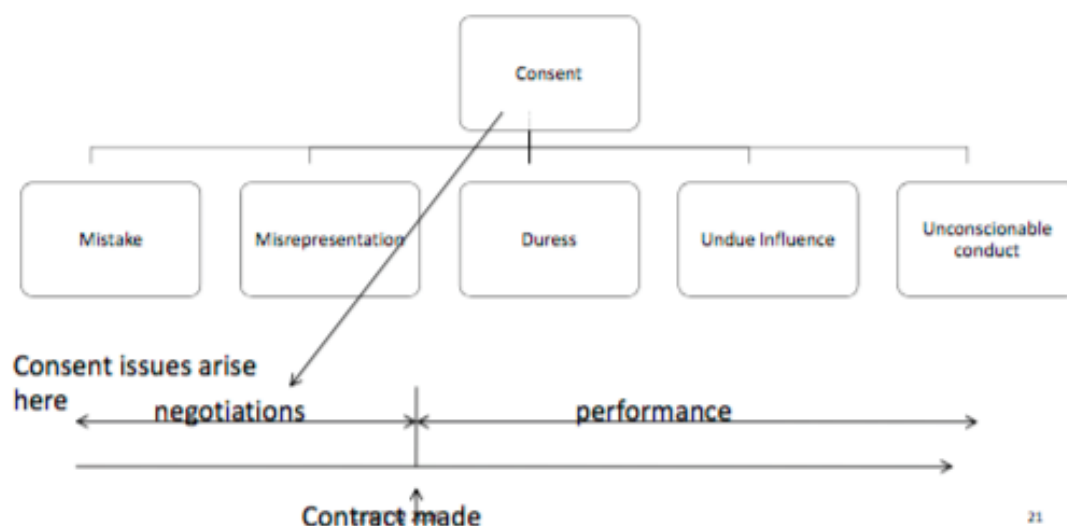
If a major failure, a consumer can:

- Rejected the goods (provided within a reasonable time); or
- **S259(7)**: Recover compensation for any reduction in value
- **S259(4)**: recover damages for reasonably foreseeable loss or damage unless failure caused by problem after goods left seller

S266: if goods are a gift, the person still has the same rights as a buyer (*goes around the Doctrine of Privity*)

** If limitation clause against suppliers → action against manufacturer

In the contractual process- during negotiations:



1. Misleading or deceptive conduct

To catch “unfair business practices” which may not fall within the scope of other specific prohibitions in s29(1)

- S18 replicates s52 of TPA- many of the cases decided under s52 are relevant
- S18 tries to prohibit conduct which is deceptive to members of the public as consumers of goods and services

Meaning of misleading

- **Objective test:** whether ‘ordinary and reasonable members of the class to whom the representation is directed’ would be misled or deceived not just confused (*Campomar v Nike*)
- What meaning would be open to “a significant number of the newspaper readership” (*Talmax v Telstra Corp*)
- Inconsistent with the truth

“A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”

1. **A ‘person’:** both ‘natural’ and ‘legal’ persons are included- sole trader, companies etc. (specify in answer)
2. **In ‘trade or commerce’**
 - Business related conduct
 - S18 is concerned with “the conduct of a corporation towards persons... with whom it... has or may have dealings which... bear a trading or commercial character” (*Concrete Constructions v Nelson HCA*)
 - Conduct is in trade or commerce even if it involves the sale of the defendants only asset (*Bevanere v Lubinineuse*)
3. **Engage in ‘conduct’**
 - Opinion, predictions, promises **s4(1)**
 - Where a person makes a representation about a future matter e.g. the economy and they do not have reasonable grounds for making it → the representation is misleading

Does silence constitute misleading conduct?

There is no general duty to disclose but:

- Literal truth may be misleading
- Failure to disclose changed circumstances
- Failure to disclose where there is a ‘reasonable expectation’ that disclosure would be made → if the seller knew that the main reason for buying and did not say anything (still breach)

Black CJ: “Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; question is simply... has there been conduct that is misleading or deceptive or is likely to mislead or deceive” (*Demagogue v Ramensky*)

Exam tip: answer questions on silence through common law and s18

Henjo Investments v Collins Marrickville

- Henjo owned a licensed restaurant
- During negotiations for its sale to Collins its agent led the purchaser to believe that the restaurant seated 128 people, which it did
- However terms of the license restricted seating capacity to 84 people

Federal Court held: in remaining silent as to the true position with respect to seating, had engaged in misleading conduct

Demagogue v Ramensky

- Ramensky contracted to purchase land from Demagogue in a proposed development of several units
- The plan, annexed to the contract referred to a "driveway" that was, in fact a public road
- Demagogue was negotiation with relevant authority for the right to use the road as a driveway but was unsuccessful → failed to tell Ramensky
- When Ramensky heard the problem, he sought to rescind the contract

Court held: Demagogue's silence constituted misleading or deceptive conduct because there was a reasonable expectation that there should have been disclosure of the unusual circumstances surrounding access to the property

ACCC v Taxsmart GroupALDI v EFTPOSTraderight v BOQMiller v BMW**4. 'Misleading or deceptive'**

- Means inconsistent with the truth (*WSC v Parish HCA*)
- Objective test: is conduct "likely to mislead the public to whom the representation is directed?" → not need to show a person actually mislead (*ACCC v TPG*)
- "Conduct is misleading or deceptive or likely to mislead or deceive if it has the tendency to lead into error, if there is a sufficient causal link between the conduct and the error on the part of the person exposed to the conduct" (*ACCC v TPG*)
- Half truths may be misleading by the insufficiency of information that permits a reasonably open but erroneous conclusion to be drawn (Chief Justice Allsop)

How to assess is conduct is misleading or deceptive:

a. Ordinary and reasonable member – of the class (→ state class)Campomar v Nike

- Facts: Sports fragrances and perfumes made by the Spanish perfume maker Campomar were displayed under the name NIKE in the sports fragrances section of the department store, and next to similar Adidas products
- Judge must decide if an 'ordinary or reasonable' member of the class whom the reps are made
- In this instance, the average reasonable person would safely assume that the products were marketed by Nike

Court held: conduct was misleading

b. Dominant messageACCC v TPG (2013)

- TPG advertised an ADSL2+ broadband internet plan
- In small print the customer was required to bundle that service with another \$30 per month and pay an overall minimum fee of \$509 including a set-up fee and deposit
- Judge found the target audience to be first time users of ADSL services
- Primary judge found that, by virtue of the array of available internet option, the ordinary/reasonable consumer would not have any starting assumption as to whether TPG's offering was of a separate or bundled service → rely on the advertisement

High Court held: There was a breach of s18 and s48 of the ACL. High court decided that:

- Dominant message was important
- The qualifying information in the small print did not do enough to correct the false impression created by the dominant message
- Pecuniary penalty of \$2m

c. Significant number of hypothetical consumers to whom advertising was directed

ACCC v Turi (2013)

- Poultry advertising and packaging claimed that their chickens were “free to roam around in large barns”
- True at some stages, but as they grew older, it was impossible
- Court considered “free to roam” when applied to chickens as “largely uninhibited ability of the chickens to move around at will in an aimless manner”
- It also considered that this phrase would be so understood by a significant number of hypothetical consumers to whom the advertising were directed

Court held: claim constituted misleading a deceptive conduct (s18) and a false representation about the history of the goods s29(1)(a)

d. “Ordinary and reasonable” members of the class of prospective purchasers

ACCC v Coles (2014)

- Supermarket advertised that the bread produced in its in-store bakeries was “baked fresh” and “baked today”
- Bread had actually been partially pre-baked by a supplier (often weeks earlier in a faraway place)

Court held:

- Constituted misleading or deceptive conduct s18(1)
- S33 breached: misleading conduct regarding the manufacturing process of goods
- S29(1)(a): false or misleading representations concerning the history of goods

Court said:

- “Where conduct or representations is or are directed to members of the public at large, the conduct or representations must be judged by their effect on ‘ordinary’ or ‘reasonable’ members of the class of prospective purchasers

Action against Misleading or Deceptive conduct

1. ACCC takes action against corporations for misleading or deceptive advertising

ACCC v Turi

ACCC v Coles

ACCC v Metricon

- Likely to mislead
- Individuals who were mislead must sue to recover the damages
- Case further down

2. Competitor takes action against a competitor (to protect consumers from deception)

Campomar v Nike

McWilliams Wines v McDonald’s Systems

- McDonald’s advertised their “Big Mac” hamburgers
- McWilliam’s a wine company started advertising wines using the words “Big Mac”
- McDonald’s sought an injunction to restrain McWilliam’s from using the slogan alleging McWilliam’s constituted engaging in conduct that was misleading or deceptive or likely to mislead/deceive

Federal Court held: a case had not been made that the use of the words by McWilliams was likely to deceive/mislead → may cause confusion but would not be misled (under s18(1))

Parkdale v Puxu (1982)

- Plaintiff manufactured and sold furniture that included lounge suites and chairs in its so-called "Contour" range
- The defendant also manufactured and sold lounge suits and chairs in its "Rawhide" range → almost identical to the furniture of the plaintiff
- On close inspection various differences could be observed
- Defendant also always labelled his furniture to note they manufactured it

High Court held: defendant had not breach s18(1) of the ACL

- On the basis that potential purchasers of furniture costing substantial sums of money were able to inspect the show room furniture
- Purchasers would pay attention to detail and would not be misled by similarities in rival products

Apand v Kettle Chip Co (1994)

- In 1989, respondent began to market potato chips under the name "The Kettle Chip"
- In 1992 the appellant (Smith's Crisps), to counter market share loss began to market a new lie of potato chips under the name "Country Kettle"

Federal Court held: Had breached in s18(1)

- At the time the appellant's chips came onto the market, the name "Kettle" had obtained a secondary meaning distinctive of the respondent's product
- Appellants had engaged in passing off → breached s18(1)

3. Consumers sue corporations for misleading or deceptive conduct (often for conduct in pre-contractual negotiations)

Bevanere v LubidineuseByers v Dorotea**Misleading conduct in pre-contractual negotiations****ACCC v Metricon**

- ACCC alleged Metricon distributed more than a million advertising brochures to potential buyers
- Brochures contained representations that were misleading or deceptive and contained specific false representation in breach of s29
- Metricon admitted it engaged in the conduct in a number of ways
- Pay fined of \$800,000 plus costs

Case proves:

- Under s18: Do not have to prove that a person was actually misled → sufficient enough only "likely"
- Individuals who were induced by Metricon because of the misleading conduct must themselves sue Metricon for to recover any loss or damage. Can sue for:
 - a. Breach of contract (if the statements were contractual); and/or
 - b. Misleading conduct under the ACL s18

Examples of action taken under s18 (s52 Trade Practices Act)

eBay v Creative Festival Entertainment (scalping case)

- In an attempt to deter ticket scalping, a promoter said that all tickets resold for profit would be cancelled and the holder refused entry
- Tickets were resold on eBay

Court held: promoter had engaged in misleading or deceptive conduct because it did not have reasonable ground for representing that a ticket sold for profit would in all cases be discovered and cancelled

Knight v Beyond Properties (similar products)

- There will be no misleading or deceptive conduct if two products have the same name
- Any impression of a connection between them will be immediately averted by a comparison between the two products

Issues of Fault and Intention

General rule- s18 imposes a form of strict liability

- Do not have to show intention → only need to show action in statute law
- Need to show a causal link between conduct or damage but no need to show intention to mislead

Exclusion Clauses and s18

General rule- a party cannot directly exclude s18 (e.g. s18 does not apply to this contract)

- A contract may have a clause which puts other party on notice that he should not rely

Butcher v Lachlan Elder Real Estate (2004)

- Butcher made enquiries with a small suburban real estate agent about the auction of a property
- Agent gave them a brochure with information about the waterfront property
- Disclaimer on the brochure: "all information herein is gathered from sources we believe to be reliable. Cannot guarantee accuracy and interested persons should rely on their own enquiries"
- Butcher wanted to relocate the pool, builder who visited said it would be okay
- Butcher purchased the property through the agent, however could not relocate the pool
- Butcher sued agent alleging the agent had engaged in misleading and deceptive conduct in breach of s18 when he gave him the brochure

High Court held: while s18 imposes a strict liability, the disclaimer put purchasers on notice not to rely on the representations in the brochure

- Purchasers were intelligent investors who had the benefit of advice from experts
- Compared to agent who ran a small suburban business and did not represent that he had expertise in verifying title details of a property

Exception: if you are merely transmitting information

Yorke v Ross Lucas Pty Ltd

- Mr and Mrs Yorke bought a record business from Treasureway Stores for \$44,500
- They raised the money by way of mortgage on their home and loans at high rates of interest
- They were assured by the agent turnover was \$3,500 per week but they found on average it was \$1800

Court held: Treasureway had engaged in misleading or deceptive conduct with s18 by falsely representing the weekly turnover which induced the Yorke's to purchase it

- By Ross acting as an agent had unwittingly contravened with s18, was held to have aided or abetted
- However, it was further held the agent R, of Ross Lucas, was not personally liable under s18 since he had simply passed on the information provided by the director of Treasureway
- R lacked the necessary knowledge to form the required intent to be personally liable

Remedies for breach of s18

Main remedy is damages **s236(1)**

- May recover the amount of loss or damage caused by the misleading conduct
- Damages = difference between contract price and what you've got
- Individuals involved in the contravention liable for damages- not just corporations s2(1): page 335
 - Aided and abetted
 - Induced
 - Knowingly involved in a way in the contravention (Yorke v Lucas)

Wakefield Trucks v Lach Transport

- Appellant sold the respondent a vehicle
- During the negotiations, the appellant made representations as to the vehicle's fuel consumption that were considerably lower than its actual consumption

Court held: under s236 the respondent was "entitled to all consequential loss directly flowing from its reliance upon the representation"

- Respondent's consequential losses were the difference between the representations made by the appellant regarding fuel consumption and the vehicle's actual consumption
- Permitted recovery of the interest incurred in respect of the extra fuel costs

HTW Valuers v Astonland Pty Ltd

- A valuer advised a prospective purchaser of a shopping arcade about the local rental market
- The valuer advised that the centre under construction would not be likely to reduce rental income from the arcade
- After the new shopping centre opened, income from the arcade was greatly reduced
- The value of the arcade was reduced by the fall in rental income

High Court held: the measure of damaged under 236 was the difference between the purchase price and the true value of the arcade at the date of the sale, along with consequential losses

236(1): loss of an opportunity to obtain a commercial advantage or benefit is “loss of damage” for which damages are recoverable for misleading or deceptive conduct in contravention of s18

- The value of a lost commercial opportunity is assessed by reference to possibilities and probability, so this value generally cannot be assessed with precision (*CAJ Investments Pty Ltd v Lourandos*)

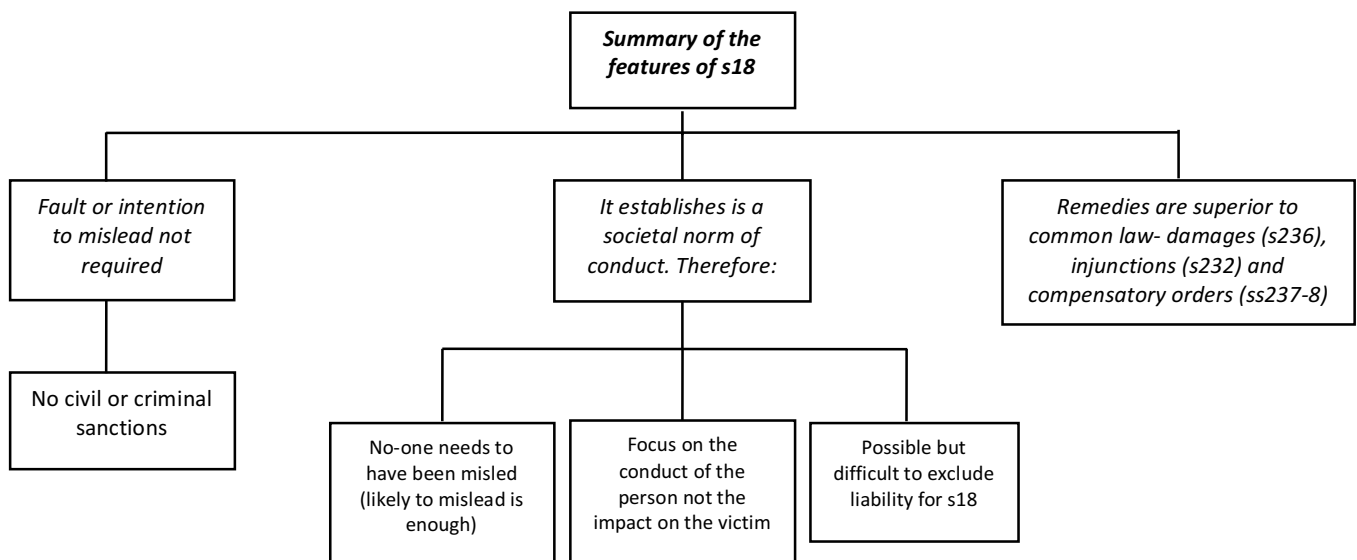
To claim damages → plaintiff does not have to show intention to mislead

FOR ACCC remedy = pecuniary penalties s224(1)

- ACCC v TPG under s18 and s29

Remedies for Unfair Practices

- Criminal penalty: ss151-168
- Pecuniary penalty: s224(1)
- Injunction: s232
- Damages: s236
- Other orders



2. Unconscionable Conduct

Refers to conduct that is more than simply unfair or harsh- it must have an element of “bad conscience”

- Main case: *NAB v Amadio* and *Taylor v Johnson*
- Since Amadio, there have been legislative initiatives
- Ss20-22 of ACL deals with unconscionable conduct
- ACCC v Lux: “The word unconscionable is not a term of art. It is not limited to traditional equitable or common law notions of unconscionability”

ACL prohibits persons from engaging in unconscionable conduct. There are two categories:

i. Under the unwritten law (or common law): s20

ACCC v CG Berbatis Holdings Pty Ltd

- A shopping centre tenant was engaging in litigation with the centres owners
- Tenant wished to assign their lease as part of the sale of their business
- Prospective buyer provided a new lease could be negotiated
- Lease was about to expire and did not contain an option to renew
- Centre owners were willing to agree to a new lease provided the tenant withdrew from the litigation
- ACCC considered to be unconscionable was the exploitation of the weaker bargaining position in which the lessees found themselves

High Court held: the centre owner’s conduct did not constitute unconscionable conduct under s20 of ACL

- A person is not at a special disadvantage simply because of inequality of bargaining power
- Good conscience does not require parties to contractual negotiations to forfeit their advantages or neglect their own interests
- Taking advantage of a superior bargaining position does not constitute unconscientious exploitation of a special advantage

ACCC v Samton Holdings

- ACCC took action against the lessors, Samton Holdings alleging that they engaged in unconscionable conduct contrary to what is now s20
- Purchasers took an assignment of a lease over the premises but failed to exercise an option to renew the lease within the time permitted
- Lessors demanded a payment of \$70,000 from the purchasers for the privilege to renew the lease

Court held: purchasers were not at a “special” disadvantage

- Court said that unconscionable conduct always has to be at the extreme end of the scale of unreasonable conduct
- The conduct although avaricious and opportunistic, was not at the extreme end of the scale

ii. Unconscionable conduct in connection with goods or services: s21

Meaning of unconscionable not defined but:

- **S22(1)(a)-(l)** lists the matters to consider

ACCC v Lux Distributors Pty Ltd (2013)

- Employee of Lux, using the existing customer database rang potential customers and followed a script
- Offered free maintenance check on their existing vacuum cleaner
- Gained entry to the homes of 5 elderly women and tried to sell them new models
- At trial: Jessup J found that is not sufficient that conduct is objectively unfair, unjust, wrong or unreasonable

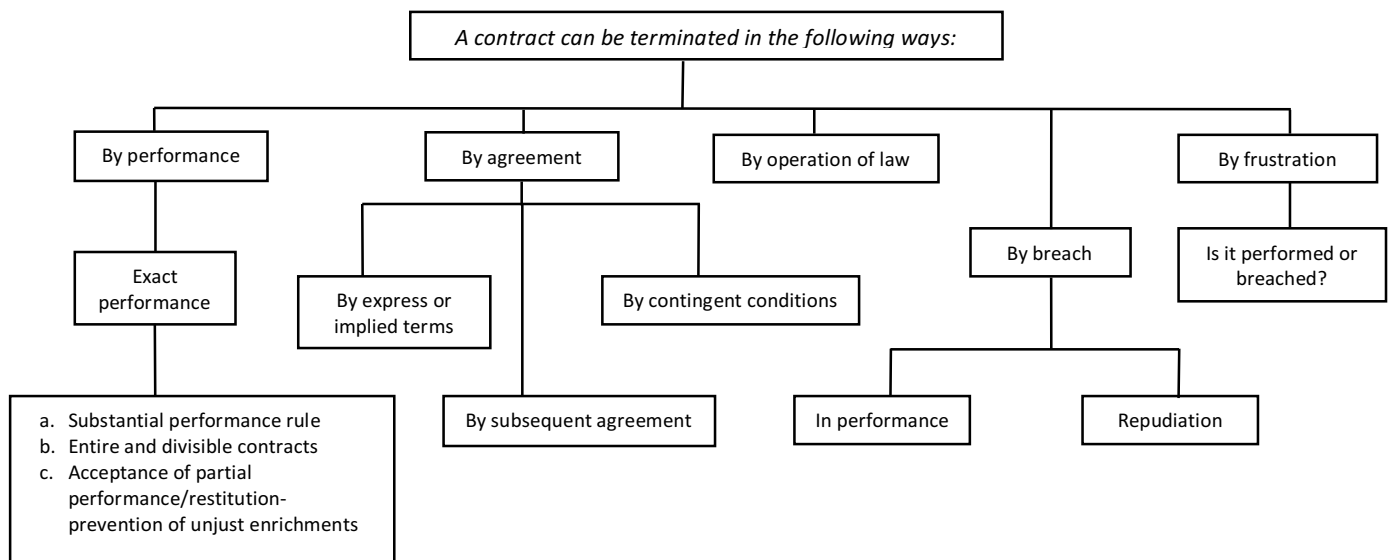
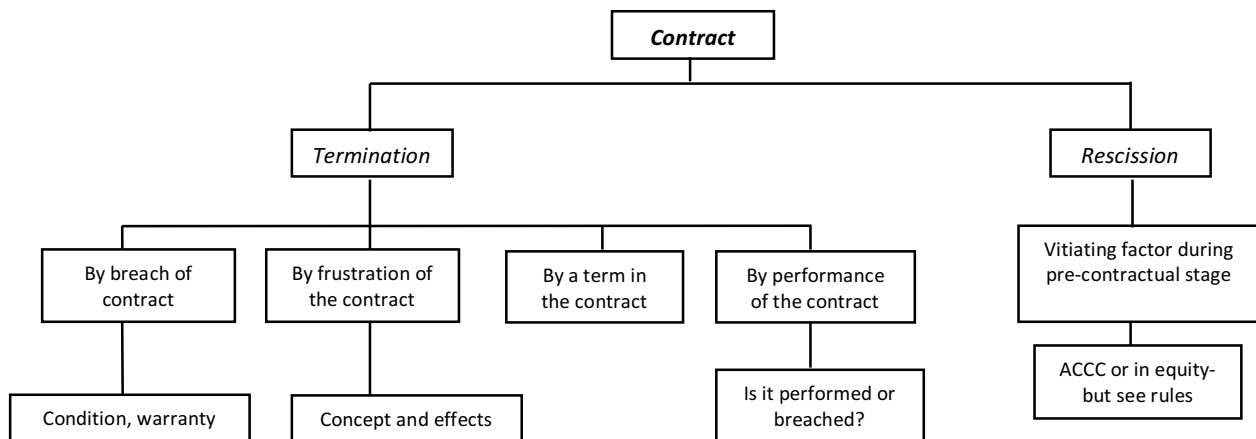
Full Court held: the seller’s deception about their purpose in entering the homes of the women constituted unconscionable conduct

- Focus on the nature of the respondent’s conduct rather than the consumer’s response

Remedies

- Pecuniary penalty
- Damages
- Injunction

7. Termination



i. Termination by performance

- Main obligation of the parties is to perform fully and exactly all their obligations → when this is done the contract is terminated by performance
- If obligations are not performed exactly = there is a breach

Cutter v Powell (1795)

- Cutter agreed to work for wages on a merchant ship and would receive a sum of money once the ship reached the Port
- Cutter carried out his duties until he died before arriving to the Port
- Widow claimed wages → Powell refused to pay for the part of the journey he had performed

Court held: he was only entitled to claim once his entire obligation was fulfilled.

- Risk of non-completion was allocated to Cutter → if he did complete the journey he would receive a handsome wage, if not he would receive nothing

Courts have developed:

a. Entire and Divisible contracts

<i>Entire contract</i>	Exact performance of the whole contract is required before the other party's obligations are triggered (<u>Cutter v Powell</u>)
<i>Divisible contract</i>	Either expressly or impliedly, that performance by one party (e.g. payment) is due after the other has performed particular stages of the contract (normally most construction) <u>Steele v Tardini (1946)</u> - Plaintiffs agreed to split 1500 tons of wood at agreed lengths per ton however the timber was not cut to the correct length - Tardianis sued for the contract price but Steele refused to pay anything High court held: the contract was "infinitely divisible" and Steele was obliged to pay for any part of the divisible contract that was substantially performed (however did not meet substantial performance test)

- As a general rule, the courts regard contracts as not divisible (Re Hall & Barker 1878)
- It is a question of fact in each case

b. Substantial performance rule

- Exact performance is subject to considerable qualification
- Unless exact performance is a condition of the contract, contracting parties who "substantially perform" their obligations will be able to claim the contract price
- "substantial performance" depends upon all circumstances including: nature of the contract and defects and the relative cost involved in rectifying or completing the contract

Hoenig v Isaacs (1952)

- An interior decorator was contracted to decorate and furnish the flat and terms of payment were "net cash as the work proceeds and balance on completion". There were two payments made
- Some time later decorator advised the work had been completed and claimed the balance
- Hoenig refused to pay the balance alleging faulty design and workmanship → argued the contract had not been exactly or substantially performed (only 55 pounds to bring up to required amount)

Court held: accepted this as an entire contract but, as there had been substantial performance decorator was entitled to recover the contract price less the amount required to finish it exactly

Bolton v Mahadeva (1972)

- Plaintiff agreed to install central heating in the defendant house
- The heating was installed but there were defects and there was a cost to remedy them
- Issue: whether the defects in workmanship were of such a character and amount that the plaintiff could not be said to have substantially performed his contract

Court held: plaintiff could not recover anything- central heating that did not heat the house adequately etc.

c. Acceptance of partial performance

- If the innocent party voluntarily accepts the partial performance of the other party
- If this happens, the parties have effectively abandoned the original contract and substituted a new one under which the innocent party agreed to accept partial performance on agreed terms
- Sumpter: if innocent party accepts part performance (e.g. 2/3rds of the good) it must pay a reasonable price or there is an unjust enrichment
- Bolton: no requirement to pay for part performance if there is no choice but to accept

Sumpter v Hedges (1898)

- Sumpter agreed to build Hedges two houses for a lump sum (although some progress payments were made throughout)
- When Sumpter ran out of money he abandoned the contract → Hedges then used the material left by Sumpter to finish the project
- Sumpter wanted compensation for the value of the work he had carried out and material used

Court held: Sumpter was not entitled to compensation because he had abandoned the project, not was he entitled to further payment on the basis of part performance → entire contract had been abandoned and no fresh contract entered into

d. Time clauses

- As a general rule performance should take place within the time specified in the contract
- If none is specified, within a reasonable time taking into account circumstances
- If time frame has been stipulated and not precisely kept, damages will be the usual remedy (not termination or breach of condition)
- Usually they are warranties unless time is “of the essence” in which case they are condition which enables termination (*Foran v Wight*)

ii. Termination by agreement**Termination under the original contract**

<i>Express power to terminate</i>	A contract may be terminated through the happening of an event as provided for in the original agreement itself (<i>Pan Foods v ANZ Banking Group Ltd 2000</i>) e.g. fixed term lease- after x years lease is automatically terminated
<i>Implied power to terminate</i>	Where a contract does not contain a provision as to its duration, the court may imply a right to terminate on giving reasonable notice to the other party (<i>Crawford Fitting v Sydney Valve and Fittings Pty Ltd 1988</i>)

Termination by subsequent agreement

- A further agreement to terminate the contract
- A subsequent agreement must be valid in order to modify a prior contract
- A void agreement cannot rescind or vary a valid earlier contract (*Coghlan v Pyoanee Pty Ltd 2003*)

A subsequent agreement may be:

a. To cancel the original contract; or

<i>Mutual termination</i>	Both parties agree to cancel the original contract → can only operate where there is still something to be done by each party under the original contract (promise to abandon rights is consideration for the promise)
<i>Release</i>	If one party has completed their undertaking and the other has not → agreement under seal to release the defaulting party or give further consideration for the release (cannot be consideration that is legally binding)
<i>Accord and satisfaction</i>	Where the release involves giving further consideration, the principle is often referred to as that of accord and satisfaction

b. To vary the terms of the original contract through substitution

A new agreement may be made providing for an alteration in the terms of the original contract so that a new contract is substituted for an old one

- If a new contract is made in order to discharge an existing one the rule is that the new contract need not necessarily be in the same form as the original one (*Morris v Baron & Co 1918*)
i.e. a simple contract may be terminated by word of mouth

Contingent conditions

The parties to a contract may make the performance of their contract conditional upon the occurrence of a specified event or an event not occurring

a. Condition precedent

Unless event occurs, no contract comes into existence (or at least there is no obligation to perform the contract)

A distinction must be made between:

- i. A condition precedent to the formation or existence of a contract
- ii. A condition precedent to the performance of a party's obligations under a contract

Sandra Investment Pty Ltd v Booth (1983)

- A contract for the sale of land contained a clause... "if in the event the approval is not obtained, the purchaser may at their option cancel the contract"
- Approval was not obtained, purchaser waived the condition but vendor refused to sell

Court held: the approval was expressed in the form of a condition precedent to the obligation to complete the contract and not as a condition to the formation of the contract → purchaser allowed to specific performance of the contract

Whittle v Parnell Mogas Pty Ltd (2006)

- Involve negotiations for the lease of a service station where the respondents offer stated the appellant was to provide an environmental site assessment
- This was not done

Court held: there was no binding agreement, respondent not prepared to enter until assessment was provided → assessment was a condition precedent to the formation of a contract

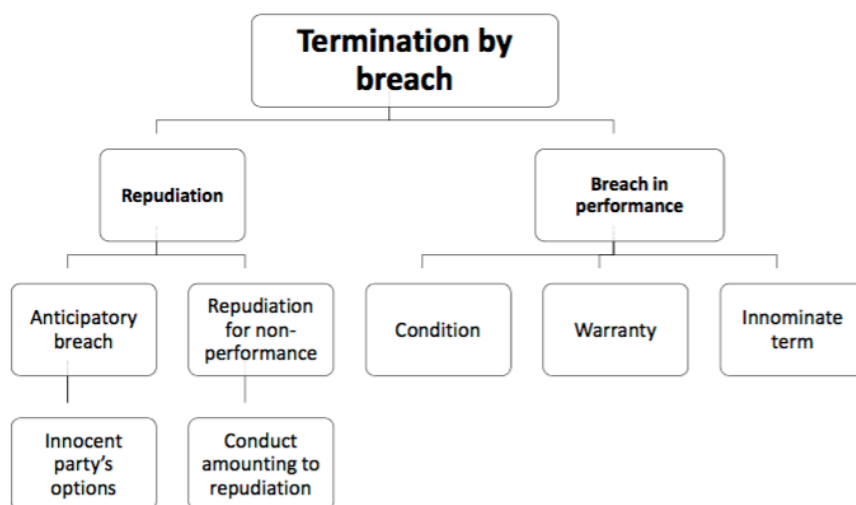
b. Condition subsequent

If an event occurs the contract is terminated (e.g. if Metro fails to meet punctuality targets)

- A condition contained in a contract upon the happening of which at a subsequent time the contract will be terminated
- Obligation is immediately binding but comes to an end should the specified event occur
- Geipel v Smith (1872)

iii. Termination by breach

A breach of contract can occur in various ways, not all of which will give the innocent party the right to terminate the contract



a. Repudiation

One party repudiates the whole contract (or remainder of contract) indicating by word or conduct that he will not or cannot completely it

- An innocent party has the right to terminate the contract where the other party repudiates their obligations under the contract → an absence of willingness/ability to perform their obligation under the contract
- It is irrelevant that the party repudiating believed that their action was justified under the contract (*Sopov v Kane Construction Pty Ltd 2007*)

i. Anticipatory breach of contract

- Where a contract is entirely unperformed on both sides- where the time for performance has not yet arrived and one party repudiates the contract → the other party can treat the contract as terminated → can sue immediately for damages such as breach
- The contract must be entirely repudiated
- The innocent party may either elect to accept the breach and terminate or keep the contract “on foot”
- If anticipatory breach is not accepted in time, it may become an actual breach

Remedies

- Innocent elects to terminate → sue for damages immediately
- It can wait for the contract date and sue for actual losses sustained

Foran v Wight (1989)

- Foran had a contract with Wight to purchase land
- Under a term in the contract, the vendors were required to register a right of way prior to settlement
- Two days before settlement they notified the purchasers that they had not been able to register the right of way
- Purchasers did not terminate at that time (for the anticipatory breach) but as a result did not pursue their application for finance and tender the balance at settlement
- 2 days later they terminated the contract (for actual breach) and sought a refund of the deposit
- Vendors refused arguing that the termination notice was not valid because purchasers had not put themselves in a position to be ready to settle on the due date

Court held: the vendors statement that they would be able to perform a condition precedent entitled the purchasers to terminate (for anticipatory or actual breach) and released them for their dependent obligation to be ready and willing to settle on the due date

ii. Conduct amounting to repudiation

Party unwilling or unable to perform the contract (*Laurinda, Progressive Mailing House*)

- Where a party expressly states that they are unwilling or unable to perform the contract
- In absence of an express statement, a party's words or conduct may indicate that they are repudiating
- A party may repudiate a contract by putting it out of their power to perform the contract (e.g. seller of an antique car sells the car to a third person → original buyer can treat seller as having repudiated)

Repudiation is determined by an **objective test** (concerned with the conduct of the repudiating party not their subjective state of mind)

Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989)

- Capalaba agreed to lease a shop to Laurinda for six years and under the contract Capalaba agreed to do what was necessary to put the lease into registrable form etc.
- Laurinda asked to see the lease twice the year later but did not receive → Laurinda terminated the lease arguing that the inordinate delay in registration amounted to a repudiation of the lease

High court: Agreed that Capalaba's conduct was repudiatory because it showed an intention to perform the contract in a manner that was substantially inconsistent with its obligations → Laurinda had the right to terminate

Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985)

- High court considered whether a lessee's conduct amounted to a repudiation of the lease
- Lessee had committed a number of breaches including failure to pay rent
- Although failure to pay rent would not on its own be enough to repudiate → the cumulative effect of the breaches amounted to a repudiation → lessor could terminate

Held: objective test- repudiating party's subjective state of mind

Effect of repudiation

Repudiation gives to the other party to the contract an option either to:

- Ignore the breach and insist on performance when due
- Accept the repudiation and treat themselves as discharged from any further obligation under the contract → can immediately sue for damages

If the innocent party does not treat themselves as discharged:

- Contract remains and continues for the benefit of both parties
- Innocent party remains subject to all their obligation
- Defaulting party can complete and may take advantage of any intervening circumstances that would entitle them to decline/complete it (*Avery v Bowen 1855*)

b. Breach in fulfilling terms of the contract

Not all breaches in the performance give the innocent party the right to terminate the contract

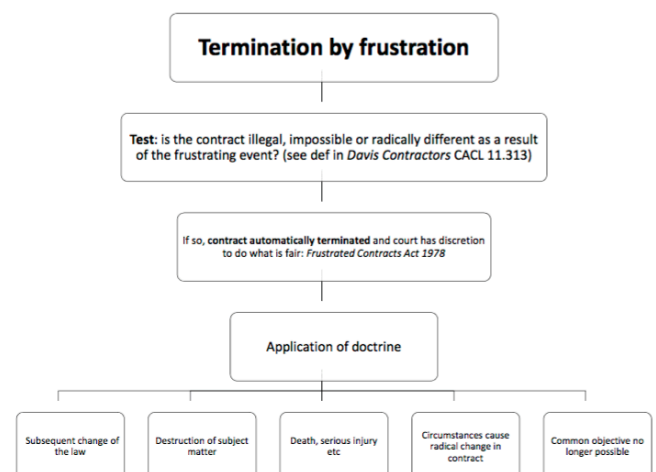
- Condition: only a breach of a condition can result in termination
- Warranty: allows innocent party to sue for damages
- Innominate term: depends on seriousness and effects of the breach (*Hongkong Fir Shipping*)

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007)

- **Held:** There are 2 relevant circumstances in which a breach of contract by one party may entitle the other to terminate.
 - Where the obligation with which there had been a failure to comply has been agreed by contracting parties to be essential – condition
 - Where there has been a sufficiently serious breach of non-essential term... *'Decision in the appeal rests not upon the ground of the breach of an essential obligation, but upon application of the doctrine respecting the immediate terms'*

iv. Termination by frustration

- Parties may trigger the doctrine only where some unforeseen event occurs which results in a fundamentally different situation from that contemplated at the time of entering into the contract
- Frustration = matter of timing → as opposed to a mistake (*Commonwealth v McRae*)
- For an event to be frustrating it must occur after the contract was made, for mistake to be operative it must occur prior to the contract being formed



Frustration will only occur when the following conditions have been met:

- a. There must be an event that occurs after the contract has been made
- b. The event causes a fundamental change to the nature of the contract (and the obligations)
- c. The event was not the fault of either party
- d. The event was not foreseeable by either party; so that
- e. It would be unfair to enforce the contract under the changed circumstances

Application of the Doctrine

➤ **Supervening illegality**

Where a subsequent change in the law renders further performance illegal → contract will be terminated

- Ertel Bieber & Co v Rio Tinto Co Ltd (1918)

➤ **Death or illness**

Where contract is one of personal service and the party to perform dies or suffer from serious disability or illness → termination

- Robinson v Davidson (1871)

➤ **Destruction of subject matter**

Performance is rendered impossible by the physical destruction of the subject matter before performance falls due → termination

- Taylor v Caldwell 1863: concert hall burned down before performance

➤ **Common objective no longer possible**

When the happening of one event can be regarded as the real basis of the contract, and if that fails to eventuate without the fault of either party → discharged

- Krell v Henry (1903): sole premise of booking an apartment was to see coronation, King was sick = frustrated as performance will be excused when
 - a. The purpose of the contract is frustrated by an unforeseeable supervening event; and
 - b. The purpose was within the contemplation of both parties when the contract was made
- Herne Bay Steamboat Co v Hutton (1903): naval review not the sole purpose → not frustrated

➤ **Other supervening factors resulting in “radical difference”**

The basis of the doctrine is that performance, as a result of an unforeseen event that occurred after the contract was made, is radically different from what the parties intended when they entered into the contract

- Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982): contract was frustrated

Changes in circumstances not amounting to frustration:

Meriton Apartments Pty Ltd v McLaurin & Tait Pty Ltd (1976)

- An environmentally concerned building union imposed a “work ban” on land owned by the defendants
- Land could not be developed in the way envisaged and workers were banned from working on the site
- The ban was placed on the site after it had been sold but before settlement
- Purchaser claimed the contract was frustrated

Held: the fact work bans had been placed on the site not, without more, a frustrating event.

- At the time the contract was entered into, the court held that the risk of such bans being placed had shifted to the purchaser

Scanlon's New Neon Ltd v Tooheys Ltd

- Appellants entered into a number of contract for the installation of neon advertising signs
- Agreed to hire the signs for a period & pay the rentals whether or not the signs were used or operated
- Signs were conspicuous even when not illuminated
- Prohibition on lighting by the State, appellants argued it was a frustration

Court held: respondents were liable → no ground for concluding the lighting of the signs was the basis on which the parties had contracted

Limitations of the Doctrine of Frustration

- The contract itself covers the event

If parties make specific provision for the event in the contract (e.g. inserting a force majeure clause that covers the event) → will prevent frustration

- Claude Neon Ltd v Hardie (1970)

- Event must not have been one that parties could reasonably foresee

- oOh! Media Roadside Pty Ltd v Diamond Wheels Pty Ltd (2011)

- Fault or self-induced frustration

The event must not have been caused by the acts or omission of the party seeking to rely on the frustration. A party should not be able to plead frustration in respect of an event that he/she could have prevented

- J Lauritzen AS v Wijsmuller BV (1990)

Effect of Frustration

At common law the effects were:

- When frustration occurs → automatic termination (Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd 1942)
- The effect is to bring the whole contract to an end not just some part of it (Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd 1975)
- The future obligation are discharged, but rights and liabilities that have already accrued are not discharged (Renahan v Leeuwin Ocean Adventure Foundation Ltd 2006)

Frustrated Contracts Act (VIC) ss37-38: court has discretion to fairly distribute the loss

OTHER:

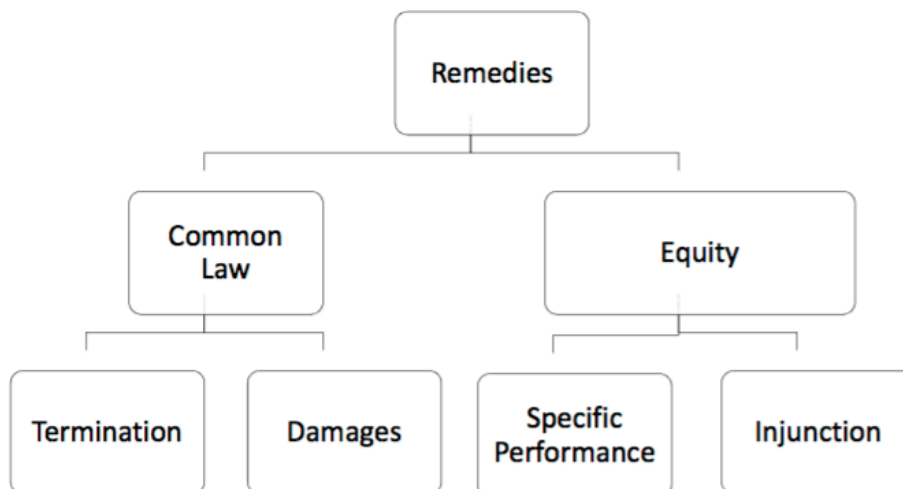
The innominate term can also justify termination of the contract where such a breach deprives the injured party of a substantial part of the benefit to which they are entitled under the contract (Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd 2007)

Thus the High Court recognised three situations that provided a right to terminate:

- i. Repudiation- either anticipatory or when the contract is being performed
- ii. Breach: in performance of a condition
- iii. Breach of an innominate term (or non-essential term) that has the effect of denying the innocent party of a substantial part of the benefit of the contract

8. Remedies

Remedies where the contract is terminated for breach



Where a breach of a fundamental term (condition) has occurred OR a party has repudiated the contract

- Innocent party can elect to terminate the contract
- If innocent party does not terminate for the breach, contract comes to an end and parties are released from obligation, the innocent party can seek damages for the losses that were caused by the breach

Remedies where the contract is not terminated

Occurs in two circumstances

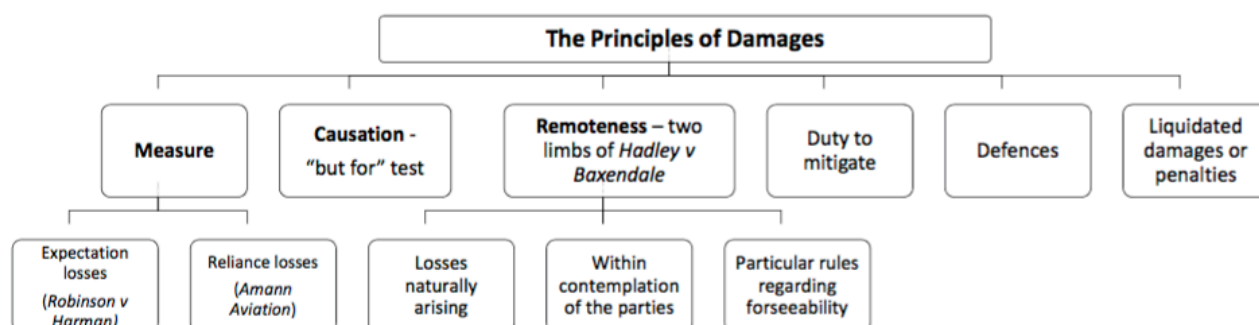
- i. Where a breach of a warranty or innominate term (unlike in *Koompahtoo*) does not deprive the other party of substantial benefit
- ii. The breach was of a condition but the innocent party has opted not to terminate

In these situations:

- Contract remains valid and both parties must perform their obligations
- Innocent party can sue for damages for the breach

**** Any breach of an obligation under a contract by one party entitles the innocent party to seek compensation by way of an award of damages for the loss or damage caused by the breach****

Damages



- Monetary compensation = basic common law remedy for a breach
- To compensate the innocent party for the loss

Three principles applying to the assessment of damages

1. The measure of damages

General principle underlying an award of damages is that the damages for breach of contract are awarded to place the innocent party, as far as money can do so, in the same position as they would be in if the contract had been performed (Robinson v Harman 1848)

The following rules/propositions were established in Commonwealth v Amann Aviation (1991) and Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009):

- **Expectation damages**
 - Most cases the plaintiff is compensated for the loss of benefits (usually loss of profits) that it expected to receive in exchange of their own promise
 - Onus on plaintiff to prove loss
- **Reliance damages**
 - Where it is not possible for a plaintiff to demonstrate whether or to what extent the performance of the contract would have resulted in profit
 - Can seek to recover the expenses reasonably incurred in reliance on the defendant's promise to perform its obligations = damages for wasted expenditure
- **Equivalent amount**
 - If expenditure would not have been fully recovered had the contract been performed plaintiff is only entitled to damages for the equivalent amount to which would have been earned if the contract had been performed
 - The onus of proving the plaintiff's expenditure would not have been recouped even if the contract had been performed is on the defendant
- **Cost of reinstatement (Tabcorp)**
 - Where a breach of contract has caused property damage the proper measure of assessing of damages is the cost of reinstatement rather than the diminution in the value of property
 - Reinstatement damages but the innocent party in the position it would have been if the contract had been performed but diminution in value damages does not

Commonwealth v Amann Aviation (1991)

- AA entered into 3yr contract with C to conduct coastal surveillance
- On day performance was to begin only 7/11 planes were ready
- C terminated for repudiatory breach
- However C did not terminated according to procedure set out in contract
- A argued that Cs wrongful termination was itself a repudiation by C which allowed them to terminate and sue for damages
- Measure of damages

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009)

2. Causation principle: the damage must have been caused by the breach = BUT FOR TEST

The innocent party must establish that the damages it seeks were "caused" by the breach → plaintiff must show that '**but for**' the breach the loss would not have occurred

- Courts use the 'but for' test: the question is "whether a particular act or omission... can fairly and properly be considered a cause of the accident" (Fitzgerald v Penn 1945)

Alexander v Cambridge Credit

- Audit contract breached – auditor careless (breach of implied warranty that service would be carried out with reasonable care)
- P suffered loss – but D argued it was government policy, the economic crisis and P's own negligence that caused the loss, not the breach of implied warranty

3. *Remoteness principle: the damage must not be too remote from the breach = REASONABLE FORESEEABILITY*

The loss must be reasonably foreseeable at the time of contracting

- Common law considered that it would be neither just nor practicable for the party in breach to be liable for every loss that might have been caused by the breach
- Fundamental principle is that damages are not recoverable for losses that are too remote → that is they are not reasonably foreseeable
- The loss is within either of the two limbs (a or b) of *Hadley v Baxendale*

Reasonable foreseeability test (*Hadley v Baxendale* 1854)

- a. Losses are those that arise naturally from the breach; or
- b. That are in the reasonable contemplation of the parties at the time the contract is made as the probable result of a breach

***Hadley v Baxendale* (1854)**

- Remoteness principle
- D took 7 days to deliver instead of 2 which prevented P from working their steel mill for 5 days – lost profits
- Held: Damages were those fairly and reasonably considered to have arisen naturally from breach itself, or such as may be reasonably supposed to have been in the contemplation of both parties at time contract was made
- Loss of profits did not arise naturally from delay – fact of sending shaft for repair did not mean mill would likely be unable to operate until its return

Held: In special circumstances where known to both parties

- Damage must have been caused by the breach and must not be too remote from the breach

***Day v O'Leary* (1992)**

- Appellants work was so defective floor had to be replaced and considerable delays in completion of work
- Respondents were entitled to damages for cost of replacing the floor
- However claim for loss of rent was rejected since the appellants had not been informed that res. Intended to let the house

Held: the loss neither flowed naturally from the breach nor was one which should have been reasonably been contemplated by appellant

- Losses arising naturally from breach

Duty to mitigate the loss (*Payzu v Saunders*)

- The law imposes a duty upon a person claiming damages to take all reasonable steps to mitigate = minimise the loss caused by the breach
- A person who fails to mitigate their loss cannot recover any part of the loss that is attributable to their failure to do so
- The burden of proving that there has been a failure to mitigate the loss rests upon the person from whom the damages are claimed
- A person suing for damages is only required to act reasonably in mitigating their loss and is not required to take undue steps- particularly so where the plaintiff's financial difficulties were primarily the consequence of the defendant's breach of contract (*Burns v MAN Automotive Pty Ltd* 1986)- pg 269

***Payzu v Saunders* (1919)**

- Buyers should have minimized their losses by accepting seller's offer and that the damages recoverable were not to be measured by difference between contract and market price but by the loss that would have been suffered had the second offer been accepted
- Duty to mitigate loss
- Burden rests upon person from whom the damages are claimed

Particular Rules

1. Difficulty to quantifying damages no bar to recovery

- It may be difficult to assess loss resulting from the breach but this does not relieve a court from the responsibility of estimating them as best as they can (*Placer Pty Ltd v Thiess Contractors Pty Ltd* 2003D)
- Damages must be awarded for the loss of a chance or an opportunity to secure a benefit where there is a legal obligation to provide the chance or opportunity (i.e. *Commonwealth v Amann contract renewal*)

Howe v Teefy (1927)

- D leased racehorse to P for 3 years
- 3 months later, in breach, D retook possession of horse
- P bought an action claiming damages for loss of profits he would have made from his bets on the horse
- D appealed claiming prospective winnings from bets were too remote to be recovered as damages, no evidence on which jury could assess such winnings

Held: P had been deprived of his right to make what profit he could from use of horse and that right was capable of assessment in monetary terms

- Difficulty of quantifying damages no bar to recovery
- 'If a plaintiff has been deprived of something with monetary value, a jury is not relieved from assessing the loss merely because the calculation is a difficult one or because circumstances do not admit of the damages being assessed with certainty'*

Damages not usually recoverable for disappointment or distress

- The general rule is that damages are not recoverable for disappointment, distress, injured feelings or mere inconvenience arising from a breach of contract (*Baltic Shipping Co v Dillon* 1993)
- Exception: damages are recoverable for distress or disappointment arising from a breach of an express or implied term that the promisor will provide the promisee with pleasure, enjoyment or personal protection, or where the distress or disappointment is consequent upon the suffering of physical injury or physical inconvenience (*Jarvis v Swans Tours*)

Falko v James McEwan & Co Ltd (1977)

- Contract was an ordinary commercial contract for breach of which the P was not entitled to recover the damages for inconvenience and mental distress
- Measure of damages was limited to cost involved in remedying the breach to full install the heater
- Damages not usually recoverable for disappointment or distress- *Baltic Shipping Co*

Jarvis v Swans Tours Ltd (1973)- exception

- J booked holiday through ST
- Brochures were tantalizing leading J to believe he would be part of a large party with skiing and social activities
- Found that only 13 guests in week 1 and only person in week 2 – skiing was far away

Held: Court awarded damages, a part of which calculated to compensate Jarvis for the disappointment he felt

- Exception to distress/disappointment → when arising from breach of express or implied term that promisor will provide promisee with pleasure, enjoyment or personal protection → or when distress or disappointment is consequent upon the suffering of physical injury or inconvenience

Baltic Shipping Co v Dillion (1993)

- Dillon paid in advance for a 14 day south pacific cruise
- Object of contract was to provide an enjoyable and relaxing holiday – implied term
- After 8 days – cruise hit rock and sank

Held: Dillon was awarded damages for disappointment and distress – but was not entitled to recover whole cruise fair since there was no failure in first 8 days

- To award full restitution would have been to give excessive compensation

2. Ordinary, nominal and exemplary damages

<i>Ordinary damages</i>	Damages flowing from the breach of contract to compensate the innocent party for the actual loss suffered → most important kind of damages
<i>Nominal damages</i>	Where there has been a breach and plaintiff is unable to establish that they have suffered any actual loss ➤ Only nominal damages will be award → token sum of say \$1 <u>Luna Park NS Ltd v Tramways Advertising Pty Ltd (1938)</u>
<i>Exemplary damages</i>	Not only awarded as a means of compensation but to punish the party in default in view of the intentional nature of the breach (only in exceptional circumstances)

Penalties and liquidated damages

- Normally damages are “unliquidated” - no estimate of losses in the contract itself → left for the court to determine according to accepted principles
- Possible for the contracting parties to put in a clause that specifies the amount of damage = “liquidated”
- The damages in clause will be enforced provided it is a genuine pre-estimate of the loss and is not a ‘penalty’
- If the amount stated is held to be a penalty, then only the actual loss sustained can be recovered
- If the sum named is held to be liquidated damages, then that sum is recoverable whether it exceeds or is less than the actual loss

O’Dea v Allstates Leasing System (WA) Pty Ltd (1983)

Application of doctrine of penalties

Andrews v Australia and New Zealand Banking Group Ltd (2012)

Equitable Remedies

1. *Specific performance*

General principle: common law favours awards of damages and will only order specific performance where damages are inadequate compensation (unique goods/land)

- Requires the party to perform the obligations under the contract
- Entirely within the discretion of the court

Will not be granted in the following cases:

- Where damages are an adequate remedy
- Where the contract is for personal services
- Where the contract would require constant supervision by the court (*Ryan v Mutual Tontine*)
- Where the order is not mutually available to both parties

Ryan v Mutual Tontine Westminster Chambers Association

- Not ordered where constant supervision required to ensure compliance
- Agreed to provide a porter 'constantly in attendance'
- Porter left for his other job for several hours during which his duties were performed by other persons

Held: Court could not guarantee by its order that the porter remain in constant attendance without constant supervision – no specific performance

2. *Injunction*

An order restraining a person from doing a wrongful act (breaching a contract) or compelling someone to do something (perform a contract)

- Court cannot order to compel someone to do something for which the court would not have ordered to do by decree of specific performance
- IF the injunction sought would not necessarily have the effect of forcing the defendant to perform their contract for personal services
 - an injunction may be granted if it is necessary to protect the plaintiff from negative consequences flowing from the defendant's conducts in breaching the contract
 - Example: where the defendant proposes to work with a competitor of the plaintiff
 - *Warner Bros Pictures Inc v Nelson (1937)*
- Discretionary remedy and is likely to be refused where the plaintiff has been guilty of delay or is in breach of their obligation under the contract
- Will not be granted where damages is an adequate remedy

9. Torts: Negligence

Introduction to torts

- The Law of Tort is concerned with minimum standards of conduct expected of people
- The rights of individuals to expect certain conduct are conferred by the law- unlike contracts where the rights are largely determined by the agreement between the parties
- Aim: protection of person, property and economic interests from damage caused by another person's failure to take reasonable care
- Tort = a civil wrong: law of torts is concerned with providing a remedy for loss caused by an illegitimate act or omission
- Tort and crime: can be same acts but different parties, different procedures, different consequences
- Tort and contract: both civil law/private actions but tort is fundamentally different because it is about rights and duties imposed by law not about specific agreements

Tort of Negligence

Scope of the tort

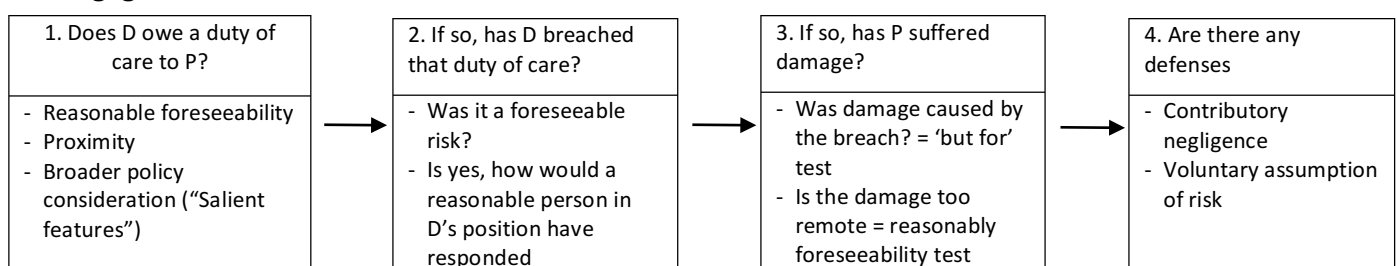
Emerged as an independent tort following the landmark decision of the House of Lords in Donoghue v Stevenson

- Negligence does not involve a specific form of conduct
- Damages are now recoverable not only for the negligent infliction of physical and psychological injury but for economic loss
- Tort of negligence is about finding fault → fault is the basis of a negligence action
- Was largely a common law creation

Statute Law

- Common law principles reformed by statute in 2002- Victoria: Wrongs Act (NSW- Civil Liability Act)
- Wrongs act: s48(1)(2)
- Effect of statute has been to limit the scope of potential liability for negligence by:
 - Modifying common law principles (duty/breach/damage)
 - Restricting plaintiff's right to recover in particular categories (e.g. professional/volunteers)
 - Placing cap on general or non-economic damages for loss of future earnings
- Despite statutory reforms, principles remain the same and plaintiffs still have to prove duty, breach and damage

Negligence Criteria



The defendant in an action based on negligence will only be liable if the plaintiff can prove:

- Duty of care:** The defendant owed the plaintiff a duty of care
- Breach:** The defendant was in breach of this duty of care
- Causation:** The defendant's breach of duty was the cause of the plaintiff's loss
- Remoteness:** The damage suffered by the plaintiff was not too remote

There are two other considerations:

- Whether either of the two defences or mitigating factors to a negligence claim are relevant (contributory negligence and voluntary assumption of risk)
- Whether the civil liability reforms are relevant

1. Duty of Care

The duty of care in three areas:

- a. Liability for psychological harm
- b. Liability for omissions: liability for failing to act
- c. Liability in cases of 'pure' economic loss (no personal or property damage just money)

Threshold for a duty of care (as established in *Donoghue v Stevenson* and others)

i. Reasonable foreseeability of harm test

- It was reasonably foreseeable to defendant that someone may be injured by their actions or omissions
- Lord Atkin: "avoid acts or omissions which you can reasonably foresee would be likely to injure (your neighbour)"
- Foreseeability of harm emerged as the threshold requirement for a negligence action (not enough, must use in conjunction with neighbour test)
- Would a reasonable person in the position of the defendant have foreseen as not far-fetched or fanciful that the act or omission of the defendant would be likely to cause harm to a class of people which includes the plaintiff?
- Reasonable foreseeability is the touchstone for a duty to exist but the High Court of Australia has said it alone is not enough because in hindsight a reasonable person may say anything is foreseeable
- Gleeson CJ (in *Tame v NSW*): "'Reasonable foreseeability' test must be applied with due regard to the... question whether it is reasonable to require a person to have in contemplation the risk of injury that eventuated"

In *Tame v NSW*, HCA affirmed that reasonable foreseeability is a composite test involving an

- a. *Issue of fact*: is it foreseeable that if D does not exercise reasonable care P would be injured?
- b. *Issue of value*: is it reasonable to say that a duty of care is owed by the defendant to the plaintiff?

The determination involved an assessment of community standards → would the community regard it as reasonable for a duty of care to exist

ii. Neighbour test (proximity)

- He or she belonged to the class of people that the defendant should have regarded as being 'at risk' of being injured or suffering loss
- Lord Atkin defines neighbours as: "persons who are so closely and directly affected by my act that I ought to reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question"
- A person is responsible for his or her careless conduct if he or she did foresee or should have foreseen the consequences to the plaintiff or the class of persons to whom the plaintiff belonged

Proximity

- Physical: closeness in the sense of space and time (*Jaensch v Coffey*)
- Circumstantial: closeness arising from the circumstances of the case or relationship between parties
- Causal: a direct link between the act/omission of defendant and loss/damage to plaintiff

To whom is the duty of care owed?

No single clear answer, but the HCA's approach is to:

- a. Determine whether there was reasonable foreseeable risk of injury (as without there is no duty of care)
 - Easy to apply "reasonable foreseeability of harm" test when there is physical damage (D v S) or when there is a precedent that has established a duty of care
 - Examples: manufacturers/consumers, public authorities/citizens, aged care and child care centres/clients, car driver/passengers, doctors and nurses/patients, football codes/players, teachers/students and parents, pharmaceutical companies/consumers, supermarkets/customers
- b. Determine whether the case is similar to other cases: in which a duty of care has been held to exist
- c. Where a case involved reasonably foreseeable harm but is not an established category or is unusual, the court has to consider its "salient features" (e.g. *Perre v Apand*)

Donoghue v Stevenson (1932)

- Donoghue and friend went to a café. The friend ordered an ice-cream and drink.
- Poured the drink into the ice-cream and a snail doped out of the bottle into the the ice-cream
- Donoghue had stomach pain → diagnosed with gastroenteritis and being in a state of nervous shock
- Donoghue could not sue for breach of implied terms with the café owner, as they did not have a contract → she sued the manufacturer in tort for negligence
- Alleged the manufacturer owed her a duty of care

Tame v New South Wales (2002)

- Tame was in a car accident and her blood alcohol level was tested- incorrectly reported as 0.14
- It was soon corrected and was never acted upon
- Tame became obsessed by the error and 3 years later was diagnosed as having developed a psychotic depressive illness → sued police in negligence

High court held: dismissed the claim. Did not have a duty of care → police sergeant could not reasonably have been expected to see his mistake carried a risk of harm of the kind that resulted

Sullivan v Moody (2001)

- Sullivan father and daughter sexually assaulted and referred to a hospital
- Defendants (doctor and two social workers) examined the daughter and concluded she had been sexually abused- investigated father
- Plaintiff alleged he suffered shock, distress, psychiatric injury and consequential personal and financial loss
- Family court resolved the family dispute in favour of the plaintiff

High court held: no duty of care owed to the plaintiff

- "Coherence of the law"
- "To impose a duty would have been incompatible with the Community Welfare Act"- which protects doctors etc. who act in good faith and in compliance with the act
- Issues: needing to protect the young from assault and needing to guard against ruining lives (like the plaintiff father)

Duty of Care in specific situations**1.a. Duty of care an acts causing physical harm**

In the case of physical harm the existence of a duty of care is established (D v S)

- Reasonable foreseeability of harm test (objective test): ask whether a hypothetical onlooker would have foreseen the possibility of injury to certain individuals involved in the particular event
- Physical harm = injury to the plaintiff or damage to his or her person and/or property

1.b. Duty of care and acts causing mental harm

A duty of care may also arise in so-called "nervous shocks" or psychiatric illness cases (courts are careful to restrict the circumstances in which a person owed a duty of care in such cases)

Jaensch v Coffey (1984)

- Mrs Coffey (plaintiff) police officer husband collided with a motor vehicle that was driving negligently
- Mrs Coffey was immediately brought to the hospital as was told her husband was "pretty bad" and only realized he would survive 3-4 weeks later
- After her experience at the hospital she suffered anxiety and depression which caused gynaecological problems and she had to have a hysterectomy

High Court held: could recover damages for "nervous shock" → although she was not present at the scene of the accident she came to the hospital in the immediate aftermath → therefore there was sufficient proximity ("so closely and directly affected by the act")

- Exclude claimants who experience normal rather than pathological grief as a result of their loved one's death or injury

See Tame v NSW

1.c. Duty of care and liability for omission

- Generally common law imposes no liability for omission or failing to act
- The reason for reluctance is that such liability involves the imposition of a duty to take positive action and the courts see this as a more serious interference with a person's liberty than imposition an obligation to take care when acting
- Only circumstances is when there is a positive duty to act and can be imposed when:
 - a. Parties are in a pre-existing relationship that contains elements of reliance or dependence; or
 - b. When defendant is in position of control
 - For example: parent/child, teacher/student, employer/employee

Reasonable foreseeability is still key, but there are two sub-categories:

1. Where there is a pre-existing relationship (e.g doctor/patient *Roger v Whitaker*)
2. Where defendant is in charge of or has control over another person or property (*CAL v Motor*)

Roger v Whitaker (1992): Failure to warn

- Whitaker was totally blind in her right eye and had an operation → developed a condition in the other eye and became almost totally blind
- Operation was carried out with due care and skill but did not warn her of the risk of the condition
- This was considered negligent- even though chances of the condition are about 1/14000 and not even all of those lead to complete blindness
- Rogers relied on the principle that the standard of care owed to a patient in all things is determined by medical judgement

Court held: except in cases of emergency or necessity, doctors have a duty to warn patients of the risks associated with a surgical procedure

- *Duty of care on the doctor to act*

CAL No 14 Pty Ltd v Motor Accidents Board (2009)

- Scott went to the Motor Inn for a drink after work. Told licensee to take keys and not return them
- Licensee handed back keys after Scott aggressively asked for them back
- Drove home, lost control and was killed
- Widow sued the licensee/owner alleging they owed her husband a duty of care
- Full court of the Supreme Court of Tasmania ruled: publican owed a duty of care to prevent a patron from driving his motorcycle home from the premises where he had been drinking

High Court held: overturned that ruled:

- Decided on a narrower basis, that the lower court was incorrect on the "fundamental reason" that:
- "Persons in the position of the Proprietor and the Licensee... owe no general duty of care at common law to customers which requires them to monitor and minimise the consequences of the alcohol they choose to consume" – outside exceptional cases

Modbury Triangle Shopping Centre v Anzil: worker injured by assailants one night in an unlit shopping centre car park → Court held: poor lighting may have facilitated, but lack of lighting did not cause injuries

Public authority that control and manages land, parks, reserves or other public areas can come under a duty of care to act to protect members of the public against foreseeable danger in those areas:

Nagel v Rottnest Island Authority (1993)

- Nagel dived from a partially submerged rock ledge → struck a rock and became a quadriplegic
- Sued board in negligence arguing: "failed to give any or any adequate warning" that the ledge was unsafe for diving that it knew members of the public would assume suitable for diving

High court held: Board was the occupier of the Reserve and was under a statutory duty to manage and control it for the benefit of the public

- Had a duty of care to warn visitors of any foreseeable risks of injury
- By encouraging the public to swim: came under duty to take reasonable care to avoid injury

Graham Barclay Oysters v Ryan: defendant authority not liable → relevant legislation did not give the council specific power with respect to oysters → council had no control over the risk of contamination

1.d. Acts causing pure economic loss

Plaintiff suffers no personal injury or physical damage to their property but is simply financially worse off as a result of the defendant's negligent acts

- Courts reluctant to find a duty of care is owed
- Something more than foreseeability and proximity is required

➤ Indeterminacy

Cardozo J: courts have refused to recognise a duty where it would lead to a liability which is "in an indeterminate amount for an indeterminate time to an indeterminate class (of plaintiff)" - Ultramares Corp v Touche

- The general rule is against recognising a duty of care to "ripple effect" victims

Johnson Tiles Ltd v Esso Australia Pty Ltd (2003)

Gillard J: building on Caltex and Perre adopted a three step methodology of reasoning in relation to pure economic loss:

- a. Reasonable foreseeability of injury
- b. Whether there is a relationship of proximity; and
- c. Consideration of competing "salient features" for and against the finding that a duty of care exists
 - Assumption of responsibility: e.g. promise to supply uninterrupted gas
 - Vulnerability question: insurance

Caltex Oil Pty Ltd v The Dredge "Willemstad" (1976)

- Defendant's dredger damaged a pipeline owned and operated by Australian Oil Refinery Pty Ltd
- Defendant's knew of the existence of the pipeline
- Owing to the damage the pipeline could not be used for some time
- Defendants admitted liability of the loss of oil in the pipeline but denied liability for the additional expense incurred by Caltex in transporting the oil by an alternative means

High court held: Caltex could recover the economic loss suffered

- Indeterminacy: the defendant had the knowledge that the plaintiff individually, and not merely as a member of an unascertained class will be likely to suffer loss
- Mason J said that a duty of care should arise when: "a defendant can reasonably foresee that a specific individual as distinct from a general class of persons will suffer financial loss"

Perre v Apand (1999)

- Apand is a national manufacturer of potato chips and negligently introduced bacterial wilt onto the Sparnon's land in SA (from importing uncertified seeds to trial a new potato chip)
- Sparnon and his neighbours (including Perre) had a very profitable business selling potatoes to WA
- WA law prohibits importing of infected potatoes/and the import of potatoes from farms in a 20km radius surrounding an infected farm
- Prohibited from exporting potatoes for 5 years
- Perre and other farmers sued for economic loss
- Apand knew of the law prohibiting the importing of potatoes

High court held: Apand did owe a duty of care to the Perres

- Indeterminacy: McHugh J held: that liability is indeterminate only when it cannot be "realistically calculated" and depends on "what the defendant knew or ought to have known of the number of claimants the nature of their likely claims"
- Perre belonged to a limited number of growers within the radius who may have been effected by the defendants careless actions
- The indeterminate group may have been pickers or truck drives on Perre's farm

2. Breach of the Duty of Care

Assuming that it is established/admitted that the defendant owes the plaintiff a duty of care, the plaintiff then has the burden of proving that the defendant was negligent → the defendant failed to reach the required standard of care

- The standard of care expected is that of the reasonable person
- Alderson B provided that classic definition of negligence in *Blyth v Birmingham Waterworks Co. (1856)*: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or something, which a prudent and reasonable man would not do."

Reasonable person test: Two step approach under statute

Wrong Act (VIC) s48 a person is not negligent in failing to take precautions against a risk of harm unless:

- i. **S48(1):** the risk of injury was reasonably foreseeable
 - S48(1)(c): defendant will only be in breach of duty for a failure to respond if the risk of harm is "not significant"
 - Not hard to establish → only necessary to establish that the general nature, not the precise task, was foreseeable
 - It is thought that a reasonable person would respond to a risk of harm that is not "far-fetched and fanciful" - *Wyong Shire Council v Shirt (1980)*
 - High court: "A risk that is not far-fetched or fanciful is real and therefore foreseeable" - *Wyong Shire Council v Shirt*
- ii. **S48(2): if the risk was reasonably foreseeable, the act asks how would a reasonable person have responded**
 - Involves an assessment of the reasonableness of the defendant's response to the reasonably foreseeable risk
 - To assess this, the statute adopts a common law approach for taking into account various factors to consider whether, and if so how, a reasonable man would have responded to the risk
 - The calculus of negligence:
 - a. The probability of the risk of injury
 - b. The gravity of the harm
 - c. The burden of eliminating the risk
 - d. The utility of the defendant's conduct

2.a. The probability of the risk of injury

When a risk is small, a reasonable person can ignore it. What a reasonable person must not do is create a risk that is substantial

Bolton v Stone (1951)

- Plaintiff was hit a cricket ball that was hit out of the ground during a match
- Evidence showed that the risk of a person being struck by a ball hit out of the ground was negligible
- Lord Radcliffe would have liked to have found the club liable because that would be fair but law is about fault to fairness

House of Lords held: in these circumstances a reasonable person would have ignored the risk → the only practical way of eliminating the risk would be to cease playing cricket on the ground all together

Roads and Traffic Authority of NSW v Dederer

- 14-year-old boy suffered injuries after diving off a bridge into a river and hitting his head on a submerged sand bar
- Although there were signs prohibiting diving, there was evidence people had been diving off for 40 years and this was the first reported incident

High court held: no breach of duty of care

- Magnitude of the risk was grave, probability was low → what more would RTA do?
- The signs were a reasonable response

2.b. The gravity of the harm if an injury occurs

The more serious the risk the greater need for precautions. This has relevance where:

- i. The activity is dangerous (*Swinton v China Mercantile Navigation Co Ltd*)
 - *Burnie Port Authority v General Jones Pty Ltd*: in the case of dangerous substances or activities “a reasonably prudent person would exercise a higher degree of care”
- ii. Plaintiff has a particular vulnerability/susceptibility which increases the seriousness/gravity of the risk (*Paris v Stepney Borough Council*)

Paris v Stepney Borough Council (1951)

- Defendants knew that the plaintiff was blind in one eye
- Plaintiff's condition was taken into consideration in determining whether the defendant was negligent to provide the plaintiff with goggles that would have protected him against injury to his good eye

House of Lords held: whatever the defendant's duty to his other workers, the gravity of the consequences of an injury to the plaintiff (complete blindness) meant that the defendant was in breach of his duty of care

Rogers v Whitaker: failure to warn

- Although the potential complication was low, the consequences for a person who was already blind in one eye were so serious that a reasonable person would have warned of the risk before operating

2.c. The burden of eliminating the risk- the expense, difficulty & inconvenience

Denning LJ: “One must balance the risks against the measures necessary to eliminate the risk” (*Watt v Hertfordshire*)

- The easier it is to eliminate a risk, the less likely a defendant's failure to take precautionary steps will be justifiable
- Courts can take into account not only the cost and inconvenience involved in taking precautionary measures but also any risk that these steps may themselves involve (*Mercer v Commissioner for Road Transport and Tramways NSW*)
- *Graham Barclays Oysters Pty Ltd v Ryan*: court found that the cessation of sale of Wallis Lake oysters or the removal of operations to another area constituted “alleviating action of the most difficult, expensive and inconvenient type”

Woods v Multi-Sport Holding Pty Ltd (2002)

- The market availability of a protective helmet was a crucial factor in determining whether it was reasonable to expect the defendant indoor cricket game organiser had to provide the player with protective gear

High Court held: since headgear had yet to be designed and manufactured and the rules of the game did not allow for the use of helmets → defendant not negligent in failing to provide helmet to plaintiff

Wrongs Act s49 restates three common law principles relating to the reasonableness of the defendant's response:

- i. The burden of taking precautions to avoid risk of harm included the burden of taking precautions to avoid similar risks (e.g. do for park A, must do for park B-Z)
- ii. The fact that the risk could have been avoided by doing something a different way does not itself give rise to liability
- iii. The subsequent taking of action does not constitute an admission of liability

2.d. Utility of the defendant's conduct

The gravity of the risk is also weighed against the utility or social value of the defendant's conduct

Watt v Hertfordshire CC: the risk of injury to the plaintiff fireman was weighed against the life-saving activity engaged in by the fire services

- Needed a jack to lift car of victim, no proper mode of transport for the jack → fell onto fireman causing injuries → no breach of duty

There are two aspects for damage: causation and remoteness

3. Damage: Causation

Not enough for the plaintiff to establish the existence of a duty of care and its breach by the defendant → plaintiff must also be able to prove that, on the balance of probabilities, the defendant's negligence caused the damage suffered

- **"But-for" test:** plaintiff must show that 'but for' the breach, the loss or damage would not have occurred
- Application: involves the consideration of a hypothetical situation where the circumstances are the same as the facts of the case except for the defendant's negligence. If, in this hypothetical situation the plaintiff would not have suffered damage then the defendant's negligence is taken to be the effective cause of the plaintiff's damage
- "If the defendant suffered damage in any event, then the defendant's negligence is not the effective cause of the plaintiff's damage" (*Cork v Kirby McLean*)
- "Factual causation" - a "common sense" test is applied
- No requirement to prove with absolute certainty that the breach caused the loss

Wrongs Act says the same thing but in different words:

- i. **s51(1)(a):** the negligence was a "necessary condition" of occurrence of harm" (factual causation)
- ii. **s51(1)(b):** it is appropriate for the scope of the liability to extend to the harm (scope of liability)

Strong v Woolworths Limited (2012)

- Strong was disabled and had crutches, injured when her crutch came into contact with a chip on the floor of an area occupied by Woolworths

High Court held: even though she could not show exactly when the chip was dropped, by showing that the probabilities were that the chip was dropped more than 20 minutes before the fall she could satisfy her onus of proof

- High court affirmed the main question in any inquiry into causation remains whether it was more probable than not that the defendant's breach was the cause of the plaintiff's loss
- Where the defendant's breach of duty is clear or admitted, the plaintiff will not fail on the causation issue

The "but for" test is not appropriate in all cases → its application could lead to absurd results where there was more than one cause that would have been sufficient in itself to bring about the plaintiff's damage

- High Court recognised that the "but for" test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury
- **"Last opportunity"/"Last clear chance" rule** = the plaintiff was entitled to recover, despite his/her own negligence, if the defendant had the last opportunity of avoiding the accident but failed to do so due to negligence

March v E & MH Stramare Pty Ltd (1991)

- Stramare parked a truck in the middle of the road to be loaded (1am)- had hazard lights on
- March was intoxicated and collided with the truck

High court held: Stramare's negligence was a cause of the accident and of March's injuries. Wrongful parking created a situation of danger, the risk being that a careless driver would act in the way that the appellant acted → March responsible for 70% of damages and Stramare responsible for 30%

Medical negligence

Reinforced the need for the plaintiff to prove that "but for" the negligence of the doctor the injury/damage would not have occurred → loss of chance of a better outcome is not enough

Tabet v Gett (2010)

- 6-year-old suffered persistent headaches and vomiting, doctors diagnosed chicken pox and had a lumbar puncture then was discharged
- Came back two days later as non-responsive, Gett ordered head CT and was diagnosed with a brain tumour and suffered irreversible brain damage

High Court held: plaintiff could not establish on the balance of probabilities that the brain damage would not have happened “but for” the defendant doctor’s negligent delay in ordering the scan

- No clear causal link between omission and brain damage
- “Loss of chance” for a better outcome should not be actionable at common law
- Would expose medical practitioners (and others) to uncertain legal liability which would impact public and private healthcare

4. Damage: Remoteness

Wrongs Act s51(1)(b): “scope of liability”

- Test for determining whether the breach of duty caused the particular harm
- Involves a consideration of issues included “remoteness of damage” considered at common law to determine whether, and to what extent, a defendant should have to answer for the consequences of their negligent conduct

Test = whether the damage was **reasonably foreseeable** by the defendant (*Overseas Tankship UK Ltd v Morts Dock & Engineering Co Ltd*)

- Whether the damage is too remote, and therefore not recoverable
- Plaintiff must establish that the negligence caused the (foreseeable) damage

There are two aspects: causation and foreseeability/remoteness of the loss/damage:

- i. The breach of duty must cause the loss (but-for test)
- ii. Only foreseeable damage is recoverable (other losses are ‘too remote’)

Overseas Tankship UK Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1) (1961)

- Captain of Wagon Mound negligently allows oil spill in Sydney harbour
- Oil spread to wharf where ships are being repaired
- Oil usually not flammable but molten metal sparked, setting fire to a rag that lodged in debris in the oil slick
- Fire starts and one ship is destroyed
- Issue: is the captain liable for the loss? Clear duty and breach. Damage- causation (yes); remoteness (‘real’ risk or ‘far fetched’?)

Held: a man must be considered to be responsible for the probable consequences of his/her act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of conduct → not reasonably foreseeable

Damages payable

Aim:

- To put the plaintiff in the position they would have been in had the negligence not occurred
- It is to compensate the injured party, not punish the wrongdoer

<i>Damage to property</i>	Cost of the property and loss of income/profits that has occurred
<i>Personal injury</i>	- Pecuniary loss (such as medical expenses, loss of earning capacity) - Non-pecuniary loss (such as pain and suffering)
<i>Economic loss</i>	Financial loss

Defences to Negligent claims

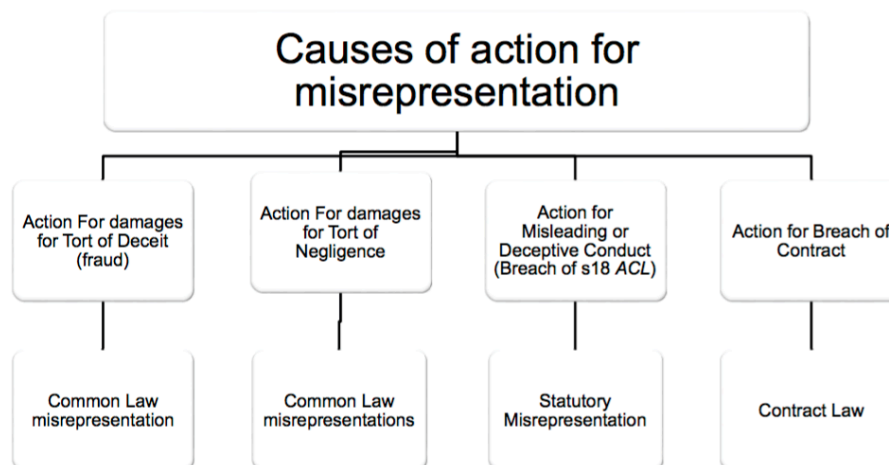
1. Contributory negligence

- The plaintiff failed to take reasonable care of one's own safety
- Common law: no compensation if plaintiff suffered damage partly through their own negligence (complete defence)
- **Wrongs act ss62-63**: damages that are assessed will be reduced to reflect the defendant's own contribution to the damage
- Must be pleaded by the defendant
- Burden of establishing contributory negligence is on the party alleging it
- Jury or judge apportions the damages → reduced percentage of plaintiff's contribution

2. Voluntary assumption of risk: Volenti non fit injuria

- **Wrongs Act s54**: A person cannot complain of damage which results from a risk which was accepted
- Complete defence → no wrong can be done to a person who consents
- Not enough to show the plaintiff knew of the risk → must show they appreciated the risk and accepted it freely and willingly
- Rarely raised successfully due to strict requirements
- In cases with obvious risk: onus on the plaintiff to show he or she was not aware

Liability for Defective Advice/Information: Negligent statements causing 'pure economic loss'



Negligent misrepresentation: “a statement of fact, advice or opinion made in business that is relied upon by another but which is inaccurate or misleading and which causes ‘pure economic loss’”

Two categories for pure economic loss:

- i. Cases where negligent **actions** cause pure economic loss (*Perre v Apand*)
- ii. Cases where negligent **words** cause pure economic loss (*Hedley Byrne v Heller*)

<i>Distinction</i>	<i>Negligent misstatement</i>
<i>2 party scenario:</i>	Assumption of responsibility: by defendant advisor (<i>Hedley v Heller</i> , <i>MLC v Evatt</i> , <i>San Sebastian</i>)
<i>3 party scenario:</i>	Reasonable reliance: by plaintiff who relied (<i>Essanda</i>)

Step 1: Duty of Care

Two party scenario

- 1932-1963: no duty of care → recovery refused on the basis of the distinction between words and acts
- Recovery was limited to cases where the statement was intentionally false (tort of deceit) or was made in breach of a fiduciary relationship
- 1964: duty of care break-through (*Hedley v Heller*) in House of Lords
 - Special relationship: *Hedley* and also *LMV v Evatt* and *Shaddock*

Ultramares v Touche (1931)

- Ultramares provided extra credit facilities to a client based off a balance sheet that had been certified by the defendant's accounts
- Balance sheet created the impression the client was in good financial position but were insolvent
- If accountants had acted with reasonable care they would have discovered the fraud
- Defendants sued the accountants

Court held: accounts did not owe the plaintiffs a “duty of care”

- Cardozo CJ: “A thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class” → refuse to recognise a duty where it would lead to liability which is for an indeterminate time, amount and class

Hedley Byrne v Heller & Partners Ltd (1964)

- Hedley Byrne was an advertising agency, Heller was a bank, Easipower was a customer of the bank
- Before taking work from Easipower, Hedley asked bank for reference and reference was good
- Reference marked: "Confidential. For private use & without responsibility on part of bank"
- Easipower went broke and couldn't pay Hedley
- Hedley sued bank for damages for giving negligent advice

House of Lord held: person could be liable for giving negligent advice or information if they owed a duty of care to the plaintiff not to be negligent

- However, on the facts, Bank not liable because of disclaimer
- House of Lords rejected earlier suggestions that liability for negligent misstatement, apart from contract, was limited to where there was a fiduciary relationship
- Duty of care could arise in situations where there existed a "special relationship" involving an element of reliance

Mutual Life and Citizens' Assurance Co Ltd v Evatt (1968)

- Officers of a life assurance company made statements to a policy holder about the financial affairs of another company

High Court: majority found that a duty of care extended not only to professional advisors but people who gave advice in "serious circumstances"

Shaddock & Associates Pty Ltd v Parramatta City Council (1981)

- Parramatta City Council was asked by Shaddock, a developer, whether the land that it intended to acquire was affected by a road-widening proposal
- Parramatta advised the developer it was not, when it in fact was
- Shaddock claimed they suffered financial loss as a result of the council's failure to disclose the information

High court: held a duty of care covered the giving of both information and advice in circumstances where it was reasonable to expect that the recipient might rely on the advice

Liability arose because one particular developer was involved and the amount of pure economic loss was reasonably easy to determine (no indeterminacy of liability)

- Test of vulnerability: the plaintiffs were vulnerable as they had no other reasonable way of finding out about the city council widening proposals
- Test of defendants' knowledge of the risk and its magnitude: the defendants knew or ought to have known of the risk and its magnitude by not providing information to the plaintiffs
- Rest of unreasonable burdens on the autonomy of individuals: this liability would not have placed serious burdens on the autonomy of city councils generally

A person owes a duty to exercise reasonable care:

- Whenever a person gives advice or information to another on a serious matter; and
- The speaker realises or ought to realise that the speaker is being trusted to give information/advice on the basis for action by another
- It is reasonable for the other to act on it

San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act 1979 (1986)

- Redevelopment plan by the State Planning Authority encouraged private developers to buy land sites and construct high density office blocks
- On the faith of the plan, plaintiffs bought up land with a view to redevelop
- Plan was unfeasible, plaintiffs suffered an economic loss

High Court held: plaintiffs could not succeed unless they could establish:

1. The alleged representation was made
2. That the Authority and the council made the representation with the intention of inducing members of the class of the developers to act in reliance on the representation

High Court held: Plaintiffs could not prove (1) therefore (2) did not arise

Third party scenario

- Where there are three parties in the transaction (e.g. accountant/auditor/solicitor, client and investor) the liability is limited
- However, if a third party (e.g. investor) can show that the auditors made the statement with the intention of inducing the third party to act in reliance on the statement, then the auditor may be liable
- House of Lords: liability of an auditor does not extend to a situation where the audit statement was relied on by a third party for a purpose other than the particular purpose for which it was prepared (*Caparo Industries v Dickman*)
- Something more than reasonable foreseeability of harm is required: there must be some reliance or assumption of responsibility (Essanda)
- "Necessary for the plaintiff to prove that the defendant knew or ought to reasonably have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class..." pg 385

Essanda Finance Corp Ltd v Peat Marwick Hungerfords (1997)

- Essanda relied on an audit provided by PMH on Excel
- Essanda lent money to excel on the basis of the audit → Excel then went bankrupt and Essanda suffered loss as a result of relying on the audited accounts prepared by PMH

High Court held: PMH owed no duty of care to Essanda

- To establish liability for economic loss, plaintiff has to show that there was sufficient relationship between himself/herself and the defendant
- Mere fact that it was reasonably foreseeable that someone might rely on the statements is not enough
- Plaintiff needs to show that the defendant assumed responsibility for providing the information or advice
- And, where there is an intention to induce the recipient or a class to which the recipient belongs (e.g. investors/shareholders) to act or not act on the advice or information
- Toohey and Gaudron JJ: Essanda should have made own enquiries

Step 2: Breach of the Duty

- Where a duty of care exists, the next step is to ask what standard of care is expected from a person giving advice or information
- The standard of care required of professional persons is that which the community reasonably expects from a person with those qualifications

Same two stage process: → relate s43 of Wrongs Act ("harm includes economic loss")

- Was there a foreseeable risk of harm: common law and Wrongs Act s48(1)
- How would a reasonable person have responded?: common law and Wrongs act s48(2)

However, four factors do not work with negligent misstatements and pure economic loss cases. Instead consider:

- Rogers v Whitaker test
- For professionals and persons with special training or skills- accountants, engineers, lawyers, doctors etc.- it has been accepted that the standard of care to be met by a person with special skill or competence is that of the ordinary person exercising and professing to have that special skill

The Standard of Care for Professionals*Wrongs Act s(59) and s(60)*

With respect to the liability of professional persons the act provides:

“Peer Professional Opinion” test

- b. A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it was established that the professional acted in a manner was widely accepted as competent professional practice
- c. However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that opinion irrational → can be overruled by the court
- d. The fact that there are differing peer professional opinion widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinion being relied on for the purpose of this section
- e. Peer professional opinion does not have to be universally accepted to be considered widely accepted

This section is a defence available to a defendant once a breach of the duty has been established according to the common law test as in *Rogers v Whitaker*

- Where the plaintiff proves that the defendant professional has not exercised reasonable care in the discharge of his or her professional duties, the defendant is liable unless he or she can show by way of defence that he/she acted in a manner that satisfies the “peer professional opinion” test in the act

Step 3: Damages

Same two requirements as for negligence acts. Need to establish:

- Causation: “but for” test and Wrongs Act s51(1)(a)
- Remoteness: “reasonably foreseeable” loss and Wrongs Act s51(1)(b)

Step 4: Defences

- Contributory negligence

Using s18 of ACL

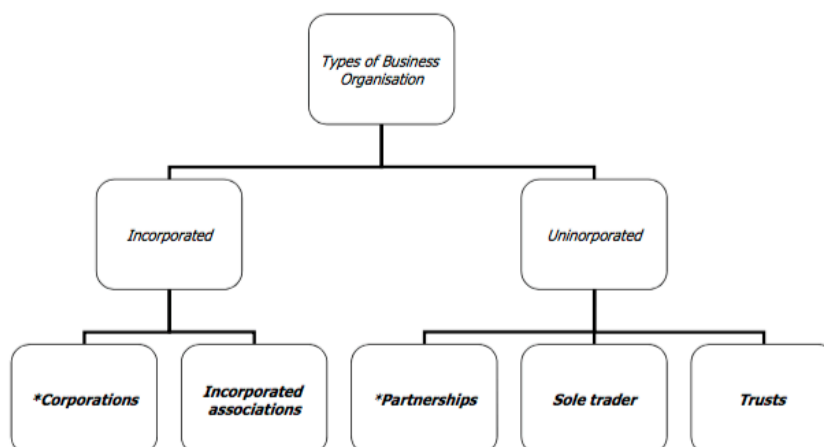
S18 of the ACL is used in many negligent misstatement cases, often in conjunction with common law negligence

Criteria of s18:

- “Engage in conduct”: broadly defined, includes silence on omissions
- “Misleading or deceptive”: “lead into error”
- Causal connection between conduct and loss is required, but if shown, no fault required
- No exclusion of s18 permitted: though plaintiff can be put on notice that it cannot rely on the statements (*Butcher v Lachlan Realty*)
- Wide remedies including damages under s236

Should have insurance against the loss

10. Law of Partnerships: and Agency Principles



<i>Sole traders</i>	<i>Partnerships</i>	<i>Corporations</i>	<i>Trusts</i>
- Ease of formation and dissolution - Low start up and recurrent costs	- Two or more people can combine their assets or abilities - Easy to establish - Better able to borrow than individuals - Partners own and control	- Establishment costs - Ownership and control separated - Transparency of public corporations - Management has serious obligations	A fiduciary arrangement that allows a third party, or trustee to hold assets on behalf of a beneficiary or beneficiaries
- Unlimited liability - Limited life - Capital raising difficult	- Unlimited liability - Less flexibility of membership - Limited life	- Limited liability - Easier to raise capital - Flexible membership of public company - Unlimited life	Legal title (ownership) is with trustee but trustee must act or benefit of beneficiaries but according to the trust

- Answer: establish who a person is (for s18 to apply)
- To own must have a legal interest (not just equitable)
- Purpose of the act is if the partnership is silent (fall back default position)
- Agency relationship → Doctrine of Privity does not apply

Partnerships: Nature and Creation

Definition: An association of people who have agreed to pursue a business objective for their mutual benefit

Necessary to determine if a partnership has come into existence to determine if:

- a. A person liable for contracts or torts of the partnership
- b. A person is entitled to share in the profits of the partnership

Need to consider two areas:

- i. *Relationship between partners themselves*
 - Look to Partnership Agreement (contract), Partnership Act and the concept of fiduciary
- ii. *Relationship of partners to third parties*
 - Agency principles: what authority does principal have?
 - Is principal liable for contracts entered into and torts committed by other partners?
 - Agent had apparent authority: what the third party thinks the agent has
 - Third party will try to bind principal to contract or tort

Use: eclipsed by the rise of the corporation but still common in relation to:

- Small family businesses (by design or default)
- Professional associations (mandatory)

Relationships

Partners are in a fiduciary relationship: partners are both principals and agents of each other

- Able to bind the other partners (as an agent does); and
- Be bound by acts of the other (as a principal is)

Legal relationship

Has the hallmarks of the relationship that exists between a principal and agent, except a partner is both a principal and agent for the other partners (power and responsibilities of agents)

1. Formation

Partnership is created by agreement- express (oral or written) or implied

- A formal partnership agreement (accountants, doctors, lawyers etc.) might deal with membership, capital, entitlement, management, accounts, dissolution, dispute resolution, goodwill etc.
- Many partnership agreements are less formal
- The Partnership Act only applied if no agreement or parties' intention are unclear
- Partnership Act has an interstitial role → informs any gaps in partnership agreement
- It is advisable to clearly and precisely state the important elements of the partnership agreement in a written form

Number: Corporations Act s115: max number is 20 except where it is professional

Name: BN Registration Act: registration required unless the name consists of the full name of each partner

If no agreement by the parties, the courts have to decide if a partnership exists → turn to Partnership Act

Statutory Definition: s5(1)

Partnership Act: s5 and s6

s(5) defines a partnership as: 'the relation that exists between persons:

- a. Carrying on a business
- b. In common
- c. With a view of profit'

For the partnership to exist, requires all three elements (go through step by step and apply)

a. Carrying on a business

- Repetitive or regular acts done in relation to 'any trade, occupation or profession'
- 'Business' is any 'trade, occupation or profession'
- 'Carrying on': Smith v Anderson
 - "implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated"
 - Repetition is the key → one-off is more likely to be a joint venture
 - Single joint venture can be considered as a partnership if satisfies- case

Smith v Anderson (1880)

- Investors subscribed for the purchase of share through a trust in various submarine cable companies
- Shares were sold to investors by the trustees of the trust who then issues certificates
- Smith along with 20 other people, received a certificate
- Smith applied to wind up the trust on the basis that it was an illegal association
- Issue: was the trust a partnership?

Court held: there were no mutual rights and obligations amongst the subscribers indicating there was no partnership agreement → there was no association for the purpose of "carrying on a business"

Khan v Miah (2000)

- Miah and colleague were head waiter and chef at a restaurant and wanted to open up their own
- Khan invested in the venture (provided most of the initial capital). They agreed to be partners
- Brother, third respondent agreed to provide business experience and financial standing
- By December, parties found a premise and began planning. Khan arranged to borrow money from the bank and deposited it into the partnership bank account
- Opening was delayed because of various difficulties that led to a breakdown in the relationship → at this time restaurant was still not open for trade
- Opened a month later, carried on without settling account with Khan
- Issue: partnership or joint venture?

House of Lords held: there was a partnership

- Partnership commenced when the proposed partners took their first steps to implement their business plan
- Lord Millett: "There is no rule that the parties to a joint venture do not become partners until actual trading commences"

Goudberg v Herniman Associates Pty Ltd

- Herniman (a firm of architects) entered into a contract with Williams for the provision of services
- Williams was "in partnership" with Goudberg and on the basis was to be jointly liable for unpaid fees to Herniman

Court held: although they were "acting with a view of profit", nothing done by them leading up to the contract constituted "carrying on of business"

- Was not preparatory in as conveyed by Millett in Khan v Miah
- While Williams had developed a plan for the business involving Goudberg, they had only done market research together and made two trips to USA
- Goudberg was not a partner → not jointly responsible for fees

b. In common

- To be a partnership there must be a "mutuality of rights and obligations"
- Does not mean equal rights but mutual right and obligations
- Business must be carried on by, or on behalf of, all the partners
- All members need not be active in management as long as it is being carried on their behalf

Deqiorgio v Dunn (2004)

- Plaintiff and defendant part of a rock band that did cover version of AC/DC
- Group disbanded, and defendant asked plaintiff to join a second band
- Plaintiff argued that upon the formation of the second band, the plaintiff and defendant entered into a new partnership of which they were the only members, as partners, they carried on the business of the second band → entitled to a share of profits

Supreme Court held: denied plaintiff's claim = no partnership. While run in a view of profit, other factors persuaded the court that no partnership existed:

- Plaintiff did not share the establishment costs with the defendant
- Chose to be paid a fixed fee (\$150) for each performance
- Did not mention partnership in tax returns (returned as "professional fees" income)
- Just after the partnership was allegedly formed, plaintiff went to Canada for 17 months and did not involve himself in the business in any way
- Plaintiff approached performers in the band and tried to persuade them to joining a new band which would also be a tribute band

Re Ruddock (1879)

- Ruddock, a sole trader, owed a debt to B. Ruddock entered into an agreement with B where:
 - B would purchase a one quarter share in the business and would receive a one quarter share of the profits

- B had full control over the share, including power of disposition
- Purchase price of the share was to be treated as having been paid by the discharge of the debt owing to B
- B's name was not to be used and she was not to be held out as a partner
- B had access to the books and Ruddock was to behave and manage the business "as one partner should do to another"
- Ruddock later became bankrupt and B argued she was a creditor not a partner
- Other creditors argued she was a partner and not entitled to priority as a creditor

Court held: although B took no part in the day-to-day management, she was a partner. She and Ruddock treated each other as partners = there was a mutuality of rights and obligations → more important than the words used in the agreement

- Molesworth J: "The cases show that the relation of partners is the result of their respective substantial rights, not of the words employed"

c. With a view of profit

- Ultimate goal = to make profit
- Need to intend to make profit (created with a view to profit)- even if you do not
- Members of sporting clubs, societies or charitable organisations are not 'partners'
- Even though these organisations make profits these are not shared among the members and the members are therefore not liable for the debts incurred by the committee in excess of their subscriptions

Statutory Rules: s6

- Not always easy to determine if there is a partnership just based on the definition
- The Partnership Act contains a number of statutory rules "to which regard shall be had" in determining whether a partnership exists
- Supplement the definition
- Example: the fact a person shares the profit of an organisation may be some evidence of a partnership but it does not necessarily prove a partnership and will not do so if the other essential criteria of a partnership are not present

Rule 1: Common ownership s6(1)

"Joint tenancy tenancy in common joint property common property or part ownership does not of itself create a partnership as to anything so held or owned whether the tenants or owners do or do not share any profits made by the use thereof."

- Common or joint ownership of property does not necessarily mean that the common owners are in a partnership → must be carrying on business in common

Davis v Davis (moodle)

Rule 2: Sharing of gross returns s6(2)

"The sharing of gross returns does not of itself create a partnership whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived"

- Sharing of gross returns does not mean the sharers are in a partnership
- Example: real estate agents who receive a wage based on the annual gross profits of the agency

Cribb v Korn (1911)

- Farmer entered into an agreement with Cribb under which he had exclusive use and occupation of a certain area of land
- Farmer would pay Cribb half of the proceeds of sale of the produce of the land and stock
- Korn was a worker employed by the farmer and was injured and claimed compensation from Cribb on the basis the farmer and Cribb were partners

High Court held: there was no partnership and the sharing of gross returns was not enough to establish a partnership. Farmer only had exclusive rights to the land and Cribb had no right to direct or control the farmer's working of the land

- Court said: "To be partners, they must be shown to have agreed to carry on some business- in this case the business of farming... There is nothing to show that the appellant intended to engage in farming at all, or to be concerned in the transaction beyond his right to compensation"

Rule 3: Profit sharing s6(3)

"The receipt by a person of a share of the profits of a business is prima facie evidence that that person is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make that person a partner in the business and in particular..."

- Sharing of profits is not conclusive proof of partnership but creates a strong presumption (prima facie evidence) that there is a partnership
- The other party has the onus of proving there is not a partnership

Cox v Hickman (1860)

- Smith and Co owed money to creditors including Cox
- Under Deed, trustees to run business and pay all profits to creditors until debt paid off and the the business would be handed back to Smith
- Hickman supplied materials and became trade creditor making firm liable to pay
- Issue: was Cox "partners" with Smith and therefore liable for debts of the business

Court held: they were not partners, even though they had a right to the share of profits

The Act gives example where the presumption does not operate (because there is no 'mutuality of rights and obligations'):

- **S6(3)(a):** a debt repaid in instalments out of profit (*Cox v Hickman*)
- **S6(3)(b):** a wage paid on the basis of a share of profits (*Plummer v Thomas*)
- **S6(3)(c):** payment of an annuity to a widow or child of a deceased partner (*Commissioners of Inland*)
- **S6(3)(d):** loan with the interest dependent on profits (*Badeley*)
- **S6(3)(e):** annuity for goodwill part of sale of business dependent on profits (*Hawksley*)

2. Rights and Duties of partners to each other

i. Partnership Agreement

Although an agreement can be reached orally or by a course of conduct, it is good practice for the rights, duties and liabilities of the partners among themselves to be set out in a written partnership agreement.

- A written agreement places on record the intention of partners to create a partnership
- Rights and duties of partners may be varied during the partnership with the consent of all partners (express or implied)
- Law of contracts applies: there may be terms implied into the agreement provided there is no agreement on the matter in the agreement itself
- Matters that should be covered: page 462 in CACL

ii. Partnership Act s(28): General right and duties

When the partnership agreement does not cover the issue, the Partnership Act determines the rights, duties and interests of partners

- 28(1): Share equally in capital and profits and losses
- 28(2): Firm indemnifies every partner for firm-related expenses
- 28(5): every partner may take part in management
- 28(6): no partner entitled to remuneration
- 28(8): Decision to be decided by majority
- 28(9): Books to be kept at the place of business and all have access

Popat v Schonchhatra (1997)

- Plaintiff and defendant were partners in a news agency
- After the partnership was terminated, the defendant continued to operate it himself but did not settle the accounts between himself and the plaintiff
- Two and a half years later he sold the business and made a capital profit
- Although he had contributed only a small part of the capital at the outset, he claimed half the profit

Court held: *Popat entitled to half the profits on the sale* → in absence of an agreement to the contrary, partners are entitled to an equal share of the capital profits (and profits that accrued after the dissolution of the partnership but before the final settlement of accounts)

S29: Restriction on right to expel a partner**iii. Fiduciary obligations**

Partners are bound to exercise the utmost good faith in their dealings with one another → mutual trust and confidence

- Gives rise to a fiduciary duty of full disclosure towards each other
- Does not conclude with dissolution but continues until the final settlement of accounts on winding up

These fiduciary duties have been expressly incorporated into the Partnerships Act:

1. S32: Duty of partners to render true accounts and full information of all things affecting the partnership

- In the event that a partner does not reveal the accounts to the other partner/s a court order may be sought

2. S33(1): Accountability of partners for private profits

3. S34: Duty of partner not to compete with firm

- If a partner without consent of the other partners carries on any business of the same nature as and competition with that of the firm, he must account for and pay over to the firm all profits made by him in that business

Chan v Zacharia (1984)

- Both partners in a medical practice which they conducted from leased premises
- Lease had an option to renew that had to be exercised by both partners
- On the dissolution of the partnership, one of the more valuable assets was the premises, with rights of renewal
- One partners suggested that the option to renew should be exercised, but the other negotiated a new lease in his own name

Court held: fiduciary relationship continued until the partnership had been wound up

- Chan was not permitted to put his interests ahead of the partnerships
- Chan had to account to the partnership for any profit he obtained from the lease

United Dominion Corp Ltd v Brian Pty Ltd (1985)

- Three joint venturers began negotiating an agreement to build a shopping centre on land owned by SLP
- They intended that SLP would be registered on the title as the owner with most finance provided by UDC, secured by a mortgage- balance provided by each party in proportion to their interests
- Parties would share profits
- 9 months before the written partnership agreement, SLP and UDC made an agreement without B's knowledge that meant the joint venture profits would not be distributed to B until the loan monies were repaid to UDC in full
- B sued UDC arguing that the joint venture was a partnership and, as such, B was owed a fiduciary duty which was breached when SLP and UDC failed to give notice of the clause

High Court held: joint venturers were "intending partners" after the agreement in 1983 and became partners in 1984 when it was executed → fiduciary relationship existed before partnership agreement signed

- Court: “A fiduciary relationship with attendant fiduciary obligation may, and ordinarily will, exist between prospective partners... before the precise terms of any partnership agreement have been settled”

Scotts and Momentum Production Pty Ltd v Lewarne (2009)

- Scotts needed \$300,000 to complete the deal to buy a hotel business company
- Approached Lewarne for the money in exchange for 15% share equity of the pub and 15% of the profits
- Lewarne agreed, Scotts used that money to discharge a mortgage over property held by his mother, transferred that property into his name and used it to secure a loan used to purchase the hotel
- Hotel traded under Scotts management and there were many problems
- Lewarne wanted to extract himself from the business and recover his \$300,000
- Issue: was that money a debt to the partnership or was the defalcating partner liable the breach of fiduciary duty

Supreme Court held: Scotts not entitled to use the \$300,000 to discharge the mortgage → resulted in the loss to the partnership

From this case:

- A partner who has, in breach of his/her fiduciary duty, applied to his/her own benefit, part of the partnership capital cannot be regarded as no more than the debtor of the partners generally, including himself
- If a partner, in breach of his duty of trust, misapplies partnership property, he or she is failing to treat property under his control, as the property of the partners as such
- Equity would, on the suit of a person beneficially entitled, intervene to prevent that happening and hold the fiduciary accountable for his breach of trust

3. Partnership Property

Issue: determining what is the property of the partnership is important particularly at the end of the partnership's relationship

- Example: when partnership end, one partner may demand the return of the computer or van → can only have it if it is his or her property and not the partnerships property

Partnership property must be used exclusively for the purposes of the partnership and in the manner set out in the partnership agreement. Partnership property consists of:

Partnership Act s24

- a. Property originally brought into the partnership (dependent on intention);
- b. Property acquired whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business;
- c. Items acquired for the purposes of and in the course of the partnership business

Partnership Act s25

- d. Items bought with the partnerships money are deemed to have been bought on account of the firm unless contrary intention appears

What right does each partner have to the partnership property:

- Partners have no title to specific property
- Partners do have the right to his/her proportion of the surplus after the realisation of assets and payments of debt
- A partner has interest in all partnership property
- *Rich J*: “Business partners own between them the whole of the partnership assets, and each proprietor has a proprietary interest in each and every item. But his interest is not a fixed proportion of each item...”

Harvey v Harvey (1970)

- Harvey owned a property which he was considering selling
- Brother suggested that he and his sons would work the land- Harvey agreed
- There were mutual benefits for both families- for Harvey this meant the land would one day become available to his son, while for his brother it meant his sons could get valuable experience running the land
- Over 20 years many improvements were made which increased the value of the property
- When the partnership ended...

High Court held: land did not become part of partnership property

- Evidence supported that both parties to the agreement recognized Harvey's intended that his son take over the land one day and this would not have been possible if the land had been partnership property

Notes on this case:

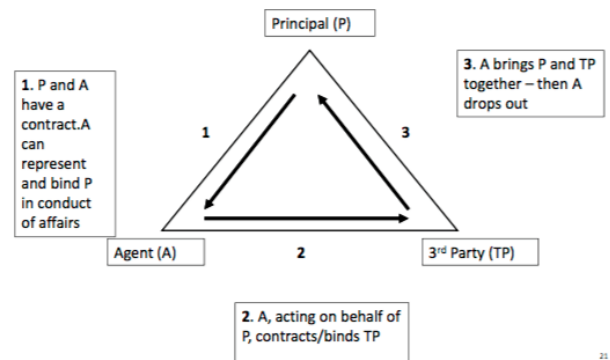
- Court decided: in the absence of agreement to the contrary, there is no general principle that an appreciation in the capital value of a partner's personal property, as a result of the expenditure of partnership money, should become a part of the final accounts of the partnership thereby become available for distribution among the partners

Goodwill

- Defined as "the probability that the old customer will resort to the old place" (*Cruttwell v Lye*)
- Consists of the advantages a business has in connection with its customers
- Goodwill of a partnership = like any other partnership asset
- In the absence of any partnership agreement to the contrary, to be sold upon the dissolution of a partnership for the *benefit of all the partners*

4. Relationship to Third Parties**Introduction to Agency**

- Usually a person is not bound by the acts/representations of another
- However, sometimes it can be useful/necessary for a person (principal) to engage another person (agent) to act on his/her behalf in dealing with another person
- Agent has the legal power to present another person in the conduct of the principal's affairs
- When the agent is acting with authority the agent binds the principal- then drops out, leaving the principal in the relationship with the third party



Agent: act on behalf of principal and deal with third parties

Authority of the agent**a. Actual authority**

- **Express:** principal gives express instruction in written or oral form (or combined)
- **Implied:** all matters necessary for the carrying on of the business in the usual way (e.g. buy stock on credit, borrow money, sign cheques, hire employees etc.)

b. Apparent or ostensible authority

- There is no actual authority, but instead the mere appearance of authority
- Device used to protect third parties who contract otherwise engage with an agent based on the authority he/she appear to have
- Principal will be bound by those acts of the agent which fall within that represented authority → agent is said to act within the scope of their apparent authority
- The authority a partner has been 'held out' by the principal as having
- Third party must have relied on the representation of the principal

4 criteria for apparent authority as in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd

1. A representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor
2. That such representation was made by a person or persons who had 'actual' authority to manage the business of the company
3. That he (the contractor) was induced by such representations to enter into the contract → relied upon it
4. Under its memorandum... only applies when the company is the principal and nowadays usually no restrictions under memorandum

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd (1964)

- Kapoor and Hoon formed the defendant company to purchase, develop and resell Buckhurst Park
- Board of directors comprised of Kapoor, Hoon and a nominee of each
- Development of the land was left to Kapoor, who with the knowledge of the board of directors, acted as managing director although he had not formally been appointed
- Employed Freeman & Lockyer, plaintiff architects
- Kapoor had no specific authority to do this
- When Freeman claimed fees, company refused to pay → argued Kapoor had no authority

Court Held: defendant company was liable for the plaintiff's fees

- Kapoor had no express authority to engage the architects and there was no implied actual authority as he was never appointed managing director
- Court unanimously agreed Kapoor had apparent authority → meetings indicated Kapoor should carry out all acts necessary to make the venture a success

Other notes:

- Apparent authority arises from the relationship between the principal and the third party
- The agent does not affect the extent of apparent authority
- The extend of the authority depends on what the principal represents to the third party (express, implied, conduct) about the authority of the agent
- Once the principal relies on the representations by the principal, the principal cannot subsequently claim the agent did not in fact have that authority
- For apparent authority to exist, someone with actual authority (usually the principal) must have represented that the agent is acting within his authority

Panorama Development v Fidelis Furnishing Fabrics Ltd (1971)

- Secretary of Fidelis contracted a hire-care company (Panorama) to hire expensive cars, ostensibly to transport Fidelis clients from the airport to the company offices
- Secretary had no actual authority to enter into such agreements and was using the car for his own purposes
- Panorama sued Fidelis for the hiring charges

Court held: entering into contracts like this was within the usual authority of company secretaries → within the apparent authority of this particular secretary

- They may be seen to have authority to make representations and enter contracts on behalf of the company in respect of the day to day administration of the company

Agency and Partnership

- Each partner is an agent of the firm and their other partners for the purpose of the business of the partnership
- A partner can bind the other partners provided he/she has authority to act
- The authority can be actual, implied or apparent

The Partnership Act s27: the acts of every partners who does any act for carrying on in the usual business way, business of the kind carried on by the firm of which they are a member, bind the firm and any partners unless:

- The partner exceeds their authority in the particular matter and the person with whom the partner is dealing knows that the partner has exceeded their authority; or
- The person with whom the partner is dealing does not know or believe the to be a partner

Partnership Act s9 Partners may be bound by the action of a partner:

- When the partners have authorised a partner to enter into a transaction on their behalf with the outsider (normal rules of agency apply)
- When one of the partners has acted, without express authorisation, in circumstances where the four requirements of the Partnership Act have been met:
 - i. The act or transaction was entered into by a partner
 - ii. The act or transaction entered into must be within the scope of the kind of business carried on by the firm (*Polkinghorne v Holland*)
 - Can be liable if of a kind that is usually entered by other firms in the same kind of business (*Mercantile Credit Co v Garrod*)
 - iii. The act or transaction must be carried out in the usual way (*Mercantile Credit Co v Garrod*)
 - iv. The other party to the transaction must either know or believe that the person lacks authority or do believe him/her to be a partner- if entered within the scope and within the usual way (*Construction Engineering v Hexyl*)

Two Limbs

1. Ask: "what is the kind of business of the partnership?" (*Mercantile Credit Co v Garrod*)
2. Even if the action of the partner was within the scope of what the partnership normally does, it must be done in the usual way if it is to bind the other partners (*Goldberg v Jenkins*)

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3. Did the other person know or believe there was no authority or did not believe him to be a partners (*Construction Engineering v Hexyl*)

Polkinghorne v Holland (1934)

- Polkinghorne was a long-standing client of a firm of three solicitors including Holland
- Polkinghorne usually invested in low risk, low yield government bonds
- Holland advised her to invest in two risky companies run by his associates
- When the companies failed Polkinghorne sued the firm

High Court held: Holland's partners were liable for her losses

- Although solicitors do not have special skills in relation to financial investments, the Court said that they had a duty to give careful advice when they were asked to provide it
- In giving her the advice, Holland failed to act reasonably, and had probably been guilty of fraud
- As the advice was provided in his role as a solicitor and had been given "in the ordinary course of the business and of the firm" and therefore the firm was liable
- Court said: giving of financial or investment advice was within the usual course of business of that firm of solicitors
- Solicitors enquire on the client's behalf and give relevant information and assistance

Mercantile Credit Co Ltd v Garrod (1962)

- Two partners were in a partnership that leased out garages. Both were prohibited under the partnership agreement from selling motor vehicles
- One of the partners sold a car he did not own, and he had also done so in the past
- Plaintiff sued the partnership and recovered damages

Court held: when he entered into the sale of the Mercedes to the plaintiff, "he was doing an act of a like kind to the business carried on by the persons trading as a garage"

Goldberg v Jenkins (1889)

- A partner purported to borrow money on behalf of the firm at over 60% interest when at the time the comparable rates were between 6-10%

Court held: borrowing was beyond “the usual way” of the firm and thus the firm was not bound to the transaction

Construction Engineering v Hexyl (1985)

- Tembel and Hexyl formed a partnership in order to develop some property
- Partnership agreement expressly said that Tembel would enter the construction contract on its own behalf and not on behalf of the partnership
- When Tembel signed with Construction Engineering, they signed with their own name
- After a dispute Construction sued Tembel and Hexyl
- Hexyl denied liability

Court held: Hexyl had no liability. There was no liability because:

- There was no actual authority (partnership agreement expressly limited Tembel’s authority)
- There was no apparent authority (Construction at the time of the contract, assumed Tembel acted on his own behalf only)

Liability for Debts and Obligations

A partnership is not a separate legal person. It is individual partners who are:

- Jointly liable for the debts of the partnership
- Jointly and severally liable for the wrongful acts of the partner(s)
- Joint and severally liable for misapplication of money or property

a. Jointly Liable for Debts

Partnership Act s13: Each partner is liable jointly with the other partners for all debts and obligations of the firm incurred while he/she is a partner

- Only one cause of action: creditor can bring only one action against members of the firm
- A partner or partners who is sued can insist that other member be ‘joined’ in the one (and only) action
- Ratification by co-partners may also render them liable for debts/obligations incurred by a partner

Liability of incoming partner s13: Partner not liable for debts incurred before he/she became a partner

- However, liability can be incurred where it is specially agreed upon
- Example: Release a retiring partner from debt and substitute an incoming partner
- Such a contract cannot be enforced by a third party unless they were a party to that contract

Liability of retiring partner

- A partner who retires does not thereby cease to be liable for partnership debts incurred before their retirement
- A retiring partner may be discharged from any existing liabilities by an agreement to that effect between themselves and the members of the firm as newly constituted and the creditors
- In order to avoid being made liable for debts incurred after their retirement, a retiring partner should give specific notice of their retirement to those persons with whom the firm had dealings
- **S21(2):** resigning partners remain liable for debts incurred before their resignation unless they receive a release from creditor or remaining partners

Hamerhaven Pty Ltd v Ogge (1996)

- Ogge was a senior partner in a law firm in Melbourne. He retired in 1987
- Two years later the firm transferred Hamerhaven’s funds into a finance company that collapsed
- Hamerhaven sued all those who were partners in 1989
- For one year after, Ogge was retained as a consultant and appeared on the letterhead
- After 1988 he retired completely and his name no longer appeared
- Issue: whether removal of name from letterhead prior to 1989 was proper notice

Court held: removal was not proper notice for the purposes of **s40 of the Partnership Act**

- **S40(1):** give actual notice to all existing clients
- **S40(2):** advertise resignation in Government Gazette and newspaper(s) circulating in area of business to notify new clients
- **S18:** alter business Names Register (if relevant), destroy old stationery, business cards etc. to avoid Partnership by Holding Out under s18

Partnership by 'holding out': s18

S18(1): a non-partner can be liable for debts of the partnership where:

- Holds himself out as a partner or allows himself to be held out as a partner
- To anyone who has given credit to the firm on the faith of that apparent partnership

This operates in cases where:

- a. A person has by words or by conduct represented themselves or knowingly allowed themselves to be represented as a partner of a firm; and
- b. Another person has given credit to the firm; and
- c. The person has so given credit on the faith of the representation (*Lynch v Stiff*)

b. Jointly and severally liable for wrongful acts: Liability for crimes or civil wrongs s14-16

- **S14:** Partners are liable jointly and severally for the wrongful act or omission of any partner acting in the ordinary course of business of the firm, or with the authority of their co-partners
- **S16:** partners can be sued together (jointly) or individually (severally)

A wrongful act or omission may be:

- Tort (negligent act) → establish in ordinary course of business (*Polkinghorne*)
- Negligent misrepresentation or defamation
- Engaging in misleading or deceptive conduct under s18 of ACL
- Breach of fiduciary duty (e.g. conflict of interest)
- A crime (fraudulent misappropriation of funds)
- DOES NOT: include a breach of contract

In order for liability to be established it must be shown that the wrongful act or omission of the partner:

- a. Occurred in the ordinary course of the business of the firm
 - Necessary to determine the nature of scope of the firm's business
 - Determined by reference to the agreement between the partners
- b. or; Was authorized by the co-partners

Polkinghorne v Holland (1934)

- The solicitors were liable even though Holland provided investment advice and not legal advice
- Was within the scope and nature of their specific business- usual course (see facts above)

Walker v European Electronics Pty Ltd (1990)

- Three partners in a firm of chartered accountants
- Garrity misappropriated a large sum on money when acting as the receiver of the company
- He was jailed for fraud and made bankrupt. Defrauded company then sued the other partners
- They argued Garrity was the only partner who did receivership work and his practice was not part of "the ordinary course of the firm's business"

Court held: after examining partnership agreement and taking into account fees earned from his work going into the partnership → court disagreed → two other partners jointly and severally liable

Gleeson CJ: "if partners have agreed to carry on a certain kind of business and that business includes acting in a particular manner or capacity then conduct by one of them in pursuance of that agreement will attract the operation of [s14]. It is their agreement to go into business which is the foundation of their joint and several liability"

National Commercial Banking Corp of Australia Ltd v Batty (1986)

- Batty and David were partners in a firm of accountants
- David fraudulently deposited cheques of a company of which he was a director into the firm's trust account and misappropriated the process
- The company, upon discovering the fraud, successfully sued NAB in the tort of conversion
- Since David died, NAB sought indemnity from Batty arguing he was liable for his partner's fraud

Court held: David was not acting in the course of the firm's business and accordingly Batty his partner was not liable for his fraudulent conduct

5. Dissolution of a Partnership

Atwell v Roberts: "It is a fundamental principle of the law of partnership that any change in the membership of the partnership, whether occurring as a result of the retirement, expulsion, death or otherwise of a partner, effects a dissolution of the partnership"

- In the absence of other arrangement, dissolution should be followed by a winding up and final settlement of accounts
- Many agreements contain provisions enabling the transition from one firm to another to be effected without the disruption of a formal winding up
- Partners remain jointly liable for debts even after the dissolution of a partnership (*Hammersmith v Ogge*)

A partnership can be dissolved through:

a. Operation of Law

- **Partnership Act: s37 or s38**
- A partnership is dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry on in partnership

b. By partners

Subject to any agreement between the partners, a partnership is dissolved:

- i. S36(A): entered into for a fixed term, by the expiration of that term
- ii. S36(B): if entered into for a single adventure or undertaking by the termination of that adventure or undertaking
- iii. S36(1): if entered into for an undefined time, by any partner giving notice to the others of their intention to dissolve the partnership etc.
- iv. S37(1): by the death, bankruptcy or insolvency of any partner
- v. S37(2): at the option of the other partners, if any partner allows their share of the partnership property to be charged for their separate debt

More page 482

c. By the courts

On application by a partner the court may order a dissolution of the partnership in any of the following cases:

- i. When a partner has been declared to be of unsound mind (permanently to the satisfaction of the court)
- ii. When a partner, other than the one suing, becomes in any other way permanently incapable of performing their part of the partnership contract
- iii. When a partner, other than the one suing, has been guilty of such conduct that affects the carrying on of business
- iv. When a partner, other than the one suing, wilfully or persistently commit a breach of the partnership agreement- or conducts themselves in matter relating to the partnership business not reasonably practical for the other partner to carry on business
- v. When the business of the partnership can only be carried on at a loss (view of profit)
- vi. Whenever in any case circumstances have arisen, which, in the opinion of the court, render it just and equitable that the partnership be dissolved

Application of Partnership Property on dissolution- s48

- Every partner is entitled to have the partnership property applied towards the payment of the partnership liabilities and thus free themselves from those liabilities
- A partner also has the right to any surplus assets, after the payment of a firm's liabilities
- Partner or representative may, on the termination of the partnership, apply to the court for a decree dissolving the partnership and for the appointment of a receiver to wind up the business and affairs of the firm (**s43**)

Final settlement of accounts on dissolution- s48

Subject to any agreement between the partners, the following rules must be observed:

1. Losses must be met first out of profits, next out of capital and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits
2. The assets of the firm, contributed by the partners to make up any losses or deficiencies of capital, must be applied in the following manner and order: (page 485)

6. Limited Partnerships

Provision in states not territories

Enable the formation of a partnership in which there is:

- At least one general partner with unlimited liability; and
- One or more limited partners whose liability for the debts and obligations is limited

Limited partnerships allow firms to bring in partners who provide capital for the firm effectively as investors in the firm

- Like other passive investor, limited partners do not participate in management
- If a limited partner takes part in the management of the business of the firm → liable as if the partner was a general partner

Incidents of limited partnerships (page 486)

S29: expulsion of partner rights

- Cannot kick out a partner, unless an exclusion clause says otherwise

11. Corporations Law

The Australian Securities and Investments Commission (**ASIC**) has sole responsibility for the administration and enforcement of the **Corporations Act** 2001 nationally.

Features of a Company

- **Corporations Act s124**: Full legal personality, distinct from its owners and managers
- The liability of its members is limited
- Members may transfer their interest in the company to other through formal transfers of shares
- Permanent existence
- Can sue or be sued in its own name
- Can commit a crime, tort or other wrongful conduct
- Has a constitution: replaceable rules
- Capacity to enter into contract in any legal manner → liable to the extent of its separate property

Nature and Formation of a company

Corporate personality

- Upon incorporation, a company is generally considered to be a new legal entity → a person in the eye of the law separate from shareholders
- Statutory force: **s124** from the date of registration = full legal capacity as a natural person
- Remains a legal person until it is deregistered **s601AD(1)**
- Based on *Salomon v Salomon*

Limited liability

- Limited liability is the main reason why people consider incorporating
- Owner is not personally responsible for business debts and obligations of the company
- If sued, only assets of the business are at risk, not the owners (or shareholders') personal assets such as houses or cars
- Especially desirable when dealing with insurance or high-risk ventures
- Decrease need to shareholders to monitor managers
- Share value determined by company- not individual wealth of shareholders
- Company can invest better if shareholders do not risk all

Salomon v Salomon & Co Ltd (1897)

- Salomon originally a sole trader decided to sell his leather and boot manufacturing business to a company that he set up (A Salomon & Co Pty Ltd) for 37000 pounds
- He took all shares except the company needed a minimum of 7 members, so his wife and 5 children were given 1 share each
- Company went into liquidation
- Creditors sued Salomon for company debt they argued that the company is just an alias for Salomon himself
- Issue: was the company a sham- a mere agent of S- so that S should be responsible for the unpaid debts of the company

House of Lords held: no fraud → the company was a legal entity separate from shareholders (was incorporated correctly) and a limited liability concept applied so Salomon was not personally liable to the creditors

Lee v Lee's Air Farming (1961)

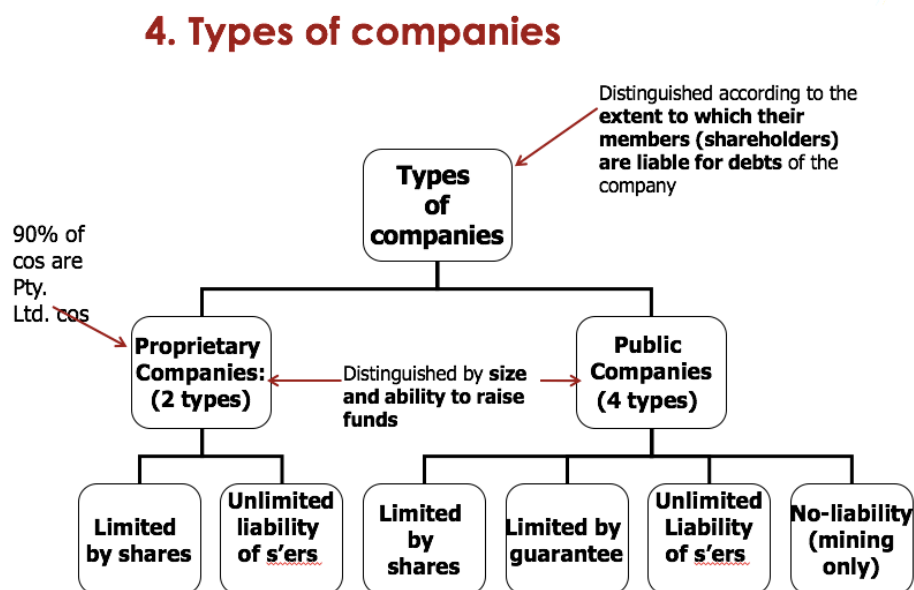
- Lee owned 2999 of 3000 shares
- One share was taken by his solicitor as nominee for Lee
- Lee was the managing director of the company and also named as an employee under his Workers compensation insurance
- He dies while aerial spraying and his wife claimed workers compensation
- Issue: could he be an 'employee' of a 'one man' company for the purpose of work care?

Held: An owner can be an 'employee' of the company. The rule in *Salomon* meant that Lee could be employed by the company he owned = separate legal entities → Lee's wife was able to get worker's compensation

Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1987)

- Holding company held all shares in a subsidiary
- The subsidiary signed, and then breached a contract
- Had few assets
- Plaintiff sued the holding company saying that the holding company should be responsible for the obligations of the subsidiary

Held: these two related companies were separate legal entities (holding company not acting as the agent of the subsidiary) → subsidiary had nothing to do with the main company

Types of Companies (that may be registered)

The most important method of company incorporation is that of formation under the Corporations Act. Can be either:

1. **Proprietary companies**
2. **Public companies**

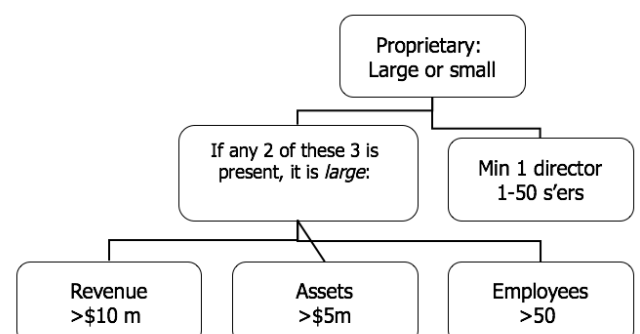
Limited by shares: a company formed on the principle of having the liability of its members limited by the constitution to the amount unpaid on their shares

Proprietary Companies

- a. *Limited by share*

Formed limiting their number of shares to fewer than 50 non-employee members (excluding those who are employees) and keeping their business affairs private

- b. *Unlimited liability of shareholders*



Public Companies

a. Limited by shares

Companies that may offer their shares, and other securities to the general public for purchase

b. Limited by guarantee

Do not have share capital → restricted scope and is usually in the non-profit sector

- Usually formed on the principle that the original guarantors of the company undertake to guarantee the payment of a certain sum to be used to pay the company's debts in the event it is wound up

c. Unlimited companies

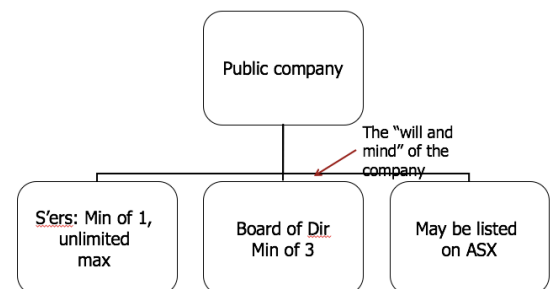
Company formed on the principle of having no limit placed on the liability of its members

- Members have no limit on their liability to contribute to the assets of the company in the event of it being wound up
- Few companies like this exist

d. No liability companies

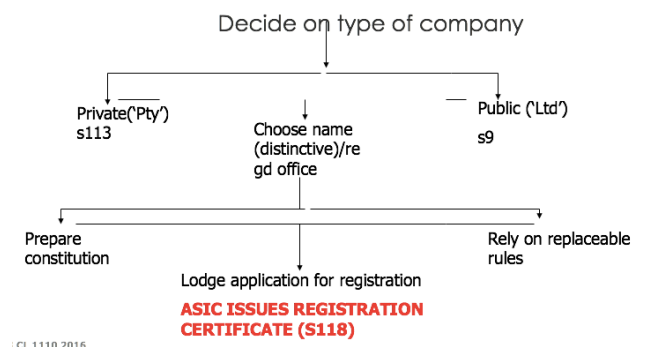
May only be formed for the purpose of mining, and on the principle of their members incurring liability to pay calls

- The acceptance of a share does not constitute a contract to pay calls in respect of money unpaid on such a share
- Special provision in the act



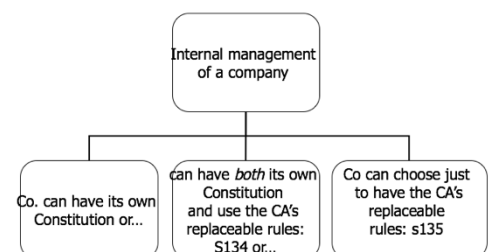
Registration Process

- Must be given a name that distinguishes it from other companies and is not already registered
- A public company with limited liability must include "Ltd"
- A limited proprietary company must have "Pty"
- An unlimited proprietary company must have Pty
- A no liability company must have NL



Constitutions and Replaceable Rules

- The rules of the company are called its constitution
- Constitution is a contract between company and its shareholders
- Constitution sets out what company can do and how it is to be done
- Internal management is governed by "replaceable rules" stated to apply to the company, a constitution if one is adopted or a combination of both



Company making contracts: Liability of a corporation for the acts of its agents

A company can make a contract through:

Formal authority

- **s126:** indirectly through agent
 - Allows authorized agents to make, vary, ratify or discharge a contract on behalf of the company
- **s127:** directly by company
 - With or without seal

Substantive authority

- Actual and ostensible authority
- The statutory assumptions (**s129** assumptions)

Company must act through its directors, officers and other agents → question arises as to when a company is liable for the acts of its agents

- Persons dealing with the company are entitled to make the assumptions outlined in **s129: s128** (statutory equivalent of apparent authority)
- These assumptions can be made even if the director, officer or agent had acted fraudulently or had forged a document in connection with the dealing **s128(3)**
- A person loses the right to rely on s129 assumption if they know or suspect that the particular assumptions are not correct **s128(4)**

Section 129 lists the assumption that persons dealing with the company are entitled to make under **s128**:

- **s129(1):** a person may assume that the company's constitution (if any) or replaceable rules have been complied with
- **s129(2):** a person, who appears, from the information provided by the company and available by ASIC, to be the director or a secretary of the company:
 - a. Has been duly appointed
 - b. Has the authority to exercise the powers and perform the duties customarily exercised or performed by a director or secretary of a "similar company"
 - *Panorama Developments v Fidelis Furnishing*: on secretaries apparent authority
 - *Freeman & Lockyer v Buckhurst Park*: on CEO's apparent authority
- **s129(3):** a person who is held out by the company to be an officer or agent of the company:
 - a. Has been duly appointed; and
 - b. Has the authority to exercise the powers and perform the duties customarily exercised or performed by a director or secretary of a similar company
 - *"Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd"*
- **s129(4):** that the officers and agent properly perform their duties to the company
- **s129(5):** That the relevant documentation has been duly signed or sealed
- **s129(6):** that an officer or agent has authority to issue a document on its behalf, and certify it is genuine

Management and Control

- Members collectively own the company
- In public companies members do not manage the business of the company
- Company (as an artificial legal person) must act through the agency of others
- Directors carry out day-to-day management of a company
- **s198A** provides that the business of a company is managed by or under the direction of the directors
- If there is more than one director → referred to as 'the Board' which will then appoint a CEO
- Executive directors run the company
- Non-executive directors on the Board but don't take part in management (liable for Board decisions)
- Companies must also have a secretary- responsible for "book keeping", drawing up agendas and organizing meetings, ensuring compliance

Directors

- All corporation must have directors who are:
 - Over 18
 - Not disqualified within meaning of s260B and 15
 - Who may be appointed by ordinary resolution at a general meeting
 - Proprietary- minimum 1 (s201A(1))
 - Public- minimum 3 (s201A(2))

Validity of acts of directors

- Acts valid notwithstanding defect in appointment s201M
- Director includes a person who is not validly appointed by “acts” as a director

Power of directors

- Set and monitor policy and strategy
- Provide accountability to shareholders
- Elect/dismiss CEO
- Carry out statutory functions
- External independent directors

** in answer: s128(4): either applicable or not applicable

Lifting the Corporate veil

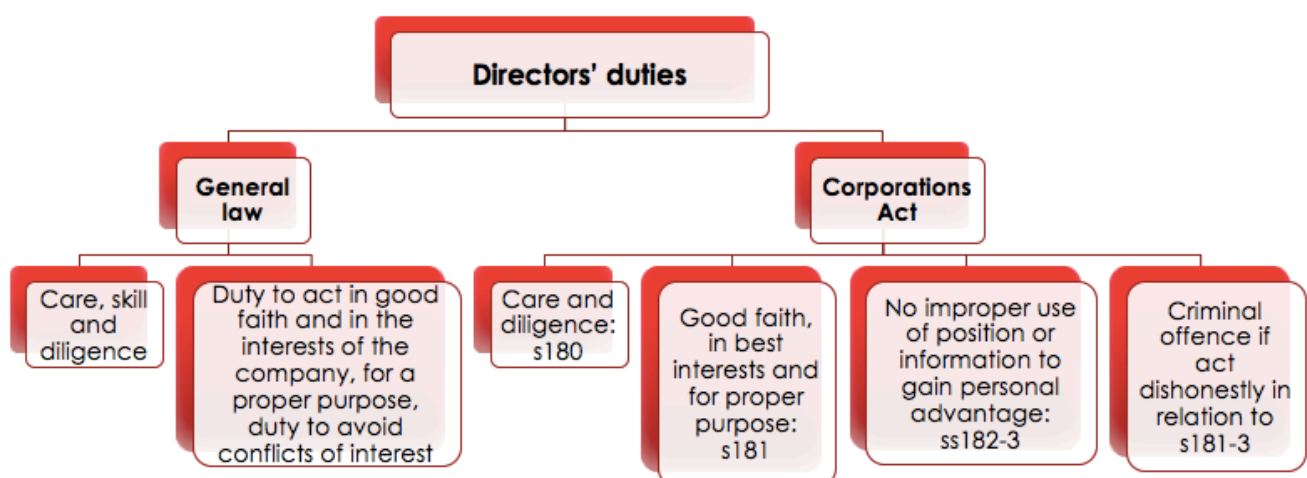
- Courts are very reluctant to “lift the corporate veil” and examine/sue the owners of the separate legal persons
- Corporate veil protects agents → cannot sue the people running the company

Exceptions:

1. Breach of director’s duties (ss180-183, 191)
2. Fraud cases: tax cases
3. Insolvent trading (s588G)

Directors Duties

Certain statutory duties are owed by directors and other officers of a corporation (ss180-184)



1. Duty of care and diligence: s180

i. *Care and diligence- directors and other officers*

s180(1): A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- a. Were a director or officer of a corporation in the corporation's circumstances; and
- b. Occupied by the office held by, and had the same responsibilities within the corporation as, the director or officer

Other notes about s180(1):

- The degree of care and diligence required in s180(1) is determined by looking at the corporation's circumstances and the responsibilities that the officer had
- Although the section does not include the word "skill" it is a requirement of the common law equivalent
- Skill is a required element in exercising the s180(1) duty of care and diligence
- Ignorance nor honesty is a defense to an action under s180(1)

ii. *Business judgment rule*

- Provides a defense for what otherwise may be a breach of s180(1)- not to any other breach
- The effect of the rule is that if a director meets the requirements, they are shielded from liability
- Directors will have acted with due care and diligence if all factors are satisfied (a-d)
- The need for rationality in (d) excludes decisions that cannot be coherently explained/reckless
- Applies to officers, not just directors
- There has to be a business judgment: defined in s180(3) to mean
"any decision to take or not to take an action in respect of a matter relevant to the business operations of the corporation" → predicate an actual decision, not inactivity

s180(2): a director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

- a. Make the judgment in good faith for a proper purpose
- b. Do not have a material personal interest in the subject matter (ASIC v Adler)
- c. Inform themselves about the subject matter of the judgment to the extent they reasonably believe it to be appropriate
- d. Rationally believe that the judgment is in the best interest of the corporation

When reviewing company accounts, executive and non-executive directors must examine all financial reports, and consider them in the context of their own knowledge of company's affairs → cannot rely solely on others competency

ASIC v Healey (2011)

- Omitted \$4.45 billion liability from the balance sheet
- ASIC launched a civil penalty proceeding against the current and former non-executive directors, former CEO and CFO of the group
- Accused the defendant directors and officers of failing to take steps to ensure compliance with the financial reporting obligations under the Corps Act 2001
- Issue: whether in the circumstances the obligation to exercise care and diligence required the directors to personally scrutinize each line the accounts looking for accounting error or apparent inaccuracies, and if not, whether it was negligent for them to have failed to detect error where both management and external auditor (PwC) did not

Held: each of the directors and officers had breached duty of care → directors were aware of the guarantees (liabilities) and that they were significant to the accounts

Middleton J:

- In essence, directors are entitled to rely on others but they must always **bring an independent and inquiring mind** to the exercise of their duties

ASIC v Hellicar (2012)

- Asbestos → wrongful claims about capacity to pay compensation (around \$1 billion under funded)

Held: fines imposed on former directors (both executive and non-executive) were disqualified from acting as directors for various lengths of time

Daniels v Anderson (1995)

- AWA suffered a \$49m loss because of unauthorized foreign exchange dealings by an employee
- Company's auditors (D) failed to notice the dealings and had not reported them to the Board
- It had not pointed out problems with the company's controls and record keeping

Held: directors owe a common law duty to their company to take reasonable care in performance of their duties
→ a breach of this duty of care renders the directors liable

Common Law: duty of care (as in *Daniels v Anderson*)

To exercise the common law duties of care and skill, directors must:

- a. *Be familiar with the fundamentals of the company's business*
- b. *Keep informed about its activities on a continuing basis*
- c. *Monitor corporate affairs and policies; and*
- d. *Keep informed about its financial status by regularly reviewing its financial statements*

2. Duty to act in good faith (fiduciary duty) and for a proper purpose: s181

s181: a director or other officer of a corporation must exercise their powers and discharge their duties:

- a. In good faith in the best interests of the corporation: act honestly in the interests of the corporation as a whole
- b. For a proper purpose: for the benefit of the corporation as a whole and not for any extraneous purpose

3. Duty not to misuse the director's position to gain an advantage or cause detriment: s182

s182: a director, secretary, other officer or employee of a corporation must not improperly use their position to:

- a. Gain an advantage for themselves or someone else (third party); or
- b. Cause detriment to the corporation

ASIC v Adler (2002)

- Adler was a non-executive director, Williams = director and CEO, Fodera = director, finance controller
- HIHC (a subsidiary of HIH) authorized a \$10m loan to PEE which was half owned by Adler
- PEE used this money to purchase shares worth nearly \$4m and the balance was used to buy shares in unlisted technology stocks from Adler Corporation and to make loans to entities that were associated with Adler
- Also BJR: not available to Adler as he had "material personal interest" in spending 10m to prop up HIH share prices so he would not lose money
- ASIC brought proceedings against the three directors alleging inter alia they had contravened ss180-183 of the Act failing to notify the Board

Held: Adler was found to have contravened each of ss180-183 of the Corp Act 2001:

- S180: Duty to act with care and diligence
- S181: duty to act in good faith and for a proper purpose
- S182: duty not to improperly use position (arrangement of the \$10m loan to prop up share prices)
- S183: duty not to improperly use information

Santow J explained the relevant principles when assessing a contravention of **s182**:

- A director causes a company to enter into an agreement that confers unreasonable personal benefits on the director
- Does so in a way that ensure any independent director is not aware of the benefits flowing to the director are unreasonable
- Carried out by the company in a way that ensures director would benefit and director does not make adequate disclosure of their interests
- Assessed objectively: whether the director has breached the section

Cummings and anor v Claremont Petroleum NL (1992)

- Cummings and Fuller were directors of Claremont, a publicly listed mining company
- Gained control of the Board and passed resolution to provide them with luxury cars and generous severance packages
- They were voted off the Board and the new Board cancelled the leases on the luxury cars and sought repayment of the severance payments
- Company argued the former directors were in breach of their duty to act honestly and not misuse their position to gain an advantage or cause detriment

Full Court: affirmed directors had misused their positions and had breached their duty to act honestly

- "One of the prime duties of a fiduciary is to avoid putting himself in a position of conflict of duty and interest, or at any rate to avoid advancing his personal interest by pursuing a gain in circumstances in which there is a conflict between his duty and interest
- Fuller and Cummings were experienced commercial solicitors, and Fuller at least was an experienced director → taken into account when determining if they had exercised a reasonable degree of care and diligence

4. Duty not to misuse the director's position to obtain and use information: s183

A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

- a. Gain an advantage for themselves or someone else (third party); or
- b. Cause detriment to the corporation

ASIC v Vizard (2005)

- Vizard was a lawyer and high profile arts personality and benefactor → appointed a non-executive director of Telstra
- Telstra invests in companies listed on the ASX, in order to buy and sell shares in listed companies Telstra's CEO would provide all the directors of Telstra with confidential information to help make the right investment decisions
- Vizard took information and instructed his accountant (Mr Lay) to proceed with share transactions on behalf of a company, CTI, that Vizard created for investment purpose
- To conceal, he appointed Mr Lay as the company's sole shareholder and director
- Aim: Vizard's family trustee company (Brigham) to benefit from the transactions
- Proven: each share transaction by CTI happened because of Telstra's information
- ASIC determined it did not have a case against Vizard for insider trading or any other crime
- ASIC did commence civil proceedings against Vizard for breach his director's duties under Corp Act **ss183 and 232**
- ASIC made no allegations of dishonesty against Vizard

Came to an out of court settlement: Vizard plead guilty in exchange for a sum and disqualification from acting as a company director (for 10 years)

5. Duty to act in good faith, use of position and use of information- criminal offences: s184

s184(1): Good faith- directors and other officers

A director or other officers of a corporation commits an offence if they:

- a. Are reckless; or
- b. Are intentionally dishonest

And fail to exercise their powers and discharge their duties:

- c. In good faith in the best interests of the corporation; or
- d. For a proper purpose

s184(2): Use of position- directors, other officers and employees

A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:

- a. With the intention of directly or indirectly gaining an advantage for themselves, or someone else, causing detriment to the corporation; or
- b. Recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation

s184(3): Use of information- directors, other officers and employees

A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:

- a. With the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
- b. Recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation

The central element in each offence is dishonesty → may be established by showing the director intended to act dishonestly or was reckless

ASIC v Adler

Four criminal charges including s184(1) and Crimes Act (obtaining money by deception)

- “offences are serious and display an appalling lack of morality. Directors are not appointed to advance their own interests but to manage for the benefit of shareholders to whom they owe fiduciary duties...these were not stupid errors but deliberate lies:
- Penalties:
 - Imprisoned for 2.5 years
 - Disqualified for 20 years
 - Compensation of \$7m
 - Pecuniary penalty of \$450,000

Statutory Remedies (page 519)

Civil consequences: ss180-183

- Civil penalty order up to \$200,000
- Prohibition from managing companies in the future
- Orders to compensate the company

Criminal consequences: s184

- Involves recklessness or intentional dishonesty
- Fine up to \$220,000 and/or five years' imprisonment

Common Law and Equitable Remedies

- Termination of appointment contract
- Rescission of contract created with company in conflict of interest
- Damages to compensate the company for loss
- Orders to account for profits made in breach of duty
- Injunction if necessary

Disclosure of interests by directors: s191

S191(1): Subject to exceptions, directors with material personal interest in a matter that relates to the corporation must give other directors notice of that interest

S191(3): Notice must be given at a director's meeting as soon as practicable after the director becomes aware of the interest

S191(4): Contravention of this provision by a director does not affect the validity of any act, transaction, agreement, instrument or resolution

S191(5): Director of a public corporation who has a material personal interest in a matter that is being considered at a director's meeting must not vote and must not be present while the matter is being discussed

Insolvent Trading**Director's duty to prevent insolvent trading: s588G**

Section s588G imposes a duty on the director to prevent insolvent trading by the company

- A director contravenes the section if, when the company incurs a debt there are reasonable grounds for suspecting that the company is, or would become, insolvent
- Insolvent: unable to pay its debt when they fall due

S588G applies where:

- a. A person is a director of a company at the time when the company incurs a debt;
- b. The company is insolvent at the time; or becomes insolvent by incurring that debt; and
- c. At that time, there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent: s588(1)

**** discuss each element**

Defenses to insolvent trading: s588H

At the time when the debt was incurred the director must establish:

S588H(1): reasonable grounds to expect (and the director did expect) that the company was solvent and would remain solvent even with the new debt(s);

S588H(2): reasonable grounds to rely on information provided by a competent and reliable person that the company was solvent

S588H(3): s/he did not take part in management owing to illness or other good reason (mere ignorance of the company's operations is not a defense)

S588H(4): s/he took all reasonable steps to prevent the company from incurring the debt

Remedies

S588J: Civil penalty

- Directors can be made personally liable for corporation debts if they were incurred at a time when the corporation was trading insolvent
- Directors may have to compensate the corporation or liquidator may seek compensation for creditors

S588G(3): Criminal offence

- Directors can be charged if dishonesty involved

S588M: recovery by liquidator

- Liquidator can recover from the director personally

S588M: recovery by creditor

- Creditor can recover from director personally

Notes:

- Assumption for contracts with third parties: say if 128(4) is either applicable or not applicable
- When talking about insolvent trading remedies → which defenses are relevant which are not
- Discuss each element required for a director to have insolvently traded (a-c)

Section	Duty
s.180	To act with care and diligence
s.181	To act in good faith and for a proper purpose
s.182	Not to make improper use of position
s.183	Not to misuse inside information
s.191	Disclosure of Interest CACL – 18.970

MThomas S2 2012 BTC_1110

Other notes:

- Compare liability with corporation and partnership
- Liability of non-executive director
- Fiduciary obligation between director and corporation (180-183)
- Page 513: AWA v Daniels: contributory negligence
- Always consider business judgement rule: only for s180(1) → only for care and skill: all conditions must be met → must be a business decision
- Vizard: why no criminal charges:
- Always discuss penalties

Notes and Tips

- Compare liability with corporation and partnership
- Always consider business judgement rule: only for s180(1) → only for care and skill: all conditions must be met → must be a business decision
- For partnership to exist- requires all three elements
- Go through elements always step by step
- Discuss: if this... if not this... (different scenarios if not completely clear)
- Always discuss penalties
- Get rid of exclusion clause first
- Answer questions on silence through common law and s18
- May have questions that are a supply of goods and services (more than one guarantee) → argue separately
- Misleading: pre-contractual reps + ads
- Don't forget defences for torts
- Negligence + partnerships
- Raise issue about insurance against the loss
- If cannot pay → bankruptcy
- If all remedies: s18 + consumer guarantees

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BTC1100: Commercial Law