BU 231

Business Law Notes

Section 2: The Law of Contracts

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Contents

These are my compiled notes for **BU 231 - Business Law, Spring 2024** with Keith Masterman. These notes represent mostly material from lecture slides and lectures themselves, and content from the textbook. Some internet sources were used to complement certain content.

To the above, the usefulness of each note may vary - I have tried my best to highlight important bits with bold or italic font, but ultimately please use your own discretion. Another important thing to note is that **no case-specific information** is included here unless the case is super important.

I absolve myself from being liable for any negligent misrepresentation or omissions that may occur from using these notes. If something is wrong, or if you feel something is missing, please tell me and I will update it whenever I get around to it.

These notes were written up in Typst.

1. The Law of Contracts

1.1. Introduction to Contract Law

1.1.1. What is a Contract?

A contract is a **set of promises** that the law can enforce. In general, it is any agreement.

1.1.2. The Suspicions of a John Swan, the Prof's Prof

When Prof. Masterman was learning about Contract Law, his prof. told him that

"Everything that I teach you is utter crap" - John Swan, the Prof's Prof

This seems to be due to their observations about how the courts sometimes handle similar court cases, giving contradictory verdicts without any certainty. They hypothesize that the courts are actually **manipulating the rules** to choose who they want to win. So no one really knows the rules!

In particular, the courts basically decide who gets the insurance payouts so they move accordingly. This is important to keep in mind in contract law.

1.1.3. A Rant on the failure of the Law of Precedent

The Courts follow the **Law of Precedent** - Lower Courts follow rules established by Upper Courts in their previous rulings. This is why decisions in cases matter - they set a precedent to be followed! This is ultimately because the courts are trying to **eliminate the courts** - in the end, every possible case would have had a precedent!

However, this is a bit of a failure as lawyers keep piling on ∞ exceptions as $t \to \infty$, so there is never a precedent! Keep this in mind with contract law - past contract rulings might have no effect.

1.1.4. Equity VS Common Law

Another thing to remember is how **equity** plays into the law - what is deemed fair. This could be yet another exception! For example, equitable remedies.

1.1.5. Contract Law Stairway

1. What is a Contract, formally?
2. What are the defences to a contract (how can you get out of one?)
3. How is a contract interpreted, especially where there are points of ambiguity?
4. How are damages awarded?

1.2. Elements to a Contract

There are 7 big elements to a contract. The courts **must see** 3 of the 7 - Offer, Acceptance, and Consideration; the other 4 the courts **assume to have been met** unless 1 party asks to dispute that.

1.2.1. Offer

An **offer** is a tentative promise made by one party (the **offeror**) in exchange for conditions/requests from the other party (the **offeree**). Once accepted, the terms are **binding** on both parties.

- All terms must be **definite and certain**. Specific prices, specific times, etc. No uncertainty!
- The offer must be **communicated** to the intended recipient - verbally, through writing, digital mediums (with back and forth), or even through actions and conduct. **An offer cannot be accepted until the offeree knows of it**!

1.2.1.1. Standard Form Contracts

Standard Form Contracts (**Contracts of Adhesion**) are "take it or leave it" offers, where there is no room for negotiation and you are essentially forced into taking the offer. The most prominent example is that of the parking lot ticket. Although they are fast and easy (and needed for a lot of businesses to run in linear time), they leave the offeree with highly unequal bargaining power and they cannot negotiate terms at all. The question is - how would a consumer get out of the contract?

1.2.1.2. Contra Proferentum (Against the Offeror)

The rule of Contra Proferentum can be used to get out of Adhesion Contracts. It states that **any ambiguity in a contract is leveraged against the drafter**. Ambiguities are not binding!

The specific test for ambiguity is to check that the clause is broad enough to encompass negligence (ex. you can't sue us for negligence) and broad enough to encompass another cause of action (ex. also contract breach). The most common use case for this would be against **Release/Exemption Clauses**.

If both of the above are true, the statement is **ambiguous**! This is why formal contracts are so long - they take the time to list out every specific cause of action.

1.2.1.3. Inadequate Notice of Terms

Another way out of Adhesion Contracts is through **Inadequate Notice of Terms**. If you can prove that you were not given enough time to read all clauses and were forced to accept, then you were not given adequate notice and thus the contract is not binding. The definition of "reasonably sufficient notice" may differ from case to case.

1.2.1.4. Unexpected Terms (Required Notice of Terms)

Another way out - for terms that are arguably "unexpected" to the offeree, the offerer must ensure sufficient awareness of the unexpected clause. Essentially, if you have a surprise "gotcha" clause in your contract - one that the offeree would not typically expect in a standard form contract - you must make sure the offeree knows of that clause with sufficient notice. This is usually decided on a case-by-case basis as the definition of unexpected & sufficient notice needs to be argued in court.

1.2.1.5. Lapse, Revocation and Counteroffers

Lapse refers to how contracts don't last forever. Contracts lapse after a *reasonable* amount of time, or in a timeframe otherwise specified in the contract. Note: you are allowed to set any time you want as the timeframe for acceptance! (If you don't let the Court choose for you, that is)

Revocation allows offerors to cancel offers at any time **before acceptance**. This has 2 exceptions: **option contracts**, a separate contract where the right to revoke was bought; and **contracts under seal**, contracts with a red dot/X at the end of names (this also extends the litigation period since they are specialty contracts lol). *You cannot enforce irrevocability in the contract.*

Offers usually aren't a one-and-done deal - negotiations can occur! When one side makes an offer, and the other side makes a **counteroffer** (any modification of the offer), the original offer is considered rejected and is immediately voided. Instead, the counteroffer is a **new offer** that can be accepted or rejected, and the process repeats.

1.2.1.6. Offer and Consumers

Here are some notable cases involving sales of goods and services as seen in the textbook:

- Invitations to do business (aka, *most* advertisements) are **not contracts**. They simply are ways to entice customers to start a contract of sale. It is the customer who, after being enticed, makes the offer; and the seller who holds the power to accept or reject.
- Having goods or services provided without request or knowledge doesn't form a contract, since no offer was made and thus accepted. Notably applies to unsolicited goods and services, with additional legislation to prevent "default assumed offer acceptance" if it was unsolicited but there was an untaken opportunity to reject it.

1.2.2. Acceptance

Formally, **acceptance** is the final unqualified (unconditional?) consent to the terms of the offer by the offeree, which is then **communicated** to the offeror by word or by specific conduct. Regardless, the acceptance must be a *positive* action (silence or no action cannot be an acceptance (unless agreed that it can be)).

Certain types of contracts are **unilateral contracts** - these are contracts that are accepted by performing act(s) required by the terms of an offer. In this case, acceptance happens *only through performance* of the acts specified.

1.2.2.1. The Postal Acceptance Rule

Special rules apply to contracts negotiated through mail, due to antics related to mail delay. Notably, acceptance is binding when **it is put in the mailbox**, and revocation is only binding when **the other party receives it**.

This can lead to a funny scenario where the offeree accepts an offer that the offerer was trying to revoke - but the revocation was still in transit when the acceptance was put into the mailbox. The revocation is too late and the contract is binding! lol

This is also why you DATE all your letters - you need to have your evidence for this sort of thing!

1.2.3. Consideration

Consideration is essentially the **price** - what is exchanged for which the promise of the other is bought. Consideration is usually money, but it doesn't have to be - it can be performance (a promise to act), or goods and services. **Both parties must give something** as part of the contract!

1.2.3.1. Gratuitous Promises

If one party doesn't give up anything, it **does not count as Consideration**. Both promise something! This is why charities usually provide some sort of promise back (even an annual dinner is enough)

1.2.3.2. Past Consideration

Past Consideration is not Consideration - Consideration that occurred before the contract was signed **does not count**. In addition, continuing consideration (defined as performing an existing legal duty) doesn't count either - it needs to be **new consideration**.

1.2.3.3. Adequacy of Consideration

The courts do not care if the contract is a fair trade - you are allowed to give a mere peppercorn, and it would be sufficient as consideration. However, both parties must ensure that the consideration is **something they have a legal right to** - for instance, in one case ruling, the right to complain cannot be given up so a "contract" involving that did not count.

1.2.3.4. Exceptions to the Requirement of Consideration

1.2.3.4.1. Debtor/Creditor Rule & Mercantile Law Amendment Act

This was a whole debacle of events involving the *Foakes v. Beer* case, where a debtor could only pay partially, which the creditor originally accepted. They then sued for breach of the original debt contract. The courts ruled in favour of the creditor - since the debtor has not given up **new consideration** (they're getting a freebie with debt relief), thus no new contract was formed & remaining was owed.

Immediately after that though, legislatures across Canada immediately moved to pass the Mercantile Law Amendment Act - when a creditor **accepts** part performance (positive action of some $) to settle a debt, and the debtor pays that partial amount in full, then the entire debt is extinguished. This essentially undid the ruling. Despite the lack of consideration, it's a binding agreement!

1.2.3.4.2. Sealed Contracts

As seen earlier under revocation, sealed contracts do not require any consideration to be binding.

1.2.3.4.3. Equitable Estoppel

1. Some form of legal relationship between the 2 different parties **already exists**
2. One party (gratuitously?) promises to release them from some or all of their legal duties to them
3. The other party acts on that promise in a way that **alters their position** such that if the promiser re-negs on their promise it would provide extreme hardship.

In this case, the courts use "equitable" jurisdiction to prevent the promiser from **denying the promise was untruthful** - that party can't back out. Notably this **can only be used as a shield, not a sword** - the promisee uses this to prevent action by the promisor to enforce their original rights.

1.2.4. Intention to Create Legal Relations

Unless brought up specifically during court, this element is assumed to have been fulfilled in a contract.

If it is raised though, the courts employ the **reasonable bystander test** - did the outward conduct/ context of the 2 parties lack serious intent to create legal obligations (for example, jokes or alcohol)

As a consequence of the reasonable bystander test, the Courts also generally assume you don't want to create legal relations with **family** or in scenarios that **lack common sense** (obviously joking I guess)

1.2.5. Capacity

Capacity is the ability for a party to enter a contract. For instance: minors and people with reduced mental capacity. No capacity = no contract.

Minors are still bound to contracts for supplying **necessary or essential goods or services** - anything needed for their station of life, or anything they don't have an adequate supply of (for some definition of necessary or essential - for example, does a car count?)

In addition, they're also bound by **contracts of service that benefit them** - employment contracts and the like. *Seemingly*, beneficial is defined in the sense of opportunity cost - if there is a better work contract or something it could be argued that the existing work contract is no longer beneficial.

For any other contract, the minor gets to choose whether they back out or enforce the contract, seemingly allowing them to **void contracts at whim**? As for when the minor reaches the age of majority, the following happens:

1. For contracts where they gain a permanent or continuous interest (like things paid in installments), they should back out **immediately** if they want to be released from those obligations; otherwise, they lose the right to do so for that contract.
2. Any contracts for non-continuous interests require **ratification** (acknowledgment and promise to perform) after they reach majority. This is required, for example, when you buy something where the payment happens after the date of majority.

People who have diminished mental capacity follow the same rules as a minor would.

1.2.5.1. Aside: Void VS Voidable

Void contracts refer to a contract that never existed, failing to form due to lack of requirements. **Voidable** contracts instead exist, but can be turned void at the option of one of the parties. If a contract is found void, the court tries its best to return the parties to their original positions. It can also decide only parts of a contract are void and **sever** (remove) those void parts of the contract.

1.2.5.2. Other Groups with Capacity Concerns

1. Corporations - they are separate legal entities and have their own rules on capacity.
2. Labour Unions, Associations, and other Organizations - unless they incorporate, it's not a separate legal entity - use **representative action** (1 person represents the group in court actions)
3. Aboriginal Peoples living on Reservations - thanks outdated Indian Act. They are "special unincorporated associations" and have capacity similar to that of a labour union
4. Bankrupts - under contractual disabilities (save for necessity) until discharged from bankruptcy.

1.2.6. Illegal Contracts

Contracts that violate an Act, Statute, or Public policy are **unenforceable** - the courts cannot provide assistance to remedy. There are some cases where the contract is deemed void under a statute - then the court could still intervene to restore positions but the contract still basically didn't exist.

For example, contracts going against the *Criminal Code* (robberies, assassination? idk), the *Income Tax Act* (sneaky payments to avoid them), the *Competitions Act* (no anti-competitive behaviour), and the *Law Society Act* (regulating the legal profession in Ontario) violate acts.

As for violating common law or public policy, this includes things like compensation (indemnity) for committing torts (bailing out of consequences?), as well as contracts deemed immoral, a perversion of justice, or prejudicial to the interests of the Canadian public.

Also a thing about the Competitions Act - technically NDAs are unenforceable, unless in the context of sale of business and employment (which is what you usually see them in anyways). The enforcing clauses must be unambiguous in location, activity, and time period for them to be reasonable and enforceable.

1.2.7. Certainty of Terms

The terms of a contract must be absolutely certain and unambiguous - if there are any vague or incomplete terms in the contract, it may be deemed **void** by the Courts, and thus no contract was ever formed.

Examples of vague terms include:

- **Fair Value** - instead of explaining how monetary value should be determined, they just use this or an equivalent term to hand wave it. Not OK!
- **Incomplete Contracts** - Contracts missing essential terms like price, what's being purchased, handover dates, and other items.

1.3. Contract Impeachment

Now that we have discussed what a contract is, we can discuss how a contract can be set aside - a way out, a defense, an ability to reneg.

1.3.1. Mistake

Mistakes happen, and despite our best efforts, they can sometimes make it onto contracts. Especially if people start using ChatGPT imo lol.

1.3.1.1. The General Principle to Finding Mistake

Although Mistake has its own subcategories as seen below, Prof. Masterman insists that if:

1. There was indeed a mistake in the Contract
2. The acceptor's interpretation of the mistake is reasonable to a reasonable bystander

then the contract is still binding and you will have to deal with that mistake. In other words, a contract can be voidable if the acceptor abuses the mistake to screw over the other party.

1.3.1.2. Rectification of Mistakes

Rectification is the correction of written documents to fix mistakes. The courts will fix the terms that contain mistakes, subject to the following:

For **Mutual Mistakes**, where both parties made a mistake of some sort, the contract doesn't reflect the parties' shared common intention so can be rectified through renegotiation.

For **Unilateral Mistakes**, where only 1 party claims a mistake was made, the courts need that:

1. There was otherwise a complete oral agreement between the parties on all terms
2. No further negotiations occurred to amend the contract
3. The mistake in the contract *could have* been due to fraud (optional)
4. The defendant (should have) known of the mistake and the plaintiff did not when signing
5. Any subsequent attempt to enforce the inaccurate document would be equivalent to fraud

only then would they rectify the contract. As such, for unilateral mistakes, rectification is **very rare** and an **extreme remedy**.

1.3.1.3. Mistake in Terms and Meaning

1.3.1.3.1. Inadvertent Word Usage / Typographical Errors

Typos happen! If a reasonable bystander would recognize that a mistake occurred, then the contract would be **voidable** by the discretion of the party who made the mistake. The courts could also choose to **rectify** the contract.

1.3.1.3.2. Errors in Recording Terms to Writing

Usually occurs when an oral agreement is improperly converted to writing. Usually, these parties don't want to void the full contract - thus the courts offer **rectification** as a remedy as outlined by the section on rectification above.

1.3.1.3.3. Misunderstanding the Semantic Meaning of Words

The 2 parties may interpret the same words differently. In this case:

- If there are unequally reasonable interpretations, the court will decide which meaning is the most reasonable in light of the fact matrix, and the contract is **binding** under those semantics.
- If the 2 interpretations are equally reasonable, then the courts rule there is **mutual mistake** and the contract is **void** for mistake as to the meaning of terms. This is "essentially" an instant defendant win though, if you think about it hard enough.

1.3.1.4. Mistake in the Subject Matter

1.3.1.4.1. Wrongly Assuming the Existence of Something

Oops, you tried to sell something that doesn't exist, or got destroyed; or you're getting insurance for something that's in the middle of being on fire! In these cases, the contract is deemed **void** - obviously there's no way to reasonably enforce that contract.

1.3.1.4.2. Misvalued Assets and Promises

What if a party made a mistake in the valuation of an asset (and was about to get ripped off)? The Courts will intervene if the mistake in value was present from the outset - a **fundamental egregious mistake** at the onset of the contract (subject to interpretation). The courts will not intervene due to market price flux. The contract gets **voided**.

1.3.1.4.3. False Identities in the Contract

If one party tricks the other into thinking they're someone they're not, the contract is **voided**. However, the *identity assumed must be an existing one* - if the identity was fake or non-existent, it's only **voidable** but you can only really get compensation from that "party" listed on the contract so good luck with recovery lol. Strange…

Also, if mistake in identity occurs but the 2 parties have met in person, the contract is only voidable.

1.3.1.5. Mistake in Document Nature (Non Est Factum)

In Latin, it translates to "not my doing" - essentially **"This is not the contract I agreed to"**. This was a very historical defense devised for the illiterate, who could be *tricked* by the literate party into signing - you're relying on another's word that the document is correct. Today it is often used for persons with blindness or who are illiterate.

Note - this defense **does not work if you were careless in not reading** - this was the case at some point but the courts reverted that decision. This defense is limited in the sense that you couldn't have been careless yet still signed a document while being mistaken about its nature.

1.3.2. Misrepresentation

1.3.2.1. Wait, isn't this Tort Law?

Well, yes, but **innocent** misrepresentations aren't tortious (although the professional still has a duty to correct). In contract law, any **material misrepresentations** may allow one party to gain the right to rescind the contract. Misrepresentations are not terms of the contract - false impressions!

1.3.2.2. Formal Definition of Misrepresentation in Contract Law

Misrepresentation a statement or representation that is made during the negotiation of the contract, **before the contract's formation**, that turns out to be false.

There are 3 types of misrepresentation:

- **Fraudulent**: The party making the misrepresentation intentionally did so, essentially lying
- **Negligent**: The party had a duty to ensure the statement was accurate, yet failed to take the steps needed to do so and fell below the standard of care (for instance, a professional)
- **Innocent**: Any misrepresentation that does not get categorized into the above. It is important to note that parties **must still correct these** when in a position to do so - else it may become fraudulent or negligent!

Recall the Elements of the Tort(s) Misrepresentation - the same general outline follows here:

1. A statement is made, and that statement is false
2. The statement is such that it is negligent/fraudulent/innocent
3. Relying on said statement **caused the injured party to enter the contract**
4. Relying on said statement caused harm to the innocent party.

1.3.2.3. Consequences of Misrepresentation

As mentioned in Tort, the contract becomes voidable at the option of the victim. Fraudulent misrepresentation allows for rescinding the contract and/or awarding extra damages; while for negligent misrepresentation only 1 of the 2 options are available. Note that the party should rescind promptly lest they lose their right to rescind after an unreasonable amount of time has passed.

1.3.2.4. Representations must be Statements of Fact

A statement can't be a misrepresentation if it is a statement of opinion - this is why saying "In my opinion" is important. However, there is an exception if you are an **expert** (or are perceived to be one?) - expert opinions are considered statements of fact.

1.3.2.5. Omissions as Misrepresentation

Omissions are misrepresentations only if there is a **duty of utmost good faith** owed (like a fiduciary duty or implied contractual duty of good faith); or if there is some latent defect (a defect that existed at the time of purchase, not obvious to a *prudent* buyer, yet serious and important).

Some contracts **require disclosure** - failing to do so renders that contract voidable. For instance, the insured must disclose to insurance companies info related to their risk; directors to their corporation (as a fiduciary duty); partners in a partnership; and professionals to their clients.

There is also the rule of **Caveat Emptor**, or **Buyer Beware**. The purchaser is responsible for clearing misrepresentations. This is however countered by the *Sale of Goods Act*, which makes contracts voidable for buyers if the vendor fails to disclose a problem with the ownership, quality, or characteristics of goods. However, the *Sale of Goods Act* does not apply to contracts involving services or land, so yeah I guess.

1.3.3. Undue Influence

Undue Influence is the *domination* of one party over the mind of the other to a degree that deprives the latter party of the will and ability to make an independent decision. In other words, they have such overwhelming power over them that it's impossible to go against them. If this is the case, the contract is **voidable** to the victim of the influence at their discretion.

This is often seen in issues with wills, spouses, and other special relationships where one party holds some special skill or knowledge and the other party places trust and confides in them. It also often goes hand-in-hand with duress.

1.3.3.1. Test for Undue Influence

It is up to the plaintiff (victim?) to show, on a balance of probabilities, that:

1. There was domination by the other party, as seen in 1 of the below cases:
    1. There exists a special relationship (doctor-patient, lawyer-client)
    2. OR they were in a desperate circumstance at contract formation
    3. OR they were under a threat of prosecution at contract formation
    4. OR the contract was **unconscionable** - unequal bargaining power between the parties
2. The contract was unfair or disadvantageous to the weaker party

In some cases (like spouses), it is presumed that undue influence exists - then the dominant spouse would need to establish that no undue influence was applied!

1.3.3.2. Minimizing Undue Influence

One way lawyers try to minimize undue influence when a contract is signed is through **independent legal advice**. The lawyer would send the weaker party to another independent lawyer and sign it separately to help reduce pressure and influence. But one must ask - given that special relationship still exists, does this *really* help?

1.3.4. Duress

Compared to Undue Influence, **Duress** is **actual or threatened violence or imprisonment** as a way to **coerce** a party to enter a contract. If this occurs, the contract is voidable at the victim's discretion.

While historically it outlined physical harm, nowadays the definition of duress is broadened - economic duress (forced payment backed by inappropriate pressure beyond normal competitive commercial pressure) and other types of violence also count for duress! This is part of why it is confused with undue influence so much, I guess.

1.4. The Requirement of Writing

1.4.1. Preface

For some contracts to be enforceable, they need to be **in writing**, as stated by statute. Prof. Masterman generally considers these as failures due to the court's propensity to manipulate rules and how the statutes benefit those who are aware of them. There are contradictory cases abound here.

1.4.2. What is "In Writing"?

In general, it just needs to be written down - no specific form is necessary, and it could be across multiple scattered documents (however, they cannot be connected through oral promises). Electronic writing and signatures are also sufficient. **Evidenced in writing**, not specifically in writing.

Essentially, they only need to include essential contract terms - names of the parties, subject matter of the contract, consideration (excepting guarantees), payment details, and signatures of signing parties.

The in-writing rule is known to be manipulated by Courts to get the ruling they need, as there is room for interpretation as to what counts as "in writing".

1.4.3. Contracts to be in Writing from the Statute of Frauds

1. The promise of a will's **executor** to pay for an estate's debts (after distribution) with their own $
2. **Guarantees**: A promise to pay the debt of another person IF the debtor defaults.
3. **Indemnities**: In BC only, promises to pay **on behalf** of a third party as long as the other party in the contract performs. **Not conditional on the debtor defaulting**.
4. **Marriage**: Historically for marriage contracts like bridal dowry, now it is governed by Family Law. However, it still needs to be in writing to be enforceable.
5. **>1 Year Actions**: Agreements where both parties perform only after a year or more from signing unless the contract has an indefinite time period.
6. **Land Interests**: Contracts that create an **interest in land** (ownership rights, including leases). A specific exception for these is the **Doctrine of Past Performance** - if both parties already partially performed parts of a land-interest contract, it is considered binding regardless.

1.4.4. Contracts to be in Writing from the Sales of Goods Act

This applies to all provinces but BC and Ontario. So it doesn't apply, but sales of goods usually over $50 need writing, acceptance, part payment (credit to paying the purchase price), or earnest (token sum or article to seal the deal); otherwise they are unenforceable.

1.4.5. Contracts to be in Writing from the Consumer Protection Act

This applies to B2C contracts only. For Direct Agreements of over $50 (like door-to-door sales) to be enforceable, it must be in writing and include:

1. Detailed Description of Goods/Services
2. Itemized Purchase Prices
3. Name, Address, and Contact Info of Vendor
4. Notice of Statutory Cancellation Rights
5. A Copy must be given to the consumer
6. Cost of Borrowing, if applicable

Some contracts under designated industries might be subject to further rules and exceptions too.

1.5. Tidbits

1.5.1. The Basis of the Bankruptcy Act

The Bankruptcy Act is based on the Debtor/Creditor Rule and its subsequent ruling! If you commit an act of bankruptcy (defined as owing more than $1000 to 2+ creditors with no way to pay them down), you have 2 recourses:

1. Your creditors issue a bankruptcy notice, and all* of your debt is paid and all* your assets are liquidated to pay whatever possible. You start over from ground zero with nothing.
2. File a proposal to distribute assets to your creditors in return for debt alleviation. If 2 of 3 **blocks** of creditors agree to this proposal (gerrymandering fully allowed) your debt is paid down and you don't enter bankruptcy. This is risky though since if you don't get 2/3 acceptance or can't live up to the proposal, you automatically enter bankruptcy.

1.5.2. You need not Perfect Capacity

The Capacity requirement needed for different contracts may differ. For example, a marriage contract has relatively low capacity compared to say **Power of Attorney** - allowing someone else to deal with your **financial care** (managing your finances) or **personal care** (managing your life and even when to pull the plug) when you inevitably lose the capacity to do so yourself as you become a boomer.

A general test for capacity is as follows:

1. Do they have a sense of time?
2. Do they have a sense of place? Where do they live and so on?
3. Do they know who lives near them?
4. Do they know the size of their assets?
5. Do they know the nature of the document they are about to sign?

1.5.3. Loopholing Damages for Negligent Misrepresentation

Say hypothetically a misrepresentation is negligent but the courts feel it appropriate to void the contract AND award damages. This is not usually allowed since it is a negligent misrepresentation, so only 1 can be chosen.

The trick is to claim the existence of an **auxiliary contract** - if the main contract was not entered without having the auxiliary contract, the auxiliary contract follows all 7 needed elements for a contract, and voiding the original contract isn't enough to cover damages, this argument may be allowed and now there are 2 contracts you can recover damages with!