



Module: Web Development Issues

Unit: Legal Aspects of Web Development

Lesson: Liability and Contracts

Liability and Contracts

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Introduction

This lesson looks at Liability and Contracts. This is a key part of business law, and as always, it is a very complex area - so always get appropriate legal advice (this is probably more important than in any of the other areas we have considered!)

Liability

Liability is found in different branches of law:

- Criminal law
- Law of tort (civil wrongs) e.g. defamation and negligence
- Law of contract

top tips

The underlying principles of the concept of liability are *individual responsibility* - a person is responsible (liable) for their own acts and omissions - and there can be *no liability without fault* - the act or omission must have caused the loss or damage. This would exclude, for instance, loss or damage caused by a natural event such as an earthquake.

The concept of *vicarious liability* is also important - liability for the torts of others (tort is explained below). The most important example is the liability of an employer for the torts of his employees (although not, generally, for the torts of an independent contractor he employs).

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The Law of Tort

Tort is a civil wrong or wrongful act - an act which causes loss or damage. The purpose of the Law of Tort is to compensate the plaintiff by awarding money - known as "damages".

Tort covers a wide range of different "heads of liability", including (but there are more):

- Trespass (intentional invasion of personal or property rights)
- Defamation (damage to someone's reputation through libel or slander)
- Loss resulting from false statements
- Loss or damage caused by dangerous premises
- Negligence - "liability for personal injury caused not intentionally, but through the defendant's negligent acts or omissions" Harris, P (1997)

think about it

R L Abel (1982) suggests a particular relationship between capitalism and tort law - "because capitalists have to maximise profits in a competitive market, they must sacrifice the safety of others - workers, consumers, those affected by environmental danger".

So "tort law under capitalism equates money with labour, possessions, care, emotional and physical integrity, and ultimately love." Harris, P (1997)

Think about these quotes - what are Abel and Harris trying to express? Do you agree with them?

Is money always going to be enough to make up for wrongful acts committed against someone?

feedback

The quotes are perhaps suggesting that if profit was not important, some wrongs would not occur. However, the need to make profit means that sometimes corners are cut, or people are asked or expected to work less safely than they should.

Harris is suggesting that the assumption of tort law is that everything can be given a financial value - even emotional or physical harm - so such harm can be compensated by a monetary payment.

You probably thought that money is sometimes an adequate compensation, but not always. Someone left with reduced mobility through an industrial accident caused by negligence may use compensation to have their house adapted for their needs, but there will inevitably be emotional effects which the money will not make up for.

There is also no concept of punishment in tort law, only compensation.

Defamation and IT

The tort of defamation has particular implications for anyone who uses IT.

Defamation means injuring someone's reputation or character by making false or malicious statements. Such statements may be libellous or slanderous - these two terms are often confused, but they are not the same thing.



Figure 05.06.01 - Libel and Slander

Slander is verbal or unrecorded. The penalties usually less severe than for libel. Libel is written or recorded. The penalties are more severe, especially when you libel someone's professional standing.

Where do email, discussion boards and SMS (mobile phone texting) fit in?

These have usually been viewed as 'transitory', especially text messages. However, lawyers are increasingly forming the view that emails and text messages could be regarded as permanent publications. Text messages are generally transitory if deleted from both phones, but may be regarded as more permanent (therefore recorded) if they have been stored on servers, or sent via text to email, for instance.

Think of the language used in these media - it is generally informal and conversational, and emails and texts are often sent with much less consideration of the content than formal letters. Employers and employees need to be careful - it is easy to send such messages in a moment of anger (and repent at leisure!) An employer could be held vicariously liable for libellous emails sent by an employee (in the course of employment).

The number of people who view a libellous message also affects the level of damages. Again, it is all too easy to hit the wrong button and broadcast a message very widely!

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Negligence

Blyth v Birmingham Waterworks Co (1856) defines what is meant by negligence:

"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 doing something which a prudent and reasonable man would not do."

This tort is now very important in professional and consulting work and business activity generally. It raises the need for indemnity insurance, which would cover damages awarded if someone was sued.

Negligent Misstatement

Negligent misstatement is defined as a statement of fact, made carelessly, which the claimant then relies upon, to his disadvantage. It is a special area concerned with cases where *professional* advice or work has been wrongly or badly performed.

Examples could include an employer who provides a character reference for a former employee to a new employer, and is negligent in writing the reference. If the new employer suffers damage as a result, he may be able to sue the former employer for negligent misstatement.

What is Negligence?

A number of criteria exist which must be met in order to sue for damages due to negligence:

- **Duty of Care:** There must be a *duty of care* - this exists when an individual can reasonably foresee that his or her act may injure someone;
- **Breach:** there must have been a breach of that duty;
- **Damage caused:** there must be resulting damage or injury to the person who brings the action -
Note: this usually refers to physical damage or injury NOT economic damage.

Take the following scenario:

A radiology machine in a hospital delivers a wrong dose of radiation due to software error. Using precedents from other professions - "developers should have exercised a level of care and expertise that could reasonably be expected from a professional in their area...it is likely that adherence (or not) to appropriate standards and codes of practice of a relevant professional body e.g. BCS [British Computer Society] are factors that would be considered" Ayres, R (1998)

A big issue, though, is the status of professional organisations like BCS - their status is not the same as those of other professional organisations governing, for instance, law and medicine. There is no compulsion for the IT professional to be registered with BCS, or any other organisation, so it is difficult to define exactly which standards and codes of practice they are expected to comply with.

my learning space activity.....

What professional organisations exist in your area of work and in your part of the world?

Who can join them?

Is there any compulsion or general expectation that a professional in your area of work would join them?

What do these organisations expect of their members?

feedback

Examples of Professional Organisations include:

- CIPD - Chartered Institute of Personnel and Development - for Human Resources professionals
- RCN - Royal College of Nursing
- IET - Institution of Engineering and Technology - for electrical engineers and those working in related technologies
- IMechE - Institution of Mechanical engineers
- The Law Society
- Professional Managers Association

The status of these organisations varies, but they all have codes of conduct for those who are registered with them.

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Duty of Care

Case law has evolved in this area and three components have emerged which must exist in order to proceed with such a case:

1. **Foreseeability of damage** - would a reasonable person in the defendant's position have foreseen that the claimant might be injured?
2. **Relationship or "proximity"** between the defendant and the plaintiff. This does not refer to physical "nearness", but to the relationship between the parties - does the claimant belong to the group of people who is owed the duty of care?
3. **Policy** - is it fair and reasonable to impose a duty upon the defendants as regards the plaintiff in the case? For instance a bank robber injured as a result of the careless driving of his accomplice would not succeed in a negligence claim as a matter of "public policy".

An important test case is *Donoghue V Stevenson* (1932).

Donoghue's friend bought her a bottle of ginger beer in a cafe. Donoghue drank some, refilled her glass and remains of decomposed snail came out. Donoghue suffered illness as a result, but as she had not bought the drink, she could not sue the cafe under contract law. Instead she sued the manufacturer.

The case went to the House of Lords who ruled in favour of Donoghue. The manufacturers were held to have a 'duty of care' to anyone whom they could reasonably foresee might be hurt by their negligence. This ruling established the principle that manufacturers can be liable for their products.

think about it

What examples can you think of where your organisation's products or services could give rise to negligence or negligent misstatement claims?

feedback

Examples could include a wide variety of things:

- If a machine operator was hurt using a cutting machine with a broken or faulty guard, it might be negligence because the company had failed to keep the machine properly maintained.
- If a batch of an anti-corrosion chemical for a central heating system was incorrectly made up, and someone's central heating corroded excessively as a result, the chemical company might be held negligent.
- If a riding stables owner saddled a horse with a loose saddle, and someone fell off and was injured as a result, the stable owner might be held negligent.
- Hospitals may be liable if they fail to adequately supervise or train their doctors and nurses or where hygiene standards are not maintained properly.

There are many more examples - you could research them further.

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The Law of Contracts

Contracts are the central feature of most business activity. A contract is a "legally binding agreement between **two** parties whereby each party undertakes specific obligations or enjoys specific rights, conferred by virtue of that agreement" Harris, P (1998).

A contract can be spoken or written, but it is advisable to have written evidence.

The term 'Breach of Contract' refers to the fact that the contract is legally binding - if one party fails to honour their side of the agreement the other side can sue.

Certain essential elements of a contract must be present to constitute a contract. The legal model of a contract consists of:

- An offer
- An acceptance of that offer (so creating an agreement)
- An intention to create legal relations
- Consideration (i.e. each party giving and receiving something of value. In business, this is usually one side receiving a goods or services and the other side paying money, **but not always**)

If an offer is not accepted, a counter-offer may be made. This has the effect of destroying the original offer. Silence can never constitute acceptance, although conduct (behaviour) can, for example, buying something in a supermarket would indicate that you intended to enter into a contract with the supermarket to buy that thing. The supermarket selling it to you indicates that it intended to enter a contract with you to supply the item.

In reality there would also be additional information on specification, delivery schedule, penalties and so on.

Implied terms can also exist - the courts can "fill in the gaps" of missing detail. This is usually done in accordance with common practice in the industry and appropriate codes of practice.

Note that an advertisement does not on its own constitute an offer (this is known as an "invitation to treat").

Knowledge check

Try this example. Analyse the sequence of events and decide whether a contract has been created. How did you arrive at your conclusion?

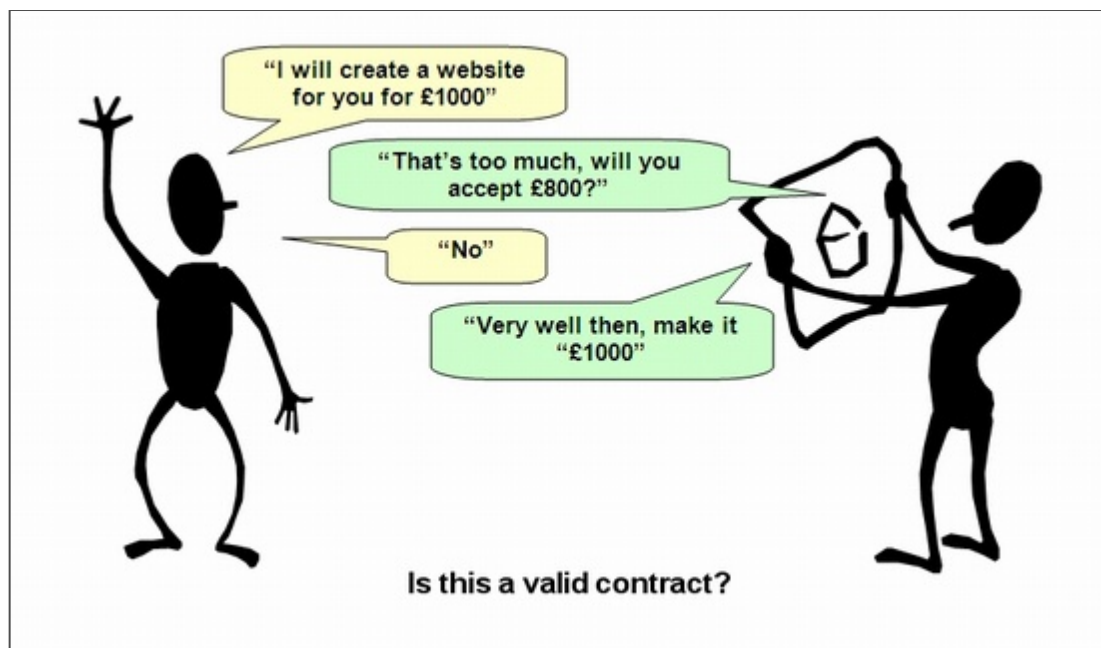


Figure 05.06.02 - Is this a valid contract?

feedback

knowledge check

X: "I will create a website for you for £1000."

X makes an offer.

Y: "That's too much, will you accept £800?"

Y refuses the offer and makes a counter offer which destroys the original offer.

X: "No."

X's refusal of Y's counter offer.

Y: "Very well then, make it £1000."

This looks like acceptance of the original offer, but this has been destroyed, so it is yet another offer, which needs to be accepted before a contract can exist. X would have to accept the new offer for it to be a legal contract. X remaining silent could not be taken as acceptance, but X starting work on the website could possibly be.

Exemption clauses

Exemption clauses are when someone tries to limit or exclude certain situations from their liability.

For example "*The management accepts no responsibility for loss or damage to guests' property howsoever caused*".

In 1977 legislation was passed (the Unfair Contract Terms Act) which meant that any exclusion clause purporting to "exclude or restrict" liability for "death or personal injury" has no legal effect, and other "unfair contract terms" were also restricted by this legislation.

As always, there is case law to assist in interpretation. The *Salvage Association v CAP Financial Services Ltd* (1995) is an important case.

The client and a software developer negotiated development of an application in ORACLE. Unfortunately neither side was particularly expert in this application, which led to the inevitable result - the software was delivered late, contained a large number of errors and was unusable.

CAP had a limitation clause in the contract limiting them to £25,000 for any defects. However, the client was awarded £662,962 in damages. CAP was unable to apply the limitation clause.

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Software contracts and liability

Liability in software contracts is affected by 'negligent misstatement', by consumer protection legislation and Health and Safety legislation.

Under the Sale and Supply of Goods Act (1994), goods should be 'fit for the purpose for which they are sold and must be of satisfactory quality'.

The Supply of Goods and Services Act (1982) specifies that services must be carried out with 'reasonable skill and care' (this is rather vague!).

The Consumer Protection Act (1987) gives a consumer the right to claim compensation for injury or damage caused by a faulty product.

The Unfair Contract Terms Act (1977) restricts the use and applicability of exclusion clauses. It seeks to "level the playing field" between parties to a contract.

Goods and Services



Figure 05.06.03 - Is software a 'good' or a 'service'?

Generally, the view is that off-the-shelf software is regarded as "goods", and writing bespoke software is a supply of "services". The definition matters because there is a big difference in contractual obligations of the supplier. *Goods* must be "fit for purpose", whereas *services* must be supplied with "reasonable skill and care". Fitness for purpose is generally considered to be a much more onerous requirement, which could lead to liability for defects which are outside the supplier's control.

Two important cases:

1. Saphena Computing Ltd V Allied Collection Agencies Ltd (1989)

Software was installed between September 1985 and February 1986. By 11th February 1986 it still wasn't working in a satisfactory manner, and in phone conversation both parties agreed to terminate the contract, with compensation to be decided through legal proceedings.

The Court of Appeal said "It would not be a breach of contract at all to deliver software in the first instance with a bug in it". It was held to be part of the contract that suppliers should have the "right and duty to test and modify as necessary the software they supplied" within a reasonable space of time.

2. St Albans District Council V ICL (1994)

The defendant supplied St Albans (and other councils) with software to administer the community charge. The software calculated the number of residents liable for the charge in different areas. An error meant that the number of tax payers was overstated, meaning the charge was set at too low a level to generate the required income, resulting in a shortfall of £1,314,846.

It was held that the defendant was liable for this sum under the Sale of Goods Act. The judge commented that "if software were not a good, it was difficult to see what it was" (although some have questioned this judgement).

ICL also had a limited liability clause for £100,000, which was not allowed under Unfair Contract Terms Act 1977, as ICL was virtually a monopoly provider, as it had committed to ICL hardware and software in the past, i.e. in effect it 'had' to buy this software package.

my learning space activity.....

Contracts and the Web Development Process

In this activity you will think about what should go into a contract.

Consider the following scenario:

A new magazine called "Petrol Headz" is being launched and the publishers would like a website to accompany it. The magazine and website will be aspirational in nature and will be about all things to do with cars, motorbikes and possibly trucks and powerboats. The company needs a logo design and a strong visual identity for the website. They also expect the site to conform to accessibility guidelines.

Outline or bullet-point the issues that you think a contract between yourself (as the developer) and the client should address.

You may also wish to discuss this with your fellow learners on the discussion forum.

See also Chapter 7 of "*The Essence of Professional Issues in Computing*" by Robert Ayres (1998).

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Repetitive Strain Injury (RSI)

Many workers spend extended periods of time working at a keyboard. This may cause problems with the wrists and hands, known as Repetitive Strain Injury (RSI). RSI is not a precise medical term, but it is now recognised by the Department of Health as an 'industrial injury'. It is referred to as "PDA4". RSI could lead to negligence claims.

Pickford V Imperial Chemical Industries Ltd (1998)

P (a secretary) used a word processor for between 50%-75% of her time at work, and developed pain in her hands. Eventually she took employers to court for negligence, claiming they should have warned her of the needs to take rest breaks.

At the original trial the judge found in favour of the defendant, but the Court of Appeal overturned the decision. The House of Lords supported the original judgement.

This judgement does not mean that all similar cases would fail. Knowledge and experience has increased since 1998, so what was not considered "reasonably foreseeable" then, may be now. In the UK, employers have to comply with the Health and Safety Executive guidelines on workstation set-up - see: <http://www.hse.gov.uk/index.htm>

AS ALWAYS, IF IN DOUBT SEEK APPROPRIATE LEGAL ADVICE!

knowledge check

To complete this knowledge check activity, see the Knowledge Check section at the end of this lesson.

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Knowledge Checks

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knowledge check

Match the description on the left with the correct word or phrase on the right.

Something which must be supplied "fit for purpose"

Negligent
misstatement

A statement excluding liability in certain situations

Exemption clause

An imprecise medical term for a recognised industrial
injury

Services

Something which must be carried out with "reasonable
skill and care"

Limitation clause

A carelessly-made statement of fact which someone
relies upon to their disadvantage

Repetitive strain
injury

Something done or promised to someone in exchange
for them entering into a contract

Consideration

A statement limiting liability to a certain financial level

Goods

Drag an item on the right to its matching statement on the left.



Knowledge Checks - Solutions

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knowledge check

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