

The nature of the president

The authority of higher levels of court. How The that hierarchy works

Business name act:

if ... failed to register the name ..., they are in violation of the Business Names Act and could be liable for a statutory fine. They cannot bring or defend lawsuit.

Partnership

Sole proprietorship

- One owner
- No formality to form sole proprietorship
- Owner personally owns all sole proprietorship assets
- Owner personally liable for all sole proprietorship debt

General partnership:

Partnership:

- 2 or more owners
- Active commercial business
- Owners jointly owning and operating that business
- Intend to make and share profit
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- **Formation:**

- 2 or more owners
- Active commercial business
 - Not investment income
 - Exchange of economic values (goods or services) between parties
- Owners jointly owning and operating that business together
 - Carrying on business in common
 - Not just promote each other, share assets, or employment
- Intend to make and share profits
 - Share cost & profit -> strong indicator
 - Exceptions: installments, payment to family, loan, investment, sale of goodwill, 员工分红, 一起购买生意或资产, 单纯偿还债务

- **Liability:**

- each partner personally liable for debts "jointly and severally"

- **Fiduciary duties (act in the best interests of the party):**

- Share information: true and full
- Not take personal benefit from using business assets and opportunities
- Not compete without partners' consent

- **Implied terms/Default Assumptions**

- Equal share: profit and loss; capital distribution; the right to management

- Full indemnity by firm for every partner's actions
- Participation by all partners in management
- No remuneration for work on firm's behalf
- Majority settles differences
- Unanimous agreement required to change terms of partnership
- Books open to all
- Only method to expel is to dissolve
- Each partner automatically has the legal ability to bind the partnership for contract
 - Unless partner has no actual authority & third party not aware the person is a partner or know the person has no authority
- Termination
 - Fixed terms defined start and end dates
 - Death or insolvency of any partners
 - Debt charged against partnership: asset & equity can not payoff
 - Business becomes illegal
 - Court order: another partner mentally incompetent, permanently unable to perform duties; has harmed partnership; abuse of trust; breach GPP obligations; inevitable loss, other equitable cause

Apparent partner

- If they hold themselves out or allow themselves to be held out as partners -> personally liable for the debt

Limited liability partnership

- formation:
 - Must meet all requirements for GPP
 - All partners agree in having LLP
 - Name ends with LLP
- Liability:
 - Only liable for debts related to negligent or wrongful action of:
 - That partner
 - Employee under that partner's direct supervision
 - Others in LLP if actions were criminal or fraud
 - Others in LLP if partner knew or should have known about those actions but not try to stop them
- Fiduciary duty
- Implied terms
- Authority of partners to bind LLP
- Termination of LLP
- Only for **professionals**.....
- Liability insurance
- The partnership itself is liable for acts of all partners, employees

- Individual partners are not liable for the negligent acts of other partners

Limited partnership

- Formation:
 - Same as GPP
 - Must have at least one general and one limited partner
 - Must register as LP by filing a form 3 declaration
 - Firm name ends with LP
- Liability
 - General partner has full personal liability for limited partnership debts
 - Limited partner has no personal liability for limited partnership debts
 - Limited partner must not be involved in the limited partnership business
If they do, they automatically become general partner
- Fiduciary duty
- Implied terms
 - Cannot receive share of profits if LP cannot pay its debt
 - Cannot participate in managing LP business
 - No rights to inspect LP books, get information about LP's business
- Authority of partners to bind LP
 - GP: have not authority to bind LP is contrary to partnership agreement
 - LP: have no authority to bind LP
- Termination of LP
 - Automatic on retirement, death, or incapacity of a GP unless
 - Partnership agreement allows the LP business to be continued by the remaining GP, and all of the remaining GP and LP consent
 - Any GP or LP can seek court order to terminate LP business

Trusts

- Trustee: Fiduciary duty
- Assets are managed for the benefit of one or more beneficiaries
- No personal profit
- Avoid conflict of interest

Corporation

Professional corporation

- Requirements
 - Approved by the profession's governing body
 - Provision that corporation's business is restricted to practicing that profession and related activities
 - Corporation's name must include professional corporation

- All shares must be owned by members of that profession; except for doctors and dentist, non voting shares may be owned by spouse or child or parent
- All directors and officers must be voting shareholders of that corporation
- Liability:
 - Law and accounting:
 - shareholders are personally liable for professional negligence/misconduct of
 - That partner
 - Employees under that partner's direct supervision
 - Others in LLP if actions were criminal or fraud
 - Others in LLP is the partner knew or should have known about those actions but did not try to stop them
 - Other professionals:
 - shareholders are personally liable for professional negligence/misconduct of
 - That partner
 - Employees, whether or not under his/her direct supervision
 - Other shareholders

Business corporation

Shareholders have no personal liability for the debts of the corporation unless

- **Court lifting the corporate veil**
 - Shareholders must control the corporation
 - The control must be exercised to commit **fraud, a tort, or breach of duty**
 - The misconduct must cause the injury complained of
- Illegal disbursement of assets to owners through **unlawful dividends or share buyback**
- Other attempts to avoid liability not through lawful organization, but rather through **fraud or similar means**

-> personal liability for the debts of the corporation

Natural person

Indoor management rule: a corporation is bound in the contract when its employees and agents act in a way that seems regular, even if it is not

- "If you reasonably believe that somebody has authority to enter into an agreement on behalf of the company and rely on that authority, then you have a legally binding agreement with the company"

Shareholder agreement

- When a corporation is formed, shareholders may agree to special arrangements for how it shall be structured
- Unanimous

Share structures

- Elect directors to the board
- Receive dividends when declared by the board
- Receive any remaining property on wind up

Class of shares

Roles

- Shareholders **own the business**
- Shareholders **elect directors** to oversee and take responsibility for the business
- Directors then **appoint officers** to run the business

Same individual to fill multiple roles: director, shareholder, officer

Shareholders

right

Shareholder meetings:

AGM:

- **Elect directors**
- Approve the audited financial statements
- Appoint the auditor for the following year
- Conduct any other business

Special general meeting

Oppression remedy

Shareholders can go to court and seek oppression remedy where intentionally **treated very unfair or where interest ignored**

- Arise from the misconduct of corporation or directors

Court -> order corporation to buy victim shareholder's shares at fair price or compensate for harm caused; but subject to **solvency test**

Derivative action

Shareholders can go to court and seek to get the corporation to **sue or defend a lawsuit** when:

- Shareholder's rights are damaged (including a loss to the corporation) and the corporation will not bring a legal case
- Director does not authorize the corporation to participate in a lawsuit
 - Must give directors reasonable notice
 - Shareholder applicant must be acting in good faith and show this is in the corporation's interest to bring, sue or defend the lawsuit

Court -> order all or portion of amounts won in the lawsuit to be paid to present or former shareholders of the corporation rather than the corporation itself.

Appraisal remedy

Shareholders can get court order requiring corporation to buy shareholder's share at fair price

- Available if any of **fundamental changes** occur and shareholder does not approve:
 - Issuing, transferring, owning shares
 - Restriction of business
 - Amalgamating or merging
 - Selling all or most assets

Shareholders can require the corporation to buy his/her shares at fair price but are subject to **solvency test**.

Preemptive right

to purchase newly issued shares in proportion to the current holdings

- Directors cannot issue shares for improper purposes, such as altering voting patterns or keeping directors in power

Unanimous shareholder agreement

All shareholders can sign unanimous shareholder agreement that gives shareholders the power to manage corporation

- To the extent that the shareholders take over powers of directors:
 - Directors no longer have those powers and liabilities
 - Shareholders have those director's duties and liabilities

Shareholder remedies

If a shareholder's rights are damaged (including a loss to the corporation) and the corporation will not bring a legal case, the shareholder may ask a **court** to do so directly

- **Derivative action**

"As long as the corporation is making rational (legal) decisions, the court will never interfere with it -> follow majority rule

broad oppression remedy

If a corporation has acted **against the interests of specific shareholders**, the court may order various remedies **test**

- May block a sale
- Order specific actions
- Order the corporation to buy back shares from those affected
- This remedy is broad in theory, but remember the importance of **majority rule**

At the extreme, the court may order a corporation wound up as a **going concern**

- Normally this would only be done if the corporation could not buy out the shareholders who demand a remedy otherwise

Shareholder duties

- Shareholders have **no duties** to one another or to the corporation
- May exercise their **voting powers** and other rights in whatever way they wish, including acting out of pure self-interest
- If a shareholders' agreement gives **shareholders powers** normally held by directors, however, they do have a **fiduciary duty** (just as directors would) in relation to those powers

If shareholders assume powers normally held by directors, they assume the same responsibilities and duties that a director would have in relation to those powers
– So, a fiduciary duty to act under these circumstances in the best interests of the corporation as a whole

Director:

• Management

- Run the corporation
- Appoint officers
- Determine whether and when to pay dividends to shareholders
- Determine whether and when to issue new shares (how many, what class, what price)
- Determine when shareholders meeting will be held
- indemnity
 - Legal authority to authorize the corporation to give an indemnity to directors or officers of the corporation against civil or criminal lawsuits where they were sued because they were directors of the corporation, if:
 - Act honestly and in good faith with a view to best interests of corporation
 - In case of criminal lawsuits: the person had reasonable grounds for believing his/her conduct was lawful/legal

• Fiduciary duty

- Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
 - act honestly and in good faith with a view to the **best interests** of the corporation; and
 - exercise the **care, diligence and skill** that a reasonably prudent person would exercise in comparable circumstances.
[reasonable investigation, decision, act, corporation's affairs]
- Conflict of interests:
 - **disclosure and abstention** from the vote are usually sufficient
- No competing
- Don't take corporation opportunity
 - Learn the opportunity in the role as director/ using corporate information
 - Unless opportunity rejected by corporation

- Duty of care
 - Give attention and care for the corporation's affairs
- Comply with the governing status, the articles, the by-laws

-> As a rule, the taker is deprived of all benefits and every gain is owed to the corporation

● Insider trading

- Director or officer buys or sells shares knowing confidential information relevant to share price
- Must disclose unless the third party knew or should have known the information or reasonably believe they did
- Liable for any loss suffered by the third party, and must turn over any profits to the corporation

● Personable liability

- Up to six months' employee wages and tax withholdings
- Personal liability for unpaid taxes
- Damages in the amount of loss [physical/reputation] because of misconduct
- Issue shares for less than fair value
- Strict liability for improper share redemption and illegal dividends
 - Violation of capital test (dividends)
 - Violation of solvency test (repurchase of shares)
- Approve unreasonable commission to a purchaser of the corporation's share
- Approve director indemnity not permitted by law (best interest&believe)

Indoor management rule

the rule is that a contract is binding if an agent of the corporation had apparent authority, and the other party reasonably believed they were acting properly

Requirements:

- Contract involves something that is in the ordinary course of the corporation's business
- Usual for someone in that position to sign that type of contract
- The third party does not have good reason to believe the person signing lack of authority

-> binding contract

Capital test

a corporation may not pay a dividend if (a) the corporation would be unable to pay its liabilities as they become due and (b) the realizable value of the corporation's assets would be less than the aggregate of its liabilities and its stated capital of all classes

-> directors personally liable for paying dividends

-> directors can ask the court to order shareholders to pay back the dividends if fair

Solvency test

a corporation may not repurchase shares if (a) the corporation would be unable to pay its liabilities as they become due and (b) the realizable value of the corporation's assets would be less than its liabilities

-> directors personally liable for repurchasing shares

Due diligence defence

- The corporation committed **criminal** offences
- Directors are personally charged for offences committed by corporations
- Directors can defence on this charge if:
 - Maintained a reasonable system to ensure compliance [industry standards]
 - The system included compliance monitoring and reporting
 - Reviewed compliance reports to ensure the corporation promptly addressing any non-compliance
 - Acted promptly to improve the system when got notice that compliance system failed

Corporation opportunities

- Opportunities learned of while acting on behalf of a corporation belong to that corporation
- If a director appropriates (takes) that opportunity, the proceeds of whatever comes properly belong to the corporation
 - It is held by the taker in constructive trust

Remedies for Breach (corporation)

- **Damages** in the amount of the loss
- **Rescission of contracts**, so far as possible, without affecting third parties
- Where directors have appropriated some opportunity, they may be found to hold assets in trust for the corporation
- Accounting and delivery of all profits
- The **corporation shall receive the full benefit of any transaction**, and the breaching director will be deprived of all benefit

Directors' Duty of Care

- A director needs no special skills or qualifications in order to serve
- A director who comes with **special qualifications**, however, may be held to a higher standard
 - Lawyers and accountants, for example
- A director must, at minimum, **give attention and care for the corporation's affairs**
- Where a board has considered an issue properly, the court will generally not second guess their decisions
 - This is called the "business judgment rule"

"You are not neglecting the information available to you. You are doing your best. And if that turns wrong, you made a call. That's your job"

Directors' liability

- Directors have strict liability for six months unpaid wages and tax withholdings
 - "It is after the bankruptcy, the director is personally liable....."
- Strict liability for improper share redemptions and illegal dividends
 - "It should only be buying shares if it is sufficient liquid"
- There is a defense of due diligence for these liabilities
 - "Defense of doing your job properly. You should be protected from any potential liability"
- Directors may also be subject to personal liability by more targeted laws, for example relating to environmental protection

Other Duties and Liabilities

- Directors may be subject to securities regulations relating to the sale and trade of stocks and other securities
- Directors have no specific duties to the public or to society in general
 - Though see BCE
- A corporation has some mandatory obligations to indemnify directors and may extend further indemnity
- It is also common to purchase directors' liability insurance for board members

Corporate Liability in Contract

who is allowed to bind the corporation in contract

- The Indoor Management Rule answers this problem
- Because people may not know who does and does not have authority, the rule is that a contract is binding if an agent of the corporation had apparent authority, and the other party reasonably believed they were acting properly

Corporate Liability for Criminal Acts

- A corporation may "commit" a crime if a sufficiently important employee is responsible for it
 - Of course, you cannot put a corporation in jail, so only financial penalties are relevant
- If someone commits a crime on behalf of the corporation, the corporation may make a due diligence defense if it took reasonable acts to prevent it
 - A policy or prevention efforts might qualify, for example
 - It is not enough simply to have a rule against the action

Corporate Liability in Tort

- Corporations can also commit torts, and be liable for the consequences
- This is much easier to prove than criminal liability, especially because torts do not require the same element of intention
- Note also that the same action may be simultaneously both a crime and a tort
 - We will discuss this next week

Torts

Negligence

It covers all situations where one individual injures another without meaning to

- In order to find negligence, the following are required
 - _Duty of care owed from the defendant to the plaintiff
 - Failure to observe an appropriate standard of care
 - Actual damages suffered by the plaintiff
 - That the injury in question is in fact caused by the action complained of

Duty of care — owed from the defendant to the plaintiff

- Duty of care owed from the defendant to the plaintiff

The neighbour principle:

- “You must take reasonable care to avoid acts or omissions which you can **reasonably foresee** would be likely to injure your neighbour.” – Lord Atkin
- Who is a neighbour?
- Just about anyone **who might be foreseen**, and is **sufficiently proximate (close) up** to and including (in some cases) trespassers

• There is a prima facie duty if the harm was reasonably foreseeable and if the parties are sufficiently proximate

- The **specific harm (or something of that nature) must be foreseeable**
- The parties must be **“sufficiently” proximate** – a very subjective test that again goes to foreseeability

- May refer to physical proximity
- May refer to relational proximity
- May incorporate other factors

Anns-Cooper test

- The Anns-Cooper test adds a further critical question
- Is there a reason, founded in public policy, which would negate or limit this prima facie duty?
 - The danger of **unlimited liability**
 - Does the law already provide a remedy?
 - Other?
- **Policy considerations** may compete with a desire to see all injured parties able to recover

(electric city) unlimited liability to an unlimited number of people

Standard of Care — Failure to observe an appropriate standard of care

- The essential standard of care is that of a “reasonable person”
 - This is not the same thing as the “average person”
 - Includes the expectation of reasonable prudence, caution, and care
- Therefore, the standard of care is in most ways objective, and set against a fixed standard, though an abstract one

“Would a reasonable person have behaved this way?”

“Did it fall below a reasonable standard of behaviour?”

If you fail to meet it, you are responsible for the consequences of not meeting it, even if you were incapable of meeting it

Subjective consideration is only available in specific, limited cases

- The law recognizes the “reasonable child”
 - A physically disabled person is required to be reasonable and cautious in context of limitations
 - Mental and psychological limitations tend not to be recognized
- In finding the appropriate standard of care, a court is likely to consider the following
 - How likely is it that harm may result from the activity at issue?
 - How severe might the harm be?
 - How possible and/or costly, would it be to minimize the risk?
 - What is the social utility of the activity?

Damage – Actual damages suffered by the plaintiff

- The normal rule in damages for tort is whatever is required to make the victim whole, or compensatory damages
 - That is, as though the tort had not happened
 - Of course money is not adequate for many kinds of injury, yet the court will find a way to tally the cost of any kind of injury in financial terms
- Some damages are too remote and therefore are not recoverable
 - That is, the damages are too far away from the harm that was done

“Return to the position they were prior to their injury”

- Once liability is established, and some damages are found to be foreseeable, the defendant is liable for all damages that result, even those that may be unforeseeable

The thin skull rule

applies to victims who are more vulnerable than they may appear and clarifies they are entitled to recover all damages they suffer

- Even movement between “types” of damage (mental / physical) is possible, when not excessively remote

Causation – That the injury in question is in fact caused by the action complained of

“But for” test

- If the injury sustained by the plaintiff would not have occurred but for the actions of the defendant
- The standard of proof is on a civil standard, that is on balance of **probabilities**
Eg. business already in trouble

Multiple Causation

- In situations where multiple parties may have contributed to harm, the Court is free to find multiple parties liable, and **assign damages according to their fault**
- The **person suffering damages may themselves be one such party** – this would be called “contributory negligence” but is otherwise analyzed the same way
- **Voluntary assumption of risk** is a similar concept, but where the **plaintiff has knowingly and voluntarily assumed all risk of harm, no other party remains responsible**

Mitigation 自己减轻损失

- Those who have been injured in tort have an obligation to mitigate their damages
- That is, they must **take reasonable actions to limit their injury and loss**
- If they do not take this action, they will only recover for damages as though they had limited
- This applies also to contract, and we will cover it in more detail there

Other Damage Concepts

- **Punitive damages** may be awarded in cases where the defendant’s conduct is especially blame-worthy
 - This is unusual in Canada
 - More common in the United States
 - Different understanding of the purpose of damages
“Punish enough To prevent next damage”
- **Nominal damages** may be awarded simply to recognize a wrong, even if it does not result in actual harm
- The court may also order an **injunction**, preventing some ongoing harm or activity

Class of shares p659 637

Shareholder rights come from two principal sources

- The right attached to their shares by the articles of the corporation
- The rights conferred on them by the relevant corporate legislation

Vote

Receive dividend

Receive remaining property of the corporation

Additional rights may be attached to shares, and if there are different classes of shares, rights may be granted to some shares and not others; but the three basic rights must exist and be exercisable by one or other class of shares