

Final Notes

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Contracts created Unfairly

Misrepresentation

Is it misrepresentation or something else?

- Is it a false statement made by **party A** to get **Party B** to enter into a contract with **Party A**?
 - a. If made by party a to party b and no contract, it is misstatement
- Was it an opinion? I think or I like does not count
- Was it pressure/ threat of violence used to get B into a contract?
 - a. Undue influence and Duress
- Was the damage material?
 - a. Means that if it were originally disclosed, party B would not enter into the contract.
- What kind of misrep?
 - Innocent: believed that it was true
 - Fraudulent: Did not believe the statement was true or believed it was false or was careless
 - Negligence: duty of care was owed, fraud or innocence not really relevant

Law: *is it a misrepresentation?*

1. One party makes false statement (**not opinion like "I think, I like, it seems"**)
2. Statement relied upon by party to enter into contract (**must be material**) and suffers damages
 - i. **Material:** strikes at heart of contract. If it were originally disclosed, the other party would not have entered into contract
 - ii. Case:
 - Collins V Dodge: The Air conditioner was an essential/material part of why Collins bought the car. Doesn't matter if salesman made the misrep **deliberately**
 - Werle V Saskenergy: Werle was dismissed with cause because his previous experiences were an essential reason he was hired.
3. Misrep was made fraudulently/negligently/innocently

Law: *type of misrepresentation:*

You can sue on all three.

Innocent Misrepresentation

Law: representor makes a false statement but can demonstrate a reasonable ground for why they believed the statement to be true

Cases:

- Trump could claim innocence as he was told his hats were USA made by manufacturers
- Fyre Festival: Ja Rule could claim innocence as he never attended meetings and acted in any operational/management capacity

Fraudulent Misrepresentation

Law:

1. Known to be false
2. Without 100% belief in its truth
3. Made carelessly to whether it is true or false

Case:

- Fyre Festival: Billy made fraudulent misreps to investors claiming that the festival was profitable

Negligent Misrepresentation

Law: There was a duty of care to be honest and truthful. I.e. Doctors, lawyers, restaurant

1. Duty of care due to special relationship between parties
 - 1) Foreseeability and proximity. A reasonable person can see that their actions would damage the plaintiff.
 - 2) Public policy can restrict the duty of care if against public policy
 - ◆ Indeterminate liability: the magnitude of the liability cannot be predicted reasonably
2. *One party makes false statement (not opinion like "I think, I like, it seems")*
3. *Statement relied upon by party to enter into contract (must be material) and suffers damages*
4. *Misrep was made fraudulently/innocently*

Law: Is it a contracts requiring extra disclosure?

- Insurance, Sale of Securities, Consumers, Exclusion Clauses

Remedies: To be eligible for damages, innocent party must renounce contract within reasonable time.

- Rescission is only remedy for **innocent misrep**.
- Rescission AND damages and costs is available for **fraudulent/negligent misrep**

For highest change of success, sue on all three.

- Equitable relief: if mistaken party cannot restore subject matter to other party, the contract cannot be rescinded

Defenses: it was innocent misrep, so I don't owe damages and costs

Unconscionable contracts

Is it an unconscionable contract?

- Did Part A use their strong bargaining power to get Party B into a contract
 - Got Party B into contract because of unequal bargaining power
 - In **negligent misrepresentation**, there does not need to be unequal bargaining power and the unfairness stems from a false statement. Undue influence unfairness stems from unequal bargaining power and party B depends on party A.
- In consumer contracts, unconscionable contracts generally include:
 - Deceptive practices
 - Putting undue pressure on consumers Where there is a substantial power imbalance between the parties, e.g.:
 - Knowledge gap
 - Bargaining power (contract of adhesion)
 - A special relationship
 - Doctor-patient
 - Lawyer-client

Law: is this an unconscionable contract?

1. Power imbalance between parties from knowledge, bargain power or special relationship when forming contract
2. Powerful party gets an extremely advantageous deal
 1. Case: Mackay V Cesar option had no expiry date

Is this undue influence?

Law: relationship where weaker Party **RELIES** on stronger Party to make a decision because of skill, knowledge, or position

If other party is a sophisticated professional, will not count.

Elicia: if the question mentions a lawyer, unless it also mentions that the client **RELIES** on the lawyer, it will not be undue influence.

Examples:

- SOME spouses; husband handles all finances

- Lenders who know about undue influence have onus to investigate further
- Mental incapacity/infirmity: Mackay V Cesar
- Lawyers, doctors, clergy

Remedies: Mackay v Cesar: contract can be made void and legal costs paid

Defense:

- **Independent Legal Advice** can rebut presumption of undue influence if lawyer not associated with transaction and issues a certificate;
- OR contract expressly waives right to independent legal advice

Consumer Protection Act BC

- **Law:** supplier cannot take advantage of consumer's mental infirmity, ignorance, illiteracy, age
 - The price paid grossly exceeds expected price of similar transactions
 - No reasonable probability of full payment by the consumer
 - Terms are harsh and adverse to the consumer; inequitable

Is this duress?

Has traditionally been associated with violence or imprisonment, however, now expanded to:

- Economic duress
- Coercion (execution of contract or payment under protest)

Think of duress as when there is an open threat against your person or property or interest

Law: weaker party enters into contract because of threats against physical health, property, or interests

- Standard commercial pressure like wanting a guarantee is not duress (Buckwold V Sagar)

Case: California Dentist and Lee, Lee needed to sign contract

Discharging/frustration

By Performance

Law: obligation is performed even if other party might not accept (ready willing able)

By agreement

Law: discharge by agreement occurs when either all parties agree or it was written in to the contract

Consideration needed

Consideration in this case counts as the promise to NOT enforce further obligations

Accord and satisfaction: discharge old contract but substitutes new contract between the same parties

Novation: replacing old agreement with new one or replacing parties in the old agreement

Law: written into contract

Condition precedent: if not fulfilled, obligations are not binding

Condition subsequent: if fulfilled, obligations are discharged

Option to terminate: Either party reserves the option

Remedies

Contract is terminated and future obligations are relieved

- Past performance is not reversed
- Buyer refunded for future expected performance that they paid for (season ticket)

Discharge by frustration

1. Caused by unpredictable event (covid in 2022 does not count)
2. Unpredictable event heavily impacts ability performance (DJs can still perform for 50 ppl)

3. Only specific goods like 1968 Porsche would count as frustration if destroyed
4. Difficult to use implied terms to establish foundation of contract (Saturley, UVIC parking)
5. If frustration, contract discharged but Contract Act allocates loss of benefits/expenses (based on expenses incurred?) between parties UNLESS force majeure
 1. Banksy art:
 2. Common law allocates losses to ONE party

Law: Frustration is when an unpredictable event beyond control of parties makes performance impossible, pointless or radically different than when the contract was created

- If yes, contract is ended, parties will not be liable for future promised performances but will be liable for damages
- Covid in 2021 vs 2020 is different

Law: Frustration 3 part test

1. Must go to foundation of contract.
 - Force Majeure clause can establish own situation for frustration
 - **Implied terms:** can establish foundation but MUST be obvious for either parties.
 - Saturley V Lund: The implied term never mentioned in negotiation
 - UVIC Parking case: purpose was for parking, not class
 - Concert fire: purpose was for the performance, not seat
2. Impossible to complete contract. *Physically impossible or very different situation from before*
 - WW1: 3x increase in price is valid frustration
 - Bal v Infinite: DJ and venue can still perform with less people attending as it is NOT radically different, just **inconvenient or undesirable**
3. Only frustration if **specific goods** are destroyed (common goods are still obligated)

Defense: implied term or purpose is not in contract, thus extraneous.

Remedies: If frustration, court will discharge future performance and allocate expenses between parties UNLESS force majeure clause. Court only allocates expenses if one party incurs expense relying on the contract.

- **Contract act:** The party suffering from the frustration can ask the other party to share some of the costs, which overrides common law
 - **Common law:** the party that incurred the expense will be responsible for all of it
- **Force majeure clause:** Contract Act/Common Law/doctrine of frustration NOT APPLY when a clause is written to account for remedies for any frustrating events

Discharge by operation of Law

Law: If borrower declares legal bankruptcy, will not owe money anymore. Cannot be caused by borrower's misconduct

Law: If limited period to collect on debts passes, obligation is discharged.

Breach of Contract

Questions

- Is this breach?
 - A breach was a fair contract formed (no false statement or pressure) where one party did not carry out their obligation (not because of an uncontrollable event like frustration)
- Is there a deposit? Liquidated damages
- Was breaching party made aware of possible damages?

Law: Is this a major or minor breach?

Major breach/condition: Breach of essential term. Damages can be claimed and can be discharged if

1. Communicated to breaching party.
2. Does not obtain benefits under contract despite breach
3. May still claim damages

Minor breach/warranty: non-essential term. *Cannot be discharged but damages available*

Law: Anticipatory breach is when a party unequivocally communicates that it will not be able to perform the contract

before performance

- Other party has right to
 1. Treat contract as discharged and communicate to breaching party
 2. Mitigate for damages

Law: (repudiation) -> deliberate or negligent act that makes performance impossible and must take place during or before performance

Types of Breaches (repudiation):

1. Express repudiation: could be implied, actions or oral
 - One party communicates to other it intends to NOT perform as promised
 - Breaching of condition or when most of the contract cannot be performed = other party can discharge/treat as terminated and entitled to sue for damage (mitigate loss as soon as possible: i.e find another buyer asap)
 - **Anticipatory breach:** if communicated before performance
2. Actions rendering performance impossible:
 - When one party takes a deliberate or negligent act that makes performance impossible = repudiation
 - BEFORE OR DURING performance
3. Failure of performance:
 - Doesn't work at time of performance, must be MAJOR failure
 - If performance can mostly be done, then there is no breach but can still sue for damages if they didn't perform how they stated in the contract

Mistakes: when a party performs the contract for the wrong party, "quasi-contract", the court will order restitution.

Remedies:

Law: the breaching party must be informed to the extent that they could predict the damages flowing from their breach
Had. v Bax.

Injured party must **MITIGATE** damages

- Can insist that the other party perform the contract but risks intervening events like frustration discharging the contract
- **Equitable remedies:** injunction, rescission (restore to the pre-contract state), and specific performance (this painting and this painting only)
- **Quantum Meruit:** you pay market price for what you have consumed so far
- **Damages:**

- | | |
|---------------------|--|
| Compensatory | put injured party in position if contract was done, not punitive. Court will accept liquidated damages and deposits. |
|---------------------|--|
- Damages must be **foreseeable** by or communicated to the breaching party
 - Hadley V Baxendale
 - WestCoast Transmission V Cullen
- Losses flow "naturally" from breach

Law: Liquidated damages: if parties demonstrate that they contemplated the damages as a genuine pre-estimate through deposit or contract, it will be enforced by the court if the contract is breached in a major way

- CANNOT be penalty clause (unenforceable), and the damages were reasonable

Exclusion Clause

Exclusion clause

- SGA: excl clause cannot be for new goods sold by a retailer (Walmart)
- Is it a ticket? -> colour, font, attention must be used.
 - Is the position of the plaintiff special?
- Is there a dispute of the enforceability of the exclusion clause stemming from damages suffered by a party?
 - Run the enforceability test of exclusion clause
 - Did the writer of the contract create the exclusion clause because they had secret knowledge that the

contract would likely result in harm for the plaintiff?

- Is it a used good? The seller must take extra steps to disclose

Law: A limitation clause sets a max amount to be liable for. An exclusion clause outlines specific types of liabilities and excludes from being liable.

Law: Did a party read the clause by signing or knew about the clause because of their position? Did the writer of the clause take reasonable steps to let them know?

Law: to be enforceable, the exclusion clause needs to pass a three part test from **Maloney V Dockside**:

1. Does the clause apply to the facts?
 1. *Thorin case: "Altering course" does not equal murder*
2. Is the clause unconscionable: 1. Was there an inequality in the process of creating the clause and 2. unfair outcome?
 - Inequality/unconscionable: ie there is inequality in process of creating the clause and 2) unfair outcome
 - Inequality: dwarves were more likely to know than hobbits
 - Did the writer intend to deceive?
 - the writer of the clause had special expertise/knowledge and did not disclose important information. Instead, they chose to create the clause to insulate themselves
 - Inequality: the position of the plaintiff meant that they are unlikely to be aware of certain dangers
 - Used goods: higher onus for disclosure
3. Is the clause contrary to public policy?
 1. The commercial implications of this would destroy trust...
 2. Homicide is not covered by public policy

Law: In Maloney, there is a higher onus for vendors to disclose info about used goods.

Principled exception to privity: An exclusion clause written by the business extends to the employee even if the clause was originally between business and customer. CASE: London Drugs

1. The limitation clause extends to employees if the original parties intended to extend it to them, impliedly or explicitly
2. The employees must have been performing services on behalf of employer and is acting within the scope of their job

Sales of Goods Act

Situation:

- Is the bulk different from sample?
- Did a customer ask for a good to perform a specific purpose?
IS there an issue of ownership or title?

Facts of case

- Is the seller selling to **business, used goods, craigslist**?
 - Exclusion clause can apply if included unless entire bargain clause or Maloney test
- Are the samples or description different?
- Was there land, bartering, gifts, a service?
- Can the customer return the good?
 - Payment is warranty. Quantity and time of delivery is Condition
- Did the buyer communicate purpose?

Law: Sale of Goods act IMPLIES the following terms

Does not include:

- **Land/real estate**
- **Bartering:** money needs to be involved
- **Consignment:** a third party agent selling goods
- **Gifts:** no consideration

- **Supply of services:** hip replacements, dental work, any service where expertise is fundamental to the operation

Section 16: Implied term of Ownership

- Seller has right to sell good and no third party has claim on goods

Section 17: Description/ sample of goods implied term

- 1) goods sold by description must match and 2) goods sold by sample and description must still meet description

Section 18 a) Purpose made known to seller

1. Buyer makes purpose known to seller
 1. APPLIES IN GROCERY STORES: McMorran
2. Relies on seller's judgement
3. Seller is in business of selling that good

Good must reasonably fit purpose UNLESS customer asks for trade name

Section 18 b) Implied term of merchantable Quality

If goods sold by description and buyer did not get the chance to inspect goods, MUST be of merchantable quality

Section 18 c) Durability

goods must last for a reasonable amount of time

Section 19: For delivered goods or bulk goods sold by sample

1. Buyer has chance to inspect delivered good/ bulk
2. Bulk must match sample
3. Must be free of defects that would not be observable on reasonable inspection

When can goods be returned/ rescind contract?

- Not under warranty: payment time
- Yes under condition: quantity of delivery, date of delivery

Section 21 3)

Transfer of title Kovacs v Holtam Clarify

Exclusion Clause Section 20:

- Exclusion clauses can be used if
 - Sales to another **business**
 - Selling **used** goods
 - Porelle V Eddie allows it
 - Someone selling goods who does not normally sell that good (**craigslist**)
- **Entire bargain clause:** Cannot contract out of liability for entire bargain. The foundation of the contract cannot be called into contract

Does exclusion clause apply? 3 attacks

- If you run Maloney v Dockside test, the clause is unconscionable...
- Entire Bargain Clause section 20 states that the foundation of the bargain/contract cannot be in question
- Exclusion clause only excluded warranties, not conditions
- Kobelt: no evidence that clause was brought to attention of customer so does not apply

SGA rules for transferring title

Whenever title is transferred to a new owner, they take risk if the goods are destroyed.

1. unconditional contract for sale of specific goods = **title passes when contract made**
- 1.
2. sale of specific goods and seller has to do something to the goods to put them in deliverable state = **title passes when seller makes goods ready and buyer receives notice**
 1. Fixing 1968 Porsche car example
3. sale of specific goods in deliverable state, but seller is bound to do something to determine their value = **title passes when buyer has notice that it has been done**
4. sale contingent on approval or acceptance = **when approved/accepted OR when accepted goods without**

rejection OR after reasonable time has passed

1.

5. sale of UNASCERTAINED GOODS (or future goods) by description = **title passes when the goods are in a deliverable state and are appropriated as subject matter of contract**

1. Bevor Farms V Veg Gro

Privity

Privity

- Only parties in the contract can enforce the contract
- HOWEVER
 - Tort allows parties outside contract to enforce contract
 - Statute also extends duty of care to parties outside contract
 - Consumer product safety: manufacturers
 - Occupiers liability: buildings
- Is there an enurement or principled exception clause?

Law: Under privity, only parties to a contract can enforce the contract or have the contract enforced on them because the parties provided consideration

Exceptions to privity: **Law:** You can side step privity with tort and statutes that establish a duty of care beyond the contract:

Tort: tort extends duty of care from just the contract parties to anyone that a reasonable person can foresee to be harmed

- Foreseeability
- Proximity

Companies

Consumer Product Safety Act: manufacturers owe consumers a duty of care even if they did not sell directly to consumers

Occupiers Liability/Buildings Act: Duty of care is extended from builders, engineers, and architects of building to any occupants of building

Vicarious Liability: employer is liable for mistakes committed by employee during work

- If not acting within scope of employment and duties, employer is not liable (crashing lambo in parking lot)
- Morsi

Other types of contracts

Trusts: Beneficiaries of trusts are now able to sue under trusts to enforce the contract even though they were not the original parties in the contract.

Insurance: Beneficiaries can sue to enforce the insurance company to pay out even though they were not parties in the contract

Undisclosed principle: When a principle hires an agent to represent them in a contract, principle can be sued even when they are not technically a party in the contract.

Land: contracts created by previous land owner must be upheld by new land owner, such as leases and easements.

Enurement clauses: clauses in contracts that binds the agreement to successors of contract. Browns V Belleville: family was a successor as they were explicitly named.

Principled exception to privity: DESCRIBE PRIVACY FIRST. An exclusion clause written by the business extends to the employee even if the clause was originally between business and customer

1. The limitation clause extends to employees if the original parties intended to extend it to them
2. The employees must have been performing services on behalf of employer and is acting within the scope of their job

Clause does not need to be exclusion, can also be any type of contract

Brown v Belleville

1. Contract can extend to any beneficiaries (family) if the contract states that it should
2. Beneficiaries must be acting within the scope of what was originally contracted between the contracting parties

Professional situations:

Negligence

Tort

Used to be strict liability, as in culpability/blame did not matter. Now it is:

1. Culpability: was the tort caused by unjustifiable behavior like intention, careless disregard
 1. Exceptions: environmental contamination
2. Causation: Did the tort cause the damage

Negligence

Questions

- Is there joint liability? Court will apportion damages by degree of negligence *MORSI V FERMAR*

Law: For the act to be negligence, it must pass 4 steps:

1. There was a **Duty of care** in relationship: Lawyer, accountant, doctor. I.e. A reasonable person can see that their actions can harm someone.
 - Foreseeability and Proximity: can reasonably see that harm can be caused
 - Restaurant/ customer
 - Parent/child
 - Indeterminate/indiscriminate duty can be removed due to **Public policy** if the duty of care would extend too broad
 1. Accountants only owe a duty of care to management, not shareholders
 2. "this would not be indeterminate duty liability as this is a very close relationship between homeowner and engineer"
2. The conduct fell below the required **standard** for the situation
 1. Objective codes like GAAP establish standard
 2. What would other reasonable people/professionals have done
 1. Testimony of other practitioners
 2. Legislation
3. Was there evidence of **Damage**? You can point to a broken car or loss of share value.
 1. Can be physical, mental, property, loss of profits/wages
4. Was damage **caused** by the **failure to meet standard**?
 1. The **"but for"** test: if it was not because of the defendant's actions, the injury would not have occurred
 2. Exceptional case: when the "but for" test does not work, the court might move to a "material contribution test". *Abestos*.

Law: Product liability

- **"Circumstantial evidence principal"**: If the buyer can prove that there was a defect, the burden of proof shifts to manufacturer to show that the defect was not caused by something they are responsible for OR that they took the reasonable precautions to prevent defective goods from reaching consumer

Duty to warn: continuing duty to warn public if manufacturer knows about danger. This can be done through newsclips, ads, contacting dealers.

- *Hollis V Dow*: for any dangerous products, manufacturer must continue to warn customers after time of sale.
- Toys, cleaning products, drugs

Law: Occupier's liability

- Owner, engineer, architect, workers, can all be liable for injuries suffered by visitors on premises. Owner must be careful to prevent any injuries from hazards to people on premises.
- Same elements of negligence
 1. Duty of care
 2. Breach of standard of care
 1. Waldick V Malcolm: owners standard of care is required to salt driveways
 3. Damage
 4. Causation
 1. The "**but for**" test: if it was not because of the defendant's actions, the injury would not have occurred

Defenses to negligence:

Question all four steps of the negligence.

- a. There was no duty of care, and it cannot be reasonably seen that I could hurt them
- b. Breach of standard: my conduct was absolutely normal in this situation. A doctor failing one in a million surgeries is allowed under the standard.
- c. Damage: your emotional distress does not qualify as damages, here are pictures of you in Vegas
- d. Causation: the asbestos did not cause your cancer, it was your smoking.

Contributory negligence: as a partial defense, the plaintiff contributed to his own injury OR two people are at fault

The defendant's negligence was only partially responsible for the plaintiff's injuries. The plaintiff was also acting negligently, meaning that they can only recover part damages.

Duty to mitigate damages reasonably

Voluntary assumption of risk as a full defense

- When there is a real risk of injury yet the plaintiff recognizes the risk and fully assumes risk but risk must be ordinarily expected in that activity ie. Assuming a car will run over you in a parking lot IS NOT ordinarily expected

Contributorily negligent/ joint liability: Court can find joint liability to negligence and apportion damages based on degree of fault. *Morsi V Fermer*

- One person is more liable and will pay more damages based on their actions...

Remedies: if found to be negligent, the defendant will be required to pay money to restore plaintiff to the position they would be in without the tort

- Costs of repair, treatment, loss of profits or wages
- Cost of litigation
- **Apportioning liability: The court might also find two people at fault**

Misstatement

Questions

- Did a professional make a statement/advice that another party relied upon and suffered damages as a result?
- Was there no contract between them?

Facts of case

- Was the advice given commonly regarded as true at the time?
- Does the contract say it wants to extend duty to other parties explicitly?
 - Rengen Deloitte
- Suing under breach or contract

Cases to cite: Rengen, Hercules, Hedley Byrne

Law: Negligent misstatement: when a professional makes a statement that resulted in the damage of a plaintiff and there was no contract

1. Duty of care

- Foreseeability and proximity: can be reasonably seen that damages can be caused by a misstatement
 - Auditors had proximity to investors
- Indeterminate liability:
 - Hercules v Ey: court decided that professionals cannot have indeterminate liability so cannot sue with misstatement.
 - Statutes provide a way to still sue for misstatement
 - Rangen V Deloitte: if parties like (trade creditors) let the professionals know **WHO is relying on the statement, WHEN, and WHAT PURPOSE, duty of care extends to those parties**
 - "this would not be indeterminate liability as this is a very close relationship between homeowner and engineer"
- 2. Breach of standard of care in making misstatement
 - Elicia: on test professional has a standard, which is that their statement must have been false at the time it was made AND that the statement came from a lack of meeting the standard
 - As long as the advice is commonly given by other advisors/professionals, it is not a breach
 - Judge professionals against other professionals for providing advice
- 3. Damage resulted to plaintiff: can point to loss of money, wages, investment
- 4. Causation of damages: plaintiff was damaged by relying on advice in a reasonable fashion
 - a. The **"but for"** test: if it was not because of the defendant's actions, the injury would not have occurred

What to sue under: can overlap with tort, contract, fid duty

- Statutory limitations: contract; starts when contract is finished. Tort; starts when discovered
- Defenses: tort; contributory negligence. contract; exemption clauses
- Remedies: disgorgement only for fid

Hedley Byrne: extended duty of care in misstatement beyond a professional/client context

Hercules V Ey: duty of care can be denied by public policy

Fiduciary duty

What if advice was true at time?

- Can the beneficiary fully expect the fiduciary to only act in his interests?
 - Doctors
- Is there a conflict of interest?
- Corporation executives have a fid duty to company (not just shareholders) by statute
 - Business judgement rule

Suing on other duties

- Contractual duties: breach of contract as basis of claim
- Tort: breach of duty of care (prox and fore) as basis of claim
- Fiduciary: fid. duty to act in the best interests of client, with breach of fiduciary duty as basis of claim

Law: Breach of fiduciary of duty can exist without the professional being negligent (Hodgkinson).

You can sue for fiduciary of duty even if negligent misstatement does not work since fid duty has higher standard (Veronica and Archie)

Law: fiduciary duty exists when a party must only act in the interests of the client.

Case: Alberta V Elder test

1. Beneficiary can expect the fiduciary to ONLY act in their best interests
 - a. Duke does not act only in the interests of students, has many other stakeholders
2. The beneficiary is vulnerable to the fiduciary's control or discretion
 - a. Vulnerability means professional has **decision making capability over the client**; does not mean the professional has more knowledge (the client could be a lawyer or doctor too)
 1. Real estate agents count even if the client needs to accept offer because client fully expects them to

- get them the best deal
- 2. For all intents and purposes, you're just at the finish line
- 3. *Hodgkinson*
 - b. In Schram, there was NO vulnerability because he was a broker who needed final approval from owner, which meant he did not have decision making power
- 3. an interest (either legal or practical) could be harmed by fiduciary's exercise of discretion or control
 - a. The beneficiary can be harmed by the fiduciary acting in the wrong way (conflict of interest)

Conflict of Interest: Case; Hodgkinson, Strother

- "bright line" test is the rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client UNLESS both clients consent
- Cite case: Strother V Davis

Remedies: Disgorgement: party gives up profits made during the conflict of interest/conduct. Disgorgement can be claimed by the defendant if the defendant's actions caused the plaintiff's damages.

Law: BC BCA mandates that corporate directors have a fiduciary duty to the company BY LAW

Business Judgement rule: SCC ruled that corporate directors do not have a fiduciary duty only to shareholders, just that the directors show they considered all stakeholders when making a decision

Strother

Hodgkinson

BCE

Galambos: was the firm

Business Structures

Sole Proprietorships: SP arises out of individuals doing business. Income is taxed as personal income and responsible for payroll deductions like EI and CPP. BC, must register the name if you are operating under different name.

Test for Partnerships:

Law: A partnership is one where there are persons **carrying on business in common with a view to profit**

Carrying on business: establishes motive and actions

- Partnership does not have to be express, will not include societies or other associations where there is charitable purpose or noncommercial purpose
- Isolated business transactions where people are acting with shared interests are not necessarily partnerships, needs to be **continuing and on a regular basis**

In common:

- Has to be consensual relationship (a sense of dependency on each other and to do things together where both are willing to be in partnerships (evidence)
- If there is no written agreement, court can look at the relationship:
 - If you contribute capital, and manage the business, you are a partner

With a view to profit: nonprofits and churches don't count

- Sharing of both revenues and losses, which is usually according to capital contribution
- Simply receiving a portion of profits or gross receipts does not signify partnership

Dissolution: implied term is that the death or insolvency of a partner will dissolve the partnership unless contract overrides or partners agree partnership should continue

Fiduciary duty is owed by each partner to all other partners

Termination:

- Agreement expressly states the provision of what led to termination: notice from partner, retirement etc.
- Partnership act implied terms
 - If no fixed term (ongoing partnership duration), termination by notice from partners
 - Automatic termination on death of a partner
- **Scragg v lotzkar**
 - **Law:** requires notice of termination
 - Apply: was not given notice
 - Conclusion: still partner

Registration

- LPs and LLPs are required to 'register'
- General partnerships require declaration for name, each partner, address and name of partnership etc for those in trading, manufacturing or mining (filed when change in membership or dissolved)
- Partnership still exists without registration

Partnership Agreement

- to the extent it is not spoken to, it defaults to what is provide under the Partnership Act
- each partner should have their own legal counsel (interests are not consistent w other partners necessarily)
- so long as not illegal or contrary to public policy, any type of term is ok
- Can be oral but better to have a written record for certainty of terms
- dissolving partnership is easy

General partnerships:

Debts: Partners are jointly liable for debt and are each liable for the full amount

- One partner can look to his other partners for **indemnification** for their respective portions if he goes ahead and pays the whole thing (ask for 500000 out of 1 million)

Contracts: All contracts taken by a partner on behalf of the partnership will be binding on all other partners

Tort: All partners are all jointly liable for the torts of other partners during their duties in operating the business.

Exception: If the third party is told that a partner is no longer in the partnership, actions they take will not be binding on partners.

- Partnerships inform the public when a partner retires

Limited partnerships:

Law: Limited partners have limited liability, provided that they do not take an active role in management. Becomes general partners if taking part in mgmt.

- As a limited partnership, the general partner will have unlimited liability for the liabilities of the partnership and each limited partner will have limited liability (limited to the amount they paid in to the partnership as capital contribution). So long as the limited partners do not take an active part in the management, they will not be liable for actions. However, the general partner can be liable for the whole amount, where the general partner is liable for all debts or liabilities (including tort liabilities) of the partnership.

Limited Liability Partnerships:**Law:**

- each partner is only liable for the capital they contributed and the own negligent acts they have control over but actively partakes in management. Only for "eligible professions" with governing societies
- However, the partnership itself and its assets are still liable under the actions of each partner
- Must maintain a certain amount of liability insurance

Corporations

Advantages: Limited liability for shareholders, easy transfer of ownership, ability to raise capital publicly, does not need unanimous consent, fiduciary duty to company

Disadvantages: can be used for fraud, shareholders don't have a huge voice, no fiduciary duty directly to shareholders

Structure

Law:

- Flexibility: Unlike partnerships, only needs consent of majority of directors
- Personhood: Corporation is a person that can sue and be sued
- Limited liability: shareholders are not personally liable

Corporate veil/ separate corporate personality

- Shareholders and managers are not personally liable to corporation

Lifting the corporate veil

- Corporate veil only lifted under fraud and intention to deceive
 - *Saloman v Salmon*
 - *SPC Holdings V Gabriel*
- Companies that go from unlimited liability to corporation must let their suppliers or creditors know of the change in status of else will be sued under unlimited liability
- You can't sue shareholders or managers if company goes under, only company can be sued
- Dividing to separate companies - Closely held Canadian Private Companies are lumped together if the same

Limited liability: the corporation itself is a person and is liable for the debts, not shareholders. Shareholders are only liable for the amount they paid for their shares.

Cite case: Saloman V Salmon

Incorporation

- Through cbca (Canadian business corporation act) or provincially under provincial act
- Crown corps are creatures of statute as are banks, trust and loan companies
- Requires constating documents (share capital, hq, name etc) *i.e birth certificates

Bylaws: Rules you set out for company after incorporation

- Detailed operating rules for day to day affairs and specific matters that require director approval
 - Day to day: election of directors, terms of office, agm (annual general meetings) meeting procedures
- Specific matters: asking directors for approval
- Can be amended with majority of shareholders

Types of corporations

- **private:** do not issue shares to public and are not reporting (do not need reporting to somebody investing who does not need protection), owners usually managers, still have shareholders but not traded publicly
- **Public:** issue shares to public and are reporting, also regulated under securities legislation

Management

Directors

- Manage or supervise the management of the business and affairs of the corporation
- Have power to:
 - Issue shares (subject to the constating documents) • Declare dividends
 - Adopt bylaws
 - Call shareholder meeting delegate responsibilities and appoint officers
- At least 1 director if private, 3 directors if public, at least 2 independent (i.e no direct or indirect material relationship with the corporation) and are **not liable to shareholders but rather what they feel is best in the interests of the company**

Officers

- Day to day management of corporation
- Subject to same duties as directors
- Are appointed by directors (directors determine responsibilities for officers)

Duties of management:

Fiduciary duty: directors owe a fiduciary duty to corporation and stakeholders but not just shareholders

- If there are conflicting interests: don't vote!!!
- Loyalty integrity and trust
- **Case; Hodgkinson, Strother**

Duty of care: exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

- Entitled to rely on info provided by officers (unless suspicious)
- Cannot be willfully blind to issue

Conflicts of Interest For management

- Contracts with corporation (you can't make company sign contract with you that is beneficial to you or company that is direct rival of the company you're working for now)
- Interception of corporate opportunities (you can't steal opportunity of the company you work for, you cannot divert opportunity to himself or affiliates)
- Can't purposely withhold information from the company
- Must disclose information that is beneficial to the company
- Corporate information (you can't use confidential company information for personal gain)

Defenses against negligence for directors and officers

- Due diligence: if you did ur research/due diligence it is ok because it was not foreseeable
- Good faith reliance (you could rely on good people who know what they're doing)
- Corporate indemnity: I need to be reimbursed as director or officer
- D&O insurance: directors and officers can be reimbursed in case they lost money

Cases:

Canadian Sports Specialist Inc. v Phillippon

Law: if fiduciary duty is breached due to conflict of interest, company can receive disgorgement from a director

1. profit or commission obtained as a result of position of directorship is the property of the company (disgorgement)
2. Secret commission constitutes a breach of fiduciary duty
3. The contract entered into is voidable since there was a conflicting interest
4. The contract cannot be ratified (consent) unless ratification occurs with full knowledge of the material facts (company must know everything regarding the deal, they must know about the mark-up)

Apply:

- 1) company entitled to disgorgement/restitution. Given the breach of fiduciary duties, the company is entitled to disgorgement (breach of the duty of care)
- 2) Marking up the computer and reselling is deceit
- 3) No one ratified the contract (they didn't know about the markup)
- 4) Also the d must return overpayments of the per diem he was paying himself

Data Business V Macintosh: for a GP to become a corp, it must let any **parties whose interests may be affected know** or they can be sued as if they were a GP and have unlimited liability

- Macintosh was never aware of the change and thus corporate veil is lifted