commerce undergraduate society

COMMERCE MENTORSHIP PROGRAM

FINAL REVIEW ANSWERS

COMM 393

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PRACTICE PROBLEM 1: DISCHARGE + BREACH + DAMAGES

A) This is an issue of whether the contract between Ava and Sakura can be discharged under the doctrine of frustration.

Frustration occurs when external circumstances uncontrollable by the parties have made the performance of the terms impossible or radically different from what was agreed on at the time the contract was made. Frustration brings all obligations to an end and each party to the contract is entitled to restitution from the other party for benefits created by the party's performance or part performance of the contract.

The Frustrated Contracts Act allows the court to share/apportion the losses equally among both parties. If any parts of the contract have been performed in full- they cannot be deemed frustrated; only the remaining obligations will be considered for discharge under the doctrine of frustration.

In order for frustration to apply, all of the following criteria must be met:

- The frustrating event took take place after the making of the contract
- The frustrating event made the contract IMPOSSIBLE to perform, not just more difficult, inconvenient, or expensive (**Bal v. Infinite)**. Hardship is not a good enough excuse for not performing.
- The frustrating event was not self-induced. The party in question did not wilfully disable themselves from performing a contract to claim it was frustrated- that would constitute a breach of contract.

In this case, Sakura did indeed run out of butterfly silk after making the contract. However, this fact did not make it impossible for her to carry out the terms of the contract - only more expensive. Furthermore, the "Japanese" nature of the fabric was not an express term of the contract. Sakura could have easily secured the butterfly silk from a local source such as Grace and fulfilled the contract.

As such, the doctrine of frustration does NOT apply and Sakura can still be held liable for breach of contract.

PRACTICE PROBLEM 1: DISCHARGE + BREACH + DAMAGES

B) The issue at hand is whether damages would be awarded to Ava for Sakura's breach of contract and whether the amount of $70,000 is considered fair. Damages are awarded for the sole reason of placing the injured party in the position it would have been had the contract been completed. Damages are in no way meant to punish individuals, but rather compensate the injured parties. As such, they must be within a reasonable limit.

The pre-requisites for an award of damages is the following:

1. Loss must flow "naturally" from the breach **(Westcoast Transmission v. Cullen)**:
    - The loss must be within the foreseeable limits of what each party would have expected as a consequence of failing to perform. Additionally, parties must be are aware of the unusual/special circumstances, otherwise, damages are not recoverable.
2. Damages must be Mitigated **(Albrechtsen v. Panaich)**:
    - The injured party has a duty to minimize their loss. Damages only recover losses that cannot reasonably be avoided. Any costs associated with reasonable mitigation are recoverable and the mitigation itself does not have to be perfect.

In this case, the $50,000 loss did flow from the contract as Ava paid the purchase price and did not receive anything in return. The damages were also mitigated, as Ava found another source to supply her the fabrics at the same price. However, it can be argued that the extra $20,000 is rather *too* punitive and the total amount does not flow naturally from the breach, as there is no basis for it in contract and there is no evidence to show that this amount is reflective of any losses. Moreover, Ava did not take much time or resources in securing her alternate order and was able to get it shipped in at the original time set out in the contract. Out of the $20,000, the courts would most likely award Ava a total of $5,000 in expectation damages, which would compensate her for the inconvenience of paying extra to get her order in on time.

Overall, it can be concluded that the courts will likely not deem $70,000 as fair and only award Ava a total of $55,000.

PRACTICE PROBLEM 2: EXEMPTION CLAUSE

A) This is an issue of whether Park&Go's exemption clause can be enforced to release the company from any liabilities towards David. According to Dawe v Cypress, when it comes to any signed or unsigned contracts, as long as the vendor has done what is reasonable to bring an exemption clause to the attention of the purchaser before or during the making of a contract, the purchaser would be bound by its terms. They would be able to do this by displaying the exemption clause very obviously (putting words in bold, adding loud colours, capitalizing, etc) and wording it very clearly (covering all scenarios and persons).

If the exemption clause is NOT reasonably brought to the attention of the purchaser **(Greeven v Blackcomb)** or it does not cover that particular person or scenario **(Dawe v Cypress)** then it will not apply. Additionally, exemption clauses involving gross negligence, fraud or public policy items such as the sale of goods (SGA) also do not apply.

In this case, the exemption clause was placed right above the parking meter where it was clearly visible to all people before a transaction (a contract) was made. The sign itself was written in capital letters, was large in size and neon in colour - meaning all reasonable actions were taken to bring it to the attention of David. However, with regards to the actual wording of the exemption clause, while the sign did cover events involving theft of or damage to the vehicle itself (such as the shattered glass and slashed tires), it did not cover theft of personal belongings inside the vehicle.

As such, it can be reasonably argued that Park&Go's exemption clause is not enough to protect the company from all liabilities and David can still sue them for damages, likely limited to the replacement cost of the stolen laptop and personal belongings. To be successful, David would have to bring a claim in court pursuant to a valid action, which in this case may be negligence, where it is implied that the garage breached its standard of care, where there was insufficient security; however, from the facts of the question, we cannot specify the nature of the claim with certainty or whether the garage's actions fell below a recognized standard of care.

PRACTICE PROBLEM 3: PRIVITY

A) The issue, in this case, is whether Sandy will be able to sue T-Mart, despite not being a party to the original transaction. According to the rule of privity, to succeed in pursuing an action to enforce contractual rights, one must be a party to the contract. Otherwise, as stated in Canada's Consumer Product Safety Act, one can only directly sue the manufacturer in tort.

In this case, given that Sandy did not participate in the original contract under which this moisturizer was purchased, she does not have privity and therefore cannot sue T-mart for damages. However, she would be able to directly sue the manufacturer of the moisturizer in tort for negligence (Donoghue v Stevenson, or any other negligence case).

Therefore, it can be concluded that Sandy's claim will not be successful and T-Mart will not be held liable.

PRACTICE PROBLEM 4: SALE OF GOODS ACT

A) This is an issue of whether the Sale of Goods Act (SGA) can be used to claim a breach of the seller's duty pursuant to an implied condition. The SGA is a set of contractual terms that are implied in every contract for the sale of goods for monetary consideration. The purpose of the SGA is to make sure sellers have minimum obligations towards buyers/consumers. If the seller breaches implied terms under the SGA, the buyer will have the ability to sue for rescission or damages.

In this case, Mina can argue for rescission under section 18A of the SGA, which is the implied condition of fitness for purpose. As seen in the Kobelt Manufacturing case, in proving that the product Mina purchased did not fit her purpose, the following requirements must be met:

1. The buyer expressly communicated the purpose for buying the product
2. The buyer made it known that she is relying on the seller's skill and judgement
3. The seller was in the business of supplying that product
4. The buyer did not use a trade name while purchasing the product

In this case, Mina stated that she wanted a pair of leggings that would help her get started in the gym, and showed reliance on the sales representative's judgement by stating " I have no idea what I am doing".Mina also never mentioned a specific trade name - and we can assume given that MumuMelon is a retail store in the business of selling athletic wear that the seller is indeed in the business of supplying leggings/sportswear. As such it can be concluded that this implied condition was violated and Mina would be entitled to rescission.

Moreover, Mina can also use Section 18C of the SGA - the implied condition of durability - to support her argument. According to this section, it is an implied condition that goods last for a reasonable amount of time. In this case, it can be argued that 2 weeks is not a reasonable amount of time for the leggings to start tearing at the knees, as it was expected for the leggings to keep their original state and stay "just as new for a long time", which is arguably longer than 2 weeks for clothing.

As such, Mina would be entitled to rescission i.e. return of her purchase price for the return of the leggings.

PRACTICE PROBLEM 5: TORT + NEGLIGENCE

A) This is an issue of whether Larry can be held liable for negligence - which is defined as the "careless causing of injury or harm to another person". In order to prove negligence, we must look at the facts via the negligence framework:

Was there a loss/damage?
Loss or damage is a requirement for establishing tort liability because the ultimate goal would be to compensate it, rather than punish the defendant. Loss can be in the form of personal injury, property damage and economic loss. In this case, Mabel suffered an injury to the head, as well as lost the chance to perform at the ceremony. Therefore we can conclude that there definitely was personal injury and economic loss caused by this event.

Did the defendant owe the plaintiff a duty of care? **(Waldick)**
As seen in the **Rankin** case, duty of care is defined as " a relationship so close that one could reasonably foresee causing harm to the other." In this case, as Mabel's driver, Larry definitely owed her a duty of care, as any act of negligence while performing his job would have had a chance of putting Mabel in harm's way.

Did the defendant breach the standard of care?
Standard of care is defined as "the level of care that the defendant had to take in that circumstance." or " what a reasonable person would do in comparable situations"**(Morsi v Fermar).** It exists when the circumstances of time, place and person would make a reasonable person aware of the probability of harm resulting from that activity.

In this case, Larry breached his standard of care by failing to equip his limousine with winter tires. As a professional driver for hire, it is expected for Larry to know about this basic safety measure, as it is common in the industry. As such, it can be concluded that the standard of care was indeed breached.

Did the defendant's conduct CAUSE the plaintiff's loss?
Causation Test ("but for"): It must be proved that but for the negligent conduct of the defendant, the harm wouldn't have occurred- therefore there is a direct causal link between conduct and harm.

PRACTICE PROBLEM 5: TORT + NEGLIGENCE

In this case, if it weren't for Larry's lack of initiative in installing winter tires earlier, the car would not have slipped and Mabel would not have suffered head injuries and missed out on performing.

Was the harm too REMOTE?
Even if the act was truly negligent, all harm resulting from it might not necessarily be compensated. It must be proved that the harm was not remote- meaning, not 'unrelated or far removed from conduct'. As such, we would have to ask: would a normal person see the harm as reasonably foreseeable harm?

In this case, suffering from head injuries and economic loss as a result of not attending the ceremony are both foresseable losses. Car crashes are commonly known for causing physical harm to car occupants, and it is expected that by not showing up to her place of work, Mabel would lose her wages.

From the facts above, we can conclude that Larry was indeed negligent and will be held liable by the court for his actions. Larry's employer can also be held vicariously liable on his part, as Larry is an employee of a car service.

In this case, the court will apportion the damages per the percentage each party is at fault - and Mabel would be likely be entitled to a monetary value that compensates her for her economic loss, as well as the cost of treating her injuries.

B) Larry can defend himself/reduce his fault by arguing that there was contributory negligence in two different ways:

- By not wearing a seatbelt, Mabel contributed to the severity of her own loss.
- By failing to adequately maintain the roads in a safe condition during the winter, the municipality also contributed to the severity of Mabel's loss.

PRACTICE PROBLEM 6: PROFESSIONAL LIABILITY

A) This is an issue of whether Johnny Jefferson can be held liable for negligent misrepresentation. Negligent misrepresentation is defined as “an incorrect statement made by a professional, without any due care for its accuracy”. A professional is defined as “anyone with skills and expertise in a particular area- making it reasonable for someone to rely on their advice”.

In order to prove Negligent Misrepresentation, we must look for the following criteria:

1) *Duty of Care, based on ‘Special Relationship’ between plaintiff and defendant*

- Is there a special relationship? As in – Is the plaintiff entitled to rely on the information? **(Rangen)**
- Was the information used for the purpose it was prepared for? **(Hercules)**
- Did they provide untrue, inaccurate or misleading advice?

In this case, there is a special relationship established between Megan and Johnny. As Megan’s realtor, Johnny held the responsibility of showing her different homes and informing her of essential information with regards to the properties. As Johnny’s client, Megan was entitled to rely on the information he gave in order to make a decision about buying a house. During the period in which Megan was still looking at houses, Johnny provided an inaccurate statement about the safety of the renovations inside the Kitsilano property, as well as failed to mention the hidden problem with the house’s gas line.

2) *Breach of Standard of Care – Falling below it*

- Did the defendant act like a competent member of their profession?
    - Must exercise the same degree of skill and abilities that one would expect a professional in their field of expertise to have.
- Was the defendant’s skill & knowledge appropriate for the particular task undertaken?

PRACTICE PROBLEM 6: PROFESSIONAL LIABILITY

In this case, Johnny did not act like a competent member of his profession, as he did not check the severity of the problem with the gas line nor inform Megan that such a problem existed. As a real estate agent, Johnny has a duty to inform his client of all latent defects, which he did not do in this case. Therefore, we can also conclude that his skill and knowledge were not appropriate for the task, as he should have known about this duty and exercised care.

3) *Injury/Harm to Plaintiff*

In this case, Megan suffered a financial detriment of $60,000 as a result of having to fix the gas line. This was something that put her in a lot of hardship.

4) *Causation of Damage*

- Was there reliance on professional advice? Did the client reasonably rely and act upon the negligent advice of the professional?
- Did the reliance cause the harm?

Megan relied on Johnny's statement about the house being renovated and safe in order to make a purchase. After making the purchase, she came to learn from the inspectors that her house was in fact not safe - and that she had to incur an extra 60,000 in order to make it that way, which ended up putting her in a tough financial situation.If it weren't for Johnny's misleading advice and negligent omission about the gas line problem, Megan would have most likely avoided buying that house.

Overall, it can be concluded that Megan's action will succeed and Johnny will be held liable for negligent misstatement.

PRACTICE PROBLEM 7: FIDUCIARY DUTY

A) This is an issue of whether Fiduciary duty exists- and if so if it was breached.

A "Fiduciary" is defined as an individual that has to act in good faith and in the best interest of another person, named the "beneficiary". The fiduciary must also exercise "the care, diligence, and skills that a reasonably prudent individual would do in comparable situations". According to Hodgkinson v Simms, "A fiduciary relationship exists where there is a relationship and confidence, as well as reliance on the advice being given by the professional."

We must first determine if Fiduciary Duty exists. As such, we would have to search for the following criteria **(Strothers)**:

1) The fiduciary has the ability to exercise discretion or power on the beneficiary's behalf.
2) The fiduciary can exercise that power or discretion so as to affect/harm the beneficiary's legal or practical interests
3) The beneficiary is vulnerable or at the mercy of the fiduciary holding the discretion or power

In this case, the financial advisor handles the investment decision for all of Tim's assets and holds power in the form of information. By using Mary's recommended investments, Tim's assets are essentially at the mercy of Mary's discretion. If that exercise of power is performed in a way that is not in Tim's interests, Tim can suffer financial loss. As such, we can conclude that there indeed is a fiduciary duty.

Now, we must assess whether the fiduciary duty was breached. With fiduciary relationships, the law would generally impose the following obligations:

1) Must act honestly, in good faith, and in the best interest of the beneficiary **(Strother)**
2) Must avoid conflict of interest with the beneficiary unless they have received consent **(Hodgkinson)**
3) Must keep the beneficiary informed of any relevant information

PRACTICE PROBLEM 7: FIDUCIARY DUTY

4) Must not earn a secret profit in the course of acting for the beneficiary or competing with the beneficiary
5) Must exercise discretion and confidentiality with respect to the beneficiary's affairs

If fiduciary duty is seen to be breached, the breaching party must disgorge (give up) profits resulting from breach to the beneficiary **(Strother & Hodgkinson).** They will also likely be held liable for loss on any investments or other consequential losses.

In this case, Mary has breached obligation #4, which clearly states that beneficiaries must not earn a secret profit in the course of acting for the beneficiary.

As such, we can conclude that the fiduciary duty was breached. Mary would now have to disgorge all of her commission to Tim, as well as pay for any losses resulting from a decline in his investment.

PRACTICE PROBLEM 8: AGENCY

A) The issue, in this case, is whether the principal, Jenny, is bound by the acts of the agent, Pablo, despite him not having real authority to make the deal.

An agency relationship exists when a person, known as the "agent" has authority from another person, known as the "principal" to bind the principal to contractual obligations. In these types of relationships, the agent would have a fiduciary duty to the principal and have to act within their authority as well as disclose clearly that they are an agent.

According to the agency by estoppel, where if an agent has no real authority but the circumstances convey the impression that the agent has apparent authority by conduct and the third person was induced into the contract based on that impression, then the principal is estopped from denying the agent's authority and would be bound by the acts of the agent.

The test to determine whether there was apparent authority is as follows **(Pemberton)**:
1) Representation that the agent had authority to enter into contract on behalf of the company
2) Such representation was made by someone with actual authority
3) The other party was induced to enter into contract on basis of representation
4) Under the company charter, a company is able to enter into that kind of contract and delegate that kind of authority

In this case, while Pablo did not have actual authority, his business card in combination with his status as an "art curator" both represented him as an agent. Given that Jenny allowed him to make purchases in the first place, it can be argued that she also made the representation that Pablo was an agent, as she did not expressly state that deals can only be made after her confirmation. The artist, thinking that Pablo was able to make the purchases himself, was induced to sell the painting to Pablo - and the contract was made. Additionally, there is nothing that states the company is not able to enter into that kind of contract, as it is within its normal business operations.

As such, we can conclude that Pablo had apparent authority and was acting within the limits of that authority. The courts will most likely rule that Jenny must honour the contract with the artist.

PRACTICE PROBLEM 9: PARTNERSHIPS + CORPORATIONS

The issue at hand is to determine who would be liable for the legal action brought against Beautilux.

In this case, Alice and Lucy have included the word “Inc.” next to their company’s name in a bid to pass off as a corporation. Corporations are defined as “legal persons” that are distinct from their directors and shareholders, have the capacity to enter into contracts, as well as sue or be sued. They count as a separate entity, meaning they have limited liability and only the company is liable to pay for its debts. This liability is also only limited to the amount of assets they have. Once these assets run out, the creditors cannot go after shareholders; even if the corporation consists of only 1 person **(Salomon v. Salomon).**

However, given that it is a requirement for companies to be incorporated either federally under CBCA or provincially under the BC ‘Business Corporations Act’, we can conclude that Alice and Lucy have not been freed of personal liability. Instead, Beautilux can be classified as a partnership.

According to Lanz v. Lanz, a partnerships is a “relationship which exists between two persons, carrying on business, in common, with a view to profit”. As the Partnerships Act states, “Each partner is the principal and agent of the other and has the power to bind the other in contracts; Additionally, each partner is jointly and personally liable for debts and liabilities of the partnership and liable for the negligence and misconduct of other partners if they were committed in connection with the partnership business”. (Liability is unlimited and personal assets can be seized by partnership creditors).

Although partnerships can be created expressly, they can also be implied by a court of law just by looking at the substance of relationship between two persons (not its form). The following factors are some of what is needed to be implied as a partnership:

PRACTICE PROBLEM 9: PARTNERSHIPS + CORPORATIONS

- A contribution of any asset, money, property, skill, effort or knowledge
- An expectation for profit (cannot be charitable/non-profit)
- Joint participation in management **(Scragg)**
- The right to share the profit, if any is generated (prima facie evidence for partnerships).

In this case, both Alice and Lucy have contributed $100,000 to starting their operations, they are not involved in charitable work and both share responsibility over management. Although not expressly mentioned, it can also be assumed that they are sharing their profits, given the 50/50 division of all other efforts.

As such, we can confirm that Beautilux is in actuality a partnership, meaning both Alice and Lucy are personally liable, jointly and severally, for the bride's legal action against them. It should also be mentioned that even though Alice has "left" the business, she will still be viewed as a partner unless she formally retires.