

LAWS1150 – PRINCIPLES OF PRIVATE LAW

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Textbooks:

Contracts Casebook - Paterson, Robertson & Duke, *Contract: Cases and Materials* (Lawbook Co, 13th ed, 2016).

Contracts Textbook - Paterson, Robertson & Duke, *Principles of Contract Law* (Lawbook Co, 5th ed, 2016).

Property Casebook - *Sackville & Neave: Australian Property Law*

CONTRACTS

Classical contract theory

Textbook [1.10] – [1.15] p. 6 -10

- The set of ideas and assumptions that underpinned the development of contract law in England during 19th C
- Second half of 19th c - classical age of English contract law - extensive development of contract principles - where prevailing political and economic views elevated contract to a position of central importance in the law
- Will theory of contract - A contract represents an expression of the will of the contracting parties and for that reason should be respected and enforced by the courts
 - Notion that a contract involves self-imposed liability
- Will theory and principle of freedom of contract connected with 19thC economic, philosophical and political views
 - Prevailing ideology - liberal individualist philosophy of laissez faire
 - Parties to a contract regarded as self-interested individuals who created their own private law through their own agreement
 - Individuals should be free to enter into whatever bargains they considered would benefit them and the courts should facilitate that freedom
- Freedom of contract - basis for the determination of all contract law issues
- Modern contract law thus favoured individualism, self-reliance and the exercise of free will over government intervention and paternalism
- 'Contractualism' (Morris Cohen): 'the view that in an ideally desirable system of law all obligations would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that the government is best which governs least. This in turn is connected with the classic economic optimism that there is a sort of pre-established harmony between the good of all and the pursuit by each of his own selfish economic gain'
- Courts were reluctant to recognise the existence of non-contractual obligations
 - Courts tended to perceive social relations in contractual terms - *Carlill v Carbolic Smoke Ball Co.* (misleading advertisement so that the plaintiff was able to obtain a remedy against the manufacturer by establishing a contract between them despite the fact that the parties had never communicated with each other or exchanged money or goods)
- Principles developed and justified by an overriding concern with giving effect to the intentions of the parties - i.e. courts not imposing legal rules but working out the implications of what the parties had themselves chosen to do
 - Principles seen as objective, neutral and based on a respect for voluntary choices
 - Therefore no requirements of fairness in contractual exchanges or the imposition of contractual obligations without party consent
- Textbooks on English contract law began to be written in the 19th C - other important factor in development of contract as a distinct body of law -
 - Described in systematic form a set of abstract general principles which applied to all types of contract
 - Separate from property law, law of tort and law of restitution - exclusively concerned with voluntarily assumed obligations (tort = obligations imposed on individuals)
 - Separation remains artificial
 - Property, tort and restitution play an important role in the regulation of market transactions and in the determination of the rights and obligations of contracting parties in particular cases

Criticisms of the classical approach

- Rights and obligations arising from a contract do not necessarily represent the will of the parties - many problems dealt with by the courts concern what the parties have not expressly agreed upon
 - Problems from miscommunication or lack of agreement cannot be resolved by treating the agreement as an expression of the will of the parties
 - Courts resolve problems by determining the rights and obligations of the parties on an objective basis

- In determining whether a contract has been formed courts not concerned with whether the parties actually intended to enter into a contract but whether a reasonable person would believe they intended to do so based on their words and behaviour
 - Liability for breach of contract can therefore be seen as tort-like liability for negligent conduct or careless use of language rather than as self-imposed liability that has emanated from the will of the parties
- Content of a contract determined objectively - statements made during negotiations may form part of a contract if a reasonable bystander would think that a contractual promise was intended and unsigned written terms form part of a contract if reasonable notice of the terms was given
 - Courts routinely imply terms to fill gaps and deal with contingencies not provided for in the contract
 - Doctrine of frustration, remoteness rule
- Contracting parties routinely leave it to the courts to decide what should happen in the event that one of the parties should fail to fulfil their obligations
 - Operates similar to the law of tort - the state imposes obligations on the parties based on norms of reasonable behaviour
 - Obligations that are imposed by the state in order to protect persons who rely on promises - broader policy goal of facilitating commercial transactions and valuable exchanges
- Assumes that contracts are fully negotiated between the parties – use of standard form contracts and unequal distribution of economic power undermines the concept of a contract as a consensus between parties
 - Most written contracts today made on the basis of standard form terms which are generally not negotiable, typically not read and not commonly understood by the other party
- Role of the state in enforcing contracts and in establishing the legal framework in which bargaining takes place
 - A contract is only binding because the state will enforce it through the courts - Cohen puts forth that this allows the law of contract to be viewed as a branch of public law
 - State also plays a decisive role in the making of a contractual bargain - in a market economy individuals have no choice but to make contracts to obtain resources to acquire skills and to work
 - The power to bargain is founded on property rights that are conferred and enforced by the state
- Falsity of distinction between public and private in contract law and the distinction between free and regulated markets
- Freedom of contract overrode by fairness of contract - modern day
- Generally - Contract still regarded as a voluntarily assumed obligation
- Property right - right that one citizen has over all other citizens
- Remedy is to advance him to the point where he would be if the contract had been fulfilled

Contract and private law

Textbook [2.05] – [2.65]

- Law of obligations - concerned with the obligations owed by individuals to one another
 - contract, tort and restitution
 - Misc. categories e.g. equitable principles relating to fiduciaries, confidential information and estoppel
- Contractual obligations may be imposed on both parties by the state or by one party on the other
- Private law - field of law including law of obligations and law of property
 - Relevant legal rights are 'private', exclusively enforceable by the individuals who are recognised as holders of the relevant rights and who may choose whether or not to enforce them
 - Significant public dimension - only recognised and enforced by the state

Torts committed in a contractual context

- If breach of contract is not available
- When an existing contract provides no means of relief
- Doctrine of privity of contract where only a party to a contract can sue on it - not required for tort
- May be an independent duty of care owed outside of the contract to/from a third party

Concurrent liability in contract and tort

- Typically arises where A owes a contractual obligation to B to take reasonable care in performing services for B and also owes B a duty of care in tort -> if A is careless in performing services, B may have an action for both breach of contract and tort of negligence
- Duplication of damages not permitted but the law allows a choice between suing in contract and tort - cause of action that appears to be most advantageous
- Differ in areas of assessment of damages, remoteness of damage, the effect of the plaintiff's contributory negligence and limitation periods

Contract as self-imposed obligation

Tort	<ul style="list-style-type: none"> Everyone is bound not to commit torts whether or not we have agreed not to commit them Duties are sometimes self-imposed - law of negligence recognises a duty of care in instances where a person has assumed a responsibility to take care
Contract	<ul style="list-style-type: none"> Duties determined by contracting parties when they voluntarily enter into an agreement Parties to a contract often have duties imposed on them that have not been the subject of express agreement between the parties
Both	<ul style="list-style-type: none"> All duties are imposed by law - law recognises them as suitable for recognition Contractual liability (& torts) arise where parties behave in a certain way - regardless of intentions obligations imposed by law on the basis of expected conformity with standards of conduct determined by the courts

Tort as universal duties

Tort	Duties to avoid committing torts owed to everyone
Contract	Doctrine of privity of contract - contractual duty is only owed to the other party to the contract
Both	<ul style="list-style-type: none"> Tort of negligence is not owed by everyone to everyone - only owed by a person in a particular situation to foreseeable victims - range of potential plaintiffs may be strictly limited Doctrine of privity has a degree of flexibility and has been substantially modified by statute

Contract as strict liability - culpability

Tort	Culpability to establishing liability in tort esp. deceit and negligence - standard of care is objective (virtually strict)
Contract	Strict liability - irrelevant that the contract breaker did not have intent or was not careless
Both	Strict liability generally

Measure of damages

Tort	<ul style="list-style-type: none"> Award of damages puts them in the position of had the tort not been committed Some damages awards in tort have the effect of fulfilling the plaintiff's expectations (e.g. wills, solicitor duty of care to third parties)
Contract	<ul style="list-style-type: none"> Award of damages aims to put the promisee in the position had the contract been performed Some cases - contractual damages protect the promisee's reliance interest through compensation restoring them to their previous position or status quo ante the contract
Both	<ul style="list-style-type: none"> Award of compensatory damages - aim to compensate for loss and put the plaintiff in the position he/she would have been in had the contractual or tortious duty had not been breached Some cases - damages do more than protect a promise from being made worse off by the contract and in tort the plaintiff may be made better off by having his/her expectation interest protected

Unjust Enrichment

- Law of unjust enrichment - obligations to restore unjust gains
- Duty imposed on one individual to pay a sum of money to another on the ground that otherwise the former will enjoy an unjust enrichment at the expense of the latter
- Plaintiff seeks restitution - return of the benefit
- Restitutionary remedy: 'to give back to the plaintiff the value obtained directly from the plaintiff's labour or assets'
- Take the form of a claim to recover money paid (e.g. under mistake) or a claim to recover reasonable remuneration for services rendered or goods delivered (e.g. under an unenforceable contract)
- Liability - 'quasi-contractual' obligation
 - Based on an implied contract to repay money or a reasonable value for the goods or services received
- Cannot be clearly distinguished from contract or tort
 - Similar to tort - the result of a successful claim is the restoration of the status quo ante
 - Similar to contract - result of a successful claim is the realisation of an exchange, recovery of a reasonable sum for services rendered or goods delivered (plaintiff may be better off than before the exchange)
- Pavey & Matthews Pty Ltd v Paul* - recovery of reasonable remuneration in restitution for the service provided, Mrs Paul's obligation to pay was a restitutionary obligation imposed by law on the basis of unjust enrichment

Equity

- Equity - the quality of fairness or justice
- System of doctrines and remedies developed historically as a means of remedying defects in the common law