

LAWS1150 PRIVATE LAW NOTES

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CONTRACTS

THE DISTINCTION BETWEEN CONTRACT TORT AND PROPERTY

<i>I. Private Law</i>	<i>Contract</i>	<i>Tort</i>	<i>Unjust Enrichment</i>	<i>Property</i>
<i>II. Causative Event</i>	Reciprocal undertakings OR Deed	Engaging in conduct which may cause unforeseeable harm	Receipt of unjust or undue influence	Property obtained by any of the other events
<i>III. Source of duty</i>	'self-imposed' – will theory		← Imposed by law	→
<i>IV. Nature of the duty</i>	To perform one's undertaking	To avoid causing harm by the prescribed conduct with the specified state of mind	To return unjust enrichment	To respect property rights
<i>V. Rights generated</i>	Law of obligations generating personal rights 'in personem'			'Property law' generating proprietary rights
<i>VI. Nature of the remedy</i>	Actual performance or compensation for non-performance	Compensation for harm caused	Restitution of benefit gained	Return of property; and account for the fruits of the property (actionable as torts or equitable wrongs)
<i>VII. Potentially enforceable against</i>	Only the party owing the duty – (in personem)			Everyone (in rem)

CLASSICAL CONTRACT THEORY

THEORIES OF CONTRACT

WILL THEORY

- Involves self-imposed liability
- Developed principles in line with philosophy
- Political and social context favoured:
 - Individualism
 - Self-reliance
 - Exercise of free will over government intervention/paternalism
- **Contractualism:**
 - Obligation would arise only in parties that were contracting freely

- Rests on the will theory and political doctrine (restraint is evil, government is best which governs least)
- **Effects:**
 - Court's reluctance to recognise the existence of non-contractual obligations
 - Principles were developed and justified by reference to an overriding concern regarding the intentions of the parties
- **Criticisms**
 - Rights and obligations from a contract do not necessarily represent the will of the parties → objective
 - Assumes contracts are full negotiated between parties
 - Fundamentally concerned with individual autonomy

CERTAINTY THEORY

- Intention is established through observation of conduct and language

EFFICIENCY AND BREACH THEORY

- Sometimes it is better for efficiency, if the contract were to be kept.
- Sometimes it is better to let people out of contracts (UK favours this, but Australia is more inclined towards Will/Certainty theory).

RELIANCE THEORY:

- People relevant to the contract are reliant upon the performance of the contract. If the contract were not to be performed, then it would be to the detriment of parties (some/all).

FACILITATION THEORY

Contract law is essential to business and commercial law:

- **Certainty v Fairness:** Facilitates fairness in business transactions (and within the market)
 - But there should be a balance between these two (overriding tensions that the courts must resolve)
- Within commercial, certainty is very important as there must be a clearly defined method of making/unmaking deals.

TORT

TORTS COMMITTED IN A CONTRACTUAL CONTEXT

- Action for damages often not available in contract can often be available in tort (*deceit, negligence*)
- Although a contract may be owed to A by B, there may be an **independent duty of care** owed to C
- **Privity** of contract between A and B

CONCURRENT LIABILITY IN CONTRACT AND TORT

- **Concurrent liability**: one person owes a contractual obligation to another to take reasonable care in performing services, and thus owes a duty of care in tort
- Plaintiff may assert one particular cause of action (no duplication of damages)

UNJUST ENRICHMENT

- Obligations to restore unjust gains
- Plaintiff seeks restitution
- Plaintiff may be better off than before the exchange

EQUITY

- Rectify defects of the common law
- Development of equity
 - Court of Chancery
 - Judicature act
 - Today, branches are administratively combined, but are not fused

EQUITABLE OBLIGATIONS

- **Equitable estoppel**
 - Rights where promises and representations have been relied upon
- **Fiduciary obligations**
 - Person undertakes to act in the interests of a second person
 - Ability to exercise powers that affect the interests of the beneficiary
- **Obligation of confidence**
 - Duty not to misuse information that is disclosed in circumstances

EQUITABLE DOCTRINES AND REMEDIES IN CONTRACT

- Equitable remedies **supplement** the common law remedy of damages in the enforcement of contracts
 - Specific performance
 - Injunction
- A contract will be set aside where there has been some unconscionable conduct in the bargaining process
 - Misrepresentation
 - Undue influence
 - Unconscionable dealing
- Equity will rectify a written document where the parties have by mistake inaccurately recorded the terms of their agreement