

Week7 notes (Extract)

Unfair Contract Terms, Enforcement and Penalties, Consumer Guarantees

Reference: CACL chapter 13

Unfair contract term:

- An **unfair term in a standard form consumer contract** is **void**: s23(1)
 - If contract can operate *without* the unfair term c. will not be void: s23(2)
- Meaning of **'consumer' contract**: s.23(3)
 - Contract for **supply of goods and services or sale of land to person who acquires them wholly or predominantly for personal or household use**
- Meaning of **'unfair'**: s24(1)
 - Three elements (CACL 13.300). The term:
 - causes a significant imbalance in the parties rights and obligations
 - is not reasonably necessary to protect legitimate interests of stronger party
 - causes detriment to other
 - **Applying s24(1) the court must consider:**
 - The extent to which the term is "transparent"
 - The contract as a whole
 - Legislative examples: s25 (CACL 13.310)
 - Meaning of **'standard form'** contract: s27(2)
 - See 6 relevant factors: s27(2)(a)-(f)
 - Case examples:
 - **ACCC v Chrisco Hampers** (CACL 13.315)
 - *'after final instalment paid, customer's bank account would continue to be debited in anticipation of a future order'...*
 - **NRM v ACCC** (CACL 13.317)
 - *'customer required to give 30 days written notice in order to terminate the contract and, then, became liable to pay a termination fee'*
 - **OFT v Ashbourne** (CACL 13.316) – UK case – similar provision
 - *'fixed membership for one year plus termination fee. Gym could terminate at will'*

Tort of Negligence

Scope of the tort

Emerged as an independent tort following the landmark decision of the House of Lords in Donoghue v Stevenson

- Negligence does not involve a specific form of conduct
- Damages are now recoverable not only for the negligent infliction of physical and psychological injury but for economic loss
- Tort of negligence is about finding fault à fault is the basis of a negligence action
- Was largely a common-law creation

Statutory reform (P.349)

1. The legislation is broad in its scope and applies to any claim for damage for harm resulting from

negligence regardless of whether the claim is brought in tort, contract, under statute or otherwise (NSW)

2. The laws cover personal injury, property damage and economic loss.

3. Limit the scope of potential liability for negligence:

- I. The general ingredients of the cause of action in negligence such as breach and causation as well as the circumstances in which a defendant can raise a defense to a plaintiff's negligence claim
- II. Right to recover in a particular negligence actions e.g. recreational activity; defendants who are professionals, public authorities, volunteers and food donors

4. Reduce the amount of damages that can be awarded to a plaintiff for personal injuries in a negligence action

The defendant in an action based on negligence will only be liable if the plaintiff can prove:

- a. **Duty of care:** The defendant owed the plaintiff a duty of care
- b. **Breach:** The defendant was in breach of this duty of care
- c. **Causation:** The defendant's breach of duty was the cause of the plaintiff's loss
- d. **Remoteness:** The damage suffered by the plaintiff was not too remote

1. Duty of Care

The duty of care in three areas:

- a. Liability for psychological harm
- b. Liability for omissions: liability for failing to act
- c. Liability in cases of 'pure' economic loss (no personal or property damage just money)

Threshold for a duty of care (as established in Donoghue v Stevenson and others)

1. Reasonable foreseeability of harm test

- It was reasonably foreseeable to defendant that someone may be injured by their actions or omissions
- Lord Atkin: "avoid acts or omissions which you can reasonably foresee would be likely to injure (your neighbor)"
- Foreseeability of harm emerged as the threshold requirement for a negligence action (not enough, must use in conjunction with neighbor test)
- Would a reasonable person in the position of the defendant have foreseen as not far-fetched or fanciful that the act or omission of the defendant would be likely to cause harm to a class of people which includes the plaintiff?

Week 8 (extract)

Introduction, Liability for Negligent Acts Causing Physical or Psychological Damage or Pure Economic Loss, Duty of Care, Breach of Duty, Damage, Defences

Reference: CACL chapter 14 (parts only)

Law of tort

What is law of torts?

Primarily concerned with providing a remedy for one person's wrongful interference with another's personal or property rights. Such rights arise as a result of corresponding duties imposed by law (either common law or statute)

What is the aim of tort damages?

To put the plaintiff, as far as money can do it, back in the position that he or she was in before the tort was committed

Negligence

Introduction to torts

- The Law of Tort is concerned with minimum standards of conduct expected of people
- The rights of individuals to expect certain conduct are conferred by the law- unlike contracts where the rights are largely determined by the agreement between the parties
- Aim: protection of person, property and economic interests from damage caused by another person's failure to take reasonable care
- Tort = a civil wrong: law of torts is concerned with providing a remedy for loss caused by an illegitimate act or omission
- Tort and crime: can be same acts but different parties, different procedures, different consequences

- Tort and contract: both civil law/private actions but tort is fundamentally different because it is about rights and duties imposed by law not about specific agreements

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week 10 cases (extract)

Khan v Miah (2000)

- Miah and colleague were head waiter and chef at a restaurant and wanted to open up their own
- Khan invested in the venture (provided most of the initial capital). They agreed to be partners
- Brother, third respondent agreed to provide business experience and financial standing
- By December, parties found a premise and began planning. Khan arranged to borrow money from the bank and deposited it into the partnership bank account
- Opening was delayed because of various difficulties that led to a breakdown in the relationship à at this time restaurant was still not open for trade
- Opened a month later, carried on without settling account with Khan
- Issue: partnership or joint venture?

House of Lords held: there was a partnership

- Partnership commenced when the proposed partners took their first steps to implement their business plan
- Lord Millett: "There is no rule that the parties to a joint venture do not become partners until actual trading commences"

Goudberg v Herniman Associates Pty Ltd

- Herniman (a firm of architects) entered into a contract with Williams for the provision of services
- Williams was "in partnership" with Goudberg and on the basis was to be jointly liable for unpaid fees to Herniman

Court held: although they were "acting with a view of profit", nothing done by them leading up to the contract constituted "carrying on of business"

- Was not preparatory in as conveyed by Millett in Khan v Miah

- While Williams had developed a plan for the business involving Goudberg, they had only done market research together and made two trips to USA
- Goudberg was not a partner à not jointly responsible for fees