



COMMERCIAL LAW

Semester Summary Notes

Semester Two - 2018

LAW2442

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Topic Four: Negligence & Negligent Misstatement

(Carelessly Causing Harm)

Chapter/s: Carelessly Causing Harm (6)

Carelessly Causing Harm to People or Property

Tort of Negligence

A person commits the tort of **negligence** if they carelessly cause harm to another person. Negligence is by far the most common tort: most acts that cause harm to other people are the result of carelessness rather than intent.

Since civil liability reforms following the insurance crisis the law of negligence is now a combination of case law and statutory rules.

A person commits the tort of negligence if:

1. they owe the other person a duty of care
2. they breach the duty of care
3. their breach causes the other person to suffer reasonably foreseeable harm

Requirement One – Duty of Care

Established Categories

In most cases the establishment of the existence of a duty of care will be relatively straightforward, provided that the relationship between the parties falls within the established categories of duty of care. These categories may include:

- motorists owe a duty of care to other road users
- doctors owe a duty of care to their patients
- directors owe a duty of care to the company

If the relationship between the parties is not one that falls within the established duties of care, the plaintiff must show two things; (1) reasonable foreseeability and (2) salient features.

Reasonable Foreseeability

To establish the existence of duty of care, it must be shown that at the time of the incident it was reasonably foreseeable that the defendant's conduct could cause harm to someone in the plaintiff's position.

[p. 221 Donoghue v Stevenson (1932)] & [Bourhill v Young (1943)]

Salient Features

Secondly, the plaintiff must show that the salient features of the case are consistent with the existence of a duty of care. This means that the court will consider the relationship between the parties and other features of the case and then compare those features with the features of other cases where a duty of care has been found to exist.

[p. 223 Sullivan v Moody (2001)]

Requirement Two – Breach of Duty

In order to establish a breach of duty, it must be shown that the defendant failed to do what a reasonable person would have done within the same circumstances.

Topic Six: Terms of a Contract & Non-Contractual Representations (Contract Law)

Chapter/s: Contract Law: Terms of the Contract (8)

Terms of a Contract

The terms of a contract are the specific details of the agreement including each party's rights and obligations. There are two types of contractual terms being either express or implied terms.

Express Terms

Express terms are those terms explicitly agreed upon by the parties. Two ways a term becomes an express term of contract includes:

- by inclusion in a signed written contract
- by being brought to the attention of the other party by reasonable notice

If a term is in a written contract that has been signed by the parties, it is a binding and enforceable term of the contract, even if one of the parties has not actually read and understood the written contract. [p. 293 *L'Estrange v Graucob (1934)*]

Exceptions to Express Terms

Cooling Off Periods – period allocated for people to be able to change their minds [*Fair Trading's Act (1999) Vic*]

Non Est Factum – not my document [p. 294]

Reasonable Notice

If a statement is not contained in a written and signed contract it will only be an express term of the contract if the other party had **reasonable notice** of the statement.

A statement brought to the attention of the other party after the contract has already been formed will not be a term of the contract [p.295-296].

Terms implied by the Court

Implied terms are terms that were not necessarily discussed or negotiated by the parties, but nevertheless included in the contract as a result of certain legal rules.

Courts are frequently willing to imply a term into a settled contract to 'fill the gaps', as long as its:

- reasonable and fair
- necessary to make the contract viable
- so obvious it goes without saying
- able to be clearly expressed [p. 298 *Scammell*]
- consistent with express terms [p. 298 *Codelfa*]

The court will imply into the contract a term of which the parties are deemed to be aware as a result of prior dealings [p.299 *Balmain Ferry*].

Statutory Terms

The **sale of goods** legislation implies statutory terms that protect the buyer into contracts for the sale of goods [*Goods Act 1958 Vic*]. A contract for the sale of goods is a contract involving an exchange in return for a monetary price. The sale of goods legislation also implies into contracts statutory terms relating to passing of ownership, payment, delivery and acceptance.

Topic Eight: Remedies & Ending the Contract (Contract Law)

Chapter/s: Contract Law: Enforcement of Contract (9)

Remedies

If one party breaches a term of contract, a statutory term or (in some cases) a non-contractual representation or promise, and they are not protected from liability from an effective disclaimer.

There are a number of possible legal remedies available to the other party include:

- rescission
- damages
- equitable remedies
- statutory remedies

Rescission

Rescission is an order of the court declaring a contract to be terminated or unenforceable in the event of:

- complete non-performance
- breach of condition
- misrepresentation
- mistake, duress, undue influence or unconscionability

The court will aim to restore the parties' original positions before the contract came into being.

Whether or not another party is able to rescind the contract will depend on:

- whether there has been a complete failure to perform or a partial performance
- whether the partial performance involves breach of a condition or a warranty
 - o condition – term of the contract of fundamental importance
 - o warranty – term of the contract of lesser importance

Performance

A party will **completely fail to perform** if [p. 339 *Gold Coast Oil*]:

- they make no effort to perform their contractual obligations
- their actual performance is completely different to what they were required to do under the contract
- prior to the time for performance they clearly indicate that they will not be performing their obligations (anticipatory breach – contract still hasn't ended)

A party will **partially perform** the contract if they comply with some of the terms of the contract but breach one or more of the other terms [p.339 *Bettini*].

Condition or Warranty

If they breach a single term of the contract, whether the other party is entitled to terminate the contract will depend on whether the term breached was a condition or warranty.

Condition is entitled to damages and rescission (entitled to end the contract) [p. 340 *Associated Newspaper*].

Warranty is entitled to damages but not rescission [p. 339 *Bettini*].

Damages

The other party will be damaged in the event of:

- any breach of contract (whether total or partial, actual or anticipatory, condition or warranty)
- breach of collateral contract
- misrepresentation

The overriding objective of the court relating to damages is to make an award of damages to restore the other parties' position prior to either the breach or misrepresentation of the contract [p.343]. Contrastingly, the opposing parties under an obligation aim to mitigate (reduce) their loss [p.344 *Brace*].

Equitable Remedies

If the other party can demonstrate to the court that an award of damages is not a satisfactory remedy, the court may decide to provide an equitable remedy, such as:

- **specific performance** – court directing the defendant to fulfil their contractual obligations [p. 345 *Dougan*]
- **injunction** – court order forbidding someone from engaging in particular conduct that will be a breach of the law [p. 345 *Buckenara*]

Statutory Remedies

If the term breached is one of the terms implied into the contract by the sale of goods legislation, the legislation provides a range of remedies

Sellers Remedies = [*Goods Act 1958 Vic, ss 44-55*]. Buyers Remedies = [*Goods Act 1958 Vic, ss 57-59*]

Ending a Contract

Most contracts come to an end primarily due to performance.

Agreement

Both parties can agree to mutually release each other from any future obligation. Examples of agreement include:

- the party who has already fully performed their own obligations can promise to **unilaterally release** the other party from complete performance of their obligations.
- the parties can **mutually agree** to replace the existing agreement with a new agreement on different terms (novation)
- the contract may contain a **condition precedent** that has not been satisfied, or a **condition subsequent** that has been satisfied

Frustration

A contract will be terminated as a result of frustration if all principles are satisfied:

- a supervening event has made performance of the contract impossible
- neither party has caused the supervening event [p. 348 *Taylor v Caldwell*]
- the contract didn't provide for the supervening event [p. 348 *Codelfa v SRA of NSW*]
- it would be unjust or unfair to compel either party to proceed with the contract

Supervening event makes performance of the contract either impossible or unable to perform in the way originally envisaged by the parties.

When a contract is frustrated all outstanding obligations of the parties are discharged.

