

## **CONTRACTS**

Contracts are generally defined as agreements or sets of promises made between parties and having the force of law

### **INGREDIENTS OF A CONTRACT**

- Offer and Acceptance (agreement)
- Consideration
- Intention to create legal relations
- Certainty and completeness of terms

## **CONTRACTS: FORMATION**

### **OFFER & ACCEPTANCE (AGREEMENT)**

#### **OFFER**

A proposal by one party to enter into a legally binding contract on certain terms with another, giving the offeree an opportunity to choose between acceptance or rejection

May be in writing, oral, or implied from conduct

Is there an offer? – what would a reasonable person in the position of the offeree think? Actual intention of offeror doesn't matter, intention is determined objectively

- *Carlill v Carbolic Smoke Ball Co* [1893] pg. 256
- *Harvey v Facey* [1893] pg. 217

Objective test, what would a reasonable person think  
Was there an opportunity to say yes or no  
Must be given the opportunity to accept or reject

#### **UNILATERAL CONTRACTS**

A bilateral contract is created by the exchange of promises and gives rise to executory obligations on the part of both parties

- *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] pg. 580

A unilateral contract is created when a party makes an offer which is accepted in return for the performance of a specified act.

- *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) pg. 256

Unilateral “if you find my textbook, I’ll give \$100 to anyone who finds it.”

One sided promise, accept it by completing the task.

In bilateral contracts the offer is accepted by communication of acceptance (to be discussed shortly). In unilateral contracts the offer is accepted by performing the act.

### **WHAT IS NOT AN OFFER**

#### **Mere Puff**

Sometimes statements can be regarded only as ‘mere puffery’- the claims are made only for advertising purposes and mean nothing.

*Carlill v Carbolic Smoke Ball Company* pg. 256

#### **Supply of Information**

The supply of information is not an offer.

A request for information must be discerned from a contractual offer. A clearer indication of a preparedness to enter into a contract, than merely providing terms or information upon which a party maybe prepared to enter into such a contract, is needed.

*Harvey v Facey* pg. 218

### **INVITATIONS TO TREAT**

Need to distinguish between an offer and an invitation to treat (invitation to make offers or enter into negotiations)

#### **Examples –**

*Fisher v Bell* pg. 104

- The display of an item in a shop window with the price attached is not an offer to sell, but merely and invitation to treat

*Pharmaceutical Society v Boots Cash Chemists* pg. 213

- The display of goods in a store is an invitation to treat

*Seivewright v Brennan* pg. 216

- Auctions – Auctioneers right to refuse a bid
- An ‘accepted’ bid does not give rise to a contract, if it did there would be a breach of contract every time a higher bid was accepted

*Spencer v Harding* pg. 217

- Unless the advertisement specifies that the highest tender would be accepted there was no obligation to sell to the person submitting the highest tender.
- Advert amounted to an invitation to treat, the tender was an offer, the defendant could choose whether to accept the offer or not.

### REVOKING AN OFFER

Can be revoked any time prior to acceptance

- *Dickinson v Dodds* [1876]

A promise to hold an offer open for a specific amount of time is not binding unless consideration has been given. This is then called an option. (i.e. promise to hold offer for deposit, if don't big trouble)

- Option holder may choose to exercise the option or disregard it: *Goldsborough, Mort & Co Ltd v Quinn* (1910)

An offer will lapse after a specified time or within a reasonable time if no time period is given (reasonable depends on case, if prior held for 2 months than this is reasonable again)

### REJECTING AN OFFER

Once rejected offer is no longer available for acceptance (terminated)

- *Tinn v Hoffman & Co* (1873)

Rejected offers may later be revived (doesn't have to be)

A counter-offer is a rejection

- *Harris v Jenkins* [1922]
- *Hyde v Wrench* (1840)

ENQUIRYS ARE NOT REJECTIONS THEY ARE JUST QUESTIONS

This is to be distinguished from a mere enquiry as to the meaning or potential alteration of terms

- *Harvey v Facey* [1893] AC 552
- *Stephenson, Jacques & Co v McLean* (1880) 5 QBD 346

### ACCEPTANCE

When the party whom the offer was made agrees, and offers their unqualified assent to, the terms of the offer

Acceptance must clearly be made in response to and because of the offer

*R v Clarke* (1927) pg. 228

Acceptance must be communicated to the offeror unless:

- Offeror dispenses with requirement of notification
- Acceptance is effected by performance of an act
- Postal acceptance rule applies

Acceptance must be in the manner prescribed by the offeror

- *Carlill v Carbolic Smoke Ball Co* [1893] pg. 257
- *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1954)

Silence cannot be prescribed as the method of acceptance

- *Felthouse v Bindley* (1862)

Acceptance may be inferred from conduct

- *Farmers' Mercantile Union and Chaff Mills Ltd v Coade* (1921)
- *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988)

*i.e. handshake, smile, wink can be a form of acceptance. BUT "if I don't hear from you I'll assume it's mine/acceptance" not ok!!*

### POSTAL ACCEPTANCE RULE

Exception to general rule of acceptance

Where acceptance is expected to be sent by post, it is effective as soon as it is posted

- *Henthorn v Fraser* [1892]
- *Adams v Lindsell* (1818)

Postal acceptance is not rendered ineffective by delay or loss of letter in the post

- *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879)

Does not apply to instantaneous forms of communication (telephone, fax, telex)

- *Entores Ltd v Miles Far East Crp* [1955]
- *Brinkibon Ltd v Stahag Stahl* [1983]
- *Hampstead Meats Pty Ltd v Emerson and Yates Pty Ltd* [1967]
- *Express Airways v Port Augusta Air Services* [1980]

EMAIL/SMS POSITION IS UNCLEAR NOT SURE WHEN IT IS EFFECTIVE.

## INTENTION TO CREATE LEGAL RELATIONS

The parties must have *intended* their agreement to be legally enforceable in order for it to be so

The test is objective:

[T]he court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: 'Would reasonable people regard the agreement as intended to be binding?'

*Merritt v Merritt* [1970]

General presumption that commercial dealings are intended to be legally binding whilst 'private' or 'domestic' arrangements are not

Presumed that commercial transactions are intended to create legal obligations – rebutted only with difficulty

- *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005]
- *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989)

Rebuttal did occur in the following case

- *Pirt Biotechnologies Pty Ltd v Pirtferm Ltd* [2001]

Generally presumed that agreements between family members are not intended to create legal relations

Financial agreements between spouses:

- *Balfour v Balfour* [1919]
- *Cohen v Cohen* (1929)

Financial agreements between other family members:

- *Jones v Padavatton* [1969]

BUT presumption may be rebutted i.e. Where an agreement between family members is essentially commercial in nature

- *Roufos v Brewster* (1971)
- *Wakeling v Ripley* (1951)
- Likewise with friends
- *Trevey v Grubb* (1982)

AGREEMENTS BETWEEN FAMILY AND FRIENDS ARE CENTRALLY COMMERCIAL THEN PRESUMPTION WILL BE RUBBLED.

## CONSIDERATION

Consideration is the concept of *price paid*, which was presented and accepted in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915]

Doctrine of consideration requires that something be given in return for a promise in order to make it legally binding

Describes exchange and what is being exchanged

Serves to distinguish bargains from gifts and ensures that something of value is given by each party

Gifts are not contracts (there needs to be an exchange)

### **Two elements**

#### **1. Benefit/detriment**

'A valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other'

*Currie v Misa* (1875)

#### **2. Bargain**

'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable

*Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915]

### **Requirements**

#### **1. Sufficiency**

Must be sufficient (i.e. have *some* legal value) but need not be adequate (i.e. a 'fair' price)

*Chappell & Co Ltd v Nestlé Co Ltd* [1960]

#### **2. Currency ('past consideration' rule)**

Something given before a promise is made cannot constitute good consideration for the promise

*Roscorla v Thomas* (1842)

Unless services are performed at request of promisor and promisor later promises to pay for those services

*Lampleigh v Brathwait* (1616)

#### **3. Movement from the promisee**

Consideration must move from the promisee i.e. the consideration stipulated by the promisor must be provided by the promisee. It need not move to the promisor.

*Price v Easton (1833)*

i.e. you buy a car for son but say to seller don't give it to be give it to him, doesn't matter still ok as car (the promise) moved from the seller

### EXISTING LEGAL DUTY RULE

The actual or promised performance of an existing legal duty does not constitute consideration.

*Stilk v Myrick (1809)*

But doing more than you were legally required under an existing contract will amount of consideration for variation

*Hartley v Ponsonby (1857)*

Half of a ship's crew deserted on a voyage. Captain promised the remaining crew members extra money  
The captain then refused to pay up.

Held: The crew were entitled to the extra payment promised on the grounds that either they had gone beyond their existing contractual duty or that the voyage had become too dangerous frustrating the original contract and leaving the crew free to negotiate a new contract.

### EXCEPTIONS TO ELD RULE

#### Practical benefit

Where a party obtains a 'practical benefit' or avoids a disbenefit from the actual or promised performance of an existing legal duty owed to them by the other party, this may amount to consideration:

- *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991]*
- *Musumeci v Winadell Pty Ltd (1994)*

**(builder running out of money, gave him extra money, he promised to do exactly what he was already doing BUT going benefit of house on time)**

#### Promises to third parties

A promise to perform an existing legal duty to a third party may amount to good consideration

- *Shadwell v Shadwell (1860)*
- *Pao On v Lau Yiu Long [1980]*

### Compromise of disputed claim

A promise to perform an existing legal duty may amount to good consideration if made by the beneficiary as part of a bona fide compromise of a disputed claim

- *Wigan v Edwards (1973)*

### PART-PAYMENT OF DEBT RULE

A part-payment of a debt is not good consideration for an agreement to discharge the debt

- *Pinnel's Case (1601) 5 Co. Rep. 117a; 77 ER 237*
- *Foakes v Beer (1884) 9 App. Cas. 605*

The logic is that the offer of a lesser sum can never satisfy the greater sum due, such that the law should refuse to enforce such an arrangement

Rule does not apply where:

- Debtor tenders something other than money or part-payment is made and accepted before due date: *Pinnel's Case (1601) 5 Co. Rep. 117a*
- The promise of part-payment is made by a third party: *Hirachand Punamchand v Temple [1911] 2 KB 330*
- Multiple creditors unanimously agree to forgo a portion of each of their debts: *Couldery v Bartrum (1881) 19 Ch D 394*

### CERTAINTY AND COMPLETENESS OF TERMS

A binding contract must be sufficiently complete

- *Thorby v Goldberg (1964)*

It must also be sufficiently clear on its terms

- *G Scammell and Nephew Ltd v Ouston [1941]*
- *The Council of the Upper Hunter County District v Australian Chilling & Freezing Co Ltd (1968)*

The courts will endeavour to attribute meaning to the language used by the parties unless it is impossible to do so

- *Upper Hunter County District v Australian Chilling & Freezing Co Ltd (1968)*

Can't use unusual phrases etc., convoluted language, terms that can not be defined

## **PROMISSORY ESTOPPEL**

Promissory estoppel is the doctrine allowing recovery on a promise made when the reliance on the promise was reasonable, and the promisee relied to their detriment.

Essentially it prevents a promisor from unjustly retracting a promise made to a promisee.

The main elements of promissory estoppel are existence or anticipation of legal relations, promise by one party, reliance on the promise by the other party and detriment.

### Elements of estoppel

*Waltons Stores (Interstate) Ltd v Maher (1988)*

1. The relying party has adopted an assumption;
2. This assumption was induced by the representor's conduct; and
3. The relying party will suffer detriment in reliance on the assumption

There are also numerous sub-requirements' i.e.

- the relying party's reliance must be reasonable; and
- the representor's departure from the assumption they created must be unconscionable

## **CAPACITY**

Refers to one's legal ability to enter into a contract

Generally speaking, contracts made with a person lacking contractual capacity are voidable

### MINORS

#### MENTALLY INCAPACITATED

Impaired mental capacity (i.e. mental disability, mental illness etc.) is voidable at that person's option.

The person must demonstrate that he or she was incapable of understanding the contract at the time it was made and that the other party to the contract knew or ought to have known of the incapacity:

- *Gibbons v Wright (1954)*

### INTOXICATED

The capacity of an intoxicated person to make a contract is the same as that of a person who lacks mental capacity: *Gibbons v Wright (1954) 91 CLR 423*  
Must demonstrate that they were incapable of understanding the nature of their actions and that the other party knew of the incapacity: *Gibbons v Wright (1954) 91 CLR 423*

Importantly, a voidable contract can be ratified on the intoxicated person regaining sobriety or the mentally incapacitated person recovering their sanity, in which case the contract will then become binding: *McLaughlin v City Bank of Sydney (1912) 14 CLR 684*

*Blomley v Ryan (1956) 99 CLR 362* 'mere' drunkenness will not permit a person to get out of a contract.

## **CONTRACTS: TERMS**

### **EXPRESS TERMS**

Typically contracts of significance are recorded in writing and signed by both parties. This document then contains all the express terms.

A party will be bound to the terms and conditions contained in a contractual document that they have signed, regardless of whether or not they have read or understood the terms contained in the document:

*L'Estrange v F Graucob Ltd* [1934]

Rule does not apply where the signing party has been misled or misrepresented as to the content or effect of the document: *Curtis v Chemical Cleaning and Dyeing Co* [1951]

### **INCORPORATION OF TERMS BY NOTICE**

***“term of this nature would be considered unusual or onerous and needs to be given special notice”***

Whether terms are incorporated depends upon 2 things:

1. Were the displayed/delivered terms available to the party to be bound prior to contract being made?
2. Were reasonable steps taken to bring the terms to the notice of the party to be bound? (party must have actual knowledge or notice of the terms)

### **TIME TERMS ARE AVAILABLE**

Only terms made available to party prior to contract being made can bind that party:

- *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988)
- *Baltic Shipping Company v Dillon* (1993)

It would be entirely unreasonable to expect a party to be bound to terms and conditions they have only seen after the contract has been formed

- *Thornton v Shoe Lane Parking Ltd* [1971] (terms on car park wall could only be seen after driven into car park and taken ticket, haven't been notified of contract terms before agreeing)

### **KNOWLEDGE/NOTICE**

If, before or at time of contract being made, party knows that delivered document or displayed sign contains contractual terms, they will be bound by them:

- *Parker v South Eastern Railway Co* (1877)
- *Causar v Browne* [1952]

If a document is presented to a party, and a reasonable person would expect the document to contain the terms of a contract, the presentation of the document will suffice as 'notice' of the terms contained in it.

The notice must be in a form likely to come to the attention of the party to be bound:

- *Thornton v Shoe Lane Parking Ltd* [1971]
- *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] pg. 372 (terms of agreement were printed on receipt but you got the terms after paying i.e. entering into the contract)

### **UNUSUAL TERMS**

Where terms to be incorporated into a contract are onerous or unusual, special notice may be required: *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989]

i.e. expensive holding fee in last terms of the contract not ok!

### **COURSE OF DEALINGS**

Where parties have a history of dealings, terms introduced in earlier transactions may be incorporated into subsequent contracts (even where the ordinary requirements for incorporation have not been met):

- *Balmain New Ferry Co Ltd v Robertson* (1906)
- *Henry Kendall & Sons v William Lillico & Sons Ltd* [1968]

i.e. used to have an agreement for year that A pays for delivery and A & B make a contract but don't mention delivery fee then A will still have to pay for delivery.

## STATEMENTS MADE DURING NEGOTIATIONS

### ENTIRE AGREEMENT CLAUSES

Clause indicating that the written document contains the 'entire agreement' of the parties. Any talking during negotiations have no contractual force (unless given effect in the written document).

Designed to preclude parties from scouring through conversations and materials arising in negotiations to find 'some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim': *Inntrepreneur Pub Co v East Crown* [2000] 2 Lloyd's Rep 611

### PAROL EVIDENCE RULE

The parol evidence rule excludes the use of extrinsic evidence by a court in determining the meaning or legal effect of words used in a written contract

- *Goss v Lord Nugent* (1833)
- *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982)

- COURTS WILL EXCLUDE ANY EXTRINSIC EVIDENCE
- ONLY THE FINAL DOCUMENT CAN BE USED NO PRIOR DRAFTS, STATEMENTS ETC.
- ORAL CONTRACT DO NOT APPLY
- IF ORAL THEN CAN LOOK AT PRIOR DRAFTS, EMAILS, TEXTS ETC. BC THERE IS NOTHING THE COURTS CAN LOOK AT PHYSICALLY

### EXCEPTIONS

In certain circumstances extrinsic evidence adding to or varying terms of a written agreement may be admitted:

#### 1. Collateral contract

Where parties enter into a collateral contract, the parol evidence rule has no application.

Collateral contract is formed where a party makes a promise independent of (but connected to) the main contract and, as consideration for that promise, the other party agrees to enter into the main contract: *de Lassalle v Guildford* [1901]

E.g. Something so close to central agreement that it tips you over to signing the contract then COLLATERAL CONTRACT

E.g. Landlord say he will mow lawns and care for gardens but not in lease and you say yes then a collateral contract can be created, it tipped you over to sign the lease

#### 2. Estoppel

Party may be able to admit evidence of pre-contractual negotiations to support an estoppel claim

- *State Rail Authority of NSW v Heath Outdoor Pty Ltd* (1986)
- *Saleh v Romanous* [2010]

E.g. Person you are buying a house from promises orally to build a carport for free if you purchase the materials and then doesn't the materials can be used as evidence

#### 3. Implied terms

Courts may consider extrinsic evidence when determining if it is appropriate for a term to be implied into a contract: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982)

Even though you haven't written it down the court thinks it should be in then so they do.

#### 4. Contract subject to condition precedent

Extrinsic evidence may be referred to in order to establish that a written contract is subject to a contingent condition that must be satisfied before the contract becomes effective: *Life Assurance Co of Australia Ltd v Phillips* (1925)

E.g. purchase of home subject to finance, condition precedent "subject to" will be included

#### 5. Ambiguity

If a word in a contract does not have a clearly ascertainable meaning or is used in an inconsistent manner, reference to extrinsic evidence may be allowed

- *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982)
- *McMahon v National Foods Milk Ltd* (2009)

Evidence may be given as to the subject matter of the contract of the identity of the parties to it (money is to go to my children but have biological and foster, "I remember she wrote it on a paper in her draw" usually excluded but as there is ambiguity courts can look)

- *Abram v AV Jennings Ltd* (2002)

Or to the meaning of special language which is specific to a particular trade or industry ("X180" what is that, courts can look at emails to find out what it is and the supplier)

- *Homestake Australia Ltd v Metana Minerals NL* (1991)

Evidence of surrounding circumstances to deduce meaning of contract appears on current High Court authority to be admissible:

- *Western Export Services Inc v Jireh International Pty Ltd* [2011]

## TERMS v MERE REPRESENTATIONS

Not all statements made in pre-contractual negotiations will be regarded as terms

\*Intent behind the statement\*

The question of whether it is a term is determined objectively from all the circumstances of the case – court asks whether a person would reasonable have considered the statement to be a promise

- *Oscar Chess Ltd v Williams* [1957]

### Factors to consider:

Intent behind statement i.e. mere inducement/representation or meant to be included as a term?

- *Hopkins v Tenqueray*

Importance of the statement to the parties

- *Pym v Campbell*

Knowledge of the parties (what did you know that I didn't? i.e. car salesman say it economical on fuel but its not court will hold him to his word as he has assumed car knowledge)

- *Oscar Chess v Williams* [1957]

Time lapsed between statement and final agreement

Was innocent party asked to check/verify?

## EXCLUSION CLAUSES

Designed to reduce or exclude liability for conduct that would otherwise be in breach or amount to a tort.

Need to consider:

- Whether the clause is part of the contract (express OK, if incorporated by notice need to ask if it was reasonable etc.): *Thornton v Shoe Lane Parking Ltd* [1971]
- Whether person seeking to rely on the clause is a party to the contract

### READ ON ITS FACE

An exclusion clause is construed

- according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract: *Darlington Futures Ltd v Delco Aust Pty Ltd* (1986) READ AS WRITTEN

Where an exclusion clause is ambiguous, it is construed *contra proferentem* = against the interest of the party seeking to rely upon the exclusion clause)

Liability for negligent conduct excluded if:

- Clause expressly mentions negligence or a synonym (reckless or careless conduct)
- Clause uses general words which could not have been intended to cover another form of liability (i.e. has to be clear that negligence is the only liability you are trying to protect against)
  - *Davis v Pearce Parking Station Pty Ltd* (1954)
  - *White v John Warwick & Co Ltd* [1953]

### FOUR CORNERS RULE

Exclusion clauses only exclude liability for acts within the 'four corners' i.e. written in the contract

- *Sydney CC v West* (1965)

### DEVIATION RULE

Exclusion clauses generally will not absolve a carrier from liability for loss occurring during a deviation from a contractually agreed voyage or route.

- *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966)



i.e. delivery take highway 1 but went on backstreets and crashed the exclusion clause would not protect you as had a pre-organised agreed route.

### STATUTORY PROTECTIONS

Can't exclude guarantees

i.e. Australian Consumer Law gauntness that products must be safe and fit for use but put in exclusion clause that they take no responsibility for injury causes by product exploding NOT OK

### IMPLIED TERMS

Terms may be implied into a contract by:

- In fact (ad hoc)
- In law
- By custom

### TERMS IMPLIED IN FACT

-Terms implied in the circumstances of the particular transaction

**THE TEST:** *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, 283

For a term to be implied, the following conditions (which may overlap) must be satisfied:

- (1) it must be reasonable and equitable
- (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it
- (3) it must be so obvious that 'it goes without saying'
- (4) it must be capable of clear expression
- (5) it must not contradict any express terms of the contract

COURTS WILL ONLY PUT IN A TERM IF IT TICKS ALL 5 BOXES!

### Modified test for contracts not wholly in writing

*Byrne v Australian Airlines Ltd* (1995) 185 CLR 411

Term must be 'necessary for the reasonable or effective operation' of the contract

### TERMS IMPLIED IN LAW

Terms implied into all contracts that are similar i.e. implied promise by builder that house will be reasonably fit for habitation, implied promise by banker not to disclose customer's financial details.

#### To imply a term in law for the first time it must:

1. Be applicable to a definable class of contractual relationship: *Scally v Southern Health and Social Services Board* [1992]
2. Be 'necessary' for implication in all contracts of that class: *Liverpool City Council v Irwin* [1977]

**Narrow view of 'necessity':** *Breen v Williams* (1996) (no implied term in contract between patient and doctor that patient has right of access to medical records – non-implication would not prejudice patient's rights or render them 'worthless or seriously undermined')

### TERMS IMPLIED BY CUSTOM

Terms implied through customer or trade usage in a particular industry, market or context.

i.e. you build a fence but accidentally smash a window not in contract that you will fix it but in building industry it is well known that other damages will be paid therefore implied by custom

*Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Pty Ltd* (1986)

### TERMS IMPLIED BY STATUTE

statue may imply terms into a particular type of contract.

e.g. *Sale of Goods Act 1895 (SA)*

### CONDITIONS AND WARRANTIES

Where terms are classified as condition, breach gives the aggrieved right to terminate

### MEANINGLESS TERMS

Meaningless terms can be 'severed' i.e. cut out from the contract to leave the rest intact

- *Fitzgerald v Masters* (1956)

Need to distinguish from ambiguous

## **CONTRACTS: TERMINATION**

### **TERMINATION BY PERFORMANCE OR AGREEMENT**

- When the parties to a contract fulfil their obligations, the contract terminates through performance
- Some allow for termination when a certain event occurs (decided on before hand)
- A right to terminate may even be implied where, for example a contract does not stipulate duration
- Contract may be terminated and replaced by subsequent agreement – need to distinguish between variation and termination: *Morris v Baron & Co*

### **CONDITION PRECEDENT**

Parties may agree to make formation, or performance of obligations under a contract contingent upon the occurrence of an event.

### **CONDITION SUBSEQUENT**

Clause stipulating that a particular event will terminate the obligations to perform or will give the parties right to terminate: *National Australia Bank Ltd v KDS Construction Pty Ltd (1987)*

### **TERMINATION FOR BREACH**

Terms are grouped into 3 classes

- Conditions (essential and fundamental) – breach gives rise to termination
- Intermediate terms – right to terminate depends on gravity of breach and consequences
- Warranties (minor and insignificant i.e. drive to wear blue bowties but they wear red) – breach does not in itself give rise to right to terminate

Where parties (or statute) don't designate a term as a condition, need to apply the essentiality test to determine if it is:

*Tramways Advertising Pty Ltd v Luna Park Ltd (1938) 38 SR (NSW) 632, 641-2:*

*BASICALLY WOULD THE AGGRIEVED PARTY HAVE ENTERED INTO THE CONTRACT IF THEY HAD NOT BEEN ASSURED OF STRICT PERFORMANCE OF THE TERM*

Courts will consider all circumstances

An intermediate term is less than an essential term (condition), but more than a warranty

Where the breach of an intermediate term can be regarded as grave, serious or fundamental and 'goes to the root of the contract', termination will be justified

- *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007)*

If a party is 'substantially deprived' of the whole benefit for which they contracted as a result of breach of an intermediate term, this will give the innocent party the right to terminate.

- *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962]*

### **TERMINATION FOR REPUDIATION**

Repudiation is a demonstrated unwillingness or inability to perform one's obligations under a contract. May amount to an anticipatory breach

Can be express, or implied through words/conduct

Not all instances of unwillingness/inability amount to repudiation, must relate to the whole of the contract: *Psaltis v Schultz (1948)*

Doesn't mean they don't want to finish the job, they just can't because too sick.

Repudiation may occur even where the repudiating party honestly does not believe that it has breached the contract

- *Penola Trading Co Pty Ltd v Sunny Springs Pty Ltd [2009]*

Wise to seek determination on interpretation of contentious clause(s) within a contract before electing to terminate – if no actual right exists, the party that thinks they've been wronged might actually be in breach!

- *Penola Trading Co Pty Ltd v Sunny Springs Pty Ltd [2009]*

## TERMINATION BY FRUSTRATION

Where a contract is affected by events outside of the control of the parties and for which neither party is responsible, the contract may be frustrated and void

### The modern test of frustration:

[F]rustration occurs whenever the law recognizes that without default of either party\* a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.

*Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 729

### EXAMPLES:

Where change in law renders performance illegal

- *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918]

Where a party dies or becomes permanently incapacitated

- *Lobb v Vasey Housing Auxiliary* [1963]

Where the subject matter is destroyed

- *Taylor v Caldwell* (1863)

Radical change in state of affairs essential to performance

- *Codelfa Construction Ptd Ltd v State Rail Authority of NSW* (1982) (work could not occur due injunction therefore could not complete by set date but injunction was a frustrating event)

### FRUSTRATION DOES NOT OCCUR WHEN:

- Contract provides for a supervening event which occurs
- The event was caused by the party pleading frustration
- The event was foreseeable

### EFFECTS:

- Ends immediately
- Election not required
- Where there is total failure of consideration, and money has been paid for it, refunded
- Arbitration clauses (future obligations) are NOT cancelled
- Debts will also have to be paid

## ELECTION V AFFIRMATION

An innocent party has two choices upon the other party's breach: **elect to terminate** the agreement (as we've been discussing) or **affirm the breach** and keep the contract on foot

Election = innocent party terminates the contract, must indicate this intention clearly, unequivocally and in a manner that does not suggest an affirmation

- *Trevilyan v Donaldson* [1997]
- *Ryder v Frohlich* [2004]

Affirmation = innocent party makes it unequivocally clear that they are overlooking the breach to keep the contract alive i.e.

- Innocent party accepts/insists upon performance: *Carr v Berriman*
- Innocent party delays in terminating: *Champtaloup v Thomas*
- Innocent party continues to perform: *Sargent v ASL Developments*

The party seeking to terminate must be 'ready and willing' to perform in order to attain the right to do so.

- *Foran v Wight* (1989)

If a party elects to terminate

- Parties relieved of future obligations
- 'Accrued' rights/obligations survive i.e. existing debts
- Innocent party may sue for damages or seek other remedies

If a party elects to affirm the contract

- Contract remains on foot
- Innocent party may still sue for damages or seek other remedies, but party in breach may rectify the breach
- Parties must continue with their obligations

## **CONTRACTS: REMEDIES**

### **SELF-HELP**

-Describes action undertaken by a person who has suffered injury or loss through another person's wrong to obtain redress without recourse to legal proceeding in court.

-Withholding performance (tradie botched job, don't pay until they fix it)

-Termination

-Deposits and advance payments (safety blanket, you screw up you loose)

### **ENFORCEMENT**

#### Specific Performance order (equitable remedy)

-Court orders requiring a party to perform the obligations under a contract

-Rarely granted, granted at courts discretion

-Common reasons for refusal:

-Damages are adequate remedy

- Contract is for personal services (i.e. employment)
- Continuing would require constant court supervision (courts don't have time or resources)
- Delay in application for relief (i.e. if asked for it 6 months after it happened, too late)

#### Injunction (equitable remedy)

-Court order restraining a part from performing a specific act

-Prohibit a party from breaching their contractual obligations (usually granted to prevent a party doing something they promised not to)

-Wont be granted where it would compel a person to do something he or she would not haven been ordered to o by order of specific performance: *Page One Records Ltd v Britton [1968]*

#### Action for debt (common law remedy)

-Used to recover sums due under a contract i.e. price of goods sold or fee for services performed as a 'debt'

-Action for debt may be brought as an alternative to, or in conjunction with, action for damages.

For a party to bring action for debt, two requirements must be satisfied

- Contract must impose obligation to pay a certain or ascertainable sum of money
- Right to payment of the sum must have 'accrued' (finished building a house but not paid a cent)

### **RESTITUTION**

-Compel payment from A to B where it would be unjust to allow A to retain the benefit which A has received at the expense of B

-All about fairness

### **COMPENSATION**

-Any breach of contract entitles the injured part to seek damages – P must prove breach

-Nominal unless P can prove they have suffered a loss

-General principle *Robinson v Harman (1848)*

*Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation ... as if the contract had been performed*

#### **-MUST MENTION CASE AND GENERAL PRINCIPLE**

#### Limitations – Remoteness

-In order for damages to be awarded P must show that the loss was not too remote

-*Hadley v Baxendale (1854) TEST*

*-considered either arising naturally, that is, according to the usual course of things, -reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract,*

#### **-HAVE TO APPLY TEST**

-Application of the rule depends on the knowledge held by D

-On the info available when the contract was made

-Would a reasonable person in D's position have realised that P's loss was sufficiently likely to result from D's breach?

#### Non-pecuniary loss

-Damages obtained for pain suffering following from physical injury caused by breach on contract

*Baltic Shipping Co v Dillon (1993)*

### Punitive/Exemplary damages

- Effectively designed to punish and teach a lesson
  - Unlike tort actions can be award for breach of contract
- Hospitality Group v ARU (2001)*

### Liquidated damages and penalty clauses

- Parties may stipulate a sum to be paid in the event of a particular breach
  - But unless a genuine pre-estimate of likely loss, provision will be unenforceable as a 'penalty'
- Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd [1915]*

### Mitigation

Concerns the reasonable steps that have been, or should reasonably have been, taken by P to reduce the loss caused by D's breach of contract *i.e. there is a safe path down the road but you didn't tell the driver, he could have avoided damage to wood, that might not have ever occurred.*

Three rules:

- P cannot recover for avoidable loss
- P can recover for loss incurred in reasonable attempts to avoid loss
- P cannot recover for avoided loss (i.e. courts can't give money for something that could have happened)

### Limitation of actions

*Limitation of Actions Act 1936 (SA) s35*

Actions must be commenced within 6 years of cause of action occurring

## **BUSINESS STRUCTURES & E-COMMERCE –**

### KEY DIFFERENCES BETWEEN JOINT VENTURE AND PARTNERSHIP

Joint Venture	Characteristic	Partnership
Individual	Liability	Joint and several
Freely (subject to alternative arrangements)	Parties can leave...	According to terms of partnership agreement
One-off projects	Duration	Ongoing
Taken by venturers individually	Profits	Taken by firm (partnership) as a whole for the common/joint benefit of all
Venturers are at arms-length, low degree of mutual obligation	Nature of relationship	Partners owe fiduciary obligations to one another
None specifically, determined by legal status of the parties comprising the joint venture	Applicable laws	Statute (mainly the Partnerships Acts), equity, contract and agency law

E-commerce – trading in products or services using computer networks

### Regulation ***Electronic Transactions Act 1999 (Cth)***

Electronic contracts are just as valid  
Acceptance has to be clear and unequivocal

#### **Shrinkwrap**

- Usually seen on software packages – accept T&C's by opening package

#### **Clickwrap**

- Formed by clicking 'I agree' or 'I accept' button, normally at end of list of T&C's

#### **Browsewrap**

- Formed by expressly consenting to T&C's by, for example, clicking 'download' to download software

The rule in *L'Estrange v Graucob* (recall from Week 3) also applies to electronically signed documents

The law is not settled: current legal position with respect to various forms of online contract (outlined below) is questionable.

#### **Shrinkwrap contracts**

- Enforceable provided the consumer can return the product unused once terms inside are viewed.

#### **Clickwrap contracts**

- Enforceable.

#### **Browsewrap contracts**

- Enforceable provided that the hyperlinks to the T&Cs are clearly presented and the consent button appears *below*.

## VITIATING FACTORS – MISINFORMATION

Competition and Consumer Act 2010 (ACL)

General s18

About future s4

Specific Contexts s29-34

Enforcement and Remedies

Injunctions s216; 232; 233; 234 and 235

Damages (not punitive, aim is compensation) s236

Non-punitive orders (community service, disclose specified info, order to publish specified advertisement) s246

Adverse publicity orders s247

Other orders (refund money, repair goods, return property etc.) s243; 244; 248-253

Aim of ACL is to give consumers more scope of remedies

CONSUMER PROTECTION

S18 Misleading conduct generally

S29 Supply of goods or services

S30 land

S31 employment advertisements

S32 gifts and prizes

S34 services

S37 home operated business

**Section 18 (no criminal consequences apply)**

-Catch all provision

A 'person' shall not in 'trade or commerce', 'engage in conduct' about goods or services that is misleading or deceptive or likely to mislead or deceive.

**'person' means:**

-a company (i.e. A Pty Ltd) or

-any other kind of person

**'trade or commerce' means:**

trade or commerce within Australia or between Australian and somewhere else

Normal business dealings are clearly in trade or commerce:

In *Shahid v Australasian College of Dermatologists* [2008] FCAFC 72, a College was found to have made representations in its handbook for trainees in trade or commerce.

In *Jacques v Cut Price Deli Pty Ltd* (1993) ASC 56-221, representations made in course of selling a franchise for a delicatessen were held to be in trade or commerce.

In *Larmer v Power Machinery Pty Ltd* (1977) 29 FLR 490 the display of a brochure in the foyer of D Company was a representation in trade or commerce.

In *ACCC v Kaye* [2004] advertisements placed to promote seminars about how to get rich quickly through real estate investment were found to be in trade or commerce.

Not in 'trade or commerce':

In *O'Brien v Smolozonov* (1983) 53 ALR 107, the private sale of rural land was held to NOT be in trade or commerce.

In *Orion Pet Products v RSPCA* (Vic) (2002) FCA 860, statements made by RSPCA opposing the sale and use of electronic dog collars were held to be not made in trade or commerce.

In *Commonwealth v Griffiths* [2007] NSWCA 370, the Australian Forensic Drug Laboratory provided an incorrect certificate to the police for prosecution purposes- held not to be in trade or commerce.

In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, an internal communication between a foreman and a worker was held to not be in trade or commerce.

NO DEFINITION FOR MISLEADING CONDUCT IN ACL EXCEPT S4, GO TO CASE LAW TO FIND DEFINITION

**Aim of misleading conduct provision**

-primary function of s18 is to protect consumers against all deceptive representations made by all persons in any aspect or trade of commerce e.g. advertisements and even pre-contractual negotiations

**'Objective test'**

-to determine if conduct is misleading

1. Define the audience (low threshold)
2. Include the gullible, uneducated etc.  
*Taco Co of Australia v Taco Bell Pty Ltd* (1982)  
"less than average intelligence and background... but not those unusually stupid"
3. Would a significant proportion of the total target audience be 'led into error'?
4. If so, is this really caused by the defendant

## Similar Names

*Taco Co of Australia v Taco Bell Pty Ltd (1982)*

*MacWilliams Wine v McDonalds 1979 High Court*

CONFUSION IS NOT SUFFICIENT TO RESULT IN MISLEADING OR DECEPTIVE CONDUCT

## Similar looking product

*Parkdale Furniture v Puxu 1982 High Court*

*Louis Vuitton v Sonya Valentine Pty Ltd 2013 Federal Court*

**No business can exclude liability for section 18 and so any exclusion clauses try to do so would be void.**

SILECNE CAN AMOUNT TO MISLEADING OR DECEPTIVE CONDUCT: *Henjo Investments v Collins Marrickville Pty Ltd 1987 Federal Court*

*ACC v Reckitt Benckiser 2015*

Nurofen Case

Deceptive under s18, engaged in conduct that was misleading

## **VITATING FACTORS – ABUSE OF POWER**

Unconscionable conduct (unfair or unjust)

S21 - A 'person' shall not, 'in trade or commerce,' 'engage in conduct' that is unconscionable:

\*according to unwritten law s20

\*relating to the supply of goods or services from a person s21

*CBA v Amadio 1983 High Court*

LANDMARK CASE IN AUSTRALIAN LAW FOR UNCONSCIONABLE CONDUCT

1. Special disability (lack of English)
2. Other person/party knew
3. They took advantage

Special disability means more than a mere disadvantage, affected party unable to make rational decisions about his or her own best interests

S20 "A person must not, in trade or commerce, engage in conduct which is unconscionable within the meaning of the unwritten law from time to time",

i.e. prohibits conduct by a person that the unconscionable with the meaning of common law of contract

**s20 DOES NOT APPLY IF s21 APPLIES**

## **s21 (51AA)**

A person must not,

In trade or commerce,

Engage in conduct that is,

In all circumstances,

Unconscionable.

NO DEFINITION!

## ***Hurley v McDonald's Australia Ltd [2000]***

-something that is clearly unfair or unreasonable

-actions showing no regards for conscience

s21 – capable of applying to a system of conduct or pattern of behaviour (diff from common law)

Not limited to the formation of the contract

## **s22 (51AC)**

contains a list of factors to determine if s21 is reached

## **UNDUE INFLUENCE**

- The relationship between the parties can give rise to a **presumption of undue influence**
- Their actions are controlled
- Solicitor and client, trustee and beneficiary, doctor and patient, parent and child **but not husband and wife**

Can be rebutted if vulnerable party still able to form an independent judgment or if it is proved that they have taken independent advice. **PERSON IN POSITION OF INFLUENCE HAS TO PROVE THEY DID NOT TAKE ADVANTAGE**

## **UNFAIR CONTRACT TERMS**

Since 1 July 2010 terms in standard form consumer contracts that are judged by a court to be unfair will be void

i.e. pre printed style, phone plan, only ever 1 sided.

ONUS IS ON TRADER TO REBUT THIS PRESUMPTION

### **S24 defines unfair if it can:**

- cause a significant imbalance in the parties' rights
- is not reasonably necessary to protect the legitimate interests
- cause detriment to a party

### **THE TORT OF NEGLIGENCE**

Usually only compensatory damages are awarded (i.e. put then back to where they were before the incident)

#### What is a tort?

A civil wrong

E.g. trespass, defamation, negligence

Negligence is associated with carelessness, it's where someone has a duty of care to someone (other person is vulnerable) and they abuse their position and the vulnerable person suffers.

#### **Donoghue v Stevenson 1932 House of Lords pg. 125**

- S manufacturer of soft drink sold in opaque glass
- Mrs. D's friend bought a bottle of ginger beer at a café
- Dead snail inside bottle
- Suffered nervous shock and gastro
- As Mrs. D did not buy no contract therefore sue under the tort of negligence

Held

- S owed a duty of care to Mrs. D
- Reasonably foreseeable by S, obviously someone drank something with a dead snail it they would get sick

Lord Atkin stated:

- "you must take reasonable care to avoid acts which you can reasonably foresee would be likely to injure your neighbour."
- Neighbour is someone who you have a duty of care too, someone closely or directly affected by your actions

**D V S establishes: owes a duty of care to consumer to reasonable care when it is reasonably foreseeable that injury will occur to the consumer**

### **OCCUPIERS LIABILITY**

- An occupier of a property (not necessarily the owner) has a duty of care to entrants into that property.
- Duty extends to those who come onto the property illegally. *Hackshaw v Shaw* (1984), *Modbury Triangle Shopping Centre v Anzil* 2000 High Court

### **EMPLOYER'S (VICARIOUS LIABILITY)**

- Vicarious liability is the liability that applies to someone who will be held liable even though they have not personally been at fault
- Does not apply if independent contractor
- Only liable if it is in the course of their employment

Step 1: establish normal duty/duties

Step 2: Was the action that led to the incident outside the scope of their employment

*Deatons Pty Ltd v Flew* (1949)

### **ECONOMIC LOSS**

#### **NEGLIGENT MIS-STATEMENT**

Careless statements/advice provided by professionals

***Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964]***  
pg. 92

Advertising case, spoke to bank, bank said they could afford to pay but it turns out they couldn't.

Bank has disclaimer not liable. Court says not liable but only reasons is the disclaimer

*Shaddock v Parramatta City Council [1981] pg. 173*

3 elements

-have to establish duty of care

-breach of duty of care

-someone suffers a loss due to a breach

**ALL 3 ELEMENTS SATISFIED THEREFORE COUNCIL LOST**



## **PLANTIFF – TEMPLATE**

1. You owed me a duty of care (duty of care)
2. You breached that duty of care (standard of care)
3. I suffered a loss (causation and remoteness)  
Therefore, you owe me money to compensate me for that loss.

### **2. Has the duty been breached?**

Established in ***Wyong Shire Council v Shirt [1980]***

Has D failed to exercise the proper standard of care?

- likelihood of injury/loss (foreseeability of risk)
- seriousness of injury/loss (seriousness of harm)
- cost of taking additional precautions (burden of precautions)

## **CIVIL LIABILITY ACT 1936 (SA)**

### **Section 31 – standard of care**

D negligent if they take less care than would a reasonable person in the same position as the defendant and with the same information

### **Section 32 – precautions against risk (codifies Wyong)**

A person is not negligent in failing to take precaution against a risk of harm unless:

- The risk was foreseeable
- The risk was not insignificant
- A reasonable person would have taken those precautions given
  - A probability of harm
  - Seriousness of harm
  - Cost of taking precautions
  - Usefulness of the activity (hit by a fire truck speeding to emergency)

### ***Romeo v Conservation Commission of NT [1998]***

- Romeo 16year old girl fell off cliff while drinking
- No fence or warning signs
- But danger would have been apparent to any sober person
- Very expensive to put up fence along km's of cliff
- Court held Commission owed her a duty of care  
BUT WAS THE RISK REASONABLY FORESEEABLE? YES

### ***Nagle v Rottnest Island Authority [1993]***

- Nagle dived into water at swimming beach
- Hit head on submerged rock

-Was this reasonably foreseeable?

-Cost of taking precaution so low that duty of care was breached

Difference than Romeo cost of taking precaution much lower, simple warning sign v fence km's long.

### ***O'Dwyer v Leo Buring [1966]***

- Champagne plastic stopper, diff design to today
- Lost eye sight
- Design was NEGLIGENT
- Warning label, cost of taking precaution very low

### ***Adelaide Chemical and Fertiliser Co v Carlyle [1940]***

- Sulfuric acid sold in large 30kg jars (dangerous good)
- Broke and splashed onto Mr. Carlyle
- Died from secondary infection
- Found any jars filled with any solution when titled allowed to fall just 9 inches would always break
- VERY NEGLIGENT DESIGN
- Standard of case obviously breached!

### **Section 40 – standard of care for persons professing to have a particular skill**

Tradesperson

What could reasonably be expected of a person claiming that skill

### **Section 41 –standard of care for professionals**

A person who provides a professional service incurs no liability in negligence if they acted in a manner that was widely accepted in Australia as competent professional practice

\*does not apply to advice about the risks of medical treatment

### ***Rogers v Whittaker (1992)***

- Mrs. W blind in right eye
- Dr. Rogers eye specialist advised her to have an operation to improve the appearance of her right eye and maybe restore some sight
- No sight was restored and left eye became inflamed and she then lost sight in both eyes
- FAILURE TO WARN WAS A BREACH OF DUTY OF CARE

### ***Chappell v Hart (1998)***

- Operation on esophagus, advised by Dr. Chappell
- Asked if it would effect her voice
- FAILURE TO WARN WAS NEGLIGENT

### **3. Did the breach cause the loss?**

- Was the loss (at least partly) caused by the breach?
- Where more than one type of loss occurred as each a reasonably foreseeable result of the breach?
- This issue is concerned with the remoteness of the losses – were they caused by the breach or were they too remote?

### **Section 34 – General Principles**

But for test/ causation

"but for" the defendant's negligence, the plaintiff would not have been injured.

Applied in: ***Wagon Mound No. 2 case [1966]***

### **Section 35 – Burden of proof**

Plaintiff is responsible to prove the actions (always bears the burden of proving)

### **DEFENCES TO THE TORT OF NEGLIGENCE**

#### Disclaimers –

It is possible to exclude liability for negligence by the way of a suitably worded exclusion clause (but not in contract): ***Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964]***

#### Voluntary assumption of risk –

-The plaintiff consents to or voluntarily assumes the risk of injury and it is a complete defence.

#### ***Woods v Multi-Sport Holding Pty Ltd (2002)***

- indoor cricket
- no helmets provided
- no warning signs that indoor cricket was dangerous and there is risk of eye injury
- VOLUNTARY ASSUMPTION OF RISK, BALL SPORT OBVIOUS THAT IT IS RISKY, YOU COULD GET HURT

#### ***Agar v Hyde; Agar v Worsley (2000)***

- two amateur rugby union players broke their necks when a scrum collapsed on them during the course of play
- BY UNDERTAKING THIS ACTIVITY YOU ARE ASSUMING THIS RISK, YOU ARE PLAYING THIS GAME VOLUNTARILLY

What are obvious risks?

- Where a risk is obvious the plaintiff is presumed to be aware of the risk e.g. bungee jumping
- Diving 9 meters into a river was an obvious risk *Great Lakes Shire Council v Dederer [2006]*
- The threat of being hit by a rogue wave while on a dolphin cruise – not an obvious risk *Lormine Pty Ltd v Xuereb [2006]*

Dangerous Recreational activities

- Non-contact rugby is not a dangerous recreational activity – *Falvo v Australian Oztag Sports Association [2006]*
- However, shooting kangaroos by spotlight is dangerous – *Fallas v Mourlas [2006]*

#### Contributory negligence –

- The plaintiff also has failed to take reasonable care for their safety or the safety of their property
- The failure to take care of their own safety has contributed to the accident
- Reduces liability

Section 50 – Court must reduce damages payable

- same standard as defendant negligence s44
- include negligence by a decreased victim s45
- assumed that a drunk victim is negligent s46
- relying on a drunk person is negligent s47
- drunk = blood alcohol level of 0.08 s48
- not wearing seatbelt or helmet = 25% reduction s49

#### ***Moore v Woodforth (2003)***

- Moore snorkeling in shipping channel (not allowed)
- Woodforth travelling at 15 knots (too fast)
- Moore suffered injuries
- Moore's negligence contributed to injury by 40% as he took no steps to protect himself (swimming face down)
- Moore's claim was reduced by 40%

#### ***March v Stramare Pty Ltd (1991)***

- Stramare packed truck in middle of road with hazards on
- March drove into back of it drunk, sued S
- Held they both caused the accident (70% March, 30% Stramare)
- March won his case but claim reduced to 30%

## **UNSAFE GOODS**

A person, who, in trade or commerce, supplies defective goods manufactured by it is liable to compensate those who suffer:

- bodily injury or death, s138
- financial loss to dependents, s139
- damage to goods ordinarily acquired for personal, domestic or household use, s140
- damage to domestic buildings ordinarily acquired for private use, s141

### STEPS TO SATISFY

- A person in trade or commerce
- Supplies goods manufactured by it
- Goods have defect
- Because of defect person suffers:

Then 'person' is liable

### **Manufacturer**

**Section 7 (1)** provides that a manufacturer is defined to include:

- a) a person who grows, extracts, produces, processes or assembles goods;
- b) a person who holds himself or herself out to the public as the manufacturer of goods;
- c) a person who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied by the person; (OWN BRANDERS, WOOLWORTHS SELECT)
- d) -
- e) a person who imports goods into Australia (actual manufacturer overseas)

### **s9 (1)**

goods have a safety defect if their safety is not such as persons generally are entitled to expect

### Extent of safety s9 (2)

In determining the extent of the safety of goods, regard is to be given to all relevant circumstances, including:

- a) the manner in which, and the purposes for which, they have been marketed; and
- b) their packaging; and
- c) the use of any mark in relation to them; and
- d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
- e) what might reasonably be expected to be

- done with or in relation to them; and
- f) the time when they were supplied by their manufacturer.

What is a reasonable assumption for use? i.e. obv don't use hairdryer in bath

S9 (3) An inference that goods have a safety defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.

S9 (4) An inference that goods have a safety defect is not to be made only because:

- a) there was compliance with a Commonwealth mandatory standard for them; and
- b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer.

### **LOSES ABLE TO BE CLAIMED**

138 - loss or damage suffered by an injured individual  
139 - loss or damage suffered by a person other than an injured individual

140 - loss or damage suffered by a person if other goods are destroyed or damaged

141 - loss or damage suffered by a person if land, buildings or fixtures are destroyed or damaged

s149 – ACCC can act on behalf of person

### **DEFENCES – s142**

- a) defect did not exist at supply time by actual manufacturer
- b) only have defect as complying with a mandatory standard
- c) state of scientific knowledge was that the defect could not be discovered (all that was done was done)

-The burden of proof to prove any of these defences is on the D

-Standard of proof is a balance of probability (more likely than not)

**Manufacturers' liability – section 271** (works the same as s54 and s55 but don't need contract)

Imposes statutory liability on manufacturers

Manufactures is liable to compensate for the loss if:

-goods not of acceptable quality

- goods do not correspond with the description
- goods do not comply with an express warranty
- manufacturer fails to comply with its obligations to provide repair facilities and spare parts