TOPIC: Overview of obligations

Civil law (Private Law) split into 2 subgroups:

* Law of property
  + – Covers relationship between people and things, gives rights in respect of a thing (property rights)
* Law of obligations
  + – Provides an action against someone who has breached a legal duty/obligation, gives rights against a person (personal rights)

*EG – If you lend computer to Bob, and he is declared bankrupt and leaves the country, you can always get your computer back because you have ‘property’ in it. If Bob had sold you the computer which had only been lent to him and then been declared bankrupt you would only have personal rights against him: i.e. to sue for breach of contract etc. – If Bob had no money, however, this is a meaningless right.*

What is a legal obligation?

* DEF:
  + A responsibility which the law places on A to act (or not to act) in a certain way towards B
  + It is the function on law of obligations to attach legal consequences to what a person does or fails to do
  + Sometimes used in discussions of criminal conduct, but law of obligations as a whole is part of civil branch of law
* Normally breach of legal obligation = compensation, penalty or sometimes imprisonment
  + Statutes can have both civil and criminal consequences, and imprisonment/fines to crown usually domain of criminal law
* To enforce civil obligation plaintiff must prove harm, however this is not always enough to establish liability
  + Balfour v Attorney-General 1991 (Gay teacher case)

3 broad categories of obligation

* Common law obligations
  + Created by agreement (promissory obligations)
  + By deed, by contract or by promises extended by statute
  + Torts: negligence & other torts
* Equitable obligations
  + Trust obligations
  + Fiduciary obligations
  + Obligations of confidence
* Statutory obligations
  + Those creating civil/criminal liability

Multiple obligations

* One act, event or omission can = multiple causes of action
  + *EG – Accountant who gives bad advice could be liable for negligent misstatement, breach of FTA, breach of contract etc.*
  + Plaintiff can choose which cause(s) of action they wish to pursue, but they can not ‘double-dip’ on compensation

TOPIC: Statutory Liability

**Civil Liability**

* Legislation that may affect existing common law and equitable obligations

* Express creation (or denial) of civil liability
  + Some statutes create express right to sue for damages/other remedies, i.e. Parliament, not the courts has created cause of action
  + EG – CGA 1993 (remedies for G/S that malfunction), FTA 1986 (liability for unfair trading practices)
* Fair Trading Act 1986
  + Prohibits certain conduct by people in trade
  + Don’t have to intend to do wrong to be liable
  + Remedies both civil *(injunctions, corrective ads, reparations)* and criminal *(fine of up to $60,000 for individuals & 200,000 for companies)*
  + S9: *“No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”*
    - Plaintiff has to prove defendant ‘in trade’ (trade requirement) and has been misleading/deceptive
    - Trade requirement based on s2 and basically says transaction must be a business one, not private – one off garage sale vs. weekly garage sale
    - 3 step test to decide if conduct misleading/deceptive:
      * Was the conduct capable of misleading section of public rather than just this person?
      * Was the plaintiff actually misled, or did they realise conduct was misleading and continue anyway?
      * Was it reasonable for plaintiffs to be misled?
* Statute can also expressly deny civil liability
  + S45 of Postal Services Act 1998 denies compensation and removes liability from Crown/postal operators if they lose/damage letters

* Implied creation of civil liability
  + Statute may not expressly create any, but interpretation of it could create liability.
  + *EG – Simpson v AG (Baigent’s Case), unlawful search of home where police know it was wrong home, P argued contravention of s21 of NZ BofR*
    - *Denied by HC on basis it wasn’t meant to be cause of action, but CofA held that it could be used*
* Changing the content of an existing cause of action
  + I.e. – modifying and supplementing common law
  + EG - Sale of Goods Act 1908 adds to common contract law by creating remedies for non consumer contracts

Criminal Liability

* Created by Parliament, not by courts
  + Govt. agencies prosecute for breach of criminal law, private individuals can bring own cases but v. expensive (unless CC sues for you = free)
  + In civil law, P seeks a remedy, in criminal law, P/State seeks punishment
  + Prosecute = criminal, Sue = civil
* Standard of proof/Procedure
  + Civil: Balance of probabilities, Criminal: Beyond reasonable doubt
  + Civil: Filing statement of claim, Criminal: Swearing of Information
* Nature of criminal liability
  + Strict adherence to words of statute, proof of each requisite element is necessary for conviction, not just some elements
  + Crimes Act 1961, creates many criminal offences and contains law relating to defenses and criminal procedure
  + Will look like: ‘Every person who…[Prohibited act] commits an offence and is liable upon conviction to…[Penalty]
* Traditional elements of a criminal offence
  + Actus reus: Physical act
  + Mens rea: State of mind to commit crime
  + These two must, theoretically, coincide EG – Fagan v Metropolitan Police
  + However, in modern NZ this is not necessarily so. Many offences don’t require proof of mens rea for sake of efficiency EG – establishing mens rea for every parking ticket would be tough
    - Also because many ‘crimes’ created in 20th century are considered amoral e.g. breaking environmental regulations, and so less need to prove mens rea (still remains for ‘true crimes though)
* Strict/Absolute liability offences
  + Strict liability means only actus reus is necessary to prove offence, but defendant may exculpate themselves by showing lack of fault (i.e. that they acted how a reasonable person would have)
    - EG – Civil Aviation Department v MacKenzie (Telephone wires/plane case)
  + Absolute liability is where neither neither mens rea nor fault is a component of the offence. May be applied where narrow escape through fault is seen to be inconsistent with policy factors

TOPIC: Protecting Privacy

Tort of invasion of privacy

* Covers info held by people not by companies, sensitive non-everyday info
* Requisite elements to establish breach
  + Existence of facts in respect of which there is a reasonable expectation of privacy
  + Someone has taken facts & given publicity to them, must be highly offensive to an objective, reasonable person
  + Leading case = *Hosking v Runting*, obiter more important than ratio
* Judge must weigh the nature and extent of legitimate public interest in disclosure of information and freedom of expression vs. individual’s right to privacy
  + “Privacy ends where the public peril begins”
  + Defence of worthiness: TV3 Network Services Ltd v Fahey, found in favour of TV3 on basis of news worthiness

Privacy Act 1993

* Concerns standards of privacy when companies/agencies handle personal information and data – both in public and private sector
  + Needed because tort wouldn’t cover everyday consumer interactions with companies/stores etc.
  + Is technology neutral, i.e. does not apply to any particular storage medium like files/documents but applies to ‘information’ so will apply for all time
* Act governs whole information cycle of personal info
  + Collection🡪Use🡪Disclosure🡪Disposal
  + S6 sets out the 12 principles of Privacy Act
* The Twelve Principles

1. An organisation can only collect personal information relevant to its legitimate purposes
2. Personal information must be collected from the subject directly
3. Subjects must be told information about them is being collected, by whom, why and who it will be shared with
4. Personal info must not be collected by unfair or intrusive means
5. Personal info must be held securely and protected form unauthorized access or loss (reasonable standard required)
6. Individuals must be allowed to access their personal info
7. Individuals have right to request correction of their personal info
8. An organisation must ensure personal info is up to date and accurate before using it
9. Personal info must not be kept for longer than necessary
10. Personal info can only be used for the purposes it is collected for
11. Personal information held by an organisation can not be disclosed unless this was a purpose it was collected for (MOST COMMON)
12. An organisation can not assign the same unique identifier that another organisation has assigned to the individual

* Privacy Commissioner can issue codes of conduct for various industries/sectors e.g. Health Information Privacy Code, in these cases CODE>ACT
* Exclusion from Privacy Act:
  + News media excluded from principles for news activities, although public broadcasters have to comply w/ 6 & 7
    - Talley Family v NBR
  + Parliament, courts & tribunals
  + As per s56: Personal info held by individual for personal, family or household affairs exempt 🡪 prevents multitude of complaints
* Enforcements & remedies
  + Limited access to regular courts: HC for breach of #6, or appeals on points of legal interpretation
  + Procedure has emphasis on conciliation and mediation
    - First goes to Privacy Commissioner, encouraged into free mediation (can make complaint on someone’s behalf)
    - If unsuccessful, PC may call compulsory conference
    - If this fails, may be referred to proceedings commissioner, who may refer to human rights tribunal, if complaint fails at later stages, complainant may be made to pay costs
  + Remedies include mandatory/prohibitory injunctions and awarding of damages up to $200,000(if harm shown)
  + *Hamilton v The Deanery*, UK model going to drugs treatment facility, falls out with them and info disclosed, gets $40,000 on lack of causational evidence for issues with immigration
* Exceptions
  + Where non-compliance is necessary for:
    - Law enforcement 🡪 Also data matching for govt. agencies
    - Conduct of legal proceedings 🡪 Also public registers
    - Statistical research where subjects anonymous
    - Prevents serious health/safety threats
    - Instances where disclosure would reveal personal info about someone else EG - evaluative employee info

Unsolicited Electronic Messages Act 2007 (Spam Act) – From 5/9/07

* Aimed at prohibiting electronic junk mail with a view to promoting a safer and more efficient online environment for businesses to operate in
  + Also at preventing data harvesting/address harvesting
* Act covers: emails, IM, texting but not fax or voice messaging
  + Prohibits sending of unsolicited electronic messages (s9)
  + Checklist:
    - Is message electronic?
    - Is message commercial? 🡪 Can all apply to single message
    - Is message unsolicited?
* Commercial e-messages must not be sent unless sender has consent of recipient. Consent can be:
  + Express – direct consent from user EG - ticking box/filling in form
  + Inferred – consent arising from your business relationship with sender EG – Follow-up email after a meeting
  + Deemed (s4) – EG – if your business email is published and you don’t display that you don’t wish to receive e-messages
* Other restrictions:
  + S10 – Must have accurate sender information
  + S11 – Must have ‘unsubscribe’ function
  + S13 – Forbids address harvesting software
* Breaches of UEMA 🡪 Results in CIVIL liability event
  + Formal warnings
  + Infringements notices of up to $2000/Injunctions
  + Fines of up to $200,000 for individual & $500,000 for company

TOPIC: Protecting Secrets

* Is information property?
  + Hard to say, because if stolen, both villain and victim still have it
  + E.g. *Oxford v Moss* 🡪 Not guilty of theft of exam paper
* Equitable breach of confidence (judge-made law)
  + Developed out of *Prince Albert v Strange* (1849), where A sought quote from S to copy art into personal albums, S made list of art & wanted to hold exhibition. No breach of contract, so judge developed new cause of action: breach of ‘confidence’
* Requisite elements
  + Come from: *Saltman Engineering Co Ltd v Campbell Engineering Ltd & Coco v AN Clark (Engineering) Ltd*

1. Information must have quality of confidence – doesn’t matter how simple it is as long as no one else knows it
2. Information must be communicated in circumstances with obligation of confidence
3. There must be unauthorized use of info to detriment of party who originally communicated it.

* Third Parties who receive confidential information
  + Can be held liable
  + EG – *Citicorp NZ v Blomkamp, received floppy disk w/ sensitive info by accident and was sued, managed to settle for 10k, but died*
* The mental element
  + No intent necessary to breach confidence
  + EG – *Seager v Copydex, S invented thing and attempted to sell it through C, during negotiations S revealed other invention which hadn’t been patented, when negotiations broke down, C attempted to patent idea, S sued & judge held there was breach of confidence*
* Trade secrets/’Stolen’ Information
  + Trade secrets may be protected under equitable breach of confidence law EG – *Franklin v Giddins, F had new nectarine and didn’t want to sell to neighbour G who knew of its value, so G snuck onto property and stole it. Judge held this was breach of obligation of confidence G had to F. Shows obligation of confidence can be imposed even if owner of info does not directly impart it.*
  + Even if you unintentionally hear confidential info, as soon as you realise it is confidential you are bound not to disclose
  + However, if information is publicly known already, won’t be protected
  + Headstart/Springboard Doctrine
    - If Y learns of X’s new product in Jan, but otherwise would have learned about it in July and released in December, Y can not test products until July and can not release them until December. 🡪 EG *Seager v Copydex*
* Contractual obligations of confidence
  + Can be expressly stated in the terms *e.g. AG v Blake (British spy)*
  + Can be implied
  + BUT: Only enforceable on parties to the contract
    - IE – if A & B have contract, but B gives info to C, A can sue B for contractual breach of confidence, but must sue C for equitable action for breach of confidence
* Employment contracts
  + EG – *Coco v Clark* – Links with fiduciary duties. Implied contractual term to serve employer faithfully and not disclose confidential info
  + If former employee, information must be a trade secret if it is still to be protected by equitable breach of confidence e.g. client lists or customer lists, if it is just general information e.g. ability to use a work tool, then won’t be protected.
  + Test for trade secret: Who had access? Nature of info? Disclosed to all employees?
* Supplementing IP rights
  + Patent owners often give info to licensees so patent can be exploited efficiently (i.e. how the machine works), this is known as ‘piggy-back know-how’
  + This can be protected by P getting L to sign confidentiality agreement
* Defences
  + Public Knowledge: ‘Spycatcher Case’ – Book with tell all spy secrets being stopped from publishing in NZ, but had already published overseas so judge held info no longer secret
  + Independent discovery – unless patented, no remedy
  + Disclosure in public interest – ‘Winebox Case’ – TV doco on tax avoidance ring, held that public interest>obligation of confidence, overlaps with tort of invasion of privacy
    - But disclosure must be made to proper authorities, newspapers not proper authorities
* Remedies
  + Injunctions
  + Damages
  + Account of profits
  + Order up for delivery of materials
* Protected Disclosures Act 2000
  + Protects disclosures of serious wrongdoing in organisations: whistleblowing law 🡪 again, can’t go to media
  + Must be serious risk to health, a crime, misuse of public money and employee must have reasonable grounds to believe truth

TOPIC: Liability in Contract

* Unlike tort & equity, contractual obligations are voluntarily assumed
  + In t&e, obligations arise irrespective of individual’s wishes
* Elements/Essentials of a contract
  + Agreement between the parties (Offer & acceptance)
  + In reaching agreement, parties intend to create legal relations
  + Promises in agreement are supported by consideration
* Other factors affecting if contract legally enforceable (vitiating factors)
  + Was there genuine consent?
    - Duress = cause of action: undue influence
  + Did the parties to the contract have capacity?
    - Could be minor or mentally diminished
  + Was subject matter legal?
    - Can’t enforce illegal contract
  + Was there misrepresentation?
    - Were you tricked/made a mistake that affected consent?
* Element #1: An Agreement
  + Made up of offer and acceptance
* Offer: Indication a person is willing to be bound by terms of contract if the offer is accepted by the offeree
  + Is a ‘take it or leave it’ deal with clear terms
  + Must be directly communicated
  + Distinguishable from ‘invitation to treat’ (negotiate), by words used and circumstances EG:
    - “I offer to buy your car for $5000” O
    - “Would you be interested in selling your car for $5000?” IT
* Difference between offer & invitation to treat established in:
  + *Pharmaceutical Society of Great Britain v Boots Cash Chemist*
    - Law held certain drugs could only be sold under supervision of pharmacist, PSGB brought case against BCC for allowing customer to select drugs and then pay at the counter, saying that selling occurred when they put in basket 🡪 without supervision this = illegal
    - BCC argued it was only invitation to treat when drugs were on shelf, and sale occurred at register where pharmacist was standing, judge agreed
  + *Fisher v Bell*
    - Illegal to sell flick knife, defendant argued was only invitation to treat so not illegal
* A ‘mere puff’
  + Expression or exaggeration made by salesperson or on an ad. Presents opinions that are not legally binding.
    - “The finest in European luxury”
    - “Your wife will love this”
* Carlill v Carbolic Smoke Ball Company
  + Company offers £100 reward to anyone who gets flu after using its smoke ball as per instructions
  + Mrs. Carlill used it and still got flu, claims for reward
  + Judge denies it is mere puff or invitation to treat and rules it’s an offer 🡪 makes company pay Mrs. Carlill
  + Similar to Leonard v PepsiCo (Harrier Jet case)
* Termination of offer
  + Can be withdrawn by offeror at any time prior to acceptance
  + Must be communicated to offeree or can still be accepted
  + Can be terminated through lapse of time depending on nature of G/S *e.g. Oil would have short lapse because values fluctuate, while real estate might have longer lapse*
  + If counter-offer made, original offer is dead, if you try to accept it you’re technically making a fresh offer
* Acceptance: Indication by offeree they agree to be bound by terms of offer
  + Options upon receiving offer:
    - Accept; Reject; Counter; Request further info
* Accept
  + Can only accept offer that is still live
  + Must accept precise terms, otherwise is counter offer
  + Acceptance effective once communicated to offeror, can usually be communicated in any way unless specified otherwise
  + Two exceptions regarding communication:
    - Postal Rule: if you post your acceptance, is effective once in mailbox, doesn’t have to be received
    - Offeror can not impose silence as means of acceptance
      * Banned because it forces offeree to make a decision when they are meant to do so freely
      * EG Felthouse v Bindley – “If I hear no more about him, I consider the horse is mine…” Judge finds there is no contract between uncle and nephew
* Reject
  + Terminates offer, must be unambiguous, can’t be reaccepted later
* Counter-offer
  + Rejects offer, but indicates willingness to be bound by new one
  + Hyde v Wrench: Offered to sell farm for 1000, counter offer 950, rejected and offeree tried to accept 1000 but couldn’t because original offer not revived
* Request for further information
  + May be hard to distinguish what is request vs. what is counter offer, EG – Stevenson Jacques v McLean, case of buying steel
* Element #2: Intention that agreement may be enforced by law
  + Usually not applicable to family or social contexts EG mother offering money for passing summer school, BUT can be depending on situation
  + If agreement made in business context it is assumed to include intent to create legal relations: Carlill v Carbolic Smoke Ball Co
* Element #3: Consideration
  + In order to enforce someone else’s promise you must have promised something in return 🡪 ‘The price paid for a promise’
  + Could be a promise to do something or not to do something in return for other party’s promise
  + Not limited to money, should be beneficial to recipient of promise and detrimental to giver of promise
  + Dollar value doesn’t matter, but sufficiency of sacrifice does
  + Past consideration not valid: Mrs. McArdle fixing house example
  + Creation of deed avoids need for consideration and creates enforceable obligation. Is legal document to enforce promise
* Forms of Contracts
  + Usually contracts don’t have to take any particular form so long as they have the 3 requisite elements (consideration, agreement & intention)
    - Key exceptions:
      * Sale of land, must be in writing (s24 of PLA 2007)
      * Guarantees must be in writing (s27 of PLA 2007)
      * Both must be signed by party to be enforced against
* Terms of a contract (2 categories)
  + Express terms – Parties have directly agreed on these terms, can be oral or in writing EG – price/quantity/date of delivery
  + Implied terms – Terms implied by law so contract may work, EG an agreement not to take bribes may not be stipulated but is implied by the law
    - Terms can be implied by courts or by statutes EG a ‘trade custom’ – roof shout or s16 of Sale of Goods Act 1908
  + Express terms > Implied terms, latter to supplement not supplant
  + Statutes that imply terms ARE DIFFERENT to statutes that impose compulsory obligations EG the CGA 1993 s6 – ‘Acceptable quality’
* Repudiation, breach of contract and remedies
  + Can be fulfilled, mutually discharged or repudiated/breached
  + Repudiation/Breach of Contract: Where one party makes it clear by words or action they will not perform obligations
    - Remedies available depends on contractual terms, they may stipulate some form of remedy (EG penalty for lateness of work), if not then Contractual Remedies Act 1979 applies
* CRA 1979 provides for:
  + Damages (Monetary compensation)
    - This is meant to remedy a party’s loss, not punish the victim, is usually claim on $ you would’ve expected if contract fulfilled
    - Can’t be too remote, must be ‘normal’ or foreseeable
    - Can have problems w/ quantification EG Jarvis v Swan Tours, ski weekend turned out to be bad, wont damages for loss of enjoyment – decided arbitrarily
    - Plaintiff has a duty to mitigate their loss (backpackers v presidential suite)
    - Damages can be pre-agreed but must be genuine estimate, can’t be duress to enforce contract
  + Cancellation of contract
    - If breach is serious, courts can award damages and cancel contract
    - May be because of repudiation or breach of essential term
    - Wrongful cancellation = repudiation
  + Special Performance – make them do it (Applies mostly to land)
  + Injunction

TOPIC: Liability for Negligence

* Liability in the tort of negligence covers liability for carelessness, negligent misstatement concerns liability for careless words
  + General meaning = carelessness
  + Legal meaning = failure to meet particular standard of care outside contractual requirements
  + Not all carelessness = negligence, depends on whether there was failure to meet reasonable standard of care
* Judges need to balance the punishment of carelessness with what the defendant could reasonably be expected to be liable for
  + EG – World trade centre, should airlines be liable?
* In NZ, you can’t sue to recover damages for physical injury from accident or mental injury from physical injury, all covered by ACC
  + EG – Can’t sue someone who punches you for negiligence
* Elements to prove tort of negligence (Must prove all)
  + Defendant owed Plaintiff duty of care
  + D breached that duty
  + D’s breach was cause of P’s harm (Causation)
  + Harm to plaintiff was not so remote as to make compensation undesirable for policy reasons or economic efficiency
* Duty of care
  + Imposition by judge depends on relationship between parties and whether any policy factors strengthen/restrict/negate imposition.
  + Donoghue v Stevenson established tort of negligence
    - Element of foreseeability and neighbourhood principle arise from Lord Atkin’s statement
    - Foreseeability: Must take care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour
    - N.P: Neighbours are persons so closely and directly affected by my actions that I ought reasonably to have them in mine when I act
  + Palsgraf v Long Island Railway Co
    - P waiting to catch train, man’s parcel of fireworks explodes after being run over by train and injures her, sues.
    - Court says no breach of DofC because P not foreseeable plaintiff 🡪 illustrates fear of floodgates and that one plaintiff can’t piggyback on DofC owed to another
  + Bourhill v Young
    - Lady sees motorbike go past and get hit/killed. Goes home and has nervous breakdown, her baby is stillborn, sues motorcyclist’s estate
    - Court says she was not foreseeable plaintiff, so no DofC
  + Duty also based on temporal proximity
    - If too far apart in time, can negate duty
    - Meah v McCreamer – person goes mental & attacks people after crash, original assailant not liable
  + Duty also be based on physical proximity/personal connection
    - Dorset Yacht v Home Office: Prison had duty to residents in immediate area
    - McCarthy v Wellington City Council: Kid blows off fingers with detonators he found in Wellington quarry site. Child won damages because Judge said it was foreseeable
    - BUT: Rolls-Royce case – Judge may find that wider policy issues render there to be no duty of care. In this case, it was commercial clarity of contracts
      * Other policy activities might be: those that benefit society EG - If police crashed whilst attempting to respond to callout, judge may say there is reduced duty of care
      * EG – Hill v Chief Constable of Yorkshire, held that police didn’t owe duty of care to final victim of Yorkshire Ripper because she was one of many potential victims, and to impose liability would result in defensive policing and floodgates
  + Rescue Cases
    - So long as a rescuer is acting reasonably, if A endangers B through their actions and C attempts to rescue B, A is liable for fate of both B & C
    - Not worried about foreseeability of rescuer’s actions, just that the danger was created and someone likely to come in
    - Russell v McCabe: Fire on lady’s farm and man attempted to help fight it but was injured, held that she owed him DofC
  + Factors affecting imposition of DofC
    - No presumption for/against, each case decided on merits
    - Judicial precedent (NOTE: HC+ judges exempt from DofC to public, but DC judges do have one)
    - Physical loss more likely to result in DofC than economic
    - Statutes encouraging/discouraging imposition
    - Special relationship between P & D
    - Contractual background
* Breach of Duty
  + Whether breach has occurred depends on whether defendant has met the requisite standard of care a reasonable person in their actions 🡪 Blyth v Birmingham Waterworks:
    - “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent and reasonable man would not do.”
    - There is no ‘moron’ defence, i.e. saying ‘I’m stupid’ 🡪 this takes out subjectivity, what is reasonable decided on facts of each case
  + If skill level higher, i.e. professional (accountant or lawyer), standard of care expected from reasonable person also higher (VV)
    - NOTE: Geography may affect level of expectations, EG a doctor in hospital has higher expectations than one responding at an accident scene
  + When deciding appropriate standard of care, courts also consider:
    - Probability of harm 🡪 more likelihood of harm = more chance of a breach
      * EG – Bolton v Stone, said there was DofC but that chance of cricket ball hitting so remote that reasonable person wouldn’t have taken steps to prevent it
    - Circumstances within D’s knowledge that affect risk
      * EG – Paris v Stepney Borough Council, man had one eye and was working as mechanic, judge held council didn’t take steps to prevent loss of 2nd eye in accident despite knowing he was special case
    - Social value of activity, if higher then their standard of care may be found to be lower
      * EG – Daborn v Bath Tramways, ambulance driver in US made ambulance, checks mirrors but has crash, judge held she had lower standard of care
    - Gravity of risk
      * “One exercises more caution carrying a bomb than a pumpkin” (More danger = more care)
    - How practical/expensive to take precautions?
      * Bolton v Stone (undesirable: high cost), Paris v Stepney Borough Council (desirable: low cost)
* Causation
  + If P’s loss would have occurred regardless of D’s actions then D not liable, i.e. negligence must cause the loss
    - Rule: ‘but for’ test
    - EG – Barnett v Chelsea Hospital, held that even if doctor had identified arsenic poisoning, would’ve been too late to save the man, so negligence not cause of harm
  + “Res ipsa loquitor” (The thing speaks for itself) is device to help prove negligence but only used if no other explanation exists
    - Shifts burden of proof to defendant to disprove negligence
  + “Novus actus interveniens” (A new intervening cause) occurs if something comes from outside & causes harm
    - D only liable for scope of risk they create e.g. painter & thief
* Remoteness of harm
  + Harm to the plaintiff must not be too remote from the defendant’s breach to be recoverable in law
    - Balance between plaintiff’s legitimate need to be compensated vs. potential costs of imposing indeterminate liability for every unexpected result of potential defendants’ actions 🡪 Butterfly effect: where does it end?
    - Defendant liable for type/kind of loss a reasonable person could foresee
    - Types of harm: Physical (can see), economic (derived from P loss) and pure economic (not dependent on P loss – EG loss of power)
  + *Wagon Mound case #1*, held that owner of ship spilling oil not liable for fire damage, because not foreseeable that engine oil would catch fire due to dock welders only that oil would cause environmental damage
    - Full extent of damage need not be foreseen, foreseeability alone is governing test
    - Must be a real risk, not far-fetched – greater the risk, more likely will be found liable
    - Taupo Borough Council v Birnie, held that council liable for B’s loss after being forced to sell due to flooding resultant from council failing to clear drain near his property 🡪 Real & foreseeable risk (Similar to AG v Geothermal Produce)
  + ‘Eggshell skull’ principle: you take your victims as you find them, if skull is thin and you punch it you’re still liable for all damage regardless of preexisting condition
    - EG – *Smith v Leech Brian*, man splashed with molten metal, gets cancer and dies. Held that original injury was foreseeable thus D was liable for all the harm
* Defences
  + Contributory negligence, i.e. P was partly responsible for their own loss 🡪 court splits blame and may reduce losses by small portion
  + Voluntary assumption of risk, D must prove P know of the risk and freely decided to assume responsibility in even of harm
* Negligent Misstatement
  + Grew out of *Hedley Byrne v Heller*, obiter established that a person w/ special skills who uses skills to assist another person & provides information/advice that other person will reasonably rely on will owe a duty of care to them & others who rely on it
    - Maker of statement only liable where reasonable for recipient to rely on statement, usually in professional capacity – social capacity unlikely to create liability
    - Unless there is an effective disclaimer, must be clear and unambiguous and given reasonable notice
  + Various reasons for judicial reluctance to impose liability:
    - # of people affected by careless statements potentially huge
    - Unfair to compensate plaintiff when no payment (i.e. no contract)
    - Plaintiff may have contributed to negligence
    - Hard to value losses
    - EG: *Balfour v AG*: P lost because of qualified privilege or *South Pacific Manufacturing v NZ Security Consultants\*
  + Elements of NM:
    - Duty of Care (Made up of proximity, reasonable reliance and assumption of responsibility)
    - Breach of standard of care
    - Actual reliance
    - Remoteness of harm (economic loss only)
  + 5 types of special relationships

1. Plaintiff in contract w/ defendant, EG Doctor/Patient, Lawyer/Client – will be liability in contract and negligent misstatement
2. P & D have communicated directly, EG Hedley Byrne v Heller or Dimond Manufacturing v Hamilton, liability likely
3. D knows P will rely & act on their advice for immediate purpose, EG Smith v Eric S Bush (Purchasers of property v Surveyors; held that P’s reliance on report reasonable but there was disclaimer so P loses) liability likely
4. D has special knowledge may reasonably infer plaintiff will use, liability possible but unlikely, EG Caparo v Dickman where shareholders try to sue accountants for NM over AGM accounts (Failed for policy reasons, cant have auditors liable to shareholders)
5. Defendant knows statements likely to be relied on but doesn’t know P 🡪 Liability unlikely

TOPIC: Fiduciary Obligations

* These are NOT usually owed in everyday commercial situations conducted at ‘arms-length’ (no party advantaged)
  + Fid concepts come from equity and don’t arise by agreement, they are imposed by equity (the law), Fid obligations allow the law to enforce a person’s conscience
  + Purpose of enforcing Fid obligations to ensure position of trust they are in is not abused for profit
    - Fid required to serve another’s interests over their own, an ‘obligation of self-denial’
* Because of Fid’s position of trust, remedies for breach greater than other common law remedies EG – can cut through legal structures
  + While breach of contract usually = damages, Fid law allows for account of profits even in P has suffered no loss
  + Don’t have to show fraud, dishonesty or bad faith, only that an unfair profit was made
* General characteristics of a fiduciary relationship

1. One party is in a position of trust and confidence
   1. *EG – Agent/Principal, Solicitor/Client, Trustee/Beneficiary*
2. One party has influence over someone in a vulnerable position
   1. EG – Parent/Child, Teacher/Student
3. One party acts in the interests of another, basing relationship on loyalty & good faith, serving other’s interests rather than their own

* Keech v Sandford (1726) [Deemed Fiduciary Relationship]
  + Landlord refuses to renew lease on Rumford Market to trust w/ child beneficiary (Keech) so trustee (Sandford) takes over lease himself
    - Courts hold this is breach of Fid duty, made trustee disgorge all profits and put lease back into trust, would’ve been better to let it run out than do what he did
    - Principle extends to many Fid relationships now
* What are Fid obligations?
  + Generally for fiduciary to act in beneficiary’s interests rather than their own
    - Involves acting w/ loyalty, not just being careful
    - Also involves good faith, fiduciary must be sincere in intentions to deal fairly w/ others
  + NOTE: Fiduciary obligations not concerned with competence, EG a careless financial advisor = negligence, while a disloyal financial advisor = breach of fiduciary duties
    - Can not use position to gain private advantage
    - Can not enter into engagements which personal interests conflict, or may possibly conflict with his FD
  + *Auag Resources Ltd v Waihi Mines Ltd (1985)*
    - P sued D for breach of FD’s despite having contract between companies saying no one owes FD’s
    - Held that contract was at arms-length and was a JV so no FD’s owed
* When do Fid obligations arise?
  + Status based fiduciary relationships (Traditional categories)
    - Trustee/Beneficiary; Partners/Fellow partners; Agents/Principals; Directors, Promoters, Liquidators/Companies [*Not to shareholders]*
  + Fiduciary liability outside traditional categories
    - Can exist where there is special relationship of trust & confidence and undertaking to act in someone’s best interest + reliance on that undertaking
    - Also where special opportunities exist for abuse of position
    - All judgments based on merits of the case

1. JV to co-venture
   1. Depends on extent to which parties rely on each other to make progress towards common goal
   2. *Chirnside v Fay,* judge held D had breached FD to P by excluding him and disgorged some of his profits
2. Dpt. of Social Welfare to child in foster-care
   1. *S v Attorney-General*, child abused by foster-parents and tried to sue AG for breach of FD, courts held FD existed but was an example of negligence not breach
3. Banker to customer in rare circumstances (Usually contractual)
   1. *Lloyds Bank v Bundy*, D was very old farmer who relied on P all his life for financial info, Judge held he was in a weak position and bank breached FD by allowing him to mortgage home
4. Company director to shareholders in rare circumstances
   1. *Coleman v Myers*, D personally knew shareholders and advised them to sell undervalued shares to company D directed, judge held that D owed P a FD
5. Crown to indigenous races
   1. *Sealord Case*, Crown gives large portion of NZ fisheries to Maori based on A2 of Treaty
6. Employer & Employee
   1. Latter owes a duty of loyalty to former
   2. *Hivac Ltd v Park Royal Scientific Instruments Ltd*, employee working for competitor outside normal hours and was held to have breached FD, would’ve been ok if they had disclosed to employer

* What do fiduciary duties require?
  + No conflict of interests (Even potential conflict)
  + No secret profits as consequence of position
  + No competition with principal
  + No misuse of principal’s property to make profit
  + May involve obligations of confidence
* Conflicts of interest
  + As per Bray v Ford, fiduciaries must avoid conflicts of interest, all other obligations really a subset of this rule
    - *Aberdeen Railway Ltd v Blaikie Brothers*, D director of railway company and partner of firm selling chairs to railway, courts held that D’s conflicting interests meant contract for sale of chairs could not be enforced, held this not on the basis that the prices were unfair, but potential for prices to be unfair
  + Same-matter conflict:
    - Occurs when same person or firm act for opposing parties in same matter
    - EG – *Clark Boyce v Mouat*, solicitor not held liable for breach because of full disclosure/telling D to get advice
  + Separate-matter conflict:
    - In the course of dealing with A you gain information on B by accident
  + Former clients
    - Adviser who worked for A asked to represent B in matter related to A
  + Fair dealing conflict
    - Where fiduciary has personal interest in outcome of the transaction
    - EG – *Witten-Hannah v Davis*, D supporting former mistress and bought house with her but didn’t tell to get advice or act in her best interests so held to be breach of FD
    - EG – *Day v Mead*, P was convinced by D, friend and solicitor, to keep investing $ in business which ended up going under, held to be breach of FD, but contributory negligence reduced damages
  + Avoidance of liability in conflict situations
    - Disclosure is effective so long as it is sufficient (i.e. explains complex legal documents/issues) and is timely (client must have time to consider situation)
    - In fair dealing conflicts:
      * May avoid consequences of conflict by making full disclosure and obtaining consent to act
      * Principal must be aware of Fid’s interest in the transaction, have consented to it, price paid by relevant party must be fair
      * Fid should suggest independent legal/financial advice
      * Contrast to *Witten-Hannah v Davis*
    - In same matter conflicts
      * May avoid conflict through full disclosure to both parties (but may breach Privacy Act/confidentiality)
      * Obtaining informed consent to double employment
      * Advising principal to obtain independent advice
      * Compare to *Clark Boyce v Mouat*
  + No competition w/ principal
    - Fiduciary has duty not to compete with principal
    - *Buckell v Stormont*, D left in charge of business while owner, P, was on holiday, stole clients and was held to have breached FD by unfairly taking advantage of position
      * Breach must = competition in same industry
      * Contrast to *Aas v Bentham* where D worked for ship chartering company and moved into building ships as well, held to be no conflict
  + No secret profiteering
    - Fiduciary may not retain secret profits for themselves
    - EG – *Bentley v Craven*, B buys sugar and sells to his own company at a profit, held that breach of FD (irrelevant whether price of sugar better than market rates)
    - Can’t retain profit even if principal wouldn’t have benefited from profits EG *Reading v Attorney-General*, where UK solider used army property to smuggle and was made to account profits for govt. despite being from illegal activities
  + No misuse of principal’s property
    - Fiduciary must not use principal’s property for their own profit, again see *Reading v Attorney-General*
  + Breach of confidence
    - Fiduciaries will usually have duties of confidence but confidants do not automatically have fiduciary duties
    - Will often involve a conflict of interest, EG – former client conflict will like involve risk of duty of confidence
  + Chinese Walls
    - An organizational device within a firm designed to prevent information flowing from one part of the firm to another
      * Sometimes effective depending on the situation, EG *Russell McVeagh v Tower Corporation*, effective because one client working out of wellington office and one from Auckland office
      * Depends on likelihood of a leak
    - 2 tests:
      * Has firm got confidential info?
      * From objective point of view, is risk of disclosure real? 🡪 If both yes, then court may grant injunction

TOPIC: Property

What is property?

* Lord Wilberforce said that for something to be defined as property, must be definable, able to be identified by 3rd parties and have some degree of permanence or stability
  + Other elements: value, transferability
  + P rights = title to something
  + P object = the something owned
* Law of property governs relationship between persons and things
  + P rights = bundle, can be split apart and shared between more than one person
  + This contrasts to personal rights which only give right of damages and don’t survive insolvency
    - Can’t get blood from a stone, but if you have property right you can enforce it against an object
* Whether something is or isn’t property may also be:
  + Defined in legislation EG – s14 of Copyright Act, copyright is a property right or s92 of Crown Minerals Act, says mining permit not property
  + Decided in case law EG – Oxford v Moss, information not property because you can’t physically steal it
* Bundle of rights can include right to:
  + To possess (physically control)
  + To use & enjoy or exclude others from using
  + To receive proceeds of dealing w/ property
  + To hire out, sell, gift, abandon
  + To use as security for a loan 🡪 *Give creditor right to sell and/or take possession in future if obligations not met*
  + To destroy/throw away
* Possession may be part of the bundle of rights, but is not always a property right (Is always subjective)
  + Possession may be too transient to be considered a full property right, EG – if you use a company car your employer leases from a finance company, you don’t have property rights in the car, only a *license* to use it. Your employer, however, is more likely to have property rights because they *lease* the car.
  + That being said, you do still have some of the bundle of rights even if you only have license to use car, EG – right to exclude others from using car
* Title can mean a variety of things:
  + Full ownership
  + Legal justification for an ownership right, EG – authority to sell a property object
  + Evidence of an ownership right, EG – Certificate of Title
  + Sometimes title is residual right, subject to someone else’s more immediate right EG if owner of building leases to shopkeeper, his title is residual right until lease expires
* Exact time title is transferred can be important
  + EG: If you buy a car off TradeMe in a private sale, risk passes when the title passes, this is the default rule law imposes unless parties agree otherwise
    - I.E. if you make offer to X for car and it is accepted, you own car once contract formed, don’t have to have physical possession of goods 🡪 So if destroyed by freak accident before you pick up car, too bad
* Nemo dat rule
  + Comes from ‘*nemo dat quod non habet’*: ‘no one can give away something that they do not have’
  + Means that no person can give a greater title to goods than they themselves have, i.e. – if you don’t own it, you can’t sell it
  + Arises in two situations:
    - If giver of object never had sufficient rights to give away
    - If giver had sufficient rights to sell but already sold to someone, i.e. – they sold the same thing twice
* Exceptions to the rule
  + No overarching principle to these, all are ad hoc
  + If robber steals cash and pays a shopkeeper, the shopkeeper won’t have to pay money back
  + If seller sells good to buyer 1, but before collection, seller fraudulently sells to buyer 2, buyer 2 will win as per s27 of Sale of Goods Act
  + Replaced by first to register rule in secured transactions law, i.e. first party to register interest publicly will win
* Ability to divide ownership rights from physical possession can be the source of economic efficiency (EG being able to borrow money from bank using security)
  + But also source of problems, as it becomes harder to know who really owns what (People usually assume when one has possession they own the thing, but not always the case)
  + Issue can be reduced by using registers, finance companies must register security interests if a good has been put up as collateral
    - If you bought car that had been registered as collateral, then nemo dat applies = tough luck
    - If finance company failed to register it, rule doesn’t apply
    - Property rights often enforced using personal rights (i.e. right to sue), but if D has no money then that’s too bad
* General classification of property (Real/Personal)
  + Real = land, estates in land (right to use land), interests in land
    - Land: land’s surface and anything growing on it, fixtures (things intended to be permanently affixed to land), airspace (to reasonable level e.g. crane not plane) and things below land (apart from minerals)
    - Estates in land: Freehold estates in fee simple/Leasehold
    - Interests: Easements, Caveats, mortgages
    - Key legislation: Land Transfer Act 1952
  + Personal = all property that is not real property
    - Choses in possession: Tangibles items/chattels e.g. books, cars, chairs, computers
    - Choses in action (*i.e. require an action to enforce p rights*): intangible items e.g. company shares, debts, copyrights, patents
    - Key legislation: Sales of Goods Act 1908/PPSA 1999
  + Some items begin as personal property then become real property, e.g. a dishwasher or an escalator
    - Real property is stable because every piece and interest is unique, immovable, high value & hard to create/destroy
    - Personal property is unstable because there are many identical items, mobile, range of value & easy to create/destroy
* Real property concepts
  + Freehold/Fee Simple estates = forever
    - Leasehold: limited term, duration affects value
    - Easements: drainage, right of way
  + Many estates or interests can exist simultaneously in one piece of land, EG – if there is leasehold owner, there will also be underlying freehold owner
  + Joint tenancy: land owned in equal indivisible shares, no one owns particular %
    - Death of co-owner = property passes by survivorship to remaining co-owner(s)
  + Tenancy in common: Held by co-owners in equal or unequal shares, each co-owner deals with share individually
    - Death of co-owner = pass according to will
* Competing property conflicts (Priority conflicts)
  + Property rights can co-exist and not conflict e.g. Leaseholder and underlying freehold title holder, but sometimes may conflict
* Security interests
  + A property right that is held by secured party for the purpose of securing performance for an obligation
  + EG – Bank holds right to take possession of good x in the future if mortgagee does not fulfill obligation to repay mortgage
    - NOTE: Banks can only sell assets to claim value of principal and interest, no profit
  + Created by contract, if no contract then not SI, EG - tradesman’s lien (right to hold onto repaired property until paid for)
* Security interests illustrate problems created by ownership and possession being separate:
  + Person may still appear to own their house, because you can’t ‘see’ that it’s mortgaged, however, this problem is reduced by registration regimes under the LTA & PPSA
* Priority conflicts are where 2 secured creditors both have security interests but value of debt > value of collateral, so who goes first depends on who registered interest first
* Registration of security interests
  + LTA 1952: as of 2002 all interests regarding land are to be recorded electronically on a central database of CofTs, this allows for easy title searches
    - CofT identifies parcel of land, all security interests, owners of land and owners of all interests
    - Registration = legal interest, no registration = equitable interest, and can be defeated by legal one
  + Indefeasibility of title: CofT is conclusive in title matters, your registered interest can only defeasible by pre-registered one
    - Main exception to this is if person seeking to rely on title has committed fraud, EG if a bank forged a mortgage then they could not rely on it
    - If person is defrauded by relying on register (I.e. victim of 3rd party fraud) state will compensate their loss, pay for this out of registration fees
  + PPSA 1999: Creates statutory regime for registering security interests over personal property, doesn’t show ownership only SI’s
    - Is ‘interests-based’ not ‘title-based’ because it would be too hard to register everyone who owned every piece of PP, indexes interests by surname of debtor
    - Register is limited by fact it doesn’t tell you who owns X, only if there are SI’s over X, so someone could be pretending to own it and you wouldn’t know
    - PPSA established priority rules for conflicts between security interests and buyers EG – if goods < $1500 buyers will be protected from other security interests
    - Otherwise: First to register rule applies
    - If no registration then either ND or s27 of SOG Act applies
* Ways to acquire/divest property rights
  + - Sale/Purchase (Willing by owner, or forced by creditor)
    - Gift
    - Succession upon death (By will or intestacy [no will])
    - Operation of law (Bankruptcy)
    - Abandonment
    - Property Relationships Act 1976 (De facto/Married couple share property equally after 3 years)

TOPIC: Trusts

* Equity: Set of rules developed from middle ages designed to fix problems developed in common law courts
  + Does not mean equality or fairness, but generally concerns how people should act in terms of what is right/just
  + Equitable interests are property rights recognised by equity courts and not by common law courts e.g. right to future property, contrast to legal interests recognised by common law courts
* Trust = combo of Eq obligation where trustee holds & administers property for beneficiary and a property right recognised in equity
  + Eq obligation to deal w/ property for benefit of beneficiary, trustee will control/manage property but beneficiary has b interest
  + Can be viewed as further splitting bundle of rights into legal ownership (trustee) and equitable ownership (beneficiary)
* Trusts are useful for:
  + Legitimate text reduction
  + Protecting assets from creditors
  + Protecting assets from claims under Property Relationships Act
  + Sharing assets between family members
  + Give effect to owners’ wishes after death 🡪 Dead Man’s Hand
* Can be business structures
  + Not a separate legal entity from trustee, but separate tax entity
  + Discretionary trusts: Trustee has discretion about who should receive benefits i.e. ‘Each child to benefit, but I leave to trustees’, as opposed to fixed trust ‘Each child gets 1/3’
* Parties to a trust
  + Trustee: Has legal title to trust property & ob to act in B’s interest
    - Example of fid, must act according to terms of trust
  + Beneficiary: Has equitable title to trust property, i.e. right to benefit from trust
    - Person can be T & B, but can’t be sole trustee & beneficiary
    - B’s interest survives trustee’s insolvency i.e. Bank can’t take trust’s property if trustee goes bankrupt
  + Settlor: Person who establishes trust, may have nothing to do with it after that, or may be a trustee or beneficiary or both
* Classification of trusts
  + 3 ways:
    - Trusts created by legislation
    - Intentional Express Trusts
    - Intentional Trusts implied or presumed by courts
* Created by legislation
  + EG – REAA 2008 s123 says trust must be created for money received by purchasers to be given to vendors
* Intentional Express Trusts
  + Created intentionally, usually set up by deed or will
  + Inter vivos trusts: Set up when settlor is still alive, can be created without written agreement, but usually by deed and will take effect from date specified on deed
    - Settlor would declare themselves to hold property in trust or transfer property to trustees to be held on trust
  + Testamentary trusts: Come into effect after death of settlor
* Implied/Presumed Trusts
  + Presumed Trust
    - Law imposes trust based on belief there was intention, EG buying property in someone else’s name legally perceived to be for trust not gift
  + Institutional Constructive Trust
    - Personal profits made by trustee would be placed in such a trust and given to beneficiaries EG, *Keech v Sandford* or *Reading v AG*
  + Resulting Trust
    - Where property remains after intention of trust satisfied, EG – fund for $100,000 operation, if it accumulates $200,000 then extra money placed in trust by courts and refunded to donators
* Trust Deed
  + Names of trustees & how they can be replaced
    - Settlor likely to be trustee and beneficiary along with professional trustees EG – a solicitor
  + Powers trustees may use when dealing w/trust property EG – what they can invest in & how income distributed
  + Identity of beneficiaries
  + Details of initial trust property
  + Duration of trust
* Declaring a trust doesn’t diminish settlor’s estate unless there is gifting
  + EG, if you declare trust and gift building to it, then estate devalues, but if you sell for $1M then estate doesn’t devalue
  + Once settlor places property in trust, they lose beneficial ownership over it unless also beneficiaries
* Testamentary Trusts
  + Come into effect once person dies based on will, testator/testatrix can change will at any time before death
  + If you die intestate, s77 of Administration act applies & property distributed accordingly
* Duration of the Trust
  + Common law didn’t want Dean Man’s Hand to last forever, so imposed ‘perpetuity period’ of ‘life in being + 21 years’, but this ran into issues with people saying ‘life of Queen Victoria’s oldest living descendant + 21 years’
  + So Perpetuities Act 1964 imposed period of 80 years
* Prerequisites for a valid trust
  + Certainty of intention
    - Words must show clear intention to create a trust EG – ‘I give this property to X upon trust for Y’
    - Inadequate intention: “I hope that X holds property on trust for Y”
  + Certainty of beneficiaries (or objects)
    - Don’t have to be named, but must be identifiable, can be ‘all my children’, but not ‘all good citizens’
    - If beneficiaries not certain, property will go back to settlor or residuary estate depending on type of trust
  + Certainty of subject matter
    - Trust property must be clearly identified or else it is not subject to trust, if not clear will go back to settlor or residuary estate
    - Must be property in trust for beneficiary to enforce property rights against in case trustee breaches FD
    - EG - ‘All my assets’ not ‘most of my assets’
* Uses for trusts
  + Express charitable trusts
    - Trusts that pursue a charitable purpose EG promotion of education or relief of poverty
    - Large tax benefits and no perpetuity period
  + Tax planning
    - Can transfer assets/income to partners to legally minimize tax, didn’t work when gift duty existed
  + Vehicle for holding family property
    - Protects assets from spendthrift children
    - Protects assets from Property Relationships Act
    - Protects assets from creditors in future
    - If discretionary, allows for flexible distribution of income as needed to take advantage of different tax rates
  + Public Investment Trusts
    - Alternative business structure with more flexibility but limited lifespan
  + Protects investors in finance companies
    - Finance companies borrowing $ from public put it in trust to make it easier to deal with, but ultimately unsuccessful because value of security (E.g. peoples’ homes) is usually less than value of debt
* Setting Aside Trusts
  + Trusts contrary to public policy or for illegal purpose may be set aside, IE the law won’t recognise them
    - EG: Charitable trust to sell P to kids
    - May depend on societal values of the day EG – prostitution
  + Courts could also attack trusts which have sought to counteract effects of Property Relationships Act after too much time
* Abuse of trusts
  + Tempting for insolvent person to just put all things in trust so creditors can’t claim them, but legislation counters this:
  + Insolvency Act 2006
    - S204 – gifts made up to 2 years before bankruptcy may be clawed back by official assignee
    - S205 – gifts made up to 5 years before bankruptcy may be clawed back by official assignee unless the bankrupt can prove their solvency at time of gifting
  + Property Law Act 2007
    - Creditors (not just official assignee) can challenge dispositions of property made for less than full value or intended to prejudice creditors & only where debtor insolvent at time or undercapitalized at time of gifting
    - EG – if X goes bankrupt but just before declaring, he sells house to trust for 50% of market value to protect from creditors
    - No time limit like Insolvency Act

TOPIC: Intellectual Property

* What is IP?
  + Products of intellectual activity, is a type of intangible property i.e. a chose in action – can not be physically touched or controlled
  + Otherwise, however, is similar to tangible property
    - Can be dealt w/ in same legal way: bought/sold/licensed, used simultaneously by many people etc.
* Main categories of IP
  + Copyrights: Copyright Act 1994
  + Trade Marks: Trade Marks Act 2002
  + Others not covered EG – Patents, designs, layouts etc.
* Characteristics of IP
  + Negative rights: the right to prevent others from doing something
    - EG – you make movie, can’t show it until rated, but you can prevent others from showing it
  + Territorial: national, not international in scope
    - EG – If in NZ, doesn’t apply to OZ unless you register
  + Some require registration (Trade Marks/Patents), some don’t (Copyrights)
    - © = American symbol, no value in NZ
    - ® = Registered trade mark in NZ
* Role of contract
  + Key means of commercializing IP, EG – contracts to buy, sell, license or franchise IP
  + Can help courts determine first ownership and increase protection
    - However, sometimes the act of creation is enough to create IP rights – EG copyright because no registration
* **Copyright**
  + S14(1) of Copyright Act 1994 provides that copyright is a P right
    - Exists in **original works**
* **Original** = it must not have been copied from someone else, irrelevant whether wildly new, just can’t be copied
  + Ok to be similar, and doesn’t necessarily have to look the same
  + No aesthetic requirement, even if you draw bad copy, is still a copy
* **Works** = literary, dramatic, musical, artistic works among others
  + Literary: Anything in writing, books poems, instructions, emails, letters, computer programs and web pages, collection of images/words
  + Dramatic: Plays, dances, scripts for movies
  + Musical: Music itself but not words, they are literary
  + Artistic works: Drawings, photographs, graphic works
* No registration requirement, copyright comes into existence the moment a work is produced
  + Doesn’t last forever, usually life of author(s) + 50 years
  + Continues even if physical object destroyed
  + Companies can’t create copyright, employees do
  + Many copyrights can exist within one work EG - film: Film itself, script, sound recordings, music…
  + Sometimes when in public, taking photos of sculptures/designs ok
* Other requirements:
  + Creator of work must be NZ citizen or resident or company or one of these in ‘recognised’ country (S18)
    - Reciprocation subject to our laws, IE – length of copyright in USA is 70 years, but if breach was in NZ could only enforce 50 years
  + No requirement of quality, merit or professionalism, IE can’t use kid’s work just because they’re a kid
  + Principles of immorality, obscenity or vulgarity don’t usually apply, but courts unlikely to protect them anyway
* Copyright owner’s rights:
  + Right to copy (Use of original work not copyright infringement, EG – maps being cut out & sold as badges ok)
  + *Beckmann v Mayceys Confectionary Ltd* illustrated that a person does not have monopoly over an idea because they have copyright, only over their version of the idea
  + Rights to perform work (Must buy rights to perform play)
  + Right to make and adaptation, translate or convert the work
  + Rights can be licensed, but if not will be copyright infringement
* Infringement of copyright (3 principles)
  + **Causal connection**: Link between P’s work & D’s copy, EG *House of Spring Garden v Point Blank Ltd*, able to show designer had been given specific instructions
  + **Objective similarity**: Coping doesn’t have to be exact, EG *Beckmann v Mayceys Confectionary Ltd*
  + **Substantial copying is sufficient**: Not a matter of %’s, is judged on quality of what copied, EG *Wham-O Manufacturing co v Lincoln Industries* & ribbing on Frisbees
* Remedies
  + Injunctions, delivery up of infringing copies, account of profits, damages (Can’t get last 2 together)
  + Infringers can also be held criminally liable
  + Some exceptions EG – making copies of CD’s for private use
* Trade Marks (Branding)
  + Can be registered under T M Act 2002, not compulsory but if it’s not registered, plaintiff can’t use Act & can only claim under FTA
* Registration procedure
  + Application for particular G/S in specific classes EG – s25 is clothing or s32 is beer/non-alcoholic drinks
    - Some names able to be registered in some classes but not others, EG – Apple ok for computers but not for food.
    - Could get registration for all categories, but v expensive
  + Examination of application
  + Acceptance, publication & registration
    - Open to objection when published
  + Renewal in 10 year blocks
* Requirement for registration
  + Trade Mark defined in S5, means ‘sign’: sign defined as including smell, sound, taste, word, signature, shape, name, logos, colours
  + For sign to be registerable must be:
    - Capable of being represented graphically (overlap w/ copyright)
    - Capable of distinguishing G/S, must be distinctive or capable of becoming so EG – Zoodle (doesn’t conflict as something like Apple might)
* Non-registerable marks
  + Laudatory: praises the good, EG – ‘bestwood’
  + Descriptive: ‘Apple’ for a fruit, would be ok for computer
  + Geographical: Usually not ok, EG calling shop ‘Auckland’ could result in conflicts, but then again 🡪 Kathmandu
  + Deceptive or confusing: EG – RETIN-A (for skin not eyes)
  + Identical or similar to other registered marks: EG Auckland Council logo and Triangle TV logo
  + Would be likely to offend significant section of community EG something racist or ‘FCUK’?
  + Application must not be made in bad faith’
* Infringement of registered trade marks
  + Must be use of the mark IN TRADE, EG if x prints trade mark on 1 shirt then may be ok, but if he prints and sells then breach
  + If trade mark becomes name of product EG sellotape or jib, then supposed to be removed unless proof of mitigation exists
  + Infringement if D’s ‘sign’ is:
    - Identical w/ ® in relation to any G/S which ® registered under
    - Identical w/ ® in relation to any G/S which are similar to that which ® registered under and likely to deceive or confuse
    - Similar to ® in relation to any G/S identical or similar to that which ® registered under and likely to deceive or confuse
    - Identical/Similar to ® where G/S involved are different, but sign takes unfair advantage of/is detrimental to character or repute of that mark 🡪 ‘death by 1000 cuts’
  + Courts may consider:
    - Look/sound of mark
    - Overall impression of mark including idea
    - The goods & customer
    - All surrounding circumstances
  + Remedies for infringement (SAME AS COPYRIGHT)

TOPIC: Business Structures and Concepts

Business Structures & the Law

* Sole proprietorship
  + Business conducted by a natural person, they will be sole trader
    - EG – Local dairy or plumber
  + Natural person: Human individual not legal creation, capable of incurring liability/suing
  + Corporate person (EG COMPANY): Artificial/fictitious person. Legally separate from owners, directors & agents, recognised in law as having full legal liability, can do most things natural person can apart from obvious EG: marry
  + Sole trader has ownership & control of business
    - Can choose when to open/close, how to distribute profits
    - Chooses name, assets, employees etc.
    - Liability is unlimited & personal
  + No formal requirements to set up business
    - Need only to start trading, no registration/public accounts
    - Must operate within laws, EG FTA
    - Ends upon death, cessation of trading (debts survive though), or bankruptcy
* Structures based on artificial legal persons (Corporations)
  + Corporation: group of individuals or series of holders who are deemed in law to be a single legal entity. Various types:
    - Statutory: UOA or Commerce Commission
    - Incorporated Societies: Clubs for social activities
    - Company: Classic example, created by Companies Act 1993
  + Fundamental feature: separate legal personality
    - Legally separate from owners, managers, directors & other agents, but full legal personality under law
    - Can sue/be sued, incur liability, charged w/ crimes
    - Can contract, borrow & enter into legal arrangements, shareholders not usually liable for debts
  + Separation of ownership & control
    - Shareholders: Own the company and contribute capital, have some decision making rights but generally there for the ride (to get dividends)
    - Directors: Control the company, likely a board unless only one D, they owe FD to company itself, but not usually shareholders (Contrast to Coleman v Myers)
  + Liability of shareholders limited to amount of capital in business
    - If company fails, shares value = loss, generally not lable to pay any more
  + Perpetual succession
    - Can last forever, only ‘die’ when removed from companies register, if shareholders die, shares go to beneficiaries
  + Act through human agents
    - Not a natural person, thus must act through humans so we must understand agency
* Structures based on contract
  + Partnership/Joint Venture/Franchise
    - NOTE: Participants may owe duties beyond contractual obligations EG – FD or good faith
    - Collective structures bind traders together, but the structure itself is not a separate legal entity
    - No formal legal process of incorporation
  + Partnerships
    - DEF: the relationship which subsists between persons carrying on a business in common w/ a view to a profit – comes from Partnership Act 1908
      * Sometimes called a firm
    - May be formed by partnership deed or contract, but can be informal or even unintentional, law can deem a partnership
    - Liability of partners unlimited, each partner personally liable for debts of partnership (no separate entity)
      * Partners are jointly and separately liable, creditors can require all/any of partners to pay debts, but other partners can claim against each other if one defaults
      * Each partner is an agent of the other partners (also owes FD to each other), their acts bind each other in relation with outsiders
  + Joint Ventures
    - Not a legal, but a commercial term
      * Much looser, two or more people associating with each other for common commercial end
      * May be structured as company with co-ventures’ holding shares in company or through contract, but this contract can be deemed as partnership depending on nature.
    - EG – Sharemilking, A provides land, B provides cows and milks herd (Not incorporated, business not in common, revenue shared evenly but profits aren’t
    - *Canny Gabriel Jackson Advertising Pty Ltd v Volume Sales*, concerned concert promotion where parties specifically said they were in JV, but court deemed it was partnership
    - *Auag Resource v Waihi Mines*, concerned 4 companies saying they were in JV but one later argued it was partnership in disguise, court rejected this, said was JV
    - However, courts can infer FD in exceptional cases EG – Chirnside v Fay
  + Franchises
    - Created when franchisor contracts to allow franchisee(s) to use their business reputation, management system or marketing methodology EG – Subway franchises
      * Franchisor – Person who gives rights to use rep/trademarks & other IP
      * Franchisee – Person who pays for rights to use Franchisor’s structures/IP
    - Franchisee’s legal liabilities are generally separate from the franchisor’s
* Choosing the right structure depends on:
  + - Costs & time of setting up particular structure
    - Liability regarding personal assets
    - Needs of the business and flexibility of structures
    - How easily business interests can be transferred between participants
    - Tax advantages of particular structures
* Concept of Agency
  + Agent = person authorized to act on behalf of principal
    - Doesn’t have to do so for money
  + Agency = fiduciary relationship between two persons, one of whom (principal) consents (express or implied) that the other may act on his behalf, so as to affect his relations with 3rd parties. Agent also demonstrates assent to act.
    - Key feature = agent’s ability to bring principal into legal relations w/ 3rd party *EG, A acts on behalf of B to contract with C, contract then exists between B & C only*
    - Principal usually liable for agent’s acts where they have been authorized by principal
  + Need for agency law
    - Corporations can only act through human agents, partnerships too (partners agents of firm and each other)
    - Allows principal to combat issues of limited supervision, lack of expertise or inability to spend time on transacting business themselves
      * EG – If you ring Air NZ to book flights you won’t get put through to CEO, but to ticketing agent who has ability to contract on behalf of company
  + Authority of agents
    - Principal *can* be bound by agents actions and any contracts they form on behalf of the P. Whether they *are* bound depends on the authority of the agent (Actual/Apparent)
    - Actual authority: Authority has been given to agent either expressly or implied by their position/job title
    - Apparent authority: (Ostensible authority), where authority has not actually been given but principal permits agent to appear to have authority
      * Estoppel: Principle that stops someone from asserting something contrary to what had previously been implied by a personal statement
      * EG – X says they will buy building and asks Y to make alterations but no contract yet, X then pulls out after Y makes alterations. Courts can estop X from denying his obligations to Y
      * Applies to P if A does something where he has apparent authority and P tries to renege
  + Duties of agent
    - Comply with agency agreement
    - Act with competence
    - Fiduciary obligations to principal