

PRBL004 – Lecture 7

Introduction to the Law of Contract Law
Introduction to the Law of Tort

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1

Introduction to the Law of Contract Law

- Introduction to Contracts
 - What is a contract
- Contract Formation
 - Offer and Acceptance
- Terms of Contract
- Sale of Goods
- Vitiating a Contract & Damages

2

What is a Contract?

- Essentially an agreement
- Involving promises enforceable by a court
- More than just a moral obligation

3

Different Types of forms of contracts

- Simple or formal
- Unilateral or bilateral or multilateral
- Implied or express (in writing)

4

ELEMENTS OF A VALID CONTRACT

- Intention to create legal relations
- Agreement: Offer and acceptance
- Form and/or consideration
- Capacity
- Genuine Consent
- Legality of object

5

ELEMENTS OF A VALID CONTRACT (cont)

- **Intention to create legal relations:**
Parties to the contract must intend their agreement to be legally enforceable.
- **Agreement - offer and acceptance:**
Must be an offer made by one party and an acceptance of that offer by another. The parties must be of one mind (ie *consensus ad idem*).
- **Consideration (and/or from):**
Something of value that passes from one party to another in return for a promise.

6

ELEMENTS OF A VALID CONTRACT (cont)

- **Capacity:**
Parties to a contract must have the mental capacity (or ability) in law to contract (e.g. minors, people intoxicated or insane may not legally bound by their promises).
- **Genuine consent:**
Necessary that the parties to a contract genuinely consent to the making of the contract. Consent must not be the result of a misrepresentation, duress or undue influence.
- **Legality of object:**
Purpose or object of the contract must be legal. Contracts can be illegal at common law or by statute (e.g. insurance companies must be licensed – cannot issue insurance contract without being licensed)

7

What About invalid contracts?

If one of the six elements is missing an apparent contract may be classified as:

- void *ab initio* – no legal effect from the beginning
- Voidable – valid until rescinded (terminated)
- Illegal – unenforceable for apparent contract breaches statute or common law

8

Offer

What is an Offer?

- An offer is the opening gambit in transaction
- Made by offeror to the offeree
- Needs to be made with intention to be bound
- To be contrasted with enquiry as to price
- Puff – self-evident exaggeration – is never an offer
- Offer can be made to particular person or whole world
- Must be communicated to another party
- Offer can lapse by passing of time or revoked before acceptance
- Option – offer held open for a certain time.
- Option – separate contract
- Offer may not lapse on death of offeror

9

What is an Offer?

Requirements of an Offer

- **Offer distinguished from information**
See *Harvey v Facey* [1983] 1 AC 552 (G&F271)
- **Offer distinguished from “puff”**
See *Carlill v Carbolic Smokeball Co* [1983] 1 QB 256 (G&F 262)
- **Offer distinguished from invitation to treat**
eg Advertising, Display, Tenders
See *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern Limited)* [1953] 1 QB 401 (G&F 268-9)
Partridge v Crittenden [1968] 2 All ER 421
- **Offers to the world at large**
See *Carlill v Carbolic Smokeball Co*

10

Rejected

- Rejection must be clearly distinguished from a request for further information or clarification
- A counter-offer is a rejection of the offer:
See **Hyde v Wrench* (1840) (G&F275)

Terminated

- As a general principle an offer may be revoked at any time before acceptance (if communicated)
See: *Dickenson v Dodds* (1876) valid by post when received:
Byrne v Van Tienhoven (1880). (G&F274)
- Termination may also occur by:
Death of a party (where contract of personal service or know of death)
Lapse of time – expressly set period of time, or an implied “reasonable” time has lapsed.
Non-fulfilment of a condition attaching to the offer

11

Acceptance of an Offer

- What is an acceptance?
- Who may accept?
- Unconditional v Conditional acceptance?
- Manner and form of acceptance
 - communication
 - silence
 - conduct of the parties
- Postal/fax/email acceptance rules

12

What is an acceptance?

- Acceptance is like lighting a fuse – it cannot be undone
- Acceptance occurs when communicated to maker of offer (the offeror)
See *R v Clarke* (1927) 40 CLR 227 (G&F 277)
- Can be accepted only by person to whom offer was made – (the acceptor)
see *Boulton v Jones* (1857) 157 ER 232 (G&F 319)
- Acceptance of an offer is an agreement on the terms
- Acceptance must be identical with offer
- Acceptance must be unconditional (but can have conditions)
See *Master v Cameron* (1954) 91 CLR 353(G&F280)

13

What is an acceptance? (cont)

- Acceptance must be communicated – no particular form required
See *Powell v Lee* (1908) 90 LT 284 (G&F279)
- Acceptance may be implied by conduct of the parties
See *Brambles Holdings v Bathurst City Council* (2001) NSWCA 61 686 (P50)
- Silence does not constitute acceptance
See *Felthouse v Bindley* (1862) 142 ER 1037 (G&F278)
- Time of acceptance = time of formation of contract
- Place of acceptance = place where contract formed

14

Postal/fax/email Acceptance rules

An exception to the rule that an offer must be communicated is the "postal rule"

Postal Rule

- When a properly posted letter is put in the hands of the post office
 - addressed, stamped, registered

Adams v Lindsell (1818) 106 ER 250 (G&F 282)

Fax/email (instantaneous communication)

Nothing in principle special about acceptance by fax or email

Contract made when fax received

See *NM Superannuation v Baker*

Entores Ltd v Miles Far East Corp (1955) 2 QB 327 (G&F 281)



15

Contracts : Interpretation & Terms

Identifying the contents of the contract

- A contract is made up of terms, which may be expressed and/or implied
- Some terms are more important than others
- Terms of contract are those in existence when parties agreed
- Terms cannot be communicated retrospectively
- Most contracts do not always have to be in writing but prudent to do so
- Courts look for what parties intended to agree to. They do not rectify errors or re-write contracts

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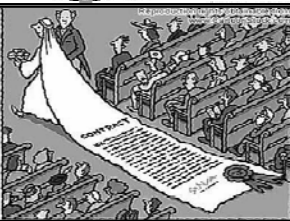
<h2>Terms</h2>	 <p>YOU'LL FIND IT ON PAGE 16 PARAGRAPH 22 CALLED BY OF YOUR CONTRACT IS DER "ANY OTHER BUSINESS"</p>
<h2>Express Terms</h2> <p>Oral / written / combination of both</p>	
<h2>Implied Terms</h2> <p>Terms not spelt out in the contract</p>	 <p>CONTRACT</p>

Oral / written / combination of both

Terms not spelt out in the contract



"Let's make it a verbal contract."



Written contracts and the parol evidence rule

- *"Where a contract is reduced into writing, where the contract appears in the writing to be entire, it is presumed that the writing contains all the terms of it and evidence will not be admitted of any previous or contemporaneous agreement which would have the effect of adding to or varying it in any way."*

See: *Henderson v Arthur* [1907] KB 10 (Graw 195)

- A rule of evidence that a written document expresses the whole contract
- External evidence of intention and negotiations cannot be considered
- The parol rule excludes oral statements of extra terms
- Problem arises where the contract is not reduced to writing.

Exceptions to the Parol Evidence Rule

- partly written, partly oral contracts;
- contracts that are impliedly subject to some trade usage or custom;
- contracts the operation of which is suspended by oral agreement;
- invalid contracts or contract does not operate because of some defect;
- where some mistake has been made in reducing the agreement to writing;
- where parol evidence is required to resolve some ambiguity or uncertainty;
- Does not accurately reflect the intention of the parties
- Note: *Van Den Esschert v Chappell* [1960] (GF 304)

Classification of Express Terms: Conditions v Warranty & Innominate terms

- Conditions - major terms of the contract. If a condition is breached, the innocent party can terminate the contract and can also sue for damages.
***Poussard v Spiers and Pond* [1876] 1 QBD 410 (GF364)**
- Condition precedent – a term that must be satisfied before a contract can come into existence
***Pym v Campbell* (1856) 119 ER 903**
- Condition subsequent – a term which provides that the contract will terminate when a particular event happens
***Head v Tattersall* [1871] LR 7 Exch 7 (GF 366)**
- Warranties - a minor term of the contract, a breach of which renders the contract different but not substantially different. A breach of warranty can only be compensated for loss.
***Bettini v Gye* [1876] 1 QBD 183 (GF365)**
- Innominate term – neither a condition or warranty – courts look at seriousness of breach to decide remedy
***Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* (GF365)**

Implied terms

- Not expressed but intended to be part of the contract, irrespective of the intentions of the parties, eg. Conditions of merchantability or fit for purpose. Three ways terms can be implied into a contract:
 - 1. Terms will be implied in fact (by the court) to give commercial meaning to the contract where:
 - it would be just and equitable to do so
 - the contract would be ineffective without it
 - it goes without saying
 - can be clearly expressed
 - it does not contradict the express terms
- See: **"The Moorcock" (1889) 14 PD 64 (GF 368)**

Implied terms (cont.)

- 2. Where it is customary or a matter of trade usage the courts will imply terms
 - it is a question of fact that there is such a custom or trade usage
 - the custom must be so well known that everyone making such a contract would be presumed to have imported the term
 - the implied term is not contrary to an express term
 - a term can be implied by custom even if a party is unaware of the custom

See: **Summers v Commonwealth (1918) 25 CLR 144 (Graw 214)**
Balmain Ferry Co. v Robertson (1906) 4 CLR 379 (GF 375)
- 3. Terms will be implied by the law where the transaction fits the specifications of the law, eg. TPA or Sale of Goods Act

Exemption, Exclusion and Limiting Clauses

- Exemption clause is a clause inserted to exclude or limit the liability of one or other of the parties (generally the party who sought its inclusion)
- Exclusion clause is a clause which completely excludes one party's liability to the other party (if the other party acquiesces to the clause's inclusion)
- Limiting clause does not exclude liability but limits it to a fixed or determinable monetary amount (usually predetermined)
- For practical purposes all three treated in the same way.
- These types of clauses can be found in all forms of contract, particularly standard forms of contracts with unequal bargaining power between the parties

Some principles relating to Exclusion clauses

- must be brought to the notice of the party against whom it is to be used prior to agreement.
- party relying on an exemption clause must be able to prove that it is part of the contract
- words used in the exemption clause must be wide enough to cover the fundamental breach.

The notice requirement

- Actual - where the existence and contents of clauses are actually brought to the other party's attention.
- Constructive - where the person relying on the clause does everything reasonably necessary to bring the clause to a reasonable person's attention. ie "obviousness" of conditions of entry

Discharge of Contract

Discharge of Contracts

- Performance
 - Complete performance
 - Substantial performance
- Consent
- Frustration
 - Impossibility of performance
- Breach or repudiation
 - Anticipatory breach
 - Repudiation during performance
 - Impossibility of performance

Vitiating Factors

Vitiating Factors

- These are factors which may allow a contract to be set aside. This is because the factors affect the ability of a party to give true consent.
 - Undue Influence
 - Duress
 - Mistake
 - Unconscionable conduct
 - Equity
 - Statutory
 - Misrepresentation

Vitiating Factors (cont)

- Undue Influence (UI)
 - Significant interference with an exercise of an individual's free will
 - UI looks for 'quality of consent' of *weaker* party
 - In Australia, much of this (but not all) is now covered by doctrine of unconscionability (DOU)
 - DOU looks at the conduct of the *stronger* party
- Duress
 - Application of pressure from one party onto another to enter a contract. May be economic or physical.
- Mistake
 - Very restrictive use. It does not cover errors of judgement of an individual [note: not a judgment from court]

Vitiating Factors (cont)

Unconscionable conduct

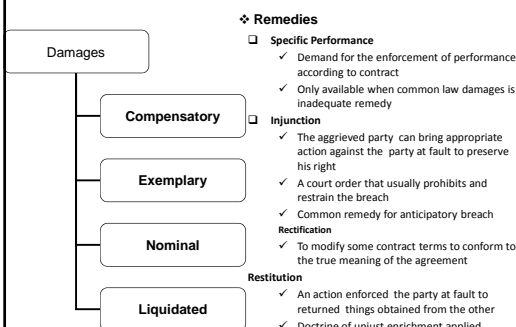
- ... is conduct 'not consistent with equity or good conscience'
- Equity
 - *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447
 - Special disadvantage
 - Knowledge of special disadvantage
 - Taking unfair advantage of disadvantage
 - *Garcia v NAB* (1998) 155 ALR 614 (HCA)
- Statutory
 - TPA, ss 51AA, 51AB and s51AC

Vitiating Factors (cont)

Misrepresentation

- A false statement of fact made during negotiations to induce another party to enter a contract. Reasonable bystander test applies.
 - Common law
 - False representation
 - Before the contract is made
 - Existing fact or past event
 - Causative (e.g. induced party to K)
 - Statutory
 - TPA, ss 52 and 53

Damages & Remedies



Sale of Goods

Sale of Goods

- Formation and Implied Terms
- Transfer of Property

35

1: Formation and Implied Terms

This part will discuss:

- Sale of Goods (SOGA) legislation
- Formation of the contract of sale
- Terms implied into every contract
- Exclusion of seller's liability

36

Sale of Goods

- SOGA provides:
 - A contract for the sale of goods is a contract whereby the seller transfers or agrees to transfer the property (ownership);
 - In goods to the buyer;
 - For a money consideration (called the price).
- “Goods” are defined as all chattels personal other than choses (things) in action and money.
- Only contracts for the sale of goods are covered by the SOGA
- Note that the respective state acts all very similar.

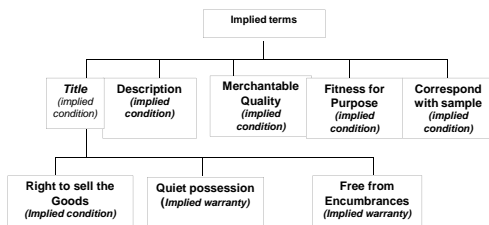
37

Elements of a sale of goods contract

- What are Goods?
 - chattels personal, but not choses in action
 - generally includes things that are physical or movable
 - Does not include services;
 - not currency, but money sold as collectibles
 - not growing crops, but harvested crops
 - future goods = to be manufactured
 - specific goods = identified and agreed upon at time of sale
 - existing goods = in existence but not yet seller's property
 - unascertained goods = not yet appropriated to the contract
 - ascertained goods = identified and appropriated
- What is the Price?
 - must be in money
 - but not necessarily wholly in money
 - must be specified or readily ascertainable

38

Implied Conditions and Warranties



39

Title – s 17 SOGA

- Right to sell the goods (condition)
An implied condition that the seller has the right to sell the goods in the case of a sale
See *Rowland v. Divall* [1923] 2 KB 500 (GF455) (bought car – discovered stolen)
Niblett Ltd v. Confectioners' Materials Co Ltd [1921] 3 KB 387 (GF456);
(sold tins of condensed milk – infringed trademark)
or
in the case of an agreement to sell, the right to sell the goods will exist when the time comes for property to pass.
- Quiet possession (warranty)
An implied warranty that the buyer will enjoy undisturbed possession of the goods.
- Freedom from encumbrances (warranty)
An implied warranty that the goods will be free from any charges to a third party.

40

Description – s 18 SOGA

- Goods are said to be sold by description where the consumer selects them according to how they are described or will be made according to agreed specifications. Goods sold by description have implied conditions:
 - That the goods shall correspond with the description or sample and description
Varley v. Whipp [1900] 1 QB 513 (GF457); (2ND reaping machine – said new)
Beale v. Talyor [1967] 3 All ER 253 (GF458)
 - The section is concerned with identity, not quality
Ashington Piggeries Ltd v. Christopher Hill Ltd [1972] AC 441 (GF458)
(mink food containing contaminated herring meal)
- Unascertained goods are sales by description

41

Sale by Sample – s 20 SOGA

- Goods are said to be sold by sample where
- Where there is a sale by sample there is an implied condition:
 - That the bulk shall correspond with the sample in quality;
 - That the buyer shall have a reasonable opportunity to compare the bulk with the sample;
 - That the goods must be free from any defect which would not be apparent on a reasonable examination of the sample
Drummond v. Van Ingen (1887) 12 App CAS284 (GF466).
(sample material to cloth merchants – split at seams)
- If the sale is by description and sample, the bulk of the goods must correspond with both description and sample.

42

Merchantable Quality – s 19 SOGA

- There is an implied condition on the seller to supply goods which are of merchantable quality.
- Merchantable quality means reasonable for the purpose described
- For this condition to operate there are four conditions that must be satisfied:
 - Has there been a sale by description?
 - Have the goods been bought from a seller who deals in goods of that description?
 - Has the buyer examined the goods? Would a *reasonable* examination have revealed the defects (a question of fact)?
 - Do the goods have one purpose or several?

See *David Jones Ltd v. Willis* (1934) 52 CLR 110 (GF462); (comfortable walking shoes – bunion on foot)

43

Fitness for Purpose – s 18 SOGA

- There is an implied condition on the seller to supply goods which are fit for their purpose.
- The buyer must expressly or by implication make known to the seller the particular purpose for which the goods are required (*Grant v. Australian Knitting Mills* [1936]) unless the goods really have only one purpose. (woolen underwear – dermatitis)
- If the goods are required for a special purpose, this fact must be made known to the seller.
See *Griffiths v. Peter Conway Ltd* [1939] 1 All ER 685 (GF4690) (woman with sensitive skin)
- The buyer must show that there is at least some reliance upon the judgement and skill of the seller
Cammell Laird & Co. v. Manganese Bronze & Brass Co. [1934] AC 402 (GF461) (ship propellers – design and specification but not thickness)

44

Rules Determining the Passing of Property (cont)

SOGA s. 23 (NT)

- Rule 1 — property passes when there is an unconditional contract for the sale of specific goods in a deliverable state
Tarling v. Baxter (1827) 6 B&C 360 (GF438) (Haystack – fire)
- Rule 2 — with specific goods which must have something done to them, property passes when that thing is done.
- Rule 3 — where the seller has to do something to determine the price, property does not pass until that thing is done.
- Rule 4 — where goods are on approval, property passes when the buyer does something to signify approval.

45

Rules Determining the Passing of Property (cont)

Rule 5 - UNASCERTAINED or future goods by description:

- Rule 5(1) – in the case of unascertained or future goods sold by description, where the goods are unconditionally appropriated to the contract and ready for delivery, property passes to the buyer
Pignataro v. Gilroy [1919] 1 KB 459 (GF439). (140 bags of rice – stolen while at premises – 4 weeks delay to collect)
- Rule 5(2) – where delivery is to the buyer or carrier and there is no right of disposal reserved by the seller, delivery is an unconditional appropriation of the goods to the contract
Wardar's (Import and Export) Co. v. Norwood & Sons 1968] 2 QB 663 (GF439) (600 cartons of kidneys in cold storage)
- If a seller imposes a reservation of title condition, appropriation is not unconditional, and property does not pass eg, a 'Romalpa' clause reserving title with the seller until certain conditions are met .
Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676 (GF440)

46

Transfer of Title by Non-Owner

- As a general rule, buyer only gets the same Title to the goods as the person from whom he obtained them – nemo dat quod non habet – one cannot give what one does not have.
- Exceptions to *Nemo dat* Rule: good title may be given in the following exceptional instances (see GF 442):
 - Estoppel;
 - By those with Special Powers of sale, e.g. officers of courts;
 - Market Overt – an open, public and legally constituted market (not found in NSW, Qld, ACT or NT);
 - Sale under a voidable title;
 - Seller in possession of goods or documents of title
Pacific Motor Auctions P/L v. Motor Credits (Hire Finance) (1965) 112 CLR 192 (GF443)
 - Buyer in possession; and
 - Mercantile or Factor agents (*Folkes v. King* [1923] 1 KB 282 (GF444)).

47

Introduction to Law of Torts

The Law of Tort

- A Tort is a '**civil wrong**' other than a claim for breach of contract', against an individual who, as a consequences suffers some form of loss or injury .
- A tort is an **act or omission** by a person that is **not authorised by law** and infringes another's **private or public rights**
- The person who commits a tort is called a **tortfeasor**
- The wrong or tortious event can be caused by action or inaction.

49

Elements of the Law of Tort

- The Law of Tort protects many interests including: Private Nuisance, Trespass, Defamation and Negligence.
- The Law of Tort becomes relevant to people and businesses after the happening of a '**loss-making event**'.
- This loss can be **economic or physical loss**.
- Law of Tort rests on two principles:-
 1. **An act or omission** by one party interfering with rights or interests of another party, thus **causing economic, physical or emotional damage**; and
 2. The interference **must give rise** to a cause of action for **damages**.

50

Tort of Negligence

- Negligence has become the most important area of Tort Law.
- Negligence has impacted significantly on businesses and the community.
- **Original formulation** – I owe a **duty of care** to persons who are **so closely and directly affected by my act** that I ought reasonably to have them in contemplation as being so affected when I am directing my mind **to my acts and omissions** which may later be called into question
- The **modern version** of Negligence was established in 1932 in the decision in **Donoghue v Stevenson [1932] AC 562**.
(The snail in the bottle case) (GF125-6)

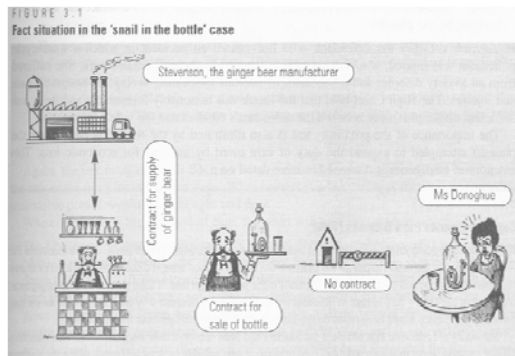
51

The Neighbourhood principle

- You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your 'neighbor'
- Your "neighbor" is a person who is clearly and directly affected by what you do or fail to do.

52

Donoghue v Stevenson(1932) AC 562 "The Snail in the bottle"



53

Negligence and a duty of care

- **Negligence** is failure to take reasonable care to prevent loss, injury or damage to others who, with reasonably foresight, would be injured had that care not been taken
- Negligence has three conjunctive elements:
 1. **Duty of care** owed by the tortfeasor;
 2. **Breach** of that duty of care; and
 3. Loss, damage or injury by another party as a result of that breach (**causation**)

54

1.The duty of care (cont)

- Restated, in modern **High Court thinking**, to establish a duty of care, a plaintiff must show that:
 - **harm or injury was foreseeable** i.e. a real possibility and not far fetched or fanciful
 - in the circumstances it was **not unreasonable to impose a duty on the defendants** to avoid anything that would cause the plaintiffs harm or injury

55

1.The duty of care (cont.)

- **Foreseeability of harm** – it must have been reasonably foreseeable to defendant that others could suffer unless care was taken to avoid the injury.
See *Waverley Council v Ferreira* [2005] NSWCA 418 (GF133)
But also see *McHale v Watson* (1966) 115 CLR 199
- Defendant need not foresee the precise loss to a specific person – enough that some loss could have been suffered by a class of person of whom the plaintiff was one
- **Duty of care is limited to those in a relationship of proximity**
 - **physical proximity** between the person and property of the plaintiff and of the defendant
 - **circumstantial proximity** – arising in particular circumstances
 - **causal proximity** – the closeness and directness of the relationship between the defendant's particular conduct and the injury that plaintiff sustained

56

2. Breaching the duty of care

- **Plaintiff must prove**
 - was owed a standard of care – **question of law**
 - defendant failed to meet that standard – **question of fact**
- **Standard of care**
 - how a **reasonable person would respond** to the risk in these circumstances
 - Consider **probability and magnitude of danger**
 - risk of event remote
 - dangerous activity
 - heightened standard where children involved
 - ~ **likelihood of resulting danger**
 - must take account of risk to persons with known disabilities
 - ~ **options open to defendant**
 - having taken all reasonable precautions defendant is not liable if a person is injured

57

3. Link between breach of duty and damage (causation)

- Was the plaintiff's loss, damage or injury a result of defendant's negligent conduct? Plaintiff to prove 3 things –
 - loss, etc is of a type the law is prepared to compensate
 - it was **not too remote in law** to be recovered (**The Wagon Mound No.1** GF 140)
 - it was **caused** by defendant's negligence
 - ~ consider the **'but for' test**; or
 - ~ did defendant's conduct cause or materially contribute to plaintiff's loss, damage or injury?

58

Negligent Misstatements

- Same elements as a general action of negligence
- Negligent Misstatements: Duty to avoid making careless statements which cause harm
 - A duty of care extends **not only** to professional advisers but also to persons who provide information or give advice in serious circumstances
MLC v. Evatt (1968)
Shaddock v. Parramatta City Council (1981) (road widening)
and where a "special relationship" exists between the parties
 - different if information was merely expression of intention
San Sebastian v. Minister Responsible for Administering Planning and Assessment Act (1986) (plans for development)
 - An inadequate response can amount to a negligent misrepresentation if it is relied upon by the plaintiff
Pyrenees Shire Council v. Day (1998) (Council found fireplace unsafe – did not enforce order with owner – liable for non-feasance)

59

Negligence in the Professional Context

Hedley Byrne & Co v Heller & Partners Ltd [1964] AC 465 (GF67)

- advertising agents/merchant bankers – requested for creditworthiness of client – replied saying credit worthy but had an exclusion clause – 'without responsibility on part of the bank officials' – client went into liquidation- held not liable because of clause (ratio) – House of Lords statements in obiter more significant
- Established that the law will imply a duty of care in the making of statements. A negligent misstatement, whether spoken or written could give rise to an action for financial loss – provided a duty of care was owed.
(Note *Hedley Byrne* extended principle of duty of care expounded in *Donoghue v Stevenson*)

60

Negligence in Summary

