commerce undergraduate society

COMM 393 SOLUTIONS

FINAL EXAM REVIEW SESSION

by Sarah Wang

Practice Problem 1: Agency

Related Cases:

- Pemberton Benchlands Housing Corp. v. Sabre Transport

ISSUE: Is Lawnmower-Is-Us bound by the contract?

LAW: An agent is a person that receives authority and agrees to act on behalf of the principal in a business transaction. The principal is bound by actions performed by the agent that are within the agent's authority and responsibility. There are 2 types of authority:

- Actual authority: express or implied
- Apparent authority is agency bound by conduct or estoppel. To test for apparent authority, the plaintiff must prove:
    1. Principal created an impression or made a representation to the 3rd party that the agent has some authority;
    2. 3rd party relies on that impression and is induced to enter into the contract; and
    3. If 3rd party knows or ought to know of any restrictions on the agent's authority, then the principal is not bound by the contract.

In the case where the agent oversteps its authority and the principal is not bound, the customer can sue the agent for breach of warranty of authority.

APPLICATION: Lawnmower-Is-Us would be bound by the contract if Donald had actual or apparent authority. From the clause in the contract that required approval by Lawnmower-Is-Us' president before the contract would bind, it would seem that Donald did not have actual authority. When Donald crossed out the term that required approval from the president of Lawnmower-Is-Us and initialed the change, it did not create apparent authority, as the impression of authority must be created by the principal and not the agent. In this case, Donald

overstepped his authorities and therefore Lawnmower-Is-Us would not be bound by the contract that he negotiated with Sandy and SpongeBob.

CONCLUSION: Lawnmower-Is-Us is not bound by the contract as Donald did not have the authority to bind it. Sandy and SpongeBob could sue Donald for breach of warranty of authority, where the agent oversteps its authority and the principal is not bound.

Practice Problem 2: Fiduciary Duty

Related Cases:

- Hodgkinson v. Simms
- Strother v. 3464920 Canada Ltd.

ISSUE: Can Hogan sue Aussie for breach of fiduciary duty?

LAW: A fiduciary relationship is created when one party puts trust and confidence in another. There are 3 characteristics of a fiduciary relationship (Strother):

1. The fiduciary has undertaken to act in the best interest of the beneficiary;
2. The fiduciary can individually exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. The beneficiary is vulnerable to the fiduciary holding the discretion or power. A party is vulnerable when the fiduciary CAN abuse the power to the detriment of the other party (Hodgkinson).

The responsibilities of a fiduciary include acting in good faith, acting with honesty, undivided loyalty to the principal, no conflict of interest without full disclosure and consent etc.

APPLICATION: As Hogan is one of Aussie's clients, Aussie owes him a fiduciary duty to act in his best interest rather than his own. Since Hogan has placed complete trust in Aussie, he would be vulnerable if Aussie were to exercise his power in a way that would negatively affect his interests, which is what occurred in this case. Aussie has breached his fiduciary duty by putting his own interests above Hogan's and not being honest when Hogan asked for his advice regarding which building to invest in.

CONCLUSION: Hogan would be successful in suing Aussie for breach of fiduciary duty, and Aussie would have to disgorge any profits made (i.e. the commission) to Hogan.

Practice Problem 3

a) Negligence, Contributory Negligence and Vicarious Liability

Related Cases:

- Waldick v. Malcolm
- Hollis v. Dow Corning
- Morsi v. Fermar
- Rankin v. J.J.

ISSUE: Was Tobi/Bella negligent? Was Winnie contributorily negligent? Will Sleep Tight Inc. be held jointly liable?

LAW:

Negligence: In order to sue for negligence, the following must be proved:

1. Was there a duty of care owed? (to anyone you should reasonably foresee will be affected by your actions)
2. Did the defendant breach the reasonable standard of care? (i.e. conduct fell below the required standard)
3. Damage was actually suffered and was caused by the breach
4. Damages were reasonably foreseeable

Contributory Negligence:

If 2 or more parties are found negligent, the court will apportion liability according to the degree of fault, and apportion damages accordingly.

Vicarious Liability:

Where an employer is held jointly liable with the employee for the employee's tortious conduct. To be vicariously liable, the employer has to either provide instruction for the employee to perform

the tortious conduct, or the employee must have been acting within the scope of their employment when they committed the tort.

APPLICATION:

Tobi: Tobi owed a duty of care to other motorists, cyclists and pedestrians on the road. He should have followed instructions and attached the mattress in such a way that it would not come free, therefore a breach of a reasonable standard seems likely. If he had attached the mattress properly, the mattress would not have come flying off and as a result, Winnie would not have been injured. The physical injury to Winnie and her bike are reasonably foreseeable.

Sleep Tight Inc.: As Sleep Tight Inc. is Tobi's employer, it will be vicariously liable for his negligence as it was committed during the course of his employment.

Bella: Bella owed a duty of care to other motorists, cyclists and pedestrians on the road. Did she breach a reasonable standard? It would seem that a mattress coming at one's windshield suddenly would cause a reasonable person to swerve, so this might not be her fault. However, she was driving over the speed limit. She will be found contributorily negligent if it can be shown that Winnie would not have been injured/injured to a lesser extent had Bella not been speeding.

Winnie: The defendants will argue that Winnie was contributorily negligent for not wearing a helmet. Reasonable cyclists wear helmets, and if it can be shown that her injuries would not have been as serious had she been wearing a helmet, her damages will be reduced as a result of her contributory negligence. It is uncertain whether this is the case as we are not provided more facts regarding where her injuries occurred (e.g. if she suffered head injuries then a helmet may have prevented this).

CONCLUSION: Tobi is negligent and his employer, Sleep Tight Inc. is vicariously liable for his negligence. Both Bella and Winnie may be found contributorily negligent, which means damages will be apportioned.

b) Corporations

Related Cases:

- Data Business Forms Ltd. v. Macintosh
- Challenor v. Nucleus Financial Network Inc.
- SPC Holdings v. Gabriel
- Canadian Sports Specialists Inc. v. Phillippon
- Salomon v. Salomon

ISSUE: Will Yuta be liable to Winnie for her injuries?

LAW: Corporations are separate legal entities; shareholders are protected by a corporate veil and have limited liability.

- Party who intends to incorporate must notify appropriate parties (e.g. suppliers) about it if he/she wants to get limited liability benefits of incorporation (be protected by the corporate veil). The defendant should have expressly informed the plaintiff about this change as he cannot expect them to notice the change by themselves (Data Business Forms).
- Shareholders of a corporation are not liable for the company's debts or obligations, with the exception of where there is some form or fraud or unconscionability committed by the shareholder.
- Company alone is liable even if there is only one shareholder.

APPLICATION: Shareholders and directors of a corporation enjoy limited liability, meaning that Yuta will not be personally liable for a damages award against Sleep Tight Inc. In this case, there is no indication that Yuta has committed fraud or another form of unconscionability, therefore the corporate veil holds.

CONCLUSION: Yuta will not be personally liable to Winnie as he is protected by the corporate veil.

Practice Problem 4: Sale of Goods

Related Cases:

- Kobelt Manufacturing Co v. Pacific Rim
- Porelle v. Eddie's Auto Sales Ltd.
- Kovacs v. Holtom
- Bevo Farms Ltd. v. Veg Gro Inc.

ISSUE: Can Tom obtain a refund from Deep Fryer Paradise for the Donut Fryer 123C?

LAW: The Sale of Goods Act (SGA) applies here as this is a sale of a "good" and not a service. Under the SGA, there are 3 requirements that must be met for the implied condition as to fitness for purpose (section 18(a)):

1. Buyer conveys purpose to seller;
2. Buyer relies on seller's skill or judgment; and
3. Seller is in the business of supplying that good.

Lastly, the buyer must have not used a trade name when purchasing the good, as this would imply the buyer did not rely on the seller's skill or judgment.

APPLICATION: In this case, Tom explained the purpose of the deep fryer to the sales representative. Since he did not know anything about deep fryers, he fully relied on the seller's recommendation to make his purchase. We can assume that Deep Fryer Paradise is in the business of supplying deep fryers based on the context given in the question. In this case, we can also apply the implied term of durability under SGA 18(c) and argue that 2 months is likely too short of a timeframe for the typical use of a deep fryer.

CONCLUSION: As all conditions under SGA 18(a) are met, Tom will be entitled to a refund for the Donut Fryer 123C as the quality of the product was not fit for his purpose. Under SGA 18(c), the product is not durable and therefore Tom will be able to rescind the contract.

Practice Problem 5: Sole Proprietorships and Partnerships

Related Cases:

- Lanz v. Lanz
- Scragg v. Lotzkar
- Pen-Bro Holdings v. Demchuk

ISSUE: Will Riley, Austin and Yohan be liable to Iain? What recourse actions do the three have against John?

LAW: A partnership is two or more persons acting in common for a business purpose with a view of making a profit. The Partnership Act incorporates not only profit sharing, but also joint risk taking (in debt obligations) and degree of managerial influence in its assessment of whether a firm is indeed a partnership. There are several criteria to determine whether or not an organization is a partnership, including:

- Carrying on a business together with a view to profit
- Management role
- Profit sharing
- Risk taking
- Capital contributions

Each partner acts as an agent of the firm and can bind the firm in dealing with third parties, and each partner has unlimited liability for the debts and obligations of the partnership.

APPLICATION: W.Asians is a podcast business run by four individuals that is not incorporated, so it fits the definition of a partnership. Each partner has unlimited liability, meaning that Iain can go after any of the partners of W.Asians for the amount he is owed for selling his mic, assuming that he was not aware of the

agreement between W.Asians that all purchases must be approved by every partner. Riley, Austin and Yohan will also have recourse against John for violating terms of their partnership agreement.

CONCLUSION: Riley, Austin and Yohan will be liable to Iain. The three can also sue John for violation of their partnership agreement.

Practice Problem 6: Negligent Misstatement

Related Cases:

- Rangen v. Deloitte & Touche
- Hercules Management Ltd. v. Ernst & Young

ISSUE: Will Ashley be successful in suing Carter Henderson LLP for her losses?

LAW: In order to sue for negligent misstatement, the following are tested:

1. Duty of care exists
    a. There is a special relationship – the professional must have known who would be relying on their information and the information must be used for the purpose which it was prepared for (foreseeability and proximity)
    b. Whether the duty should be limited for public policy reasons
2. Standard of care is breached
    a. Defendant did not use the standard of skill and care of a competent member of his profession
    b. Defendant did not use the skill and care appropriate for the task
3. Real damages are suffered
4. Plaintiff relied on the negligent misstatement to act (causation of damages)

APPLICATION: In this case, although Carter Henderson LLP does owe a duty of care to the shareholders of EarthCom Inc., this duty is negatived by public policy due to the overriding concern of indeterminate liability. The purpose of audited financial statements is to guide the shareholders in assessing the performance of the Board and to help the shareholders decide whether or not to retain existing management. The Hercules case says clearly that the auditor is not liable to the shareholder who uses the audited financial statements for an extraneous purpose, such as deciding whether to retain or sell his/her shares in the

corporation. In this case, since Ashley is using the audited financial statements to decide whether to buy/hold/sell her shares of EarthCom Inc., the court will say that the auditor will not owe a duty of care to the shareholder.

CONCLUSION: Carter Henderson LLP does not owe a duty of care to Ashley and therefore she will not be successful in suing the accounting firm for her damages.

Practice Problem 7: Exclusion Clauses

Related Cases:

- Dawe v. Cypress Bowl
- Greeven v. Blackcomb
- Maloney v. Dockside

ISSUE: Will Ross be successful in his legal action against EscapeCity?

LAW: In order to determine whether an exclusion clause is binding, the following tests can be performed:

1. Did the seller take reasonable steps to bring the exclusion clause to the buyer's attention? (Dawe)
2. Maloney test:
    a. Does the exclusion clause apply to the circumstances at hand?
    b. If yes, was the exclusion clause unconscionable at the time the contract was made? (Or, was there evidence of a fraudulent misrepresentation? Evidence of a fraudulent misrepresentation will nullify an exclusion clause)
    c. Is the clause contrary to public policy? (i.e. is it offensive to society?)

APPLICATION: Angela informed Ross of the waiver form and the exclusion clause was state in red, bold print on the waiver, indicating that the seller took reasonable steps to bring the clause to the buyer's attention. Applying the Maloney test, it is clear that the exclusion clause applies to the current situation, which is Ross undertaking the escape room challenge. There is no evidence of fraudulent misrepresentation that will nullify the exclusion clause, although it could be argued that Angela lied about the fact that no participants have ever been injured (this is not clearly stated in the case, so be sure to state your assumption if you decide to argue this). The clause is not contrary to public policy.

CONCLUSION: Unless it can be proven that fraudulent misrepresentation was present at the time Ross signed the waiver form, he will be bound by the exclusion clause and will therefore not be successful in his legal claim against EscapeCity.

Practice Problem 8: Privity of Contract

Related Cases:

- Peacock v. Esquimalt & Nanaimo Railway Co.
- London Drugs Ltd. v. Keuhne & Nagel International Ltd.

ISSUE: Will Six Star succeed in its legal action against Jim and Dwight? If yes, how much will they have to pay?

LAW: Outsiders to a contract cannot enforce any promises made between contracting parties to which the outsider does not have privity. To succeed in an action in contract law, the plaintiff must prove that he/she has privity (is a contractual party) to the agreement (Peacock).

According to the law of privity of contract, only the contracting parties have privity and a "stranger" (someone that is not a party to the contract) cannot sue to enforce a contract. However, employees that are strangers to a contract can benefit from a limited liability clause in their employer's contract if the Principled Exception to Privity applies (London Drugs):

1. Limitation of liability clause must expressly/implicitly extend benefit to employees; and
2. Damage must have occurred during course of employment (employees were acting in course of employment and were performing services provided for in the contract between the employer and the other party).

APPLICATION: The initial contract with the limitation of liability is between Munder Difflin and Six Star, so Jim and Dwight would be considered strangers to the contract. However, we can apply the principled exception to privity rules to see if it applies:

1. The two employees, Jim and Dwight, are warehouse workers and would therefore be considered “warehouseman” as stated in the limited liability clause; and
2. The damage occurred during their normal course of employment when they were preparing goods for a shipment.

CONCLUSION: Jim and Dwight would be protected by the limited liability clause in the contract between Munder Difflin and Six Star, which overrides the privity of contract. As they are covered by the clause, they would only have to pay $50 instead of the full cost of the damages.

Other Topics (not covered in practice problems)

Occupier's Liability:
Owner can be liable to an injured party if it fails to take reasonable care to ensure that persons and property on its property are reasonably safe in circumstances.

Product Liability & Duty to Warn:
Manufacturer of dangerous product is presumed to be liable unless they can prove that they have taken all reasonable steps to prevent the product from being distributed.
The duty to warn is an ongoing obligation. The responsibility of a manufacturer is to warn a learned intermediary of risks associated with the product's usage where warnings are unlikely to reach the consumer directly.

Sale of Goods Act

Section 16: Quiet Possession – Right to sell with no charge or encumbrance
16(a) Seller has right to sell goods
16(b) Goods will be free from any charge of encumbrance in favour of any third party, not declared of known to the buyer when the contract was made

Section 17: Correspond with Description/Sample
17(1) In contract of sale of goods by description, there is an implied condition that the goods must correspond with the description
17(2) If the sale is by sample, as well as by description, it is not sufficient that the goods correspond with the sample if the goods do not correspond with the description (i.e. if goods are sold by sample, still need to correspond with the description)

18(b) Merchantability:
If goods sold by description and buyer has no opportunity to examine the goods, then the goods must be of merchantable quality.

18(c) Durability:
Goods will last for a reasonable amount of time (taking into consideration the typical use of the good).

Section 19: Sale by Sample
If bulk goods are sold by sample, then:

1. Buyer must have reasonable opportunity to inspect
2. Bulk must correspond with sample
3. Must be free from defects that would not be observable by the buyer on reasonable inspection

Section 20: Exclusion Clause:
With the exception of retail sales (new goods sold by dealer to ordinary individual for personal use), parties can expressly exclude implied terms – can exclude for:

- Used goods
- Sales to a business
- Someone who does not ordinarily sell those goods (e.g. Craigslist)

1. Must be clearly worded and specifically name type of liability (e.g. warranties vs. conditions)
2. Cannot contract out of liability for the entire bargain (i.e. cannot exclude out of purpose for contracting)

5 Rules of Title and Risk

1. Unconditional contract for sale of specific goods – title passes when contract made
2. Sale of specific goods & seller has to do something to the goods to put them in deliverable state – title passes when buyer receives notice that it has been completed

3. Sale of specific goods in deliverable state but seller is bound to do something to determine their value (appraisal) – title passes when buyer has notice that it has been done
4. Sale contingent on approval or acceptance – when approved/accepted OR when accepted goods without rejection OR after reasonable time has passed
5. Sale of unascertained goods (or future goods) by description – title passes when goods are in deliverable state and are appropriated (i.e. designated as the subject matter of the contract) by one party with the assent of the other

With regards to unascertained goods, transfer of title and risk is deemed to pass to the buyer upon delivery of goods to a 3rd party carrier. (Bevo Farms)

Partnerships

General Partnership:
Partners in a general partnership face personal unlimited liability. They are jointly liable for the debts and obligations of the firm. If the assets of the partnership are insufficient, the plaintiff can claim the personal assets of the partners.

Limited Partnership:
Partner's liability is limited to the amount they invested in the business. If you become involved in management/operations, you become a general partner with unlimited liabilities.

Limited Liability Partnership:
Partners are jointly liable for debts up to their capital contributions. They are liable for their own negligence but not for the negligence of other partners, unless they knew about it or authorized it.