STUDY UNIT 7 - ERROR (MISTAKE).

Consensus: is 1 primary basis for contractual liability. Actual agreement between parties is 1 primary basis of a contract — this approach, known as intention, will or consensual theory — places emphasis on 1 intention (will) of contracting parties. Under circumstances intention theory proves ineffectual then contractual liability — secondary basis. 1 secondary basis is 1 reasonable reliance of one contracting party ± agreement bet 1 parties exist.

Factors influencing consensus:
- If 1 consensus of one of 1 parties is legally invalid then there can be no contract. If consensus or ostensible agreement is absent — no contract. ✓
- If there is consensus but it has been obtained in an improper manner (duress) there will be a valid contract, but which is voidable. At instance of 1 prejudiced party. ✓
- Contract is void (it does not exist) in case of material mistake where there is no reasonable reliance ± agreement exists. Since then, is absence of consensus or ostensible agreement ✓
- Contract is voidable — misrepresentation, duress & undue influence. Since in these cases there is consensus but it has been obtained in an improper manner.
mistake - one or even both contractants act while under some or other incorrect impression which affects contract between them.

Material mistake

**Elements of consensus**

Consensus exists when parties
1. have agreed on obligations they intend to create, i.e. have agreed on persons between whom obligations are to be created, and on contents of obligations, i.e. performance to be rendered.
2. Have agreed to be bound by contract, have agreed to create juristic consequences.
3. are aware of their agreement.

Material mistake

Exclusion of one of 3 elements of consensus results in a material mistake.

There will be no consensus
1. Owing to some mistake, parties are not agreed about persons between whom obligation is to be created.
2. Owing to some mistake, parties are not in agreement regarding performance to be rendered.
3. Are not in agreement regarding nature of contract they wish to conclude.
4. Mistake as to juristic consequences of contract.

(Y in West says to Z & Z may purchase his V86 for 20,000 and 2 accepts)
Non-material mistake
- A non-material mistake does not affect or exclude an element of consensus & if parties are in agreement & a basis for contractual liability is present.
- A mistake relating to performance or person will not be material if it does not affect mistaken party's decision to agree. Eg. X wishing to support Y's new boutique, buys a dress from M whom she assumes to be Y. She makes a material mistake about other party to duty obligation. - If it were no concern of X from whom she bought dress her mistake would not be material.

Traditional approach to material & non-material mistake

(i) error in negotio - mistake regarding nature of contract being entered into which is material (A intends to purchase while B intends to let).
(ii) error in persona - mistake regarding identity of other party which is material (Z enters shop to purchase a packet of cigarettes & mistakes I man behind I counter for a prominent sportsman.)
(iii) error in corpore - mistake regarding identity of subject matter of contract which is material (Y intends to sell Golf GTI, Z intends to buy Y's Golf VR6).
(iv) error in substantialia (error in qualitatem) mistake regarding an attribute or characteristic of subject matter of contract (Not material) A buys Horse from B thinking it former July winner when it has never won July.
5) Error in motive - mistake regarding reason or ground for entering into contract (Not material).

C.A offers to buy B\$ car because he mistakenly believes his car to be stolen.

* ANY ERROR ≠ EXCLUDES AN ELEMENT OF CONSENSUS WILL BE MATERIAL EXCEPT FOR ERROR IN PERSONA WILL ONLY BE MATERIAL WHERE IDENTITY OF OTHER CONTRACTING PARTY IS OF ESSENTIAL IMPORTANCE TO MISTAKEN PARTY.

CASES / MISTAKE

1) In National & Overseas Distributors Corp v Potato Board, mistake of respondent was material since it related to persons between whom obligations were to be created.

2) Steyn v LSA Motors.

Respondents mistake related to other party to potential contract. (It only intended any possible contract could arise if condition were met; would arise bet itself & was material as professional golfer was named)

3) George v Faircloth.

Appellants mistake related to a term which he believed would not be in contract & was material because it related to an aspect of performance.

4) Allen v Sixteen Stirling Investments.

Mistake related to performance - material.
Consequences of application of intention theory to all instances of mistake.

(1) Consistent application of intention theory would mean every material mistake would exclude contractual liability. A wholly subjective approach to contract, which intention theory represents, can lead to inequitable results. For this reason intention theory has been rejected by some jurists. An alternative basis of a contract has been sought in something other than subjective agreement between parties. Courts have expressed preference for reliance theory as an alternative basis for contractual liability where consensus has been excluded as a result of material mistake.

(2) Alternatives to & qualifications of intention w/s: estoppel, declaration & reliance.
The Reliance theory is applied in 2 ways:
1) Direct Reliance approach
2) Justus Error approach (indirect approach to reliance theory)

(A) THE DIRECT RELIANCE APPROACH
Before 1992 courts very seldom used this approach
Sonap Petroleum case it was applied
1 court in Sonap set out 1 test for 1 direct reliance approach as follows:
"... did 1 party whose actual intention did not
conform to 1 common intention expressed,
lead 1 other party, as a reasonable man to
believe his declared intention represented
his actual intention?

This 2 enfold a threefold enquiry
1) Was there a misrepresentation regarding
one party's intention?
2) Who made 1 misrepresentation
3) Was 1 other party actually misled & if
so would a reasonable man also have been misled?

App of Direct reliance theory
George V Fairmaod
Da Toit v Atkinsons Motors
Sonap Case
(E) THE IUSTUS ERROR APPROACH (INDIRECT APPLICATION OF RELIANCE THEORY).

This approach is merely reliance theory in another form. The problem is whether a party to a contract who, labouring under a mistake, wishes to escape contractual liability must prove:

(i) that his mistake is material
(ii) that his mistake is reasonable.

See worksheet

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**Steps to Solve a Mistake Problem**

1. **Detect Whether Mistake Is Material**
   - Apply the Intention Theory.
   - If both parties had the same performance in mind if not, mistake is material.

2. **Decide Whether D&RA or I.E.A. Can Be Applied to Problem**
   - Is there an apparent contract? If yes, both can be applied. If no, only D&RA can be applied.

3. **Apply Approach**
REQUIREMENTS FOR DELICT / CULPABLE MISREP ACT

There must be a misrepresentation, i.e. a false statement of fact, made by a contractant or someone for whose acts a particular contractant may be held liable.

- Statement may be made by commission i.e. positive conduct or by omission - failure to remove an existing wrong impression under which another party is labouring.

Wrongfulness

- A misrep must be wrongful, it must have caused some harm in a legally reprehensible or unreasonable manner.
- Test for wrongfulness: 1 legal convictions of 1 community / 1 boni mores - objective test based on reasonableness.

"1 basic 1 is according to 1 legal convictions of 1 community & in 1 light of 1 circumstances of 1 case 1 plaintiff 1 defendant infringed 1 interests of 1 plaintiff in a reasonable or unreasonable manner.

Wrongfulness in 1 case of a commission

Misrep in 1 form of commission, wrongfulness is apparent if 1 misrep has induced 1 other party to conclude 1 contract which he would not otherwise have agreed Ranger V Wykerd, De Jager V Grunder.
Wrongfulness in case of an omission by omission — failure to remove an existing incorrect impression will be wrongful if

1) There was failure to disclose a material fact
2) There was a duty to speak on part of misrepresentor & he failed to remove false impression

where one person is in some way responsible for others false impression he must remove false impression (Trotman v Edwicke)

- A rep will only found an action based on misrep if it relates to some past or present fact & accordingly a mere opinion will not suffice.

- Is merely a factor to be taken into a/c when det + wrongfulness of a misrep & not a requirement. Misrep must not only mislead but should be of such a nature that it would also mislead a reasonable man. In same circumstances, if it is fraudulent, misrepresentor cannot aver on this ground.

- Mere puffing is not actionable because it is not considered wrongful. Puffing amounts to representations made in course of negotiations which representations praise & commend properties of represented performance.
Fault
- legal blameworthiness or a reprehensible state of mind or conduct of the misrepresentor. Fault has 2 forms:
  - intent (dolus) / Negligence (culpa)

Intent
- legally reprehensible state of mind which consists in directing and will @ attaining a particular result while conscious of the wrongfulness of the conduct

Negligence
- consists in a lack of a necessary degree of care required in circumstances under which a reasonable person in the position of the actor (misrepresentor) would have seen the possibility of harm to another (misrepresentee) and thus taken reasonable steps to prevent the harm ensuing.

Causation
- a misrep must have caused a misrepresentee to enter into a contract where he would not have entered into it (contract at all or, alternatively, a contract which he with an unfettered will would not have assented to.

Factual Causation
- is part of a test for causation: it is used to determine whether a misrep actually caused a contract (Courts apply the conditio sine qua non test; but for test

"Would the contract or specific terms contained therein have resulted but for the misrep?"
**Legal Causation**

Legal causation is used to determine whether a factual consequence may be considered legally close enough to conduct to justify liability (which consequences should be imputed to him).

Legal causation arises when a fact for which undesirable or harmful consequences caused by wrongdoer's wrongful, culpable act has should be held accountable or liable.

**Damage**

Where a conclusion of a contract as a result of misrepresentation caused actual damage, the misrepresentee may claim his loss from the misrepresenter.

In case of culpable misrep proof of damage is not required to justify a rescission.

**Remedies for fraudulent & negligent misrep**

Two-fold remedies available to injured party:
1. He may rescind (cancel or annul) the contract.
2. Whether he rescinds or upholds the contract he may claim damages to compensate him should he have suffered actual loss.

**Rescission**

Culp misrep contract is voidable. If aggrieved party decide to rescind the contract obligation between parties will be terminated with retrospective effect. Parties must restore to each other what has already been performed in terms of the contract so they may be in the position they were by the contract was concluded.
recission leads to restitution or restitution in integrum (literally return to previous position)

Dolus dans

If misrepresentee may elect to cancel where facts show if it had not been for misrep he would have not entered into contract

In context of fraud — dolus dans causam this is true for neg misrep as well

Dolus incidens

But what if facts show if there had been no misrep would he have still entered into contract but on different terms? Dolus incidens in contractum

There is merit in contention since a contractant's consent has been obtained in an improper manner, he should be afforded an opportunity to withdraw from contractual relationship under all circumstances.

* Exercising election to rescind or uphold contract refer to W/S
Innocent misrep (Non-culpable)
No delictual liability will arise where the wrongdoer does not culpably (aure + loss suffered by aggrieved party (law of delict). However in contract there is a deviation from strict delictual principles.

Requirements
There must be a precontractual false statement of fact made innocently by one of the contracting parties, which induces the other party to enter into a contract or to agree to terms he would not have agreed to had he known the truth.

Remedies
1) Rescission & restitution (see above)
2) Damages
Hall v Milner - court held in the case of innocent misrep the purchaser was entitled to claim a reduction of the purchase price (resititutional damages) with Actio Quanti Minoris. The misrepresentee could claim a diff bet price paid & actual value of thing purchased.
Actio Redhibitoria - cancellation of contract & restitution was claimed & Actio Quanti Minoris - reduction of purchase price.

Phame v Paizes (Innocent misrep)
Court asked to decide upon these ffg?

1) Can an innocent misrep entitle a buyer to a reduction of the price under Actio Quanti Minorns
2) If so under what circumstances
I. appellate Division answered as follows:

1. *Actio Redhibitoria* or *Actio quanti minoris* available if res vendita suffered from a latent defect at time of sale.

2. I above also available if seller made a *dictum et promissum* & it turned out to be false.

3. *Dictum et promissum* is a material statement made by seller to buyer during negotiations, bearing on quality of res vendita & going beyond mere praise & commendation.

4. Whether a statement by seller goes beyond mere praise or commendation will depend on circumstances of each case.

**Phane V. Paizes** (Position regarding innocent misrep)

1. Buyer who has been misled by a representation amounting to a *dictum et promissum* made by seller, may claim rescission & restitution with *Actio Redhibitoria* or *restitutional damages* with *Actio quanti minoris*. He can also raise an exception redhibitoria or exception quanti minoris as a defence to action by seller.

2. If seller's mere representation does not amount to a *dictum et promissum* or if representation is made to a party to any contract other than a contract of sale, I misrepresentee can claim rescission & restitution based on innocent misrep. He does not have an action for *restitutional damages*.
Exclusionary Clauses - limits remedies available to parties in a contract e.g.: common law excluding liability for misrep. Remedies for intentional misrep cannot be excluded.

**STUDY UNIT 10 / DURESS.**

Compulsion may be exercised by a direct application of physical force or indirectly by way of threat of harm.” 2 kinds of duress
1) Physical force or violence - via absoluta
2) Threats which induce a person to act - via compulsiva (moral compulsion)

via absoluta - overwhelmed party does not act in legal sense of word; there is no voluntary human action on his part see example pg 96

via compulsiva - aggrieved party has indeed acted & has expressed his will even though his will has been attained by improper means, will of aggrieved party is affected by duress, expression of his intent valid & there is thus agreement.