

1 course topic are either
 2 [1] critical & hard;
 3 [2] critical & easy;
 4 [3] less important & hard; or
 5 [4] less important & easy
 6 the instructor will be sure to cover in class item [1].
 7 students are responsible for items [1] through [4]
 8

9 INTRODUCTION

10 USA law focuses upon actions that are knowing and voluntary.
 11 subjective v. objective
 12 **knowing:** actual knowledge (subjective) (i.e., scienter)
 13 receipt of notice (objective)
 14 reason to know (objective)
 15 adhesion contract
 16 **due process:** notice and hearing, both proportional to the interest(s) involved
 17

18 CHAPTER ONE

19 reasonable expectations

20 Reasonable Person

21 separation of powers

22 Individual v. government
 23 federal v. State
 24 legislative v. executive v. judicial
 25 (make law v. enforce law v. interpret law)
 26 **Judicial Review**
 27 (statutes v. regulations v. cases)

28 equity v. law

29 maxims v. case of first impression & precedence & *stare decisis*

30 latches v. statute of limitations (can toll) & statutes of repose

31 **express:** words: oral or written (p. 214)

32 **implied:** acts, words, **and/or** circumstances

33 Natural Law School and *Declaration of Independence* v. *USA Constitution*

34 ethics ≠ law; and law ≠ ethics

35 Art. VI, para. 2: **Supremacy Clause** & Judicial Review

36 preemption (p. 80) & uniform State laws (see, Art. I, sec. 8, cl. 1)

37 analogy (e.g., distinguishable) v. deductive syllogism v. linear

38 precedence v. binding v. authoritative v. persuasive

39 precedence:

40 [a] settled expectations;

41 [b] court's legitimacy (e.g., jurisdiction); and

42 [c] workable (e.g., eroded)

43 substantive law (e.g., *Substantive Due Process*) creates a right

44 v. procedural law (e.g., *Procedural Due Process*) enforces a right

45 civil law v. criminal law (only the legislature can create a crime)

1 court's **jurisdiction**:
 2 subject matter
 3 (e.g., bankruptcy), and
 4 geographic
 5 (i.e., substantial minimal contacts
 6 [e.g., jurisdiction of download {p. 34; 87}])
 7 **taking**: *due process* + public use + just compensation (p. 24; 77; 973)
 8 v. mere regulation
 9 dormant Commerce Clause

10

11 **CHAPTER TWO**

12 complaint: [a] cause of action; [b] court's jurisdiction; and [c] remedy
 13 substantial minimal contacts = purposefully avails; long arm statutes

14 confidential v. privileged (p. 42 & 1041)

15 privileged v. predatory

16 choice of: forum v. venue v. law v. language

17 **standing to sue**: injury in fact **and** within the zone of protected interests

18 role of trial court: find fact and apply law

19 role of appellate court: find error and interpret law

20 **appellate** court will **affirm** the **trial** court **unless** there is an:

21 **clear error of fact,**

22 **non-harmless error of procedure, or**

23 **any error of law**

24 **person**: natural v. legal

25 All consumers and all citizens are natural persons;

26 some legal persons are corporations.

27 **good faith**

Subjective G.F. **Objective G.F.**

28 consumer, non-UCC honesty in fact *none*

29 consumer, UCC HiF and commercially reasonable

30 merchant HiF and commercially reasonable

31 fiduciary (utmost GF) HiF and personalized objective

32 federal jurisdiction: federal question v. diversity of citizenship

33 ADR: but, discovery, public, precedence, and neutral

34 **adhesion contract**:

35 public policy is hostile towards adhesion contracts

36 because these contracts are less knowing and less voluntary.

37 However, some contracts must be adhesion contracts

38 (e.g., insurance; Equal Protection),

39 in which case the law is less hostile.

40 An ambiguity in an adhesion contract is interpreted against the drafter;

41 unless the non-drafting party had the opportunity to

42 discover and object (i.e., receipt of notice) to the ambiguity,

43 in which case the adhesion contract ambiguity is interpreted reasonably.

44 arbitration can be binding or non-binding

45 federal preemption of enforceability of arbitration *contracts* in Commerce

46 mediation in NEB: mandatory in divorce if children; privileged mediation

47 Some pretrial and all settlement conferences are **privileged**

1 **CHAPTER THREE**

2 contingency fees: never in UK; rarely in Canada; only civil in USA

3 affirmative defense

4 counter suit v. cross suit

5 **Motion to Dismiss:**

6 assume as true all claimed by nonmoving party

7 as well as assume as true all reasonable inferences,

8 and moving party still wins as a matter of law

9 **Summary Judgment:**

10 no material question of fact (e.g., parties agree on the facts),

11 and moving party wins as a matter of law

12 discovery reduces surprise and increases settlement:

13 depositions (i.e., oral questions); interrogatories (i.e., written questions);

14 volunteered documents (e.g., computer hard drives)

15 *express constitutional rights receive Substantive Due Process* (see, Chap 4)

16 relevant (i.e., more likely): hearsay v. excited utterance

17 **burden of proof**

18 criminal > 99%

beyond a reasonable doubt

19 civil [rare] ≈ 75%

clear and convincing

20 civil > 50.1%

preponderance of the evidence

21 indictment ≈ 25%

probable cause (but, only look at evidence of guilt)

22 arrest ≈ 10%

probable cause (i.e., reasonable person could believe)

23 relationship between trial and appellate courts

24 law provides a defendant: law does not provide a defendant with money.

25

26 **CHAPTER FOUR**

27 typo p. 77; disagree p. 79

28 **binary** conclusions based on **triad** analysis

29 separation of powers:

30 NEB. express

31 federal form of government

32 Art. I, sec. 9, cl. 1: technological change surprises the law

33 **Police Power** is the power of the State government to regulate for the People's health,

34 safety, morals, and general welfare

35 power to **tax** is the power to destroy:

36 but, may not do indirectly that which may not do directly

37 general controls the specific

38 person: natural (e.g., citizen) v. mere legal (e.g., corporation)

39 Art. IV, sec. 2: Privileges *and* Immunities (see also, Amd. XIV, sec. 1: *or*)

40 Art. IV, sec. 1: Full Faith and Credit: domestic comity (see Chap. 52)

41 Art. I, sec. 8, cl. 3: **Commerce Clause**42 AMONG: between = direct **E**ffect

pre-1937

43 within = close and substantial **A**ffectpost-**1937**44 **core** **penumbra** **emanations**

45 transportation manufacturing retail

46 Art. I, sec. 8, cl. 4: naturalization; bankruptcy

47 Art. I, sec. 8, cl. 5: coin money; weights and measures

- 1 Art. I, sec. 8, cl. 7: Post Offices and post roads
 2 Art. I, sec. 8, cl. 8: copyright and patent
 3 Art. I, sec. 8, cl. 9: courts
 4 Art. I, sec. 8, cl. 18: make all laws ... necessary and proper
 5 Art. I, sec. 9 & 10: denial of powers
 6 exclusive (rare) powers v. concurrent (ordinary) powers
 7 ([express grant + express denial] = exclusive)
 8 all foreign affairs to federal government (e.g., naturalization; treaties)
 9 paper money; bankruptcy
 10 **Preemption** is *not favored*, but *may* be allowed if:
 11 1. clear intent of Congress **and** national interests outweigh State interests;
 12 or
 13 2. **express** intent of Congress **and** need for **uniformity**.
 14 preempt if direct conflict (e.g., dormant Commerce Clause); presume concurrent powers
 15 **Bill of Rights**
 16 Amd. I: free religion, speech, press, assembly, petition government
 17 **Free Speech:**
 18 reasonable time, place, and manner regulations
 19 **political** speech: **no** content regulation
 20 **commercial** speech: content regulation if and only if:
 21 [a] directly furthers substantial government interest;
 22 [b] proportional to that interest; **and** [c] least restrictive alternative
 23 **unprotected** speech: defamatory; criminal; obscene (not equal porn, indecent)
 24 Amd. II: militia's arms
 25 Amd. III: quarter soldiers
 26 Amd. IV: **warrants** if unreasonable searches upon probable cause
 27 personal v. statistical probable cause
 28 custodian v. owner of business records
 29 Amd. V: Grand Jury; double jeopardy;
 30 **self incrimination**
 31 only natural persons:
 32 corporation's employee as custodian; who is the attorney's "client"?
 33 **due process**
 34 *substantive* (i.e., fundamental rights: travel; privacy; voting; Amd. I)
 35 **privacy** is an implied, yet fundamental, right
 36 reasonable expectation of privacy
 37 *procedural*: i.e., notice & hearing, both proportional to interest(s) involved
 38 **taking** requires *due process* + public use + just compensation
 39 Amd. VI: speedy & public trial; **jury**; confront witness; Assistance of **Counsel**
 40 Amd. VII: if \$20, then jury; facts by jury
 41 Amd. VIII: no excessive bail; no cruel and unusual punishment
 42 **Amd. IX:** enumeration not disparage
 43 **Amd. X:** not delegate nor denied, then to the States and/or People
 44 Amd. XI: State's **sovereign immunity** in federal courts
 45 Amd. XIII: no involuntary servitude

1 **Amd. XIV**, sec. 1: dual citizenship; Priv. or Immun.; due process; Equal Protection
 2 due process **Absorption Doctrine:** States bound by Bill of Rights
 3 *Equal Protection Clause*
 4 **Rational Basis Test:**
 5 *presumed valid:* social or economic reg.; rational basis; legitimate govt. interest
 6 **Heightened Judicial Review:**
 7 gender, legitimacy, handicap; substantially related; important govt. interest
 8 **Strict Scrutiny:**
 9 race, national origin, citizenship; necessary; compelling govt. interest
 10 Amd. XIV, sec. 5: Congress power to enforce
 11 Amd. XVI: income tax without apportionment
 12 Amd. XIX: a woman is a person
 13 Amd. XXVII: Congressional pay raise only after next election
 14
 15
 16
 17
 18

19 **CHAPTER FIFTY-TWO**

20 USA *Constitution* is a treaty: Senators are ambassadors
 21 international law is the predictable projection of power
 22 customs, executive agreements, treaties, international organizations
 23 treaties
 24 Art. II, sec. 2: President + 2/3 Senate
 25 but, Fast Track Legislation
 26 Art. VI, para. 2: supreme law of law: pursuance v. under the authority
 27 **comity:** consistent with the public policy of the accommodating nation
 28 but, Art. IV, sec. 1: Full Faith and Credit clause
 29 express v. implied and specific controls the general
 30 **Act of State**
 31 judiciary of Nation A not review Nation B's domestic governmental acts
 32 what if Nation B acting within Nation A?: sovereign immunity, sometimes
 33 **sovereign immunity**
 34 Amd. XI
 35 which do domestic business *_always_* prefer: quotas or tariffs?
 36 **dumping** is exporting unemployment
 37 common law: Individual can command judge to decide case of first impression
 38 civil (or code) law: cases of first impression referred by court to the legislature for
 39 answer when and if the legislature chooses to decide
 40 which USA State and which Canadian Province are like Mexico and use civil law?
 41

- 1 **CHAPTER FIVE**
 2 **ethics**
 3 (**see also**, Focus on Ethics
 4 pages 115 - 117; 206 - 208; 376 - 378; 472 - 475; 984 - 986; and 1061 - 1063
 5 which, typically, will be covered after the last chapter of each such Unit)
 6 objective v. subjective
 7 knowing: actual knowledge, receipt of notice, and reason to know
 8 **Bounded Rationality**
 9 person: natural v. legal
 10 good faith: consumer (non-UCC & UCC), merchant, fiduciary
 11 2x2 matrix: **ethics ≠ law; and law ≠ ethics**; gray areas of the law
 12 can = power
 13 may = law
 14 should = ethics
 15 future tense: might, may, ought
 16 *ethics requires the power to act*; the law does not.
 17 business ethics: individual profit max **and** social cost min
 18 POINTS of REFERENCE
 19 Individual can
 20 subgroup(s) can
 21 society can not avoid spillover costs
 22 **punitive damages:**
 23 [1] degree of reprehensibility;
 24 [2] ratio of compensatory to punitive (e.g., typical max of 10p : 1c);
 25 [3] legislatively created civil fines or criminal fines
 26 leading others towards ethics: from top and from bottom organization
 27 knowledge varies by role, as does law.
 28 SOxA requires reporting up the chain of command,
 29 ultimately to the Board of Directors if necessary.
 30 means justify the ends (duty based ethics)
 31 ends justify the means (Utilitarianism)
 32 Golden Rule v. Golden Rule
 33 knowledge distinguishes ignorance v. lie
 34 "cost / benefit analysis" really is benefit / cost analysis (= profit)
 35 bribery correlates with war: rule of law
 36 when in Rome do as SEC requires
 37 bribery (purchase & sale of discretion) v. grease (ministerial facilitation)

- 1 **CHAPTER SIX and CHAPTER SEVEN**
- 2 privileged v. predatory
- 3 objective v. subjective
- 4 standing to sue
- 5 good faith
- 6 type of torts:
- 7 [1] intentional;
- 8 [2] negligence;
- 9 [3] strict liability (not fault based; *social risk allocation*)
- 10 do not focus on the names of specific torts or their specific elements
- 11 unless specifically covered in class (e.g., NEB a&b = assault)
- 12 focus on the generic characteristics (e.g., defenses to a&b on p. 121)
- 13 **elements** of all torts (see, negligence on p. 140)
- 14 [1] duty of care
- 15 [2] breach of the duty of care
- 16 [3] **proximate cause**: what a Reasonable Person in the position of the
- 17 defendant would have **reasonably foreseeable** at the time of the
- 18 defendant's breach the plaintiff's injury (i.e., Bounded Rationality)
- 19 **actual cause**: *chain of events until superseding cause*
- 20 [4] injury (i.e., damages), and
- 21 [5] *no defenses*
- 22 **Assumption of the Risk** (see, p. 145)
- 23 plaintiff **knowing and voluntarily** exposes the plaintiff
- 24 to the risk of harm created by the defendant
- 25 contributory negligence is a **bar** to suit (coupled with actual cause)
- 26 comparative negligence is an **offset** at suit (coupled with proximate cause)
- 27 defamation: slander (= oral); libel (= written);
- 28 unlike slander which does, slander *per se* do not
- 29 require proof of **special damages** (i.e., actual economic loss)
- 30 if public figure, then either actual malice or reckless disregard
- 31 common law **fraud**
- 32 [1] knowing
- 33 [2] intentional
- 34 [3] misrepresentation of a *material* fact
- 35 [4] proximate cause
- 36 [5] damages
- 37 an expert's opinion is a fact
- 38 wrongful interference with [a] contractual relationship; [b] business relationship
- 39 at will employment (Amd. XIII)
- 40 employment, bailment, warranty, and license need not be a contract,
- 41 but can be a contract
- 42 latent defect
- 43 vicarious liability via imputed knowledge
- 44 **damages**, see p. 341 - 347 as well as p. 143
- 45 *res ipsa loquitur*
- 46 negligence *per se*
- 47 strict liability for abnormally dangerous activities, but see p. 457 and 957

- 1 **CHAPTER EIGHT**
 2 separation of powers
 3 preemption
 4 exclusive powers v. concurrent powers
 5 grant of powers v. limitation on powers
 6 **public domain**
 7 property: real v. personal (see, Chap. 47 & 48); tangible v. intangible
 8 Art. I, sec. 8, cl. 8: exclusive rights and limited times; patent & copyright
 9 intellectual property: patent, copyright, trademark, trade secrets
 10 Exhibit 8-1, p. 155: add preemption; reverse engineering; and parody
 11 **patent: idea reduced to practice**
 12 subject matter (not laws of nature, not abstract ideas),
 13 genuine, novel, useful, and not obvious
 14 first to invent v. first to file
 15 disclosure in patent application
 16 scope leaves some trade secret to be captured by **reverse engineering?**
 17 duration 20 years
 18 TRIPS
 19 **copyright: expression of an idea**
 20 fixed in a tangible medium; can be perceived
 21 automatic registration
 22 statutory damages
 23 duration: human life + 70 years; corp. + 100 years
 24 **FAIR USE:** [1] *purpose* of the use; [2] *nature* of the work;
 25 [3] ; *substantiality* of the copying; and/or [4] *effect on the market*.
 26 **moral right:** personal identification of author with the work
 27 **parody** is a constitutional right
 28 DMCA: felony to defeat security measures
 29 **trademark: allow buyer to uniquely identify a source**
 30 *focus on the right of the consumer* rather than the owner of the mark
 31 **parody** is an infringement
 32 federal Commerce Clause and State's Police Power
 33 prior State use **not** preempted by subsequent federal registration
 34 distinctiveness of a mark (i.e., identify a source):
 35 [1] generic, [2] secondary meaning (e.g., descriptive);
 36 [3] fanciful, arbitrary, suggestive
 37 duration: use in commerce
 38 *dilution* of a famous mark
 39 (e.g., cybersquatting) requires actual damages
 40 good faith
 41 **trade secret: [1] information; [2] economic value; and [3] reasonable efforts to protect**
 42 grant of powers v. limitation of powers: only *international* federal TS
 43 Restatement of Torts v. Uniform Trade Secrets Act
 44 not exclusive rights; not limited duration
 45 protection against improper taking (i.e., misappropriation)
 46 **reverse engineering** is a lawful means of obtaining ownership

1 **CHAPTER NINE**

2 capacity: crime > contract > tort > wills

3 legislature must create a crime; but, unitary executive (see, p. 194)

4 tort is harm to an individual with remedy of compensation

5 crime is harm to society with remedy of punishment (i.e., victim lacks standing to sue)

6 **burden of proof** (see, ToL p. 3, line 17)

7 felony v. misdemeanor

8 Grand Jury v. petit jury

9 **elements of crime:**10 *actus reus* (i.e., bad act) **and** *mens rea* (i.e., bad thought) **and** no defenses
11 **scienter**

12 degree of crime

13 attempt crime requires specific intent and is minus one degree from completed crime

14 person: natural v. legal

15 vicarious liability and imputed knowledge

16

17 "principal"	"agent"	control	liability
18 principal	agent	shared what & how	shared
19 principal	independent contractor (IC)	P what; IC how	per control
		<i>strict liability to P</i>	
21 employER	employEE	ER: what & how	all to ER

22

23 float a check v. kite a check

24 mail and wire fraud

25 bribery v. grease

26 insider trading: SEC 10b-5 (i.e., tippee) and SEC 16b (i.e., statutory insider)

27 money laundering: bundle \$10k

28 RICO (Racketeer influenced and Corrupt Organizations) Act

29 two predicate acts within 10 years

30 civil liability (e.g., forfeiture)

31 *full breadth of Congressional authority*

32 capacity:

33 infancy (i.e., **age of majority in NEB = 19**)

34 try child as an adult if objectively prove child has subjective capacity

35 intoxication: involuntary v. voluntary

36 insanity: [1] M'Naghten test; [2] irresistible impulse test; or

37 [3] (majority rule) lacks substantial capacity

38 presumption of capacity, burden to disprove on defendant

39 prosecutorial discretion

40 ignorance of the law is no excuse:

41 but, [1] mistake of fact; and [2] justifiable reliance on one's attorney

42 self defense: NEB must escape, if feasible; COLO may attack attacker

43 liberty restraints on governmental authority:

44 burden of proof; entrapment

45 Amd. IV and Amd. V: exclusionary rule (e.g., fruit of the poisonous tree)

46 Amd. IV, V, VI, and VII: *Miranda* Rule

47 Sentencing Guidelines and the separation of powers