

1 **INTRODUCTION**2 USA law focuses upon actions that are knowing and voluntary.

3 subjective v. objective

4 **knowing:** actual knowledge (subjective) (i.e., scienter)

5 receipt of notice (objective)

6 reason to know (objective)

7 adhesion contract

8 **due process:** notice and hearing, both proportional to the interest(s) involved

9

10 **CHAPTER ONE**

11 reasonable expectations

12 Reasonable Person

13 **binary** conclusions based on **triad** analysis14 **separation of powers**

15 Individual v. government

16 federal v. State

17 legislative v. executive v. judicial

18 (*make law* v. *enforce law* v. *interpret law*)19 (*statutes* v. *regulations* v. *cases*)20 **Judicial Review**

21 equity v. law

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

23 latches v. statute of limitations (can toll) &amp; statutes of repose

24 **express:** words: oral or written (p. 214)25 **implied:** acts, words, **and/or** circumstances26 Natural Law School and *Declaration of Independence* v. *USA Constitution*

27 ethics ≠ law; and law ≠ ethics

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

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

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

31 precedence: binding v. authoritative v. persuasive

32 **precedence:**

33 [a] settled expectations;

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

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

36 substantive law (e.g., *Substantive Due Process*) creates a right37 v. procedural law (e.g., *Procedural Due Process*) enforces a right

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

39 court's **jurisdiction:**

40 subject matter

41 (e.g., bankruptcy), and

42 geographic

43 (i.e., substantial minimal contacts

44 [e.g., jurisdiction of download {p. 34; 87}])

45 **taking:** *due process* + public use + just compensation (p. 24; 77; 973)46 v. *mere regulation*

47 dormant Commerce Clause

1 **CHAPTER TWO**

2 complaint: [a] cause of action; [b] court's jurisdiction; and [c] remedy

3 **substantial minimal contacts** = purposefully avails; long arm statutes

4 confidential v. privileged (p. 42 &amp; 1041)

5 privileged v. predatory

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

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

8 role of trial court: find fact and apply law

9 role of appellate court: find error and interpret law

10 **appellate** court will **affirm** the **trial** court **unless** there is an:11 **clear error of fact,**12 **NON-harmless error of procedure, or**13 **any error of law**14 **person:** natural v. legal

15 All consumers and all citizens are natural persons;

16 some legal persons are corporations.

17 **good faith****Subjective G.F. Objective G.F.**

18 consumer, non-UCC

honesty in fact

*none*

19 consumer, UCC

HiF and

commercially reasonable

20 merchant

HiF and

commercially reasonable

21 fiduciary (utmost GF)

HiF and

personalized objective

22 federal jurisdiction: federal question v. diversity of citizenship

23 ADR:

24 negotiation v. facilitation v. mediation v. arbitration

25 but: discovery, public, precedence, and neutral

26 arbitration can be binding or non-binding

27 federal **preemption** of enforceability of **arbitration contracts in Commerce**28 **adhesion contract:**

29 public policy is hostile towards adhesion contracts

30 because these contracts are less knowing and less voluntary.

31 However, some contracts must be adhesion contracts

32 (e.g., insurance; Amendment XIV's Equal Protection Clause),

33 in which case the law is less hostile.

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

35 unless the non-drafting party had the opportunity to

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

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

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

39 Some pretrial and all settlement conferences are **privileged**.40 In more and more USA States mediation is **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**ffect

post-**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 (*meaning of a comma*)  
 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 (*meaning of all three commas*)  
 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  
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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 SIX and CHAPTER SEVEN**
- 2 privileged v. predatory as distinct from confidential v. privileged
- 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] inducing the plaintiff's justifiable reliance
- 36 [5] proximate cause
- 37 [6] damages (see p. 341 - 347 as well as p. 143)
- 38 an expert's opinion is a fact
- 39 wrongful interference with [a] contractual relationship; [b] business relationship
- 40 at will employment (Amd. XIII)
- 41 *employment, bailment, warranty, and license need not be a contract,*
- 42 *but can be a contract*
- 43 latent defect
- 44 vicarious liability via imputed knowledge
- 45 *res ipsa loquitur*
- 46 negligence *per se*
- 47 strict liability for abnormally dangerous activities, but see p. 457 and 957

