BOOKKEEPING & SYLLABUS

COURSE: Curriculum B: Torts/Contracts/Unjust Enrichment (“Contorts”)  
Fall/Winter 2014--2015.


INSTRUCTOR: Mike Townsend, met@u.washington.edu, 336 William Gates Hall, 543-4907. Office hours: TH 3:30-5 and by appointment.

REQUIRED TEXTS:


These are available at the University Bookstore. Some course materials will be distributed via pdf/doc files or as hard copies in class.

Glannon & Blum: These are examples of “student self-study guides.”

There are several concerns about assigning such materials, including the issues of extra reading and coping with multiple points of view. On the other hand, Glannon & Blum are written well and have the great advantage of providing worked examples that you can use for practice. Moreover, students always ask for my recommendations on such guides.

Some reading from them is required as indicated in the assignments, and I will answer questions you have about these study guides as opposed to others.

With respect to assignments for which there is no required material from Glannon/Blum, you are encouraged to use the Glannon/Blum Tables of Contents and indices to find and read relevant material.
**GRADING:** Grades appear on your transcript only for the full two quarters. The grades will be based on (1) a short mid-course examination given at the end of the fall quarter, and (2) the final examination given at the end of the winter quarter. There are no intermediate assignments (so make use of the Glannon/Blum examples), and there is no grade for class participation, although I may call on people from time to time.

The material in this class will be fully integrated, but *I will write your exams and grade your answers so as to give you separate contracts and torts grades.* I will do this to minimize the need to explain transcripts to future employers. Examinations might have questions particular to contracts or to torts, as well as integrated questions, similar to the hairy-hand hypo for Assignment 1, that require you to consider both subjects simultaneously. To familiarize you with the exam format, the course website has a sample midterm—note that course coverage changes from year to year.

The mid-course and final examinations are “open book” in the sense that you may use your required books, your class notes and handouts, and any outlines that you have prepared. No other materials may be used. The mid-course examination will count 10%. The final exam will count for the remaining 90% and will cover the entire course. If you use a computer, then you will be required to use exam-taking software.

The “mandatory-curve” for the overall course is explained in the law-school bulletin.

**FURTHER NOTE ON GRADING:** The course grade is based on the midterm and final. There is no other graded intermediary work, but worked problems will be provided from time to time. Although there are some exceptions, most notably your legal skills course, this is fairly typical of courses here and at other law schools. This often comes as a shock to those used to the typical undergraduate course. Reasons for such a grading scheme range from a sense that law-school grading is not so much about testing rote learning in discrete areas (that’s for the bar exam) as it is about testing an overall legal-type pattern matching ability best reflected as a GPA to the lack of institutional structures such as a cadre of teaching assistants.

**CLASS NOTES:** To the extent feasible, I provide class lecture notes. *These notes generally are finished by me on the class day, so they are provided by hard copy at the beginning of class and, if possible, by e-mail a few minutes before class. The notes are intended to facilitate class discussion by taking away some of the drudgery of trying to read my handwriting. They are not intended to be a substitute for attending class or for paying attention in class or for engaging the material on your own before class. Note that the law school requires 80% attendance to receive credit for a course.*

**CLASS MECHANICS:** In the fall, we meet for two consecutive 50 minute periods MTWTH. Normally (BUT NOT ALWAYS), there will be a ten-minute break after the first period.
**COURSE MATERIAL:** We cover the traditional torts and contracts material.

As far as torts is concerned, we cover the traditional areas of negligence, intentionality, and absolute liability. Roughly speaking, this is the material in Dobbs Chapters 1-10, 12-13, 16, and 19-31. Some of the material in Chapters 19-22 will be covered by discursive reading from other sources. The remaining material in Dobbs is left for other courses or for your own study.

As far as contracts is concerned, we cover the traditional areas of contract formation and enforcement. Roughly speaking, this is the material in Dawson Chapters 1-6. The material in Chapter 6 is covered by lecture. The material in Chapters 7&8 is left for your bar-review course.

The Dawson contracts book also has a brief introduction to unjust enrichment law, which we will cover.

We will skip around a bit in the books, and you might find this distracting at first, but all major texts are written to accommodate various permutations of the material. I expect you to keep up with the reading, taking into account the number of 50 minute periods to be spent on an assignment. You are responsible for all the assigned material, whether or not it is specifically discussed in class.

**NOTE ON READING:** MANY, IF NOT MOST, FIRST-YEAR STUDENTS ARE SHOCKED, EVEN DISMAYED, BY THE DIFFERENCES BETWEEN (A) WHAT THEY GET OUT OF THE MATERIAL FROM READING THE NIGHT BEFORE, AND (B) THE TEACHER’S COVERAGE OF THAT SAME MATERIAL IN CLASS THE NEXT DAY. DO NOT DESPAIR; THE DIFFERENCES DIMINISH AS THE THREE YEARS OF LAW SCHOOL PROGRESS. INDEED, THIS DIMINISHMENT IS A LEARNING GOAL.

**Disability-related needs:** To request academic accommodations due to a disability, please contact Disability Resources for Students (DRS), 448 Schmitz, (206) 543-8924 (V), (206) 543-8925 (TTY). If you have a letter from DRS, please present the letter to me so we can discuss the accommodations you might need in this class.

I expect you to bring your books, handouts, and Restatements to class as per the course syllabus. A rough schedule and annotated syllabus for the first quarter follow.
FALL-QUARTER SCHEDULE

Week 1:
- Sept. 22: (Asst. 1) Introduction to Contorts & Hairy Hand
- Sept. 23: (Asst. 1)
- Sept. 24: (Asst. 2) Tort Neg. Duty: Reasonable Person, Standards v. Rules
- Sept. 25: (Asst. 3) Tort Neg. Breach of Duty: Concretizing the RP--Role of judge, jury, legislature, and custom
- Sept. 26: (Asst. 3)

Week 2:
- Sept. 29: (Asst. 3)
- Oct. 1: (Asst. 4)
- Oct. 2: (Asst. 5)

Week 3:
- Oct. 6: (Asst. 6) Contract Duty: Restatement Sections 1 & 2, ground for enforcement: deals—definition of consideration
- Oct. 7: (Asst. 6)
- Oct. 8: (Asst. 8) Contract Duty: Special issues with bilateral—factual and logical lack of commitment

Week 4:
- Oct. 16: (Asst. 13) Contract Duty: contracts grounded in the past—barred obligations & recognition of past benefit
- Oct. 18: (Asst. 15) Contract Breach: Conditions

Week 5:
- Oct. 20: (Asst. 15)
- Oct. 21: (Asst. 16)
- Oct. 22: (Asst. 17)
- Oct. 23: (Asst. 18) Tort Neg. Consequence: Proximate cause

Week 6:
- Oct. 27: (Asst. 18)
- Oct. 28: (Asst. 18)
- Oct. 29: (Asst. 19) Tort Neg. Consequence: Proximate cause (special harms—emotional distress, pure economic loss)
- Oct. 30: (Asst. 20) Contract Consequence: Cause in fact, Hadley

Week 7:
- Nov. 3: (Asst. 22) Actual damages—Groves
- Nov. 4: (Asst. 23) Actual damages—certainty
- Nov. 5: (Asst. 24) Actual Damages—UCC
- Nov. 6: (Asst. 25) Contract Sanction: Coercion (specific performance/injunction)

Week 8:
- Nov. 11: (Asst. 26) Contract Sanction in non-deal setting: Section 90, promises grounded in past, seal
- Nov. 12: (Asst. 28) Tort Neg. Sanction,
- Nov. 13: (Asst. 29) Contract Capacity Defenses

Week 9:
- Nov. 17: (Asst. 30) Tort Capacity Defenses,
- Nov. 18: (Asst. 31) Contract Defense: Mistake
- Nov. 20: (Asst. 34) Contract Defense: Imptractability

Week 10:
- Nov. 24: (Asst. 35) Contract Defense: Avoidability
- Nov. 25: SLACK (If we are behind will use, else no class.)
- Nov. 26: SLACK

Week 11:
- Dec. 1: REVIEW SESSION
- Dec. 2: STUDY DAY
- Dec. 3: STUDY DAY
ANNOTATED SYLLABUS FOR THE FIRST QUARTER

Assignment 1 (4 fifty-minute periods):
Dobbs Casebook: 20—32.
Handout: “The hairy hand.”
Blum: §§2.3-2.6, 3.1-3.3 (most of these generalities also apply to torts). (4th and 5th same).

The first four periods provide an introduction to the course. Roughly speaking, we will consider the following questions.

With what is the American legal system concerned?
What does the system look like?
Why have such a system?
Who runs it? (‘‘Source of sovereignty’’ question)
What forms do laws take? (‘‘Source of law’’ question)
How is the course material organized?
As indicated in the class discussion of Assignment 1, a key theme of the course is that torts and contracts share a basic substantive template. Roughly speaking, we cover culpability, then consequence, then sanction.

We begin with culpability. In reading the cases in this Assignment, you should focus your attention on culpability, not on consequence or sanction. This might require “filtering” or “bracketing” out other parts of the case.

We must start with either the contracts or torts view of culpability. I have decided to start with torts. In particular, I have decided to start with negligent torts.

Remember that culpability deals with two basic questions. What are the standards/rules of conduct, which subject defendant to the possibility of a successful suit if not met? Did Δ’s behavior conform?

This assignment focuses on the first question. In negligent tort law, this question can be broken down into two further questions. What is the nature of the negligence duty? When does this negligence duty exist?

What is the nature of the negligence duty? We begin by considering whether rights/duties should be expressed in terms of rules or standards. Without getting into an argument about definitions, we will say that rules are expressed in terms of facts, standards in terms of principles. The Kennedy excerpt has more. As is clear from the reading, our legal system approaches the negligence duty in terms of the “reasonable person” standard. We will see later that contract law prefers rules to standards.

When does this negligence duty exist? Do you see any discussion of such a question in the cases? We will see that modern tort law spends little time on the existence-of-duty question in negligence cases. That is, it is generally assumed that one must act reasonably in the circumstances. We also will see that the situation is quite different in contracts. One need not always keep a promise. In contracts, there is an elaborate body of law describing the circumstances in which an extant promise becomes a legal requirement.

Make sure you understand that the Restatement is not law. It is the egghead view of what generic tort law is.
Assignment 3 (4 periods):
Dobbs Casebook: 124—37 (skip note on page 125, skip n.4 on page 136), 143-57, 174—77 (start with Duncan).
Glannon: 118-62.

This assignment focuses on breach of the due-care duty.

One of the downsides of using a standard to describe a duty is that it might be difficult to determine if that duty has been breached. In particular, what is “unreasonable” under the circumstances? Look at the range of possibilities described in n.3 on Dobbs page 157. We could, as suggested in (1) and (5), just leave it to the jury with a vague instruction. In this regard, go back and reread the jury instruction in Stewart on page 110.

I think you can feel the pull to concretize/particularize the due-care standard. Note 3 on page 157 suggests the other possibilities that we explore in this assignment. They include the use of rules of thumb in certain circumstances (e.g. Marshall on page 124), the use of statutes (e.g. Martin on page 127), and the use of industry custom (e.g. Duncan on page 174).

But the most controversial of attempts at concretization, and the one on which we spend the most time, is a cost-benefit approach (e.g. Carroll Towing on page 153). Be careful of the scholarly attention paid to this approach. It might appear far less at the trial level than the discussion in Glannon suggests.

NOTE: I do not see any such approaches as replacing the due care “standard” with a “rule” so much as saying we “know” how the general standard “operates” in a particular case. That is, the attempts at concretization come in at the breach of duty stage. In this regard, look at the language in the last two sentences of Marshall (pp. 124--25).

You may note that some cases discuss the issue in terms of plaintiff’s contributory negligence. That is, the cases discuss whether plaintiff violated a duty to exercise reasonable care for herself. Contributory negligence is a defense we will discuss later. Ignore that distinction for now.

Assignment 3.5 (On your own):
Dobbs Casebook: 157—60.

We cover the multiple-defendant situation later, but you might find it helpful to look at these pages now.
Assignment 4 (3 periods):
Dobbs Casebook: 161 (just the first paragraph), 177—91 (start at Section 4 on page 177; don’t read Collins).
Glannon: Chapter 9.

The preceding assignments focused on the substance aspects of tort culpability. This assignment deals with some procedural matters. In particular, we consider how one establishes culpability in situations in which defendant’s precise conduct is hidden. For present purposes, plaintiff’s typical negligence culpability presentation consists of (1) establishing defendant’s actual conduct and (2) showing that such conduct breaches the due care standard. (Remember, we are assuming that due care is the general standard and that it always exists.) Now, the two situations that have come up are the res ipsa situation (think of Byrne—page 178), where plaintiff has a problem with respect to both (1) and (2), and the scenario of note 3 on page 185, where plaintiff has trouble with (1). Focus on two questions in connection with res ipsa. When does it apply? When it applies, what is its effect?
Assignment 5 (3 periods):
Dobbs Casebook: 346-72 (stop at Brown, you will have to skim Ybarra’s discussion of vicarious liability/respondeat superior), also reread T.J. Hooper (pages 176-77). In connection with Ybarra, look at the Collins material on pages 191-92.

This assignment offers a brief look at the medical situation. Make sure you distinguish between the provision-of-services material (e.g. botched surgery) and the informed-consent material.

This assignment finishes our first look at negligent tort culpability from the plaintiff’s point of view. We will look at various culpability defenses later. We turn next to (some of) the corresponding contract material.

Assignment 6 (3 periods):
Dawson Casebook: 206-216 (skip Marmer), 613-616 (skip Embola).
Contracts Restatement: §§ 1, 2, 3, 17, 71, 72, 75, 79, 81.
Handouts: Introduction to Restatement.
Blum: Chapter 7 (skip 7.3.5 and Example 7)—roughly speaking: §§ 7.1-7.4 & 7.7-7.8 cover Assignment 6 and Section 7.5-7.6 cover Assignment 7 and Section 7.9 covers Assignment 8. (4th and 5th same).

Remember that culpability deals with two basic questions. What are the standards/rules of conduct, which subject defendant to the possibility of a successful suit if not met? Did Δ’s behavior conform?

This assignment focuses on the first question. In contract law, this question can be broken down into two further questions. What is the nature of the contract duty? When does the contract duty exist?

With respect to the nature of the duty, defendant’s behavior is prescribed by defendant’s own promise. That is, defendant herself sets up the substance of the duty. Read the Restatement § 1 black letter carefully, and note the definition of “promise” in Restatement § 2. Contract law prefers promises that are definite in nature. With respect to duties, that is, contracts prefers rules to standards. This contrasts with the negligence duty in tort. We will talk more later about this definiteness requirement. For now, ask yourself why there is/should be a difference.

Consider next the existence question. That is: In what circumstances should a promise rise to a legal baseline? In terms of Restatement § 1, when does a promise become a contract? This is the “grounds for enforcement” or “validation” issue. This is the focus of this Assignment. Although our book uses the phrase “grounds for enforcement,” I prefer the word “validation” because words like “enforcement” and “enforceability” have multiple meanings and are overused. As opposed to the situation with negligent torts, there is an elaborate body of law on the existence issue in contracts. Indeed, this material takes up much of Dawson Chapters 2 and 3. Again, you should think about why this is/should be the case.
You can begin by asking: Why should one keep a promise? What should/would/do you tell your own children about this question?

According to some philosophers, the answer is that a moral obligation arises from the very act of making a commitment to future action. In lay terms, “You gave your word!” This type of answer is called “deontic,” from the Greek for “that which is obligatory.”

Another answer to the promise-keeping question is provided by economists who tout the benefits of markets. In lay terms, “We had a deal!” This type of answer is called “instrumentalist.” We say that instrumentalist reasoning is forward looking and deontic reasoning is backward looking.

Others offer the justification, “I relied on you!” Whereas the first answer focuses on the promisor, and the second answer focuses on the promisor and promise, the reliance answer focuses on the promisee. Do you consider this answer deontic or instrumentalist?

Dawson’s Chapter Two considers the legal reception of these basic rationales. We begin with “We had a deal!” Economists point to the modern market economy with its credit, insurance, resource allocation, and division of labor features, all of which would be impossible without a mechanism for securing future performances. For instrumentalists, *contract law involves bringing the future into the present.* What do you think about this answer? Even accepting its force in everyday life, should it follow that every promise creates a *legal* standard? This assignment considers these questions.

In our study of deals, we distinguish the statics/structure of a completed deal from the dynamics/mechanics of deal formation. In the context of deals, there is a large body of law on both. Chapter Two is largely about the structure of deals, and Chapter Three is largely about the mechanics of deals.

The focus for now is the structure of a legal deal. For the most part, this course considers simple deals. That is, deals not involving third-party plaintiffs or defendants. (But who exactly are the plaintiff and defendant in *Hamer*?) Roughly speaking, there are three things to keep in mind. (1) In a legally recognized deal, we have a bargained-for exchange—defendant’s promise for some returned thing from the plaintiff (normally some combination of promises and/or acts). (2) This “thing” must satisfy a “kind” analysis. (3) As a general matter, this thing need not satisfy any “degree” requirement. (But we will see that the degree issue may affect the sanction.) That is, plaintiff’s return must be of a certain type (“kind”) but there is no balancing of defendant’s promise against plaintiff’s return (“degree”).
Pay careful attention to the terminology in the deal arena--consideration, legal benefit, legal detriment, sufficiency of consideration, nominal consideration, adequacy of consideration. The deal theory is predominant in Anglo-American law, so be forewarned that this assignment is only an introduction to our study of deals.

Note: We will spend more time on the Contracts Restatement than the Torts Restatement.

IMPORTANT NOTE ON BLUM CHAPTER 7: Blum’s Chapter 7 illustrates one of the problems with using student study guides. On page 178 (154 4th ed., 174 5th ed.), Blum says “Consideration is an essential element of contract, and a promise is not recognized or enforced as contractual unless consideration has been given for it.” This is not accurate! It is true that the law prefers to see deals, but promises are recognized and enforced as contractual even in the absence of deals. You may already have noticed that Restatement Chapter 2, Topic 4 is entitled “Contracts without Consideration.” Read Blum’s Chapter 7 as a description of the structure of a deal.

IMPORTANT NOTE ON DAWSON: AS OPPOSED TO DOBBS, DAWSON PICKS CASES THAT GENERALLY ARE BETTER FOR TESTING YOUR METTLE IN THE SKILL OF READING A CASE. BATSAKIS IS A GOOD EXAMPLE OF THIS.
Assignment 7 (1 period):
Handout: *Duncan v. Black* and following material.
Contracts Restatement: §§ 73, 74.

This assignment considers the “kind” requirement when plaintiff returns an act. The Restatement position is that there are two forbidden types of plaintiff returns--those involving certain claim settlements and those involving pre-existing legal duties. With respect to claim settlements, what is the key difference between the First and Second Restatements?

In doing legal work, you must be able to “find the law” by researching various materials. So far, we have concentrated on cases and my lectures. In this assignment, you learn about the pre-existing duty rule by reading a commentator (Blum) and the Restatement §73. **We will not spend a lot of time on pre-existing duties in class.**
Assignment 8 (2 Periods):
Dawson Casebook: 348-56 (skip Davis and Problem (2) on page 351).
Handout: Gurfein.
Contracts Restatement: §§ 2, 7, 8, 75, 76, 77, 78, 79, 80.

This assignment focuses on the “kind” requirement when plaintiff returns a promise. In addition, Section 80 covers compound returns (e.g. combinations of promises and acts). There is a lot going on here.

With respect to the “kind” analysis, focus on the following questions.

Should we accept promises as valid returns at all? (Pages 348-50)

What should we do if defendant would have trouble “turning the picture around” and suing plaintiff? (Pages 352-53)

What should we do if plaintiff’s words arguably lack the commitment necessary to satisfy the §2 definition of a promise? (350-51 and 353-56).

IMPORTANT NOTE ON THE RESTATEMENT: THIS ASSIGNMENT CONTAINS SOME TRICKY RESTATEMENT SECTIONS. AS SUCH, THEY ARE GOOD FOR LEARNING HOW TO READ THE RESTATEMENT.

Assignment 9 (2 periods):
Dawson Casebook: 300-304.
Contracts Restatement: §§ 17(1), 18, 19 (Comment b), 20, 21, 22, 23, 24, 50(1).

We have talked about the formal structure of a deal. We will have much to say about the details of deal formation later. Indeed, the mechanics of deals is the focus of Dawson’s Chapter 3. Nonetheless, we will make a few preliminary comments about deal formation at this time.

As indicated in the reading, deals are usually formed through the mechanics of offer and acceptance. One problem is when the parties disagree on whether a purported offer/acceptance is an offer/acceptance. Embry is meant to introduce the substantive answer to the problem.
Assignment 10 (1 period):
Handouts: Article on Section 20.

Look at the formal structure of §20. Consider two parties who attach differing subjective meanings to a manifestation (think McKittrick’s statements). Suppose two possible meanings--there is a contract (K) (think Embry) and there is not a contract (No K) (think McKittrick). There are two determinations made with respect to each party. First, a party either knows or does not know of the other party’s attached meaning. Second, a party either has or does not have reason to know of the other person’s attached meaning. It is critical to understand that there is no necessary dependence of these determinations. The independence of the determinations with respect to a given party follows from the formal structure of the black letter, together with the canon of construction that all words must be given meaning. Indeed, if a given party “having reason to know” implied that party “knowing,” then (1)(b) would be logically equivalent to “each party knows the meaning attached by the other.” Similarly, if “knowing” implied “having reason to know,” then (1)(b) would be logically equivalent to “each party has reason to know the meaning attached by the other.” It is also clear from the wording that the determinations of one party need not depend on the determinations of the other.

1 It also follows from the Restatement definitions. The Restatement defines knowledge as “conscious belief in the truth of a fact.” According to the Restatement: “A person has reason to know of a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know of a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence.” The Restatement goes on to say that “reason to know is to be distinguished from knowledge.” RESTATEMENT (SECOND) OF CONTRACTS § 19 Comment b (1981).
2 See also RESTATEMENT (SECOND) OF CONTRACTS § 19 Comment b (1981) (“Knowledge means conscious belief in the truth of a fact; reason to know need not be conscious.”). Colloquially speaking, a person may have reason to know of a fact without having a conscious belief in the truth of that fact.
3 The idea that the law draws a distinction between a conscious belief and a reasonable conscious belief troubles some students. Colloquially speaking, a person may have a conscious belief in the truth of a fact without having reason to know of that fact.
Consequently, these determinations yield the 16 cases given in the table below.

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According to Section 20, what happens in each situation? Is Section 20 consistent? This gives us a chance to talk about mechanical jurisprudence, legal realism, and critical legal studies in more detail.
Assignment 11 (2 periods):
Dawson Casebook: 238-49 (not Siegel).
Handout (11A): East Providence Credit Union material.
Contracts Restatement: Section 90.
Handout: (11B): Allegheny College article.
Blum: Chapter 8 (skip §§8.3 & 8.7 & 8.12 and Examples 5 and 6).
(5th same, 4th -- Chapter 8 (skip §§8.3 & 8.7 and Example 5)).

This assignment covers “I relied on you!” Read the Allegheny College article carefully. In learning the law, you have used cases, my lectures, the Restatement, and commentators. This assignment gives you an introduction to the use of law review articles. As you are reading the article, focus in particular on the following: the doctrinal history of Section 90, the notion of law as a discipline, the artistic aspect of Allegheny College, and the Allegheny College deal.

IMPORTANT NOTE ON BLUM: Reread the note on Blum in Assignment 6. Once again in Chapter 8, Blum seems to be suggesting that §90 is not really part of contract law. This is most definitely not my position and not the position of the Restatement. A contract is a “legally recognized promise.” A promise can become a contract through a deal, but a deal is not required. Section 90 will work as well. Read Blum Chapter 8 as a description of the elements of Section 90.
Assignment 12 (1 period):
Dawson Casebook: 193-201, 203-06, 166-68 (include last full paragraph).
Handouts: Introduction to the UCC.
UCC: §2-203 and the sections referenced below.

This assignment considers “You gave your word!”

Fix in your mind the following features of the UCC (skim the referenced sections). (i) As opposed to the Restatement, the UCC is law. Be careful even here. The Sections are law. The Official comments are part of the “legislative history,” and, although often referenced in interpreting the Code provisions, are not law. (ii) The UCC has been enacted as a statute in all but one state and in virtually identical form down to the numbering of the sections. (iii) As a general matter, it covers “commercial transactions,” and its aims are simplification, clarification, modernization, and uniformity. It is meant to reflect commercial practice (§1-102(2)). (iv) In a sense, the UCC represents an island in a sea of common law, and “unless specifically displaced by the provisions” of the UCC, the common (i.e. judge-made) law still governs (§1-103). (v) In this course, we are interested in Article 2, colloquially described as the “sale of goods” Article. The Article itself says somewhat more generally that it covers “transactions in goods” (§2-102). (vi) The word “goods” has a specific meaning (§§2-105(1), 2-107). (vii) There are competing approaches for dealing with so-called mixed contracts (goods and services). Such approaches are beyond the scope of this course. (viii) There are upper-level courses covering Article 2.

Note: Remember the basic first-year sources of law: judicial decisions, statutes, and constitutions. Contracts and torts courses focus on judicial decisions. Through an examination of the UCC, the contracts course also serves as your introduction to statutes as a source of law. We do not cover constitutions in our course. The goal is not to become a UCC expert. Indeed, there are a host of UCC courses available in the second and third years. The goal here is to understand some of the differences between statutory and judge-made law. We spend more time on statutes in contracts than in torts.
Assignment 13 (2 periods):
Dawson Casebook: 220-28 (skip the question on following Mills, stop at the end of Harrington).
Restatement: §86 (skip Comments b, g, and h).

While the validation notion is usually clear in a given case, some cases are hard to classify. Some see these cases as “We had a deal!” Some see them as “You gave your word!” Some see these cases as something else, such as waiving a defense. In any event, make sure you understanding the factual difference between the barred-obligation and Mills/Webb cases.

We also talk about validation devices in the Old Testament. No reading for this.
Assignment 14 (1 period):
Contracts Restatement: § 201.
Handout: Calamari and Perillo Hornbook on indefiniteness.

The law of negligent torts accepts duties described by standards, but contract law prefers duties described by rules. That is, contract law requires definiteness. With definiteness, the issue of breach in contracts becomes relatively simple, as opposed to torts.

Consider the following general statements about culpability in negligent torts and in contracts. As far as the nature of the duty is concerned, contracts prefers rules but torts accepts standards. As far as the existence of the duty is concerned, contracts has an elaborate machinery while torts doesn’t. As far as breach is concerned, torts has an elaborate machinery, but contracts doesn’t.

These observations might not surprise you if you start with the premise that there is little possibility of advance negotiation in most negligent torts situations (the hairy hand hypo is an exception) but there is the possibility of advance negotiation in most contract settings (rewards are an exception).

Assignment 15 (2 periods):
Handout: Gilbert’s on condition subsequent.

The preference for rules makes the breach issue simpler in contracts than in torts. Still, the breach of promise issue is not exactly trivial. The one fly in the ointment is the doctrine of conditions on performance. This material will be covered completely by lecture. The idea is that there are two types of breach. Breach by repudiation occurs before performance is due and breach by nonperformance occurs after performance is due. But we must know when performance is due to determine which type of breach we have. The doctrine of conditions on performance tells us when performance is due.

MAKE SURE YOU BRING ALL YOUR RESTATEMENTS TO CLASS FOR THESE PERIODS.
We shift our attention to consequence.

For a number of reasons, law school focuses on the notion of consequence in the context of torts. The corresponding discussion in contracts courses/books is extremely brief.

The consequence analysis consists of two steps. First, we determine the “outcomes” of defendant’s breach of duty. Second, we decide for which of these outcomes defendant will be held legally accountable.

Assignments 16 and 17 focus on the first step in the consequence analysis. This first step is sometimes called the cause-in-fact or actual-cause step.

There are two points to Assignment 16. First, we must understand the traditional counterfactual or but-for approach to cause in fact. The idea here is that differences between the (counterfactual) world as it would have been had defendant carried out her duty and the world as it is under defendant’s actual conduct are those “caused in fact” by defendant’s behavior. The second point is that there are problems with the counterfactual/but-for approach which has led some courts to consider an alternative approach, called the substantial-factor (or material-element) approach.

Assignment 17: (3 periods):
Glannon: Read the Introduction to Chapter 11. Then read (only) the fact patterns provided in Examples 16 and 21.

This assignment also has two points. One involves the use of probabilities in establishing cause in fact. The second involves the general question of the use of scientific evidence.
Assignment 18 (6 periods):
Dobbs Casebook: 218—49 (skip n.3(c) on page 222), re-read 129-34.
Handout: Dobbs on attorney fees §3.10(1), Dobbs on intervening forces of nature.
Glannon: Chapter 12.

This Assignment deals with the second step in the consequence analysis. As a general matter, lawyers call this the “legal-cause” step. In torts, legal cause is referred to as “proximate cause.”

I think of the idea here as “attribution” or “accountability.” Of the things cause-in-fact by the defendant, which will be attributed to the defendant? That is, for which outcomes will defendant be held legally accountable? As the Dr. Dayden example on page 218 makes clear, we might be reluctant to legally attribute to the defendant everything that is caused-in-fact. That is, we might be reluctant to say that the defendant is the legal cause of everything that is caused-in-fact.

**You should be aware that this material is one of the most complicated parts of traditional torts courses.**

This assignment deals with three related issues: the appropriate guidelines for attribution, the appropriate rhetoric for attribution, and some specific doctrine in several canonical fact patterns: “unusual plaintiff” (think *Palsgraf* on page 223), “unusual type of harm” (think 3(a) on page 222), “unusual extent of harm” (think eggshell skull on pages 234-35), and “unusual sequence of events leading to harm” (think *Watson* on page 237).

We focus here on outcomes that represent harms to the plaintiff. It is generally up to the defendant to raise differences that are benefits, so we will talk about such differences in connection with defenses.

Assignment 19 (1 period):
Dobbs Casebook: n.8 on page 371.
Handout: Understanding Torts §§ 10.01, 10.02, 10.03, 10.04.

This assignment considers the proximate-cause issue in some special contexts. **The material talks in terms of culpability, as if culpability always has a class of person/type of harm analysis. As I have indicated, I do not like that view. I think it’s better to see these as proximate cause issues.**

NOTE: The discussion of wrongful life presents another issue for the but-for approach to cause-in-fact; namely, commensurability. How do we compare not ever being alive (world of due care) to being injured (world under actual conduct)?
Assignment 20 (1 period):
Dawson Casebook: 75-78 (Hadley), 82-85, 87-91.
Contracts Restatement: §§ 348(3), 351, 353, 19 (comment b).

We turn to consequence in contracts. Consequence plays much less of a role in contracts courses than in torts courses. There are two possible explanations. First, perhaps consequence plays less of a role in contracts cases than in torts cases. Second, as a matter of pedagogical efficiency we focus more on consequence in torts (and more on sanction in contracts). In any case, the Dawson casebook is traditional in this regard.

Remember that there are two steps to the consequence analysis.

The first step is the cause-in-fact step. Under the traditional but-for approach, we build two worlds. One is the world as it is now under defendant’s behavior. The other is based on baseline behavior. The idea of is that the differences are those “caused in fact” by defendant’s conduct.

The second step is the legal-cause step. The idea is to attribute some (perhaps all or none) of the differences to defendant. Attributed differences are to be measured by the sanction machinery.

As you read through the material, think about how the consequence machinery works in contracts as compared with torts.
We turn next to sanction.

As already mentioned, torts courses concentrate more on consequence (at the expense of sanction) and contracts courses concentrate more on sanction (at the expense of consequence). We continue the tradition by starting the sanction discussion with contracts.

In class, we present a general framework for thinking about sanctions from the first-year point of view. Here is a picture.

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<table>
<thead>
<tr>
<th><strong>Types of Sanctions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Damages</td>
</tr>
<tr>
<td>Punitive</td>
</tr>
<tr>
<td>Nonpunitive</td>
</tr>
<tr>
<td>Compensatory</td>
</tr>
<tr>
<td>Fixed (say by statute, parties, …)</td>
</tr>
<tr>
<td>Actual</td>
</tr>
<tr>
<td>Nominal ($1—even if “no compensable harm” or can’t prove)</td>
</tr>
</tbody>
</table>

Generally speaking, the sanction of coercion is nonmonetary. The sanction of damages is monetary. For the purposes of this course, there are two types of damages—punitive and nonpunitive. For the purposes of this course, there are two types of nonpunitive damages—nominal and compensatory. (Some people use the word “noncompensatory” for punitive and nominal damages.) For the purposes of this course, there are two types of compensatory damages—fixed and actual. The particular focus of this assignment is actual damages.

We begin with actual damages. Some people offer general formulas for measuring the expectation interest. I am not a big fan of such attempts outside of the fact that they might help us think about the “logic” of the situation. Nonetheless, these formulas do appear from time to time, so we should get used to them.
Assignment 22 (2 periods):
Dawson Casebook: 6-16, 26-27, COMMENT on 50-53 (ONLY READ from the start up to and including the first paragraph following the Holmes excerpt (Dawson page 50 to top of 53)--ignore the rest of the COMMENT, 802-04 (Jacob & Youngs)
Contracts Restatement: §§ 347 (comment b), 348(1),(2), 355. ALSO READ Restatement's Chapter 16 Introductory Note and the Reporter's Note that follows it (pages 99-102 of Volume Three--right before Section 344).
Handout: Snider, Muris, redactions and Groves.
Blum: Example 7 of Chapter 18. (4th and 5th same).

The Groves material presents the basic contracts position on punitive damages. As the reading indicates, the traditional notions of retribution, rehabilitation, and deterrence have little pull in the contracts setting.

We focus here on actual damages. Everybody agrees that we must calculate the monetary equivalent of the “hole in the ground.” How easy is it to calculate this amount? Carefully consider the structure and substance of the argument over two possible calculations in Groves. What is the importance of the fact that the diminution in market value is less than the cost of completion/repair? How could this have arisen in the hairy-hand hypo?

Assignment 23 (1 period):
Handout (23A): Freund and Fera material.
Handout (23B): Excerpt on nominal damages.

This assignment covers some odds and ends of the basic picture of damages.
Assignment 24 (3 periods):
Dawson Casebook: 22-26 (skip questions after Acme Mills and skip Laurin).
Handout (24A): Missouri Furnace material.
Handout (24B): UCC remedies survey, more on the lost volume seller, more on other 2-708(2) situations (p. 903 of Knapp et. al.) & Keating, buyer’s problem and answers, seller remedies problem and answers, White & Summers on §2-714.

In spite of my dislike of general formulas, sometimes we are “required” to consider them.

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You should be aware that this material represents one of the most complicated parts of traditional contracts courses.

Assignment 25 (2 periods):
Dawson Casebook: 158-174 (stop at In Rem …), 177-85 (including NOTE),
read 188-91 on your own, skim 885-93 (stop at “marriage”).

This assignment covers the sanction of coercion. This topic is complicated by the history of two types of court systems--one specializing in coercion, the other in money. This history explains the existence of the two basic prongs of analysis--adequacy (of damages) and balancing (the equities). In contracts, coercion is called equitable, and a damage award is called common law (or even more confusingly “legal” or “at law”). Make sure you can distinguish this use of the phrase “common law” from other uses: referring to judge-made law as opposed to statutory law, referring to judge-made law as opposed to Restatement rules, and referring to the Anglo-American legal system as opposed to other legal systems such as the so-called civil-law system used in continental Europe.
Assignment 26 (1 period):
Dawson Casebook: 222-25, 281-83.
Contracts Restatement: §§ 86, 364 (Comment b).

How much does the consequence/sanction picture change in the non-deal setting?

Assignment 27 (1 period):
Dawson Casebook: 156-58 (Manchester Dairy), 134-152 (not Problem).
Contracts Restatement: §356.
Handout: Banta.

We have seen that plaintiff faces a number of hurdles in truly placing herself where she would have been under defendant’s promise: Hadley, no-emotional-damages, certainty, and (in)adequacy/balancing-the-equities principles. What if she tries to handle these sorts of things “up front” by inserting clauses into the contract? Put slightly differently, to what extent shall we allow parties to contract around the default contract rules?

Assignment 28 (2 periods):
Dobbs Casebook: 775—90 (start with “Property torts”).
Glannon: Chapter 18.
Handout: Chapter 16 of Glannon’s third edition.

In this assignment, we consider sanction in the context of torts. The focus here is on actual damages. We will talk about punitive damages in tort law later.
[NOTE A. Chapter 16 of Glannon’s third edition.

(i) Importance: (a) As Glannon puts it on page 371: “As a lawyer, you will need to understand these actuarial matters well enough to prepare an expert to testify, and to expose doubtful testimony by cross-examining the other side’s economic experts. So it is worth a little brain drain to try to understand what’s going on ….”

(b) Glannon focuses on litigation, but obviously an understanding here is important for pre-trial negotiation/settlements, as well as for deciding whether to take the case in the first instance.

(c) Glannon focuses on torts, but issues can arise in contracts as well (see also Contracts Restatement Section 354).

(ii) Exposition: I am not going to spend a large amount of class time going over what I consider to be a very good exposition in Glannon. I suggest you read Glannon twice before you consider looking for “better explanations.”

(iii) Even with (ii), it is worth keeping the following points in mind.

(a) The basic context of future periodic losses: Plaintiff suffers an injury which will result in periodic losses in the future. In the hairy-hand case, for example, both contract and tort breaches result in periodic future losses, say yearly wages.

(b) No periodic lawsuits so we need present value: (1) The law frowns on periodic lawsuits. For example, the law frowns on the hairy-hand plaintiff suing year by year to get the lost wages year by year.

(2) What the law does is forecast what your lost wages will be in a given year in the future, and give you an amount today such that if you invest that money today it will grow to that lost wage amount in that very year.

(3) In the tort hairy-hand lawsuit, for example, suppose nothing can be done with the now hairy hand. Suppose the trial is in 2006 and we forecast lost wages for 2016 (= forecast of what you could earn with a due care hand in 2016 – forecast of what you could earn with a hairy hand in 2016). Suppose that forecasted lost-wage amount is $10,000. You are not given $10,000 today in 2006. You are given an amount x which, if allowed to grow, will yield $10,000 in 2016.

(4) Glannon pages 369-71 discuss how to calculate x given the $10,000.
(c) So how many years in the future are you due these lost wages? (1) With respect to the tort hairy-hand lawsuit, for as long as a due-care hand would have produced more wages than the now hairy hand.

(2) The starting point for the number of years in the lost-wage context comes from a work-life expectancy table such as on Glannon page 368.

(3) If we are looking at increased medical expenses we need a forecast of the number of years such increases will occur, etc. That is, different types of harm may have different relevant future years.

(4) Note 3 on Glannon page 367 suggests that the relevant tables may take into account things like race, gender, etc.

(d) How do we forecast $10,000 lost future wages in 2016? (1) Martin indicates that things like forecasted promotions are taken into account.

(2) As Glannon pages 372-73 indicates, inflation (in the guise of cost of living increases) can be taken into account.

(e) What about the effect of taxes? As indicated in Glannon’s Examples 7 & 8, taxes could be used to adjust both the present value and the forecast.

(f) As indicated in Glannon pp. 373-74 & Example 8, there are a number of approaches for combining investment rates of return, inflation, and taxes.

(g) Actuarial adjustments and future nonpecuniary damages: As Glannon points out in Example 10, these sorts of actuarial adjustments are not normally made with respect to future nonpecuniary losses (pain and suffering/loss of enjoyment).

(g) Total amount for future losses: (1) A present value is obtained for each relevant year and each type of pecuniary loss. These present values are all added together.

(2) Then you add in a lump sum (with no actuarial adjustment) for future pain and suffering/loss of enjoyment.

(3) Plaintiff is free to spend this money as she pleases. For example, Dobbs note 7 on p. 780 says that pain and suffering may go to attorney’s fees.
Assignment 29 (2 periods):
Contracts Restatement: §§14, 15, 16, 376, 384.
Dawson Casebook: 587-99 (including COMMENT).
Blum: Chapter 14. (4th and 5th same).

We have pretty much covered plaintiff’s basic case in a negligent tort action. We have covered a good deal of plaintiff’s basic case in a contracts action. (The remaining contracts material with respect to plaintiff’s case involves some thorny details of the dynamics of deal formation that we will treat in our next basic hypothetical.)

We turn next to things defendant might say. That is, we turn to defenses. As with plaintiff’s case, we proceed through the culpability/consequence/sanction picture.

We begin with defenses that go to the initial existence/nature of the duty. Such defenses are sometimes called formation defenses. In particular, we begin with what are known as “capacity” defenses.

With respect to the capacity idea, it’s fair to say that contract law has the most concern for children, then the mentally ill, finally the intoxicated. What do you think about such a ranking? Does the stance on children make any sense in today’s world?

Assignment 30 (1 period):
Dobbs Casebook: 115-24 (begin with Shepherd, skip n.4 on page 119, skip n.3 on page 1210), read n.4 136.

This assignment covers the corresponding capacity defenses in torts. How are the two treatments in contracts and torts similar? Different?
Assignment 31 (2 periods):

Contracts Restatement: §§ 151--154, 157, 158.
Dawson Casebook: 513-32 (skip Tracy and “Warranty Alternative”).
Handout: Wood.
Blum: Sections 15.1-15.5, 15.7 (these sections cover Assignments 31-34). (4th and 5th same).

We continue with some contracts defenses, concentrating on those that seem most directly applicable to the hairy hand.

In particular, this assignment introduces another formation defense--mistake. Is there any difference in the Restatement and Sherwood framework? Can you distinguish Sherwood and Wood? Why should it be more difficult to get relief in the unilateral setting?
Assignment 32 (1 period):
Contracts Restatement: §§ 159—172.
Dawson Casebook: 539-40 (NOTE), 546-50, 504-08.

This assignment focuses on misrepresentation. Does the duty-to-disclose doctrine go too far? Not far enough?

Assignment 33 (2 periods):
Contracts Restatement: §§ 261--64, 266(1), 269, 270, 272, 377.
Dawson Casebook: 550-60 (exclude Tompkins, Garman and the note following), 563-67 (start at RESTATEMENT).
Handout: Understanding Sales on UCC §2-613.

The impossibility defense is a “performance” defense in that the main concern is excusing nonconformance. That is, defendant does not contest the existence/nature of the duty, but argues that she should not have to perform. Note the drawn out history here—the Paradine starting point, the carving out of exceptions (Act of God, Act of State, implied conditions in certain cases of property destruction), the turning point in Taylor, and the final rejection of Paradine in cases like Carroll.

Assignment 34 (1-2 periods):
Dawson Casebook: 568-75 (skip YPI).
Handout: Mineral Park, Farnsworth on existing impossibility/impracticability, Understanding Sales on UCC §2-615.

The impossibility defense represents the statement, “It can’t be done.” The impracticability defense represents the statement, “It’s too hard to do.” It is a natural generalization of impossibility and is treated as such in the Restatement.

Assignment 35 (2 periods):
Contracts Restatement: § 350.
Dawson Casebook: 56—59 (skip Leingang), 61-67 (start with Parker), Question 2 from page 60 of Handout24A, 68-75 (In re WorldCom).

This assignment covers the main defendant responses (other than the statute of frauds) in the consequence/sanction setting of contracts.