

The Common Law of Contracts: The Great Cases

Course description and instructions

The law of contracts is one of the essential foundations of any market-based economy. This course will explore the law of contracts in the common law through the lens of its most important leading cases – cases that have shaped both the law and legal education. In each class, we will explore one aspect of the law of contracts, from the rules of formation of contract to the law of remedies, by focusing on a ‘leading case’: what does it teach us about this area of the law, which principles does it embody, and what is its lasting significance? But we will also dig deeper: how would a civil law system address the issues the case in question addresses? What are its theoretical implications, what is the historical context out of which it grew? Each case will be the subject of a student presentation. The cases we discuss will encompass true “classics” as well as cases that are just now emerging as leading authorities; the cases will lead us to “timeless” doctrinal and theoretical issues as well as to timely and pressing policy questions.

In modern common law jurisdictions, the law of contract is – despite many statutory additions – first and foremost case law. A body of law shaped through hundreds of years and thousands of judicial decisions, it underwent a comprehensive reformulation in the 19th century, coinciding with the economic and social change brought about by the industrial revolution. It was in the same period that the idea of “leading cases” was first formulated: cases that embody principles of the common law in exemplary fashion and thus help navigate the never-abating flood of new cases, and that are, therefore, particularly suitable for instruction – “lighthouses of the law, which never fail, are never dimmed, and are most visible in those times when the need for guide is most felt”. Since “Contracts” is one the most important courses of the core law school curriculum, the leading cases in the law of contracts shape the experience of every common lawyer and are part and parcel of modern common law culture.

Two Goals: Introduction to contract law / Research seminar

The course aims to achieve **two goals**. **First**, this course will serve as an **intense introduction to the substantive law of contracts in the modern common law**. We will discuss cases primarily from England and Wales, but also from the Commonwealth and the US. Particularly for students without any prior exposure to the common law and the common law of contracts, this seminar will also provide valuable first insights into common law thinking and methodology. **Second**, the course also serves as a **research seminar**; students will have the **opportunity to study and discuss individual leading cases in depth from various methodological perspectives – comparative, theoretical, and historical**.

PLEASE READ THE FOLLOWING INSTRUCTIONS CAREFULLY!

INSTRUCTIONS

Language of instruction: The class will be taught in **English.**

Format:

The course will be taught in a **one-week block**. It is open to **undergraduate students** and **graduate students** who have not received their primary legal training in a common law jurisdiction. For location and hours, please refer to the Faculty website.

Assessment: Student Presentations, Papers, Presence in class

Students who take this course for credit (6 ECTS credits) will be assessed “Pass” or “Fail” on the basis of

- **a presentation in English** which students introduce and discuss one of the cases. Presentations should be between 15 and 20 minutes long. For a list of cases from which to choose the subject of a presentation, please see below.
- **a paper in English** (10-12 pages) that summarizes the presentation and that adheres to the formal standards required by UNIL (style sheet available from Ms Gavillet).

DUE DATE

for the submission of the paper
by email to me (helge.dedek@mcgill.ca) AND marzia.gavillet@unil.ch is

FRIDAY, DECEMBER 6, 2019, by 5pm.

Participation is expected, and **attendance of the seminar sessions is mandatory.**

Further Instructions / How to Pick a Case/ Tips for the Presentations

Thank you again for your interest – I am looking forward to working with you during what will be an intense but undoubtedly fruitful and hopefully enjoyable week in December. I am aware, of course, of the fact that this is the first contact with the common law for many of you, and also a course taught in language that is a foreign language for most of you. All of this will be taken in account when assessing your presentations and contributions. I am confident that we will succeed in creating an atmosphere of relaxed and respectful collegiality in which all students feel comfortable participating.

As a first step, you need to choose a case:

1. How to pick a case

As a first step, you need to choose a case. For a list of available cases from which to choose the case you will introduce to the class, please go to

https://docs.google.com/document/d/1UXGAOVQkb6N9D3bOs1IG97OYoWG7y1_BMXq83554_Og/edit?usp=sharing

and follow the instructions!

The cases can be accessed here:

<https://www.dropbox.com/sh/emrild7kqt9sgxo/AABJJDPlybeerz76r21qEeRVa?dl=0>

2. What should I focus on in my presentation/paper?

As mentioned above, presentations should be at least 15 and up to 20 minutes long. A presentation should introduce your classmates to the case(s) you have selected. This introduction should include short a depiction of

- the facts (name of the parties, what happened factually, what gave rise to the dispute?)
- the issues (what are the legal questions in dispute?)
- the procedural history of the case (what happened procedurally, how did the lower courts decide?)
- the holding (the rule of law applied)
- the rationale (reasons for the holding).

However, keep in mind that the role of a case in legal history and the history of legal education – ie its role of a “leading case” – is not necessarily co-extensive with its binding effects as a precedent. Some cases are famous for their dissents (which may have offered some interesting theoretical insights, or even prepared the groundwork for later jurisprudential developments), or their *obiter dicta* – take, for example, the decision in *Hedley Byrne v Heller* that shaped the law of tort in the commonwealth with hypothetical musings on negligent misrepresentation while in the case at bar liability was clearly excluded by a disclaimer. Some cases are well known simply because they are curious and/or particularly instructive illustrations of a certain legal problem.

In the context of our seminar, we therefore want to pay particular attention to the question: **why is this case important, well-known, or even famous? Which impact did it have on legal development in its field? Why has it been used in casebooks for the purpose of legal instruction?**

Since this is also a research seminar, you are free to go beyond this first contextualization of the case(s) using any methodology that is of interest to you – you could discuss the doctrinal argument, compare with other legal approaches you are familiar with (Swiss law, for example, or other common law jurisdictions), focus on the historical context, discuss a case from a socio-legal

perspective etc., if you wish. All the cases in the list have been amply discussed in subsequent decisions and in the scholarly literature, both easily accessible through the usual electronic databases.