

## Course Outline

COURSE:	LAWS 4801 B - Risk and the Legal Process
TERM:	Fall 2013
PREREQUISITES:	Fourth Year Honours Standing
CLASS:	Day & Time: Monday 18:05 – 20:55 Room: Please check with Carleton Central for current room location
INSTRUCTOR:	Dr. Dwight Barnaby
CONTACT:	Office: B442 Loeb Building (Contract Instructor's Office) Office Hrs: By appointment Telephone: (613) 562-2966 Email: <a href="mailto:999ott@rogers.com">999ott@rogers.com</a>

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You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

**Pregnancy obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

**Religious obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

**Academic Accommodations for Students with Disabilities:** The **Paul Menton Centre** for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or [pmc@carleton.ca](mailto:pmc@carleton.ca) for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your **Letter of Accommodation** at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (*if applicable*). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (*if applicable*) at <http://www2.carleton.ca/pmc/new-and-current-students/dates-and-deadlines/>

You can visit the Equity Services website to view the policies and to obtain more detailed information on academic accommodation at <http://www2.carleton.ca/equity/>

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## COURSE DESCRIPTION

While mathematics, statistics, physics, and epistemology seek to describe risk naturally and scientifically, and common sense addresses risk intuitively, law approaches risk through its own deliberately artificial logic. Both ordinary intuition and political ideology also have their own distinctive views of the moral issues involved in risk, but here again law views risk in terms of its own independent moral philosophy, resisting the influence of both common sense and politics. Studying the way law deals with risk highlights the unique style of analysis which law brings to social issues.

The moral significance of imposing tangible harm on another person is quite clear, but the ethical meaning of merely increasing the risk of harm for other people is a more subtle issue, especially since almost all human action elevates risks for the rest of society. How law determines which risks amount to prohibited actions and which do not also illustrates law's characteristic style of approaching social problems.

This course will use risk as a lens to study the peculiar nature of legal thinking in its understanding of social action and its moral significance.

### **REQUIRED TEXTS**

A coursepack with all the required reading is available at the university bookstore. Two copies will be on reserve at the library.

### **SUPPLEMENTARY TEXTS**

No supplementary texts are required.

### **EVALUATION**

16% of the grade will be based on class attendance and comments in class discussions. Credit for class attendance and comments will only begin to be awarded starting with the October 1 class, so as not to penalize late registrants.

28% of the grade will be based on each of three short papers of no more than four typed, double-spaced pages each (ca. 1000 words), due on the October 7, November 11, and December 9 class meetings, or by email on those dates. Each paper should represent your own original, academic response to the readings, discussions, and lectures in the section of the course completed up to the due date of the assignment and since the previous assignment. It should not be a mere summary of the readings, but instead your own critical insight into and independent analysis of the ideas of the authors studied and the material presented in class. The paper can treat the entire set of relevant readings and discussions as a whole, some continuing theme you have identified in them, or any particular issue in the material covered that interests you. You are not required to develop your thoughts by reference to any reading beyond the coursepack.

All components must be completed in order to get a passing grade.

### **SCHEDULE**

#### **September 9, 2013: Introduction**

There is no required reading for this introductory lecture, which will explore the nature of risk to provide a context for understanding law's special approach to the problems of risk in a social setting.

**September 16, 2013: Detaining People for Being Risks Rather than for Being Criminals**

The foundational idea of a liberal society is that the state may not deprive its citizens of their liberties without first proving that they are guilty of a crime. But how can detaining people against their will for being a risk to themselves or others be reconciled with the demands of liberty? How is the state's assessment of these risks to be kept honest?

Kant, *The Metaphysics of Morals*  
R. v. Lyons, [1987] 2 SCR 309  
Charkaoui v. Canada, [2007] 1 SCR 350  
*Canadian Criminal Code*, s. 515  
United States v. Salerno, 481 US 739 (1987)

**September 23, 2013: Criminal Responsibility for Encountering Unusual Risks of Harm**

If you commit a criminal assault against someone, how far should you be held responsible for the risk that your assault may have unusual or unexpected consequences? If your victim or those helping your victim oppose the attack in surprising ways that result in further injury, who is to blame for the additional harm?

Glanville Williams, *Textbook of Criminal Law*, 381-401  
R. v. Mackie (1973), 57 Cr App R 452  
R. v. Blaue, [1975] 61 Cr App R 271  
R. v. Pagett, [1983] Crim L R 383  
R. v. Cribben (1994), 17 OR (3d) 548  
R. v. Nette, [2001] 3 SCR 488

**September 30, 2013: Tort Responsibility for Encountering Unusual Risks of Harm**

If your negligence injures someone with a thin skull so that extraordinary harm results, should you be held responsible for that unexpected outcome? What if your victim had not just a thick skull but a crumbling skull, so that unusual injuries were already developing before your negligence caused any harm? How broadly or narrowly is the range of your responsibility for the results of your carelessness to be drawn?

G. W. F. Hegel, *Elements of the Philosophy of Right*, 147-148  
Ernest Weinrib, *The Idea of Private Law*, 157-158  
Palsgraf v. Long Island Railroad Company, 162 NE 99 (1928)  
Rogers v. Elliott, 15 NE 768 (1888)  
Athey v. Leonati (1996), 140 DLR (4<sup>th</sup>) 235  
Fairchild v. Glenhaven, [2002] 3 WLR 89

**October 7, 2013: Tort Law and Losing a Chance of a Better Outcome**

A chance is the logical complement of a risk, so how does tort law handle negligence

that causes someone to lose the chance of a better outcome? Since no one really has a better future in the way that people have their present characteristics and possessions, is it really justified to let people claim compensation for the loss of something they merely might have had if they had not been harmed? Also, if there is only a chance that some particular person is responsible for your injury, how should the law treat that situation?

Hotson v. East Berkshire Area Health Authority, [1987] 1 AC 750  
Chaplin v. Hicks (1911), 2 KB 786  
Tarleton v. M'Gawley (1797), Peake 270  
Tuttle v. Buck, 119 NW 946 (1909)  
International News Service v. Associated Press, 248 US 215 (1918)  
Sindell v. Abbott Laboratories, 26 Cal. 3d. 588 (1980)

### **October 14, 2013: No class - Thanksgiving**

### **October 21, 2013: Voluntary Assumption of Risk**

If you deliberately expose yourself to a risky situation, can you still claim compensation for injuries you may receive as a result of the carelessness of the people creating or managing the risky situation, or interacting with you in it? If you voluntarily expose yourself to risk by attempting to rescue a person in danger because of his or her own carelessness, should that person be held responsible for any injuries you receive?

Haynes v. Harwood, [1935] 1 KB 146  
Horsley v. MacLaren, [1972] SCR 441  
Dube v. Labar, [1986] 1 SCR 649  
Crocker v. Sundance (1988), 51 DLR (4<sup>th</sup>) 321  
R. v. Leclerc (1991), 67 CCC (3d) 563

### **October 28, 2013: No class – Reading week**

### **November 4, 2013: The Right to Personal Risk Autonomy**

It is generally accepted that the state has a right to protect the health and safety of its citizens, but what if a person wants to take a risk that the state does not want to allow? If the risk harms only the person taking it, can it still be the business of the liberal state to forbid that risk? What if that risk concerns an intimate personal decision of overriding importance to the person taking it, such as trying a risky medication to cure an otherwise hopeless disease?

Jonathan Simon, "Risking Rescue: High Altitude Rescue: A Moral Risk and Moral Opportunity," in R. Ericson and A. Doyle, eds., *Risk and Morality*, 375-406  
L. Newton, "Liberty and Laetrile" (1981) 15 *Journal of Value Inquiry* 55-67  
Abigail Alliance v. von Eschenbach, U.S. Court of Appeals for the D. C. Circuit, August 7, 2007  
Aaron Spital, "Ethical Issues in Organ Donation" (2001) *American Journal of Kidney Disease* 189-195

**November 11, 2013: Social Regulation of Risky Personal Interactions**

If your own important interests and rights are put at risk by the interests and rights of others, to what extent can you be allowed to assess the competing needs and dangers and to resolve the conflict independently of the state? How serious does your interest have to be for the risk-benefit assessment to be left up to you rather than controlled by the community's legal restrictions? What if the risk occurs in an emergency situation where the state could only intervene too late?

United States v. Holmes, 26 F. Cas. 360 (1842)  
Tarasoff v. Regents of the University of California, 551 P 2d 334 (1976)  
Dobson v. Dobson (1999), 174 DLR (4<sup>th</sup>) 1  
Ferguson v. City of Charleston, 532 US 67 (2001)

**November 18, 2013: The Right Against State Actions Imposing Risk**

On the one hand the Canadian Charter guarantees people protection of certain vital personal interests against state actions, but on the other, a democratically-elected government can claim a certain right to make its own risk-benefit judgments for the society. How is the tension between these competing values to be resolved?

Operation Dismantle v. The Queen, [1985] 1 SCR 441  
R. v. Morgentaler, [1981] 1 SCR 30  
Jane Doe v. Metropolitan Toronto Police (1990), 74 OR (2d) 225  
Chaoulli v. Quebec, [2005] 1 SCR 791

**November 25, 2013: State Restriction of Risky Rights**

Although liberal governments often guarantee their citizens certain rights against state interference, these freedoms can be restricted to prevent their use from actually harming other people. But what if certain uses of these freedoms only risk harming other people? How far should the state's judgment of how far personal liberties should be limited to prevent a mere risk but not certain harm to the public be controlled by the courts?

R. v. Butler, [1992] 1 SCR 452  
Skokie v. National Socialist Party of America, 366 NE (2d) 436 (1977)  
David Dyzenhaus, "Pornography and Public Reason"  
Anonymous, "The Limitation of Free Speech for Causing 'Real Harm'"

**December 2, 2013: Public vs. Private Insurance**

Some maintain that public provision of insurance to all people without user fees creates the 'moral hazard' that people may be encouraged to become careless and irresponsible since their risks are taken care of by the state. But others point out that all systems of private insurance discriminate against those most in need of protection,

since these people are unprofitably risky. Where to draw the line between these two opposing concerns is an essential issue in modern public policy. Private tort actions serve as a kind of social insurance system, but they are often criticized for failing to achieve a socially coherent approach to spreading the costs of accidents.

Guido Calabresi, *The Costs of Accidents*, 293-318

Mark Schaun, "From Universal to Conditional Risk Take-Up," in Law Commission of Canada, ed., *Risk and Trust*, 123-143

Tom Baker, "Containing the Promise of Insurance," in R. Ericson and A. Doyle, eds., *Risk and Morality*. 258-281

Whiten v. Pilot Insurance Company, [2002] 1 SCR 595

### **December 9, 2013: Capitalism and Risk**

Do capitalists have the right to run huge speculative risks, even though the failure of these gambles may cause the collapse of the economy and injure people who would not have gained from those risks had they been successful? Also, should people have to gamble their money on expensive legal fees to enforce their private rights before the courts? How should the risks that a contract may prove inoperable be distributed between the parties? Risk is an essential feature of a capitalist economy, and these are just a few of the legal issues it raises.

F. von Hayek, *The Road to Serfdom*, 146-156

Karl Marx, "Wage Labour and Capital," in *Marx/Engels Selected Works*, 85-90

D. Abbott, *et al.*, in P. Taylor-Gooby and J. Zinn, eds., *Risk in Social Science*, 228-245

Keith Uff, "Costs and Risk: Recent Developments in the English Law of Costs," in G. Woodman and D. Klippel, eds., *Risks and the Law*, 146-156

Fibrosa Spolka Alcyna v. Fairbairn, [1943] AC 32