

Course Outline

COURSE:	LAWS 4801 A - Risk and the Legal Process
PREREQUISITES:	Fourth Year Honours Standing
TERM:	Fall 2007
CLASS: Day & Time:	Tuesday, 11:30 am - 2:30 pm
Room:	B146 LA (Loeb Building)
INSTRUCTOR:	Tara Ashtakala (Contract Instructor)
CONTACT: Office:	C476 LA (Loeb Building) Contract Instructors' Office
Office Hrs:	By appointment
Telephone:	613-297-1183
Email:	tashtaka@connect.carleton.ca

Students with disabilities needing academic accommodations in this course are required to contact a coordinator at the Paul Menton Centre to complete the necessary *letters of accommodation*. The student must then make an appointment to discuss their needs with the instructor at least two weeks prior to the first class or ITV test. This is to ensure sufficient time is available to make the necessary accommodation arrangement. Please note the deadline for submitting completed forms to the PMC for formally scheduled exam accommodations is November 9, 2007 for December examinations. With regard to accommodations for religious obligations and pregnancy, please see <http://www.carleton.ca/law/accommodations.htm>.

REQUIRED READING

Required Readings will be posted on WebCT. Some additional articles, as well as case study exercises, will be distributed in class.

EVALUATION**(1) Term essay- 40% of final mark**

- suggested topic must be approved by 25 September
- essay due in class by 27 November
- Length: 12-15 pages double-spaced, excluding bibliography
- Format: the paper is to follow the same order and content as the Course Objectives below

(2) Take-home examination - 50% of final mark

- will be distributed in class on 27 November
- due at the Department of Law Office by 21 December

(3) Class participation - 10% of final mark

Each student will be required to give a short presentation on his/her Term essay in progress, as well as participate in the discussions following each of the presentations of the other members of the class. A sign-up sheet for presentation dates will be circulated at the first class.

OBJECTIVES OF THE COURSE

- to identify situations of risk with legal implications
- to determine which actors (individuals, governments, courts) are affected by the risk issue
- to evaluate the strategies employed by those actors for preventing or mitigating (ie managing) the legal risks
- to explore the impact of legal risks and their management on law and society as a whole

COURSE OUTLINE AND REQUIRED READINGS

11 September INTRODUCTION AND OVERVIEW

18&25 September THE NATURE OF RISK AND UNCERTAINTY:

2 & 9 October

A. Situations of Risk

1. Sharratt, "Risk Renewal" Canadian Insurance 10 (January 2002)
2. Baer, "Thinking Outside The Courtroom," 2 Just. Can. 1 (2003)
3. Sudell, "To Tell Or Not To Tell: The Scope Of Physician-Patient Confidentiality When Relatives Are At Risk Of Genetic Disease," 18 J.Cont.Health L And Policy 273 (2001)
4. Krishna, "Crime Pays More If You've Got Class," Globe & Mail, April 29, B9 (2002)
5. "World's first humanitarian insurance policy issued", World Food Programme, 06/3/6
6. "Dying for a Job", cbc.ca (25 April 2006)
7. 'Laser scam' gamblers to keep £1m , BBC News online, 5 December 2004
8. Law School Buried in Fraud, Ghanaian Chronicle, 9 August 2007, allafrica.com

B. Nature of Risk

1. Short, "Essence of Risk"
2. Steele, Ch. 1 (pp. 3-15) and Ch. 2 (pp.17-51)

C. Concepts of Uncertainty and Risk - Micro and Macro

1. Risk-Taking: Who benefits and who pays

A. Risky behaviours: do we penalize risk-taking or absorb it collectively?

1. Wildavsky, "No Risk Is the Highest Risk of All" in Glickman & Gough eds., Readings In Risk (1990) at 120
2. No-Fault Automobile Insurance. Christopher J. Bruce & Angela Tu Weissenberger, ECONOMICA LTD.The *Expert Witness* Newsletter, Autumn 2001 Vol. 6, No. 3
3. Culpability and Compensation in Canadian Health Care: Much Ado About No-Fault? Chris Hubbard, CROSSROADS: WHERE MEDICINE AND THE HUMANITIES MEET, 1999.
4. Subsistence as a Social Right: A Political Ideal for Socialism? Ian Angus, Department of Humanities, Simon Fraser University (2001)

B. Regulation v Innovation: philosophical debate and practical problems of managing risk through regulation (or not)

1. Van Waarden, "Institutions and Innovation - the legal environment of innovating firms", accessed at www.findarticles.com, Organization Studies, Sept-Oct. 2001
2. Macdonald, "Coerciveness and the selection of environmental Policy instruments," 44 Can. Pub. Admin., 161
3. Macrory, "Regulating In a Risky Environment," 54 Current Legal Problems 619 (2001)
4. Hawkins, "FATCATS" And Prosecution in a Regulatory Agency, Ch.15 in Short op cit.
5. McDonald, "Judicial Review Of NHTSA Ordered Recalls," 47 Wayne Law Rev. 1301

[2001]

6. "Fronting for Business", multinationalmonitor.org

2. Prevention and Mitigation of Risk

A. Concept of Insurance

1. Tanega, "Implications Of Environmental Liability On The Insurance Industry," 8 Jour. Environmental Law
2. Flyvbjerg et al, "Megaprojects and Risk" Ch. 7 (2003)

B. Tort Action

Comite d'environnement de la Baie Inc. v. Societe d'electrolyse et de chimie Alcan [1990] RJQ 655, 6 CELR (NS) 150(Que. CA), leave to appeal refused [1990] 2 SCR xi.

3. The Precautionary Principle

1. Morris, "Defining the Precautionary Principle", Ch. 1 (2000).
2. Scott, "Shifting the Burden of Proof: the precautionary principle and its potential for the 'democratization' of Risk," Draft, Report To Law Commission of Canada (May 2003).

4. Democratic Participation in the risk decision-making process

Reddy, "Claims To Expert Knowledge And The Subversion Of Democracy: The Triumph Of Risk Over Uncertainty", 25 Economy And Society 222 (1996)

16 October THE ROLE OF THE LAW AND RISK

A. Theoretical considerations

1. Valverde, Levi & Moore, "Legal Knowledges of Risks," Draft, Report To the Law Commission of Canada, (May 2003)

B. Practical Problems: the courts

What practical problems do the courts encounter in dealing with risk?

Case law:

1. *R. v. Tutton*, [1989] 1 S.C.R. 1392.
2. *Waldick v. Malcolm*, [1991] 2 S.C.R. 456.
3. *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753
4. *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30

Articles:

1. Swaigen, "The Role Of The Civil Courts In Resolving Risk And Uncertainty In Environmental Law," 1 J.E.L.P. 199 (1991)
2. Copeland, "Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence," 46 Crim. L. Q. 188 [2002]
5. Triantis, "Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability" 42 Univ. Tor. L.J. 450 (1992)

23 October DISASTERS AND RISK MANAGEMENT

1. Thornton, "Hurricane Katrina - The Legal Saga Begins", www.tortlaw.net
2. Bannon and Fisher, "Legal Lessons in Disaster Relief from the Tsunami, the Pakistan Earthquake and Hurricane Katrina", American Society for International Law, vol. 10, Issue 6, 15 March 2006.
3. Text of Bill C-78, *An Act to provide for emergency management and to amend and repeal certain acts*, 1st Session, 38th Parliament, 53-54 Elizabeth II, 2004-2005.

4. United Nations Development Program, "Is Sustainable Human Development Achievable under Natural Disaster Risk?", in *Reducing Disaster Risk: A Challenge for Development*, ch.1, s.6 (2004).

30 October RISK AND PUBLIC HEALTH

1. World Trade Organization, "EC Measures Concerning Meat and Meat Products (Hormones)", Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R 16 January 1998.
2. Parexel drug trial articles, The Times Online
3. "Safety of Plasma Derivatives: The Role of Regulation", extract from Final report of the Commission of Inquiry on the Blood System in Canada
4. "Legal Access and Preparedness", extract from The SARS Commission, Second Interim Report: SARS and Public Health Legislation

6 November RISK ISSUES IN CRIMINAL LAW

1. Hood & Shute, "Protecting the Public: Automatic Life Sentences, Parole, and High Risk Offenders," [1966] Crim. L. Rev. 788
2. Shute, "The place of Public Opinion in Sentencing Law," [1998] Crim. L. Rev. 405
3. MacAllister, "Use of Risk Assessments by Canadian Judges in the Determination of Dangerous and Long-term Offender Status from 1997-2002," Draft May 12, 2003
4. "Conservatives announce tough new crime measures", cbc.ca
5. "Shooting victim Russo claims victory but critics denounce \$2M plea bargain", canada.com

13 November VOLUNTARY ASSUMPTION OF RISK : THE CASE OF SPORT

1. Husa & Thiele, "In the Name of the Game: Hockey Violence and the Criminal Justice System." 45 Crim. L. Q. 509 [2002]
2. Citron, Jeffrey A. & Ableman, Mark, "Civil liability in the arena of professional sports". 36 U.B.C. L. Rev. 193-230 (June 2003)
3. Niggli and Sieveking, "Selected Case Law Rendered Under the World Anti-Doping Code", World Anti-Doping Agency (2005)
4. *R. v. Cey*, 75 Sask. R. 53; 48 C.C.C. (3d) 480 (C.A. 1989)
5. *R. v. Leclerc*, 4 O.R. 788; 67 C.C.C. (3d) 563 (C.A. 1991)
6. *Dunn v University of Ottawa* (1995), Unreported Decision of the Ont. Ct. of Justice (Gen. Div.), Docket No. OJ2865.

20 November VOLUNTARY ASSUMPTION OF RISK: THE CASE OF TORT

1. *Dube v. Labar*, 27 D.L.R. (4th) 653; 36 C.C.L.T. 105 (Sup. Ct. Can. 1986)
2. *Crocker v. Sundance Northwestern Resorts Ltd.*, 51 D.L.R. (4th) 321; 44 C.C.L.T. 225 (Sup. Ct. Can.(1988)
3. *Childs v. Desormeaux*, 2006 SCC 18

27 November REVIEW

TAKE HOME EXAM DISTRIBUTED