

Course Outline

COURSE: LAWS 4801B - Risk & the Legal Process

TERM: Winter 2009

PREREQUISITES: Fourth year Honours standing

CLASS: Day & Time: Thursday 1135-1425
Room: A620 LA (Loeb Building)

INSTRUCTOR: T. Ashtakala
(CONTRACT)

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"Students with documented disabilities requiring academic accommodations in this course must register with the Paul Menton Centre for Students with Disabilities (PMC) for a formal evaluation of disability-related needs. Documented disabilities include physical, mental, and learning disabilities, mental disorders, hearing or vision disabilities, epilepsy, drug and alcohol dependencies, environmental sensitivities, as well as other conditions. Registered PMC students are required to contact the PMC at 613-520-6608, early each term to ensure that your Instructor receives your Letter of Accommodation no later than two weeks before the first assignment is due or the first in-class test/midterm requiring accommodations. If you require accommodations for your formally scheduled exam(s) in this course, please submit your request for accommodations to PMC by March 6, 2009 for April exams." Also available at http://www.carleton.ca/pmc/faculty/acom_statement.html. For Religious and Pregnancy accommodations, please contact Equity Services, 613-520-2600 x. 5622 or their website: www.carleton.ca/equity

COURSE DESCRIPTION

Risk management is **not just for business majors** anymore; it is an increasingly important aspect of both public and private activities. Nowadays, the ability to anticipate the consequences in law of a proposed or uncontrollable event is essential for legal counsel, whether your client is an individual involved in an everyday consumer transaction or a construction company carrying out a megaproject or a government institution concerned with protecting the safety of the public. Policies, contracts and even lifestyles need the rigorous scrutiny of the legal professional in order to avoid lawsuits or other adverse legal consequences. This course is intended to introduce students of law and legal studies to the situations, actors, methodology and societal impact of risk management. **You will be surprised and intrigued by the diversity of issues that you will be exposed to in this course and you will use the skills you learn herein in your future law-related career.**

COURSE OBJECTIVES

- 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 risk
- to explore the impact of the risk and its management on law and society as a whole

REQUIRED TEXTS

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

EVALUATION**All components must be completed in order to get a passing grade****(1) Term Essay- 40% of final grade**

- suggested topic must be approved by 22 January
- essay due in class on 2 April
- Length: 12-15 pages double-spaced, proper legal citation and bibliography required
- Format: the paper is to follow the same order and content as the Course Objectives above

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

- will be distributed in class on 2 April
- due at the Department of Law Office by **8:30 am** Monday 27 April (**NOT** END OF DAY)

(3) Presentation and class participation - 10% of final grade

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.

SCHEDULE**8 Jan INTRODUCTION AND OVERVIEW****15 Jan THE NATURE OF RISK AND UNCERTAINTY**

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

"'Laser scam' gamblers to keep £1m , BBC News online, 5 December 2004
Law School Buried in Fraud, Ghanaian Chronicle, 9 August 2007, allafrika.com

B. Nature of Risk

Short, "Essence of Risk"

C. Concepts of Uncertainty and Risk - Micro and Macro

22 Jan Risk-Taking: Who benefits and who pays

i. 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.

ii. 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

29 Jan 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.
- C. 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).

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)

5 Feb 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.
- Waldick v. Malcolm*, [1991] 2 S.C.R. 456.
- Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753

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. Maich, "Ethics of Plea Bargains Questioned", Maclean's, 9 July 2007
- 3. Triantis, "Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability" 42 Univ. Tor. L.J. 450 (1992)

19 Feb Winter Break week, no class**26 Feb 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).

5 Mar 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

12 Mar 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
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
"Conservatives announce tough new crime measures", www.cbc.ca
"Shooting victim Russo claims victory but critics denounce \$2M plea bargain", canada.com

19 Mar VOLUNTARY ASSUMPTION OF RISK : THE CASE OF SPORT

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

26 Mar VOLUNTARY ASSUMPTION OF RISK: THE CASE OF TORT

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

RISK AND THE MEDIA**2 April REVIEW OF COURSE****TAKE HOME EXAM DISTRIBUTED**