

Course Outline

COURSE: LAWS 4801B - Risk and the Legal Process

TERM: Winter 2009-10

PREREQUISITES: Fourth year Honours standing

CLASS: Day & Time: Thursday 14:25-17:25
Room: Please check with Carleton Central for current room location

INSTRUCTOR: T. Ashtakala
(CONTRACT)

CONTACT: Office: C476 LA (Loeb) - Contract Instructors' Office
Office Hrs: By appointment
Telephone: 613-297-1183
Email: tashtaka@connect.carleton.ca

"Students with disabilities requiring academic accommodations in this course must contact a coordinator at the Paul Menton Centre for Students with Disabilities to complete the necessary Letters of Accommodation. After registering with the PMC, make an appointment to meet and discuss your needs with me in order to make the necessary arrangements as early in the term as possible, but no later than two weeks before the first assignment is due or the first test requiring accommodations. For further information, please see: http://www.carleton.ca/pmc/students/accom_policy.html . If you require accommodation for your formally scheduled exam(s) in this course, please submit your request for accommodation to PMC by **March 12, 2010 for April examinations.**

For Religious and Pregnancy accommodations, please contact Equity Services, 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 21 January
- essay due in class on 1 April (no fooling!)
- Length: 12-15 pages double-spaced, proper legal citation and bibliography required
- Format: the paper is to follow the same structure as the Course Objectives above

(2) 24-hour take-home examination - 50% of final grade

- will be posted on WebCT at 12:00pm (noon) on Thursday 8 April
- due at the Department of Law Office by **12:00pm (noon)** on Friday 9 April
- the objective of the exam is to put you in the position of a decision-maker in a situation of imminent risk; you must use all the tools at your disposal (readings, lectures and case studies done in class) to assess the risks and to choose the most legally sound course of action in four different scenarios, within 24 hours.

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

Each student will be required to give a 10-15 minute presentation on the subject of his/her Term Essay research paper, as well as participate in the discussions following each of the presentations of the other members of the class. The presentation will be in the form of a debate on the risks and counterarguments (pros and cons) of the issue. This will require the student to partner up with a colleague in the class. One student will prepare the risk analysis of his or her topic, while the partner will come up with the counter arguments and the first student will then have to reply to the counterarguments for the remainder of the presentation. Each debate presented will constitute the mark for the one student whose chosen topic is being debated; in other words, every student in the class has to prepare and present a debate on their selected issue. A sheet for presentation dates will be circulated at the first class.

SCHEDULE

7 Jan INTRODUCTION AND OVERVIEW

14 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

6. "Laser scam' gamblers to keep £1m", BBC News online, 5 December 2004

B. Nature of Risk

Short, "Essence of Risk"

C. Concepts of Uncertainty and Risk - Micro and Macro

21 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

28 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).
- D. Democratic Participation in the risk decision-making process
 - 1. 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).
 - 2. Reddy, "Claims To Expert Knowledge And The Subversion Of Democracy: The Triumph Of Risk Over Uncertainty", 25 Economy And Society 222 (1996)

4 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)
- 4. Evidence, Persuasion and the Jury

11 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).

18 Feb Reading week, no class**25 Feb 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

4 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

11 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.

18 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

25 Mar RISK AND THE MEDIA**1 Apr REVIEW OF COURSE**

8 Apr 12 noon: 24-hour take home exam will be posted on WebCT;

Written responses must be submitted at the Law Department in the drop box by 12 noon on Friday 9 April.