

# EXTRA-CONTRACTUAL OBLIGATIONS / TORTS

(LAWG 101)

## Syllabus – Fall Term 2007

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Even though the expressions *extra-contractual obligations* and *torts* may seem unfamiliar to you at the moment, you have been involved in the situations they refer to more often than you imagine! It is the case if you have ever been hit by a speeding cyclist; suffered food poisoning after being treated to a good restaurant meal by a friend; been the subject of discrimination or defamation. You may have also been the debtor of an extra-contractual obligation if your dog has ever bitten someone, the postman has ever suffered harm after slipping on your icy staircases; or a friend visiting you for the week end has ever gotten electrocuted by your defective hairdryer. The subject is fascinating, not only because it is part of our everyday life, but also because it prompts difficult but interesting questions, and is the subject of on-going developments.

This course is concerned with a basic fundamental subject in every system's legal curriculum: *extra-contractual obligations*. This is meant to relate to the body of law that organizes the obligation to repair the harm caused and the corollary right to obtain compensation for harm suffered. At McGill, this subject takes a totally different dimension, however. *Extra-contractual Obligations* encompasses both the common law of *torts* and the civil law of *responsabilité civile* in one single course. The two subjects are dealt with in an integrated way. This means that we will tackle issues, ideas, concepts, problems and solutions that exist in every system, but by drawing on both systems and making them enter constantly in relation with one another.

Two words are found in the title of this course: *Extra-contractual* and *Obligations*. Generally, obligations refer to duties that are owed by one person (the *debtor*) towards another (the *creditor*). These duties may have several origins, and be contained, for instance, in a contract between the two persons. They may also be imposed by the law without any contract and even between persons who are strangers to one another. This is where *extra-contractual* comes into the picture. This category will be our field of interest.

This course will not be only about learning rules! It will also be about questioning them, not taking them for granted. It will be about learning to be critical, not accepting the

*status quo*. It will be about confronting the theory with the everyday reality; about understanding how values, morality, politics, different forces in society and other non-legal factors play a role in defining the law. It will be about understanding differences between the systems, but also about appreciating their common grounds, their mutual influence, as well as, more generally, the influence of legal cultures on legal rules. It will also be about understanding the part that history has played in the definition of our current law of civil liability.

## **A. COURSE INFORMATION AND TEACHING STYLE**

*First term:* Mondays and Wednesdays, 14:30-16:00

*Second Term:* Mondays, 10:30-12:30

The class will ordinarily meet for a lecture during which students are invited to participate. The main aim of the lectures is to transmit to students the basic theoretical knowledge related to each subject covered and to allow for the setting of strong foundations for the ensuing discussions. You are expected to prepare *in advance* for each class with the prescribed readings assigned for each week

Occasionally, discussions will be more intense and students will be invited and expected to participate more actively. Students may be called upon to deal with specific issues or questions and you may have the opportunity to work in teams with colleagues as you grapple with the ideas raised within the course. One of the aims of these sessions is to allow students to develop problem-solving skills and understanding of the tradition-specific dimensions of the material. *myCourses* will be used for distribution of instructions for these sessions, at least one week in advance. Please, consult it regularly.

### *Group Assistant & Tutorials*

For both terms, the professor will be assisted by a group assistant, Mrs Emily Caputo. Mrs Caputo can be reached by email at: [emily.caputo@mail.mcgill.ca](mailto:emily.caputo@mail.mcgill.ca). Mrs Caputo will hold periodical optional tutorials which you will be able to attend in order to consolidate the knowledge you have acquired in class and through your preparatory work.

### *Language*

The language of instruction and examination will be English. However, students should feel at liberty to ask questions and participate to the seminar discussions in French or English. Similarly, the examinations and assignment may be written in French or English. Note that all students are expected and required to prepare for classes and seminars by reading materials *both in English and French*. Moreover, exams questions may include excerpts in French.

## B. MODE AND GENERAL EVALUATION CRITERIA

### *Examination*

December exam will be held on December 6, 2007, at 14:30:

- App. 1:00 in length
- Counts for 15% of final grade
- “To assist only”\*

Final exam will be held on April 29, 2008. 9:30:

- App. 3:00 in length, Open book
- Counts for 60% of final grade

### *Assignment*

A compulsory short essay in the second term will count for 25% of the final grade. The topic and deadline will be announced in January 2008 on *myCourses*.

## C. SOURCES AND MATERIAL

While *common law* often refers to the legal tradition of English law (Anglo-American or Anglo-Canadian law), the term *common law* also refers to the general law (*droit commun* or *ius commune*) in the *civil law* tradition. Learning common law – in the former sense – can only be done by carefully reading cases, given that the law relevant to *Torts* is not found into any legislative enactment. In the *civil law* tradition, the general or common law is generally anchored in a code such as the *Civil Code of Quebec (CcQ)* of which Book V is concerned with *Obligations*. The *Civil Code of Lower Canada (CcLC)* was enacted in 1866 and preceded the 1991 CcQ (which came into force in 1994). At times, it will be crucial to study the provisions of the CcLC.

### 1. Compulsory material

*Civil Code of Québec*, 2007-2008 edition.

Khoury, Saumier & Van Praagh, *Extra-Contractual Obligations / Torts* (2007-2008 edition), vol. 1 and 2.

Additional material may be distributed as a handout in the course of the year.

### 2. Optional material

You are strongly recommended to refer to the following general textbooks to complement your seminars’ preparation, or for any question that arises in the course of this preparation:

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\* It will be included in the calculation of the final grade only if it improves the grade received in the April examination.

- J.-L. Baudouin and P. Deslauriers, *Responsabilité civile*, 6<sup>th</sup> ed. (Cowansville: Yvon Blais, 2003);
- L. Klar, *Tort Law*, 3<sup>rd</sup> ed. (Scarborough: Carswell, 2003);
- A.M. Linden, *Canadian Tort Law*, 8<sup>th</sup> ed. (Toronto: Butterworths, 2006)
- J.G. Fleming, *The law of torts*, 9<sup>th</sup> ed. (North Ryde, N.S.W. : LBC Information Services, 1998);
- D. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995)
- C. Von Bar, *The Common European Law of Torts* (Oxford: Clarendon Press, 1998)
- W. Van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 2000)
- J. Carbonnier, *Droit civil, tome 4: Les obligations* (Paris, P.U.F. 1998)
- J. Ghestin, G.Viney and P. Jourdain, *Traité de droit civil: les conditions de la responsabilité*, 2<sup>nd</sup> ed. (Paris, L.G.D.J. 1998)
- M. Tancelin, *Des obligations: actes et responsabilités*, 6<sup>th</sup> ed. (Montréal: Wilson & Lafleur, 1997)

Moreover, you are encouraged to consult dictionaries of private law from time to time, as you learn new language from both jurisdictions. For civil law terminology, the *Private Law Dictionary* can be referred to (it includes a French-English lexicon). In common law, one may refer to *Blacks Law Dictionary*. Both are on reserve at the library.

#### **D. INTRODUCTION TO COURSE CONTENT AND TERMINOLOGY**

##### ***Attributing Liability***

In the first term, you will be introduced to civil liability and its various forms and functions. You will start by examining the notion of *injury* and the law's characterization of compensable losses. You will also examine various mechanisms employed to limit recovery. You will then examine the second necessary component of a successful action: that of *wrongdoing*. In analyzing the obligation to act with care, you will see that the law often demands a level of *reasonable conduct* which sometimes takes into account the character, context, and community affiliations of the *defendant*. You will then turn from situations in which we may be liable for the results of our own wrongdoing to those in which we may be held responsible for the injury caused by things or people with which we have a particular relationship. In examining various kinds of wrongdoing, we will investigate variations on and modifications to the general requirement of *fault* in the law. At the end of the first term, we will begin our examination of the third criterion for liability: the identification of a factual link between the fault and the victim's injury. This will include the consideration of the uncertainties that often arise within that inquiry,

whether in relation to the identity of the defendant or to the available scientific knowledge.

### ***Delineating Liability***

In the second term, we will focus on the ways in which the law delineates the appropriate scope of individual liability. It is not enough to say that a defendant is liable for harm caused by wrongful behaviour. The law shapes responsibility through the use of various principles and mechanisms. The following questions may be relevant to either limit or extend liability: “Who was hurt?”, “What kind of injury occurred?”, “How did the events happen?”, and “What did the victim do?” Responsibility may be defined through an analysis of who the plaintiff is, what his or her characteristics are, and whether the plaintiff is *foreseeable* to the defendant. It may also be restricted by the nature of the harm caused or by the intervention of another wrongdoer. Moreover, if the injury can be characterized as *remote*, the link between the defendant’s act and the injury may not be recognized as significant. Finally in considering the plaintiff’s own actions, responsibility may be distributed between defendant and plaintiff. The course will finish with a discussion of the connections between the protection of fundamental rights and the legal tools offered by civil liability. While it is important to remember that options beyond private law exist for addressing our needs (eg. auto insurance, workers’ compensation schemes), we can also ask whether it is necessary, possible or desirable to expand the traditional parameters of private law.

### ***Objectives***

The course has three main general objectives:

#### *Thinking about the relationship between law and social reality*

The first aim of the course is to engage in the study of the principle of civil liability in the civil law and common law of Canada. But learning about rules is only half the work. Students should also think about the distance between the law’s abstraction and the complexity of social interaction. Law’s concepts and categories do not always match up perfectly with other ways of seeing the world. For instance, what morality or common sense regards as blameworthy may not give rise to a remedy in law. Moreover, the rules of civil liability are often difficult to apply, or too crude and simplistic to deal with the outcomes of human agency.

#### *Thinking about law and political commitments*

Law’s transformations are often evidence of shifting political commitments of the community. Our second aim will therefore be to attempt to recognize this connection between changes in political outlook and legal reform in the law of accidents. Students are invited to draw upon their existing expertise in other disciplines to enrich this component of the course.

*Thinking about law and legal culture*

The conditions that give rise to harm do not vary significantly from one Western country to the other. Nevertheless, students will quickly realize that the way in which the obligation to repair harm that one has caused is expressed varies across jurisdictions, through different concepts and methodologies. While these variations may sometimes be identified with traditional divisions between legal systems (eg, civil law vs common law), there are often equally significant differences within such systems (eg, Quebec law vs French law; English Law vs Ontario law). A third goal of the course is to convey the importance and weight of culture on the transformation of civil liability; different legal cultures emerging from different historical paths impose different constraints on the ways in which law deals with liability.

**E. SUBJECTS COVERED**

Please, note that this schedule is *tentative* in the sense that it may be subject to modifications as we go along. Moreover, as you will note, one class was left open and will be used to catch up if we happen to be behind schedule. The schedule for the Winter term 2008 will be given at a later date.

<b>WEEKS</b>	<b>SUBJECTS COVERED</b>
<b>1</b> <i>(5 sept)</i>	INTRODUCTION TO THE COURSE
<b>2</b> <i>Sept 10 &amp; 12</i>	INTRODUCTION TO THE NATURE AND FUNCTIONS OF EXTRA-CONTRACTUAL LIABILITY  INJURY 1. Introduction

<p style="text-align: center;"><b>3</b> <i>Sept 17 &amp; 19</i></p>	<p>INJURY (continued)</p> <ol style="list-style-type: none"> <li>2. <i>Restitutio in integrum</i> ?</li> <li>3. Limits to Recovery</li> </ol>
<p style="text-align: center;"><b>4</b> <i>Sept 24 &amp; 26</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <ol style="list-style-type: none"> <li>1. Articulating the Obligation</li> <li>2. Liability for One's Wrongdoing <ul style="list-style-type: none"> <li>• The Meaning of Fault</li> </ul> </li> </ol>
<p style="text-align: center;"><b>5</b> <i>Oct 1 &amp; 3</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <ol style="list-style-type: none"> <li>2. Liability for One's Wrongdoing (continued) <ul style="list-style-type: none"> <li>• Who is the Reasonable Person?</li> <li>• The Defendant's Abilities and Context</li> </ul> </li> </ol>
<p style="text-align: center;"><b>6</b> <i>Oct 10</i> <i>(Classes are cancelled on Oct 8)</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <ol style="list-style-type: none"> <li>2. Liability for One's Wrongdoing (continued) <ul style="list-style-type: none"> <li>• Fault's Relationship to Specific Norms</li> </ul> </li> </ol>
<p style="text-align: center;"><b>7</b> <i>Oct 15 &amp; 17</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <ol style="list-style-type: none"> <li>3. Modifications of Fault <ul style="list-style-type: none"> <li>• Introduction</li> <li>• Liability for Injury Caused by the Acts of Others / Vicarious Liability</li> </ul> </li> </ol>
<p style="text-align: center;"><b>8</b> <i>Oct 22 &amp; 24</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <ol style="list-style-type: none"> <li>3. Modifications of Fault (continued) <ul style="list-style-type: none"> <li>• Liability for Injury Caused by the Acts of Others (continued) / Indirect Liability</li> </ul> </li> </ol> <p>REVISION SESSION</p>
<p style="text-align: center;"><b>9</b> <i>Oct 29 &amp; 31</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <ol style="list-style-type: none"> <li>3. Modifications of Fault (continued) <ul style="list-style-type: none"> <li>• Liability for Injury Caused by Things (I &amp; II)</li> </ul> </li> </ol>

<p style="text-align: center;"><b>10</b> <i>Nov 5 &amp; 7</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <p>3. Modifications of Fault (continued)</p> <ul style="list-style-type: none"> <li>• Liability for Injury Caused by Things / Nuisance – Regulating the Neighborhood</li> <li>• Liability for Injury Caused by Things / Products Liability</li> </ul>
<p style="text-align: center;"><b>11</b> <i>Nov 12 &amp; 14</i></p>	<p>THE OBLIGATION TO ACT WITH CARE (continued)</p> <p>3. Modifications of Fault (continued)</p> <ul style="list-style-type: none"> <li>• Medical Liability –Protection of the Patient’s Integrity</li> <li>• Medical Liability – Medical Products</li> </ul>
<p style="text-align: center;"><b>12</b> <i>Nov 19 &amp; 21</i></p>	<p>ESTABLISHING A FACTUAL CAUSAL LINK</p> <ol style="list-style-type: none"> <li>1. The Conditio Sine Qua Non (“But For”) Test</li> <li>2. Inherently Uncertain Connections (I)</li> </ol>
<p style="text-align: center;"><b>13</b> <i>Nov 26 &amp; 28</i></p>	<p>ESTABLISHING A FACTUAL CAUSAL LINK (continued)</p> <ol style="list-style-type: none"> <li>2. Inherently Uncertain Connections (II)</li> <li>3. Inherent Uncertainty in Identifying the Wrongdoer</li> </ol>
<p style="text-align: center;"><b>14</b> <i>Dec 3</i></p>	<p>REVISION AND PREPARATION FOR EXAMINATION</p>

## F. OFFICE HOURS

### *Office hours*

I you wish to meet me, you may come to my office without an appointment on Tuesdays, from 11:00-12:30. Otherwise, I will see you **by appointment only please**, which can be made by contacting me by email ([lara.khoury@mcgill.ca](mailto:lara.khoury@mcgill.ca)).

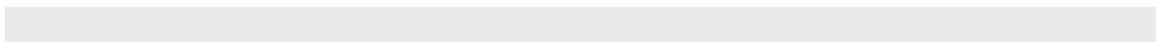
Please, kindly note that, for pedagogical reasons, I do not answer questions by email. This does not prevent you from sending me questions through this medium, but please always accompany your questions with your availabilities for a meeting in person or by phone.

The office of my assistant (Mrs. Julie Fontaine), is located in the entrance hall of 3690 Peel Street. She can be reached at: (514) 398-2381.

## G. READINGS

Before each class, you are asked to read the legislation, doctrine and cases listed in the reading list. The reading list will be available on *myCourses* at the beginning of term.

## H. FINAL NOTES

- If you are encountering, in the course of the year, any problem, academic or personal, that is affecting your studies, please make sure to either see Me Véronique Bélanger, Assistant Dean (Internal Affairs) or Professor Geneviève Saumier, Associate Dean (Academic).
  - McGill University values academic integrity. Therefore all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of Student Conduct and Disciplinary Procedures (see [www.mcgill.ca/integrity](http://www.mcgill.ca/integrity) for more information).
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**Faculty of Law – McGill University**  
**Extra-contractual Obligations/Torts**  
**Lara Khoury**  
**LAWG101 (001) – Winter 2008**

**COURSE OBJECTIVES:**

In the fall term, we first thought in general about the nature of civil liability as one kind of response to the needs of people who have been hurt by others. We then looked at the types of interests that are protected by a system of individual responsibility, and continued with an examination of the kind of behaviour that subjects us to liability. After considering the centrality and meaning of fault and, on the other hand, reasonable conduct, we observed that fault is sometimes displaced or modified, in particular when individual responsibility for the actions of someone else is at stake. Further, we inquired into the justifications for liability without fault in particular contexts. Finally, we rounded out the picture by working with the notion of causation and the requisite factual link between defendant's wrongdoing and plaintiff's injury.

In the winter term, we will focus on the ways in which the law delineates the appropriate scope of individual responsibility. It is not enough to say that a defendant is liable for harm that he or she has caused due to wrongful behaviour. That is, the law shapes responsibility through the use of various principles and/or mechanisms. We will see that emphasis may be placed on the following general questions: "Who Was Hurt?", "What Injury Occurred?", "How Did It Happen?", "In What Order did Events Occur?", and "What Did the Victim Do?". Any one, or a combination, of these questions can serve to limit or extend liability. Responsibility might be determined through an analysis of who the plaintiff is, what his or her characteristics are, and whether the plaintiff is "foreseeable" to the defendant. Alternatively, responsibility might be restricted by the nature of the harm caused or by the intervention of another wrongdoer; if the injury can be characterized as "remote", the link between defendant's act and the injury will not be established. Finally, the law considers the plaintiff's actions as well and may distribute the loss between defendant and plaintiff. The study of Extra-Contractual Obligations/Torts demands a solid grasp of the contours and justifications found in the law for shaping the appropriate scope of responsibility. In turn, examining the allocation of responsibility in civil liability reveals much about the orientation of the law and its understanding of interpersonal relations, responsibility for our actions, and protection of our interests.

***Subjects Covered***

This schedule is *tentative* in the sense that it may be subject to modifications as we go along.

<b>CLASS</b>	<b>SUBJECT COVERED</b>
<b>Week 1</b> <i>(Jan 7)</i>	<b>Acts and Omissions – A “Duty to Rescue”?</b>
<b>Week 2</b> <i>(Jan 14)</i>	<b>Delineating a Duty of Care</b>
<b>Week 3</b> <i>(Jan 21)</i>	<b>To Whom, For What, How Did it Happen? Giving Shape to Liability</b>
<b>Week 4</b> <i>(Jan 28)</i>	<b>Approaches to Relational Loss – The Suffering of “Secondary Victims”</b>
<b>Week 5</b> <i>(Feb 4)</i>	<b>Approaches to Relational Loss – Injury to Economic Interests</b>
<b>Week 6</b> <i>(Feb 11)</i>	<b>Causation – The Scope of the Risk</b>
<b>Week 7</b> <i>(Feb 18)</i>	<b>The Scope of the Risk – Directness vs. Foreseeability</b>
<b>Reading Week</b> <i>(Feb 25-29)</i>	
<b>Week 8</b> <i>(March 3)</i>	<b>Complication of the Story: Multiple Wrongdoers and Multiple Causes</b>
<b>Week 9</b> <i>(March 10)</i>	<b>Subsequent Events and Aggravation of Injuries</b>
<b>Week 10</b> <i>(March 17)</i> & <i>(March 20)</i>	<b>Placing the Victim/Plaintiff under Scrutiny – Predispositions</b>  <b>Placing the Victim/Plaintiff under Scrutiny – Victim’s behaviour</b>  <i>Classes are held on the Monday (17) and on the Thursday (20) this week (Thursday, March 20, follows the Monday schedule)</i>
<b>Week 11</b> <i>(March 24)</i>	<i>Classes are canceled on March 24 because of Easter</i>
<b>Week 12</b> <i>(March 31)</i>	<b>Fundamental Rights and Civil Liability</b>

**Week 13**  
(April 7)

**Conclusions – The Promise and Limits of Private Law**

**Revision and Exam Preparation**

**COURSE MATERIALS:**

See Fall 2007 list.

The reading list and learning objectives are posted on WebCT.

**EVALUATION:**

***Examination***

- Tuesday, April 29, 2008, 9:30 a.m.
- Open book
- App. 3:00 in length
- Counts for 60% of the final grade if the student's grade for the Fall 2007 examination improves his/her final grade. Otherwise, it counts for 75%.

***Compulsory In-Term Assignment***

A short essay in the second term will count for 25% of the final grade. The topic will be announced in January 2008 with detailed instructions posted on WebCT. The essay will be due at S.A.O. on (T.B.A.).

**GENERAL INFORMATION**

***Course Schedule & General Information***

Mondays, 10:30 to 12:30 p.m. in room 102 (NCDH).

Please, see the Fall term syllabus for general course information.

***Professor's coordinates:***

3690 Peel, bur. 302

(514) 398-6610

[lara.khoury@mcgill.ca](mailto:lara.khoury@mcgill.ca)

The office of my administrative assistant, Mrs. Julie Fontaine, is located in the entrance hall of 3690 Peel Street. She can be reached at 514.398.2381 or by email ([julie.fontaine2@mcgill.ca](mailto:julie.fontaine2@mcgill.ca)).

***Office hours:***

Tuesdays, 11:00 to 12:30.

Otherwise, you may see me *by appointment only*, which can be made by contacting me by email ([lara.khoury@mcgill.ca](mailto:lara.khoury@mcgill.ca)).

***Preferred method of communication:***

Please, note that, for pedagogical reasons, I do not answer questions by email. This does not prevent you from sending me questions through this medium, but please always accompany your questions with your availabilities for a meeting in person or by phone.

***Difficulties?***

If you are encountering, in the course of the year, any problem, academic or personal, that is affecting your studies, please make sure to either see Me Véronique Bélanger, Assistant Dean (Student Affairs) or Professor Geneviève Saumier, Associate Dean (Academic).

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