

FACULTY OF LAW, MCGILL UNIVERSITY
EXTRA-CONTRACTUAL OBLIGATIONS/ TORTS

(LAWG101 D1- 002)

2013-2014

Professor Shauna Van Praagh

Course Syllabus

Introduction to the course

Extra-Contractual Obligations/Torts is a first year law course about human relations and actions, injury, responsibility and repair. All legal traditions include within them guidelines for human behaviour and, more specifically, provisions regarding reparation for harm suffered. All students of law study “extra-contractual obligations” as a basic foundational course in order to appreciate how law views and responds to injuries we may suffer, and how it treats us as people who, whether intentionally or not, may harm others through our actions. At McGill, first year law students engage in the study of “extra-contractual obligations” in an integrated way. That is, students work within both the Common law and Civil law traditions of Canada to understand how law defines wrongdoing, injury, and the connection between wrongdoing and its harmful consequences. By doing so, you are invited to develop a sophisticated and critical comprehension of the purposes, contours and consequences of the private law of civil wrongs.

Course information

Class meetings:

Fall term: Tuesdays and Thursdays 10:00-11:30, Moot Court

Winter term: Mondays 10:30-12:30, Moot Court

Course materials:

*In-house casebook, available at McGill Bookstore: Khoury, Smith, & Van Praagh,
Extra-Contractual Obligations/ Torts

(additional or substitute materials may be made available on ‘mycourses’)

**Code civil du Québec / Civil Code of Quebec*

Evaluation:

**Exams:*

Mid-term exam (9 December 2013, 9:30-10:30, open book sit-down) – 20% of the final grade.

Final exam (23 April 2014, 9:30-12:30 – closed book, sit-down) – 50% of the final grade.

**Assignment:*

A written assignment due in the winter term, date to be determined - 30% of the final grade.

Language of Instruction:

The course will be taught in English, but in-class participation and discussion are encouraged in both English and French. As guaranteed by McGill’s Charter of Students’ Rights, all written work may be submitted in either French or English.

Professor information

Office: Room 38, 3644 Peel (Old Chancellor Day Hall - OCDH)

Office hours: Fall: Tuesdays 11:30-12:30; to be announced for the winter term

To make **appointments** via my assistant, Mme Julie Fontaine: julie.fontaine2@mcgill.ca

Phone: 514-398-6626; **e-mail:** shauna.vanpraagh@mcgill.ca

General Course Objectives

In this course, students will engage in the study of liability for civil wrongs in the civil law and common law of Canada. Understanding the structures and principles of extra-contractual obligations is only part of that study. Beyond grappling with the rules, students are invited to think about the relationship between *law and social reality*, to question the concepts and categories found in law, and to think critically about the particular features of law's specialized way of describing and evaluating events that take place in our world. Further, students will consider, often implicitly, the ways in which law responds to shifting *political commitments* of the community in which it operates. That is, the law related to accidents has shifted in time and place, and students are invited to draw upon their existing expertise in other disciplines to enrich this component of the course. At times, discussion and readings will centre explicitly on the connections among law, society, and politics. Finally, students will gain some appreciation of the importance and weight of *legal cultures* on the shape and features of civil liability. That is, civil law and common law traditions often employ different concepts and methodologies as they grapple with the problems presented in this area of law and, by appreciating the "language" of each tradition as it speaks to injury, wrongdoing and causation, students will be well equipped to work with and respond critically to the guiding principles of the law of civil liability.

A Guide to Course Content and Terminology

The law of "obligations" refers to the formation, regulation, and performance of duties owed by one person (the debtor) to another (the creditor). Obligations may arise through an agreement (thus "contractual"), or they may be imposed by the law between individuals who not only have no contract but indeed may not know each other at all. When the duty is breached, the wronged party may bring a claim against the person who has failed in his or her obligation. This course draws on the law of "torts" in the common law tradition and, in the civil law tradition, on the subcategory of the law of "obligations" that relates to the breach of duties not grounded in contract. In both common law and civil law, we are situated in "civil liability" as opposed to criminal responsibility; in other words, the dispute is between two individuals as opposed to between the state and an individual.

In the common law tradition, the law of "torts" deals with civil wrongs (e.g., blood transfusions without consent, defamation, negligent driving) that cause concrete loss (e.g., pain, medical expenses, damaged belongings) to others. In the conceptual vocabulary of the civil law, it is "extra-contractual civil liability" (*responsabilité civile extra-contractuelle* ou *responsabilité civile delictuelle*) which concerns itself with wrongful behaviour and resulting injury. The person who acts in a harmful way is referred to as the "tortfeasor" or the "defendant" to the complaint. The person who suffers the injury is the "victim" and instigates proceedings as the "plaintiff". In both traditions, the wrongdoing may be intentional or not. The distinction between intentional and unintentional torts (*delicts* and *quasi-delicts*), while historically significant to the organization of this area of law, is no longer central to the analysis of extra-contractual obligations.

This course integrates the study of the common law of "torts" and that of the civil law of "responsabilité civile". Thus we tackle issues, concepts, problems and solutions by drawing on both traditions, and by actively engaging with and entangling system-specific frameworks and approaches. We will both learn and question the precepts and principles of civil liability; we will probe theoretical justification and contemplate real-life application; and we will think about the impact of legal culture and societal values on the articulation and shaping of legal rules and, more broadly, of private law.

An Overview of the Course

Term One: Attributing Liability

In the fall term, you will be introduced to civil liability as one kind of response to the needs of people who have been hurt by others. We will explore the kind of behaviour that subjects us to liability, continue with an examination of the required connection between wrongdoing and injury, and then turn to the types of interests that are protected by a system of individual responsibility. Thus, we start with the notion of *wrongdoing*. In analyzing the obligation to act with care, we will discover that the law often demands a level of “reasonable conduct” which may take into account the character, context, and community affiliations of the defendant. After considering the centrality and meaning of fault, we will observe the ways in which fault may be displaced or modified, in particular when individual responsibility for the actions of someone else is at stake. We will inquire into the justifications for liability without fault in particular contexts, thus filling out our investigation into the variations on and modifications to the general requirement of wrongdoing in the law. We then work with the requirement and meaning of causation and the necessary *factual link* between the wrongful action and the victim’s injury. Finally, we will round out the picture by examining the notion of *injury*, and the private law’s characterization of compensable damage and the various mechanisms it employs to limit recovery.

Term Two: Delineating Liability

In the winter term, we 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 action; rather, the law insists on a meaningful connection between the defendant’s behaviour and the eventual outcome of that behaviour. We will see that the law shapes responsibility through the use of various principles or mechanisms. One or more of the following questions may serve to limit or extend liability: “Who was hurt?”, “What injury occurred?”, “How did it happen?”, “In what order did events occur?”, and “What did the victim do?”. 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. Further, the plaintiff’s actions may also be considered, and may serve to justify a distribution of the loss between defendant and plaintiff. A solid grasp of the contours and justifications found in the law for shaping the appropriate scope of responsibility reveals much about the orientation of the law and its understanding of interpersonal relations, responsibility for our actions, and protection of our interests. While it is important to remember that options beyond private law exist for addressing our needs (e.g., auto insurance, workers’ compensation schemes), we can also ask whether it is necessary, possible, or desirable to expand the traditional parameters of private law.

Course Outline

A detailed course outline, including specific readings and guiding questions to help you in your preparation for class, will be distributed in installments throughout the year. The readings are usually organized by week; in the fall, when we meet twice per week, students should aim to familiarize themselves with all of the readings prior to Tuesday’s class and then reread in greater depth for Thursday’s class meeting.

Pedagogy, Preparation, and Participation

The course will be taught using a mix of pedagogical formats and tools. Often, the style will be that of a lecture and large group discussion. Regularly, however, the course will be taught in a seminar-style manner: discussion will be more intense and students will be invited and expected to participate even more actively than in the lecture sessions. In this way, all students will be given the opportunity to work with colleagues in the classroom as you grapple with the ideas raised within the course. Students will be encouraged to develop their problem-solving skills, critical analytical ability, and enthusiasm for learning from a variety of sources. The pedagogical context of the course should assist students in deepening their understanding of the tradition-specific dimensions of the material as well as of the thematic and shared civil liability-related preoccupations of two legal traditions.

Students are expected to prepare for each session by carefully reading the required materials, referring to the *Civil Code* and thinking about the issues raised. Supplemental readings may be assigned (*additional or substitute materials may be posted throughout the term on MyCourses*), and reference materials (listed below) are always useful in preparing for class. Note that class time will not be devoted to summarizing the materials; instead it will be presumed that all students have read carefully and have taken time to reflect and prepare. Particularly when specific problems are assigned, students should expect to participate fully in the ensuing discussion.

Students are invited to ask questions and participate generally in either English or French. All written work may be done in either language. Note that *all students are expected and required to prepare for class by reading materials in both English and French*. Exam questions, while primarily in English, may include excerpts in French.

Exams in both December and April will test your comprehension of the material, your ability to analyze difficult issues and complex problems, and your ability to articulate and justify arguments grounded in the sources we have worked with. *Students are encouraged to work with colleagues throughout the year and to prepare their own critical summaries* which combine notes on the assigned materials, critical synopses of in-class discussions, and references to relevant secondary sources. In the second term, you will have the opportunity to write a short critical essay on a topic as yet to be determined. Throughout the year, we will be working together to develop a rich understanding of the material along with the ability to articulate creative, persuasive and incisive analysis of that material, and you will be evaluated accordingly both on exams and the essay.

Teaching Assistant

Ms. Clarissa Allen, a law student in her third year, will act as group assistant for the course throughout the year. She will provide information on her availability, and on the sessions she will organize to help students synthesize material, discuss concepts, and develop critical perspectives on the law of Extra-Contractual Obligations/Torts. She can be reached at Clarissa.allen@mail.mcgill.ca.

Notes:

- 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 for information).
- If, during the course of the year, you encounter any problem (academic or personal) that affects your studies, do not hesitate to make an appointment to see Assistant Dean Aisha Topsakal or Associate Dean Jaye Ellis.

Secondary Sources:

For general sources relating to the law in Canada, the following textbooks can be found on reserve in the law library:

Quebec civil law

- **JL Baudouin & P Deslauriers, *La responsabilité civile*, 7e éd (Cowansville: Editions Yvon Blais, 2007)**

Canadian common law provinces

- **L Klar, *Tort Law*, 5th ed (Scarborough: Carswell, 2013)**
- **PH Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011)**

While most texts are specific to a legal tradition some try to present a trans-European picture. Useful reference texts include:

- D Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995)
- C Von Bar, *The Common European Law of Torts*, vols 1 & 2 (Oxford: Clarendon Press, 1998)
- G Viney & P Jourdain, *Traité de droit civil: les conditions de la responsabilité*, 3e éd (Paris, LGDJ 2006)
- AM Linden, *Canadian Tort Law*, 9th ed (Toronto: Butterworths, 2011)
- Tony Weir, *An Introduction to Tort Law*, 2d ed (Oxford: Oxford University Press, 2006)
- W Van Gerven, J Lever & P Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart, 2000)
- John G Fleming, Carolyn Sappideen, Prue Vines, *Fleming's the Law of Torts* (Sydney: Lawbook, 2011)

Course Outline – Topics

Term One

I Introduction to Extra-Contractual Liability

Introduction to the Course

Introduction to the Nature and Functions of Extra-Contractual Liability

II Personal Wrongdoing as the Basis for Extra-Contractual Liability

Introduction: The Obligation to Act with Care

The Meaning of Fault

Critique of the Reasonable Person Standard

Culpability: The Defendant's Abilities

Context: Fault's Relationship to Specific Norms

III Other Bases for Extra-Contractual Liability

Modification of Fault - Introduction

Liability for Injury Caused by the Acts of Others

Liability for Injury Caused by a Thing

Product Liability

Nuisance – Regulating the Neighbourhood

IV Establishing a Causal Link

Approaches to Assessing a Factual Link

Inherent Uncertainty in the Connection

Inherent Uncertainty in Identifying the Wrongdoer

Mass Torts

V Injury: *Restitutio in Integrum*

Term Two

VI Delimiting the Sphere of Extra-Contractual Obligations

According to the Nature of the Injury: Moral Injury

Injury: Limits of Recovery

Human Dignity in the Context of Medical Liability

Fundamental Rights and Civil Liability

According to the Nature of the Injury: Wrongful Life, Birth, and Conception

According to the Nature of the Relationship Between the Parties

Acts and Omissions: Good Samaritan/"Duty to Rescue"

The Concept of the "Duty of Care"

Approaches to Relational Loss: "Secondary Victims"

According to the Nature of the Injury: Economic Loss

General Limitations of the Private Law of Civil Liability

VII Defining the Scope of Civil Liability

Revisiting the Causal Connection: Directness and Foreseeability

Complicating the Story: Multiple Wrongdoers and Multiple Causes

Placing the Victim/Plaintiff Under Scrutiny

Predisposition of the Victim

Victim's Behaviour

Conclusions: The Promise and Limits of Private Law