

Equality in Practice

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"DISABILITY
AND LAW"
RESOURCE GUIDE
FOR LAW TEACHERS



In 2006, Reach Canada began a project entitled "Equality in Practice". It involves initiatives and products to inspire law professionals and Canadians with disabilities and their organizations to work together in the interests of equality in Canada's justice system.

In association with the Canadian Paraplegic Association and The Canadian Association of Independent Living Centres, Reach Canada has developed:

- ✓ A Handbook on Disability for Law Professionals (English and French)
- ✓ Understanding Justice — A Consumer's Guide to the System, For Canadians With Disabilities (English and French)
- ✓ A Service Provider's Companion to Disability and The Justice System (English and French)
- ✓ **"Disability and Law" Resource Guide For Law Teachers** (English)
- ✓ Promoting Responsive Legal Services for All Clients: A Guide for Student Legal Clinics on Accommodating Clients with Disabilities (English)
- ✓ Instructional Companion On Student Legal Clinic Services And Disability Issues (English)
- ✓ Audio CD (A Discussion About Justice in Canada) (English and French versions)

All of these materials are available at

www.reach.ca





“Disability and Law” Resource Guide for Law Teachers

June 2007

Prepared for the Equality in Practice Project
by Allan McChesney





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Michael Sousa

President

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Reach Canada

400, rue Coventry Road,
Ottawa, Ontario
K1K 2C7

Phone: (613) 236-6636

TTY/ATS: (613) 236-9478

Fax: (613) 236-6605

Toll Free: 1 800 465-8898 e-mail:

email: reach@reach.ca

website: www.reach.ca





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1. INTRODUCTION – WHY THIS GUIDE IS NEEDED

This Teaching Guide is designed to foster greater stress on “disability and law” issues within legal education. Through the Guide and other initiatives, Reach Canada aims to promote legal education and training that adequately prepares future lawyers - and others working in legal fields - to do two related things:

- a. avoid and prevent discrimination against individuals (clients, employees and others) who have a disability; and
- b. offer appropriate disability accommodation for employees and clients who have disabilities.

Such desirable and ethical conduct is in keeping with the “duty to accommodate”, as interpreted by the Supreme Court of Canada. It is also in line with other human rights law. Moreover, in Ontario and elsewhere, such conduct is mandated for lawyers by the profession’s Rules of Professional Conduct and recommended by organizations of legal professionals. (See the illustrations below in Chapter 2.)

Greater awareness and heightened professional knowledge concerning disability issues among legal educators, law students and lawyers would serve the general goal of equitable access to justice. This Teaching Guide is meant to encourage law schools and all law teachers to encourage better access to legal services - and justice - for clients and potential clients who have disabilities.

The project that produced this Guide is part of a broader initiative led by Reach Canada. That broader venture includes advice from, and partnership with, organizations of and for people who have disabilities. Participating groups include the Canadian Paraplegic Association and the Canadian Association of Independent Living Centres.



Through our project partnerships and from past experience, we know that persons with disabilities and their families often complain about the lack of information possessed by legal professionals (such as lawyers, court staff and judges). Those knowledge gaps may pertain to laws, to disability-related barriers in everyday life and to accommodations that can help to overcome the barriers. Examples of perceived problems include the following:

- a. There is a scarcity of legal professionals qualified to deal well with issues of concern to clients who have disabilities. Relevant issues include human rights violations such as discrimination. There are additional - and wide - awareness gaps with respect to: (i) disability-related services that are available; and (ii) entitlement to disability-related income programmes and other kinds of support programmes.
- b. There is a dearth of legal professionals qualified to deal with issues for parents of children with disabilities, such as special education law, access to support programmes and benefits, and child protection cases.
- c. Difficulties are experienced by parents of adults with disabilities in finding legal, financial and service professionals who are able to assist them with estate and personal planning issues for a family member.
- d. There is a general lack of awareness about appropriate and practical accommodations for disabilities in many law-related situations:
 - during lawyer, law student and paralegal interviews of clients
 - when steps are not taken to ensure that legal documents are provided in formats that are accessible for everyone involved in a legal matter
 - when legal advice and services are inadequately communicated or rendered to clients





Often lawyers and other professionals are well-equipped to deal with “standard” aspects of legal matters that anyone, including a client with a disability, may face. But this professional preparedness may not extend to more specialized aspects. For example, many lawyers can effectively obtain an insurance settlement for a person injured in a motor vehicle accident. Yet few are knowledgeable about the implications of such settlements for social assistance recipients or for disability pension recipients.

Despite the evident need to improve disability awareness among legal professionals, neither specialized course content nor comprehensive courses on “disability and law” issues are mandatory or widespread in legal education.

We trust that many categories of legal educators will borrow from the precedents and good practices that we highlight in this resource. For instance, we hope that ideas and examples presented here will find their way into courses that focus on law in university curricula offered outside of law faculties. A number of Canada's universities have law, criminology, disability studies or other departments that offer courses centred on law. In fact, a few of the curriculum illustrations put forward below as examples of how to organize a course on “law and disability” are drawn from the wider university community, rather than from faculties of law.

Reach is grateful for the active cooperation of several law professors, whose participation was essential to the success of the Teaching Guide project. Our gratitude extends to other law teachers whose course descriptions and reading assignments are included as examples of what legal educators can do to enhance students’ understanding of “law and disability” issues.



2. *RULES OF CONDUCT ON DISABILITY ISSUES FOR LEGAL PROFESSIONALS*

Most lawyers in practice will represent at least some clients with disabilities, or clients who have family members with disabilities. Statistics Canada states that about 12% of Canadians report having some level of disability and confirms that rates of disability rise with age. (See: Statistics Canada, *A Profile of Disability in Canada*, 2002, at pages 7-8.) All lawyers should thus have some awareness of laws, programmes and available accommodations that are of particular concern to people with disabilities.

Professional licensing bodies and other lawyers' organizations have become increasingly aware of the need for disability awareness and related expertise and ethics. This raised awareness has led law societies and bar associations to ensure that rules governing lawyers' conduct embrace principles of disability accommodation and non-discrimination. Most law faculties in Canada also gradually (and wisely) have come to embrace the idea of adding more disability-sensitive content to their curricula, teaching, student grading methods and students' services.

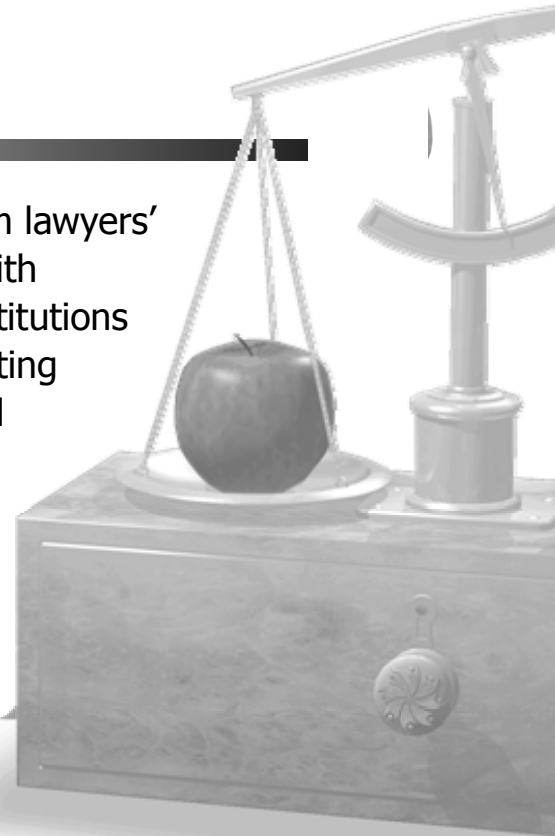
Reach Canada, with the aid of Pro Bono law students, researched what law societies and bar associations offer as guidance to the legal profession on disability discrimination and accommodation. All provincial law societies cover equality and discrimination (including unintended discrimination) in their codes of conduct, with disability as one prohibited ground. Special efforts are made in several jurisdictions to educate members on how to respect and work with clients and employees who have disabilities. Initiatives such as an Equity Ombudsperson, Equity and Diversity Committee, Equity Office, or Model Policies on diversity and accommodation exist in many provinces.

We offer below a few samples of guidance from lawyers' organizations on professional responsibilities with respect to people with disabilities. Lawyers' institutions thus far devote more space and time to promoting disability accommodations for law students and lawyers (as compared to clients) with disabilities. These efforts pertain mainly to legal education and work. Exemplary reports and publications in this field are available on the websites of the B.C. and Upper Canada law societies and at www.reach.ca.

Other law societies are also aiming to update disability-linked policies. For instance the Law Society of Manitoba's Equity Committee is developing a model policy on accommodation for law offices, to include coverage for both clients and staff (E-mail message from the Deputy Chief Executive Officer, March 21, 2007). Saskatchewan's Law Society is researching what other jurisdictions are doing re "accessibility to law firms" (E-mail message from the Equity Ombudsperson, March 21, 2007).

Here then are illustrations of official guidance for lawyers. These rules should influence lawyers to strive to offer more professional and accommodative legal services for clients who have disabilities. Each of the following excerpts, compiled from the rules of practice of law societies, tends to be echoed in the language and/or spirit of comparable rules from other jurisdictions in Canada:

- The Law Society of Alberta Code of Professional Conduct - *Chapter 1: Relationship of the Lawyer to Society and the Justice System*, states as follows: "A lawyer ... has certain special duties as an officer of the court and by virtue of the privileges accorded the legal profession, including a duty to ensure that the public has





access to the legal system." A commentary (C.9), says that lawyers have "an ethical obligation to recognize the essential dignity of each individual and the principle of equal rights and justice for all persons".

- The Law Society of Upper Canada's analogous Rule 1.03 (1) adds that a lawyer has a "special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws...". Para. 1.03 (1) (f) of the Rules of Professional Conduct notes that "rules of professional conduct cannot address every situation, and a lawyer should observe the rules in the spirit as well as in the letter".
- The Code Of Conduct: Law Society Of New Brunswick, in Commentary 1 to Chapter 21, adds this re a lawyer's duty to "respect the dignity and worth of all persons" and to "treat all persons equally and without discrimination": The lawyer "shall not deny professional services or provide inferior professional services" on the basis of prohibited grounds that include "disability".
- Law Society of Upper Canada Rule 3.01, on Making Legal Services Available, States the following: "Lawyers shall make legal services available to the public in an efficient and convenient way that commands respect and confidence and is compatible with the integrity and independence of the profession." A Commentary adds these observations: "It is essential that a person requiring legal services be able to find, with a minimum of difficulty or delay, a lawyer qualified to provide such services. The lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services, by engaging in programmes of public information, education or advice concerning legal matters, and by being considerate of those who seek advice but are inexperienced in legal matters or cannot readily explain their problems."



- It is also instructive to review the non-binding "*Code of Professional Conduct*" of the Canadian Bar Association. The CBA has about 36,000 members, including lawyers, judges, notaries, law teachers, and law students. The Code's Chapter XX "Non-discrimination" states this Rule: "The lawyer shall respect the requirements of human rights and constitutional laws in force in Canada, and in its provinces and territories. Except where differential treatment is permitted by law, the lawyer shall not discriminate...in professional dealings with...any other person on grounds including...physical or mental disability". A Commentary on the Duty of Non-Discrimination adds that this duty includes "(c) the requirement that the lawyer act in accordance with the legal duty to accommodate ...".
- ARCH Disability Law Centre contends that lawyers and law firms have a legal (not just ethical) obligation to ensure that offered services "are accessible to persons with disabilities". Additionally, asserts ARCH, the obligation not to discriminate includes an obligation to accommodate persons with disabilities, up to the point of undue hardship. Moreover, ARCH argues that lawyers must not deny services on the ground that an individual has a disability. "Too often, persons with disabilities report that lawyers refuse to consider representing them because of their unfamiliarity with the person's particular disability. Someone who has a speech-related disability may find his/her call to a law office inappropriately 'screened out' by the receptionist."
- (*Providing Legal Services to Persons with Disabilities, Updated to Jan. 2007*, www.archdisabilitylaw.ca, at 9-12) Note that law societies also generally promulgate rules relating to a client "under a disability", i.e. clients whose mental capacity to make decisions is impaired. Under these rules, a lawyer may not act on behalf of a client who lacks the requisite mental capacity to instruct the lawyer. At the same time, as Ontario's Rule 2.02(6) states, if a client's disability to make decisions is impaired because of "minority,



mental disability, or for some other reason”, the lawyer “shall, as far as reasonably possible, maintain a normal lawyer client relationship”. To avoid discrimination and to provide truly professional legal services, it is important that lawyers not base an assessment of a client’s mental capacity on stereotypical views of disability. Guidance on the matter of mental capacity to instruct counsel may be found in “Notes on Capacity to Instruct Counsel” at www.archdisabilitylaw.ca.

3. *THE 1990 "LEPOFSKY" RECOMMENDATIONS ON LAW TEACHING*

Legal education organizations and institutions still have a long way to go before fully attaining the goals set out in recommendations gathered by David Lepofsky in 1990. These were expressed in a speech to the Council of Canadian Law Deans in 1990. This presentation was published in (1991) McGill Law Review, at page 636, as "Disabled Persons in Canadian Law Schools".

One facet of Lepofsky’s recommendations dwelt on steps for building up the teaching of disability-related matters in law schools. Most legal education bodies have moved forward since then. Some individual legal education personnel (administrators, staff and law teachers) have achieved very laudable progress. (The recommendations and subsequent developments are discussed in a publication available at www.reach.ca: Promoting Disability Accommodation in Legal Education and Training: The Continuing Relevance of the 1990 Lepofsky Recommendations.)

Many of the Lepofsky recommendations dealt with such matters as achieving disability accommodations for law students with disabilities. We present here an edited version of the group of recommendations that were aimed more directly at law teaching and research, numbers 20-24 and 26. These remain highly relevant today:



Disability-Related Issues That Could Be Infused into Law Courses

20. Substantive legal topics which should be considered for infusion into law school curriculum include the following non-exhaustive list:

- a. Introductory and advanced administrative law courses could include study of regulatory agencies of particular importance to persons with disabilities, including human rights commissions, welfare agencies, psychiatric detention review tribunals, and school boards;
- b. Family law courses could examine family law issues arising with persons with disabilities, including their capacity to enter into legal matrimonial relations, their capacity to enter into matrimonial contracts, education rights of children with disabilities, and custody and support issues arising in the case of family members with a disability;
- c. Introductory and advanced constitutional law courses could include a study of constitutional issues pertaining to persons with disabilities, including the scope of Charter s. 15's equality rights guarantee to persons with disabilities, and the impact of Charter s. 7 (fundamental justice) on criminal, civil and administrative proceedings targetted at the detention or treatment of persons with disabilities;
- d. Basic and advanced tort courses could examine the treatment of disability in tort law, including the assessment of damages for personal injuries or death in the case of persons with disabilities (which now includes a number of stereotypical presuppositions about life with a disability), alternatives to traditional tort law for income maintenance for persons with disabilities, the duty of care concerning plaintiffs who have disabilities in negligence law and the foreseeability of plaintiffs who have disabilities. As well, an examination could be





provided of tort concepts of "consent" as a defence to intentional torts such as battery, as it relates to persons with mental disabilities, and the legislative provisions regarding substitutional consent;

- e. Introductory contract courses could include an examination of the law's treatment of the capacity of persons with mental disabilities to form contracts;
- f. Feminist jurisprudence courses could include a comparison of judicial and legal attitudes towards persons with disabilities and those attitudes towards women, as well as the impact on legal and judicial attitudes of the compounded situation confronting women with disabilities;
- g. Introductory and advanced criminal law courses could examine the treatment and perceptions of persons with disabilities inherent in the criminal law, both in the case of accused persons and victims of crime, respectively, who have disabilities. Alongside the traditional examination of the insanity defence and its relationship to mens rea and criminal responsibility doctrine, these courses could explore the related topics of judicial and legal stereotyping of mentally disordered persons, the comparatively disadvantageous law pertaining to mentally disordered persons found unfit to stand trial, or found not guilty by reason of insanity, and the law's deferential view of psychiatric evidence in this field;
- h. Estates and trusts courses could include a component examining the special aspects of estate planning for dependents who have disabilities, as well as an examination of the law governing the management of the property of "mentally incompetent" persons, so labelled;
- i. Courses on employment law, law and discrimination, and equality rights can include a component addressing legal



doctrines concerning legal protection against discrimination based on disability, the concept of reasonable accommodation as applied to persons with disabilities, and the practical barriers to the enforcement of the human rights of persons with disabilities;

- j. Tax law and tax policy courses could consider the tax position of persons with disabilities and its interplay with income support legislation and programmes;
- k. Law and Poverty courses could include a section addressing the specific poverty-related issues confronting persons with disabilities, such as the barrier to the pursuit of employment created by certain social assistance schemes, and the impact of sheltered employment regimes on persons with disabilities' poverty.

21. As well, law school courses dealing with subjects of procedure or practice could be infused with curriculum components regarding disability issues. The following is a non-exhaustive list of topics that could be covered in basic and advanced civil procedure courses, basic and advanced criminal procedure courses, courses on legal ethics, professional responsibility and the legal profession, and advanced advocacy seminars:

- a. the current, insufficient level of legal services for persons with disabilities, and the lawyer's ethical obligations to ensure that all, including the disadvantaged, secure adequate legal representation;
- b. the barriers to legal services that now confront persons with disabilities, and the means by which such barriers can be reduced or eliminated;
- c. legal and practical considerations regarding the taking of instructions from clients with disabilities, including the capacity to instruct, the securing of interpreters' services for clients





with communication disabilities and the preservation of client confidentiality for clients with communication or cognitive impairments;

- d. legal, statutory, judicial and social attitudes towards persons with disabilities, and their adverse impact on access to justice for a client who has a disability;
- e. other barriers to access to justice for persons with disabilities, including (among others) physical barriers posed by inaccessible court facilities;
- f. familiarization with the perspective of persons with a disability re access to legal services, and re attitudes towards disability, through opportunities to meet and interact with persons with disabilities;

22. In order to facilitate the most expeditious development of course materials, casebook chapters and the like, to assist in the teaching of the matters described in the two preceding recommendations, the Canadian Council of Law Deans, Canadian Association of Law Teachers, and/or other interested groups should form a committee of interested academics and others. This committee could prepare casebook chapters dealing with disability issues that could be circulated to all law schools, and made available for use by those professors wishing to take advantage of such resources... In addition to legal academics, the committee should include community representatives of people who have disabilities, to help ensure that the materials developed are accurate and appropriate for the needs of persons having different disabilities... It is critically important to secure the input of consumers with disabilities themselves. They are in the best position to articulate their needs, and to ensure that materials are presented in a sensitive and appropriate fashion.



23. In addition to the preceding recommendation, each faculty should set up its own internal committee to ensure that the law school's curriculum adequately addresses disability issues referred to above. This committee could assist in the development of casebook chapters, especially if no inter-school initiative in this regard is undertaken.
24. Each faculty should review its curriculum's clinical legal education component, to ascertain the extent to which students in such programmes are exposed to the provision of legal services to persons with disabilities. An effort should be made to infuse disability-related curriculum into such programmes where appropriate and feasible.
26. Law schools should encourage their faculty members and students to undertake research in areas of the law that are especially pertinent to persons with disabilities, and to endeavour to have this research published. This is in conformity with the law school's traditional role as a source for innovative legal scholarship that can contribute to law reform through legislation and litigation...



4. *DEVELOPING COURSE RESOURCE UNITS AND EFFECTIVE TEACHING APPROACHES FOR COVERING DISABILITY AND LAW*

During the project that produced the present Teaching Guide, Reach's consultant (a legal researcher and educator) worked in cooperation with law teachers committed to enhancing teaching and awareness of disability issues in law courses. Because funding for the project was approved some months after the academic year began, it was not practicable to work with legal educators to design courses from the ground up. We did find professors who were willing to exchange ideas with Reach's consultant, in the academic mid-year. With input from Reach, these law teachers devised meaningful refinements for courses that were already planned or were well under way.

Practical measures for improving coverage of disability issues in law teaching were generated during the project by the law teachers who participated in the project. They responded in proactive ways to the general goal of better integration of disability awareness into law school curriculum and teaching. The Reach consultant also proposed innovations, after observing successful pedagogical approaches taken by other law teachers, or by drawing upon his background as a legal educator in several arenas. The consultant's suggestions for infusing new disability-related elements into law courses included ways to nudge students toward raising their personal awareness of issues pertaining to disabilities, justice and access to justice. For instance, the consultant exchanged thoughts with law teachers on how examination questions and class discussions - on which students are graded - can take greater account of disability-related barriers and disability-influenced legal problems.



Through consultation with academics and consideration of how law school and university courses usually get launched, approved and improved, it became apparent that it might not be fruitful for Reach to propose fixed templates for integrating disability aspects into specific law courses. We reasoned that more useful contributions would be (a) to provide units of information that could be used in any law course to introduce or enhance coverage of disability issues and (b) to provide a short survey of existing disability-focused courses and course components, as sources of precedent.

An advantage of highlighting a number of illustrative courses, rather than attempting to devise "ideal" courses, is that we could thereby identify several professors responsible for developing and teaching precedent-setting courses. Other law instructors may contemplate seeking collegial advice from the named teachers when establishing or upgrading their own courses or materials. (During the project, the Reach Canada consultant confirmed that law teachers in one part of the country were not necessarily aware of all courses taught in the same subject area in other provinces.)

The timetable for the current project and its funding support permitted worthwhile initiatives, but only in a few subject areas. (Reach may be able to extend its work into additional teaching areas in future academic years.)

In the specialty domain of advanced "Disability and Law" seminars, we are able to share (below) several course examples, many of them quite new. This permits us to showcase a spectrum or menu of choices.

Concerning one mainstream law field (Criminal Law) we worked with a teacher of first year students. We sought ways to inspire students to become more aware of disability-related questions that might arise in criminal law practice but are far outside their



normal frames of reference. In this effort, we considered, inter alia, appropriate guest experts and examination questions. Reach also learned of Advanced Criminal courses taught elsewhere that concentrate on intersections between mental disability issues and criminal law and procedure. In another subject usually taught to first year students (Torts) the participating professor, in cooperation with the Reach consultant, came up with a number of elements that could enhance relevant disability awareness among students and academic colleagues.





5. COURSE REFINEMENTS AND OTHER PROMOTIVE STEPS TAKEN BY PARTICIPATING PROFESSORS DURING THE PROJECT SPAN

In all cases where a member of the Reach project team worked in conjunction with law teachers, advancements were made, as seen from the perspectives of Reach and the disability consumer community. These positive pedagogical changes resulted from contributing law teachers being committed to the project's concept and taking concrete steps in line with our shared objectives.

During the time span of the project, contributing law professors took a number of significant steps designed to enhance coverage of disability issues in law schools (not just in their own courses) and to upgrade associated awareness by law students and law teachers. We do not claim that all such measures taken can be attributed to the professors' interaction with the Reach project. In a few instances, however, professors said directly that an innovation arose out of participating in the project and/or because of communications with the Reach consultant. (A couple of contributors had been aware of the project's intentions many months before it was launched.)

The following are examples of simple but worthwhile measures undertaken by contributing law professors over the period of the project. We hope that one or more of the listed items will encourage other law teachers to adopt a more proactive approach to promoting the teaching of disability issues in their own law courses and academic settings:

- a. Participating law teachers whose courses were taught during the project span each added new readings or discussion topics to the curriculum that related to disability-related issues.



- b. Participating teachers whose courses were taught during the project span each agreed to invite to classes an additional guest expert on disability-related issues and/or planned how to ensure that an invited guest expert would deal more fully with disability-centred matters.
- c. Two of the participating professors decided to invite to course sessions legal experts who are also active in the affairs of disability consumer organizations. (All professors responded positively to the idea of doing so in future.)
- d. One professor decided to promote wider infusion of disability awareness into compulsory first-year courses by (a) inviting colleagues to a lunchtime roundtable, (b) sharing thoughts by e-mail, or (c) both.
- e. Specifically because they were inspired by the Reach project, two professors teaching mainstream law courses devised new exam questions that included a disability-related theme as one pivotal issue.
- f. Because one of the aforementioned test questions was placed on a mid-term exam, the professor chose to engage the students in a class discussion about the students' assumptions re disabilities, problems with stereotyping people who have disabilities, and - of course - established and emerging legal quandaries raised by the exam question.
- g. As a result of exchanges among a professor, the Reach consultant and an invited guest expert, the professor is considering how, in the next school year, students can witness in person specialized criminal court proceedings in which questions linked to accused persons with serious mental disabilities are frequently examined as important issues.
- h. There was mutual learning involving professors contributing to the Reach project, the Reach consultant, and law students and faculty





doing research on an equity-promotion project involving a survey of all law schools in Ontario. (One project focus is on disabilities and accommodation).

- i. At the annual meeting of the Canadian Association of Law Teachers (Saskatoon - May 2007), one professor participating in the Reach project plans to promote wider infusion of disability awareness into law teaching, during a planned colloquium on a mainstream law subject.
- j. One participating law teacher launched and put the finishing touches on a new "Law and Disability" course - the first at that professor's faculty.

We indicated above that two professors teaching traditional (compulsory) first year courses decided to devise new examination questions that took into account disability as a factor. In both instances, an individual in a fictional fact situation was described as having a disability that was in some respect relevant to legal issues that students writing the exam needed to address. Again in both instances, the situations described in both questions bore some resemblance to real-life situations found in reported Canadian law cases.

In the 2006-2007 academic year, Assistant Professor Lynda Collins has taught Torts to one section of first year students at the University of Ottawa. On a mid-year open book exam in December 2006, she included the following question:

Question 3

Independence, Inc. is an advocacy and support organization that serves persons with disabilities in a major Canadian city. Each summer, Independence, Inc. pays for its clients to spend a two-week period at Green Acres Resort, a facility owned and operated by Nancy Xavier. Independence, Inc. specifies a list of activities to be made available to its clients, as well as the





nature of accommodation and food to be provided. Ms. Xavier owns the resort property, pays for her own supplies and employs 15 workers to assist in the running of the resort.

In the summer of 2005, Ms. Xavier was going through a bitter divorce and was experiencing significant psychological distress, including uncharacteristic angry outbursts. On July 7, 2005, Mr. Jamie Yaris, a quadriplegic client of Independence, Inc. who was attending the Green Acres summer program, approached Ms. Xavier and politely asked whether Green Acres would be offering any musical entertainment that year. Ms. Xavier became overwhelmed with anger, grabbed Mr. Yaris by the shoulders and shook him, yelling that she was “sick and tired of responding to his unreasonable demands!” Mr. Yaris was understandably upset by this incident, but did not sustain any physical injury or serious psychological harm.

- Briefly advise Mr. Yaris on any tort claims he could bring against Ms. Xavier, including any defences she may raise.
- Advise Mr. Yaris on any tort claims he could bring against Independence, Inc., including any defences it may raise.

(Ed. Note: *Information that was given to students with regard to grading and timing was removed from this illustration during the editing process.*)

Placement of the quoted Torts question on a mid-year exam enabled the professor to engage with students in a class discussion during the second term. She was thus able to raise awareness concerning commonly held assumptions re abilities and disabilities. What could be termed as “ablist” stereotyping of people who have disabilities had steered some students in the wrong initial direction when dealing with legal issues in the exam question. Concrete evidence arose later in the term that perhaps demonstrates that the post-exam discussion had a positive effect on students’ perceptions. (In the interest of





student confidentiality we choose not to relate this evidence here.)

Earlier in the first teaching term, Professor Collins and the Reach legal education consultant exchanged ideas on how certain components of a Torts course could benefit from elaboration of disability-related law problems. The examination question tied in well with course areas that were seen as being more obviously suitable for integrating disability perspectives. The Torts subject areas identified initially were as follows:

Initial Ideas for Integrating Disability into Tort Law Teaching

- a. Assault, Battery, False Imprisonment (Use disability examples.)
- b. False imprisonment (Do I have the right to affirmative assistance in mobility?)
- c. Vicarious liability
Second branch – creation of “zone of risk”/power-dependency relationships (For example, use disability examples, such as care facility situations.) [See 2006 Tort exam, Question 3.]
- d. No-Fault Motor Vehicle Accident (MVA) Insurance
In addition to considering the impact of auto insurance on tort liability, one should explore (or at least mention) insurance litigation advocacy. Most people with acquired disabilities from MVAs have to fight with insurance companies to get necessary benefits. In particular, Torts courses should cover case law dealing with insurer misconduct, e.g. the *Whiten v. Pilot Insurance* case. [Hint to law teachers: Personal injury law firms often provide helpful materials discussing such matters on their websites.]

Another domain that we agree is deserving of examination in a Torts context is that of “Crown” or government liability in many kinds of matters related to disabilities. These issues are also



appropriately addressed in “Law and Disability” courses, such as those being taught by David Baker and Ravi Malhotra (see 7.2 below).

During the 2006-2007 academic year, Assistant Professor Graham Mayeda has taught Criminal Law to one section of first year students at the University of Ottawa. In a final exam in April 2007, he may include a question including most of the elements of the Draft question presented below:

Question 1

On the night of May 2, 2006, or early in the morning of May 3, 2006, Kamal Ranganathan caused the death of his wife by striking her several times on the side of the head with an axe. Ranganathan was subsequently charged with first degree murder.

Much of the evidence at trial will be submitted by means of an agreed statement of facts. It was admitted by Ranganathan that he had made arrangements, several days before the incident, to return to his native country, India, along with his two children. To this end, he purchased three airline tickets and collected them on May 2, 2006. He also purchased a number of other items during this period, including an axe and a suitcase. Ranganathan admitted that he and his wife argued over a number of matters several days before the incident, to the extent that his wife left their home in order to stay with relatives for a short time, returning only on the afternoon of May 2, 2006. The argument that caused her to leave was precipitated in part by Ranganathan's decision to quit his job. The spouses had also disagreed on numerous occasions as to whether the family should return to India.

Five hours after killing his wife, Ranganathan tried but failed to enlist the help of friends in order to remove her body from the





home. He finally severed the body into smaller parts with an axe and disposed of them in a nearby river. He cleaned the premises and later made attempts to enter the United States.

Ranganathan's statement to police indicates that he had become deluded that he was a prophet who had been called upon by God to lead the world in forming an international government; the disorder also caused him to hear voices telling him that he and his family were cursed and that they must return to India. Although Ranganathan likely knew that the act of killing his wife was a crime, he believed that his wife would be corrupted if she did not return to India with him and that it was therefore necessary to kill her. The evidence also suggested that Ranganathan believed that his wife would be "reborn" in India as a living person.

The accused is a chronic alcoholic. Leading up to the day before the murder on May 3rd, Ranganathan had been drinking for almost a 24 hour period. As a result, Ranganathan's memory of the events leading up to the murder was patchy because of blackouts in his memory. He recollected being in his home, feeling sick and dizzy. He had a hallucination: a man with a long beard dressed in sacred clothing but with a white, crooked tail, kept jumping in front of him. He was sweating, thirsty and felt as if he was constantly falling down.

Ranganathan said that he remembered very little as to what happened in the hours before the killings. He did not recall the fatal events at all, other than the hallucinations about the prophet and his conviction that his wife would be corrupted if she did not return to India. He next remembered sitting on the couch of his living room holding an axe, which he then dropped. He was sick and sweating. He heard noises. The vision of the prophet with his crooked tail came back to frighten him.



The first of the expert witnesses, Dr. Frederick Shane, a well-known psychiatrist in Ottawa, was hired by the defence. In his medical report, he states the following in regard to his opinion of the accused's state of mind at the time of the killings:

...[B]ased on the information I have, listening to him again and my original assessment and accepting the credibility of what he had to say, I think that there's quite a reasonable possibility that at the time of the commission of the offence, Mr. Ranganathan was in a state of alcohol withdrawal and was probably experiencing a syndrome called the delirium tremens ...

As to the effect of being in delirium tremens, Dr. Shane said four things:

1. "[I]t traditionally tends to create a state of impaired judgment. A person's appreciation of what he's doing is really very, very fragile";
2. "Mr. Ranganathan's ability to appreciate the nature of what he was doing was quite fragile. He had only limited ability to recognize the incredible seriousness of the consequences of his act";
3. "[People suffering from delirium tremens] really do not appreciate the quality of what they are doing";
4. "I do not think [such a person] really appreciates, in a genuine true manner, what he has done."

Dr. Shane confirmed that Ranganathan had not previously been treated by a psychiatrist, and that he was not aware of Ranganathan having suffered similar episodes.

Dr. Janet Jacyk, a Crown witness, is an expert in the field of alcohol dependency. She is well-known for her work in this field, being affiliated with the Alcoholism Foundation of Ontario



as a medical consultant. In her report, she explains the physiology of delirium tremens. She wrote that two things happen after a subject has used alcohol to excess for a prolonged period. The first thing is that the brain cells swell, causing a certain amount of dysfunction and disorientation. The second is that the subject's brain produces an increased amount of adrenalin to offset the effect of the alcohol. When the subject withdraws from alcohol, an excess of adrenalin remains within the tissues. This causes the subject to become agitated or excited, the degree of agitation or excitement being categorized in five stages of its continuum.

Based on the information available to her, Dr. Jacyk expressed the opinion that the accused was a chronic alcoholic. He would stop drinking only when he ran out of alcohol. Acknowledging that it was difficult to say when that occurred, Dr. Jacyk thought it might have occurred sometime during the day prior to the killings.

The symptoms described by the accused were, in Dr. Jacyk's view, those of a person in the third or fourth stage of delirium tremens. The capacity of such a person, Dr. Jacyk wrote, would depend upon how grounded he was in reality at the particular time. When comparing such a person's capacity with that of a drunk person, Dr. Jacyk said: "[I]t is worse than being simply drunk, because there is a greater chance of being totally out of touch with reality."

Finally, Dr. Jacyk testified that for a person like Mr. Ranganathan who is an alcoholic, drinking is not self-induced or voluntary, but rather necessary due to the addiction and dependency involved. The effects of chronic alcoholism are not passing, but rather permanent, due to the deterioration of the brain cells caused by repeated consumption of alcohol over a long period of time.



You are junior defence lawyer and have been asked to produce a memo for your boss. What is the likelihood of conviction on the charge of first degree murder? Be sure to consider any relevant defence(s).

(Ed. Note: *Professor Graham Mayeda kindly allowed us to quote the above question on the understanding that the Teaching Resource Guide would not be made public until after the final exam. Information with regard to grading was removed from this draft illustration during the editing process.*)

This Criminal Law exam question links well to syllabus areas that Professor Mayeda, in exchanges with the Reach legal education consultant, had identified as likely candidates for further integration of disability-related issues. Those areas included consideration of criminal procedures, criminal defences, personal circumstances and disabilities associated with “capacity-based defences”, such as: mental disorder; chronic alcoholism or addiction; and automatism. (We observe that in the Browning case, tribunals and judges up to the Court of Appeal level in Saskatchewan (2004) confirmed that chronic alcoholism is a disability that is protected by law against discrimination.)

Assistant Professor Ravi Malhotra teaches two courses at the University of Ottawa in which discrimination against, as well as equity and accommodations for persons with disabilities are standard subject components. One of these courses is a new (2007) seminar on Disability Rights. Substantial parts of the syllabus for this seminar are captured in Chapter 7 of this Resource Guide. The other seminar is on Human Rights Law in Canada. In the latter course, Professor Malhotra has added several new elements to give stronger representation to legal problems concerning people with disabilities.

Professor Malhotra engaged supplementary outside expertise, in both mentioned courses. He ensured that important emerging issues were commented on by guests knowledgeable at a practical





level and/or directly involved in these current issues. For example, in collaboration with the Reach education consultant, Professor Malhotra arranged for students to conduct a debate concerning the pros and cons of recently legislated changes to complaints procedures under the Ontario Human Rights Code. In the real world, there are serious advocates from and for consumer communities who support opposing sides of the issue.

As in the Human Rights course, Professor Malhotra called on guest speakers to assist in covering a few significant current legal developments on Disability Rights. For example, a lawyer spoke to the class about the contents, implications and background of the Convention on the Rights of Persons with Disabilities. This international treaty was adopted by the UN General Assembly in December 2006 and was signed by Canada on March 30, 2007. Disability consumer groups from Canada were strongly involved as partners in the treaty negotiation process and in lobbying governments in Canada at various stages. (The guest speaker discussing the Convention was the Reach legal education consultant, who has been active in advising and giving treaty drafting suggestions to a Canadian network of disability consumer organizations.)

The University of Ottawa law teachers who have contributed in so many ways to the Reach Equality in Justice project will continue to promote better integration of disability perspectives in law instruction. As an illustration, Professor Collins has determined to do the following at the 2007 annual meeting of the Canadian Association of Law Teachers In Saskatoon: (1) raise the importance and under-representation of disability issues in tort pedagogy and in the law school curriculum in general; (2) communicate the importance of integrating disability issues into law school rather than leaving it to optional upper year classes; and (3) foster a concrete 'how-to' talk discussing where and how disability issues can be raised in the first year curriculum.



6. *COURSE RESOURCE UNITS FOR LAW COURSES THAT COVER DISABILITY ISSUES*

6.1 Objectives of This Chapter

We recognize that if you are a law teacher reading (or hearing) this, you may already have a good grounding and keen interest in disability issues. For you, much of what we provide in the following Units of information will be redundant. Nevertheless, we hope that some of our ways of expressing and supplementing this information will prove useful in your teaching and in course preparation.

If you are developing or revamping a broadly reaching course in "Law and Disability", you might decide to make use of all or only some of the following units or modules. Perhaps they could form the basis of an introductory course session. Further into this Guide, you will find clustered a range of differing approaches and materials that other law teachers employ in their own "Law and Disability" courses.

A lecturer seeking ways to add disability perspectives to a traditional or mainstream law course might decide to select from these Units only certain elements from introductory or foundational course units. You might then look through the "Law and Disability" course descriptions and reading lists in Chapter 7 to find subject-specific or pedagogical components that fit your purposes. If you are a teacher of Criminal Law or of Torts, you will discover a couple of ideas specific to those subject areas. If you are teaching Human Rights, you can also benefit from reviewing the broad band of course samples from the Law and Disability domain.

Whatever course you teach, you should encounter here some datum or practical tip that could assist you to infuse more



disability-sensitive content and context into your work as a law teacher.

In addition to the units set out below, we believe that law teachers wanting to augment the treatment and awareness of disability issues in legal education should look at Chapter 2 on conduct rules for lawyers. That chapter offers examples of information that is required reading for lawyers. So it should be of interest to law teachers who contemplate how law and the legal-judicial system can be improved for persons with disabilities.

6.2 Evolving Views of Disability and of Disability Accommodation

6.2.1 Definitions of Disability

There is no universal definition of disability; and “disability” is an evolving concept. As the Preamble to the new UN treaty on the Rights of Persons with Disabilities observes, however, “disability results from the interaction between persons with impairments and attitudinal and environmental barriers”. These barriers “hinder full and effective participation in society by people with disabilities on an equal basis with others”. (Convention on the Protection and Promotion of the Rights of Persons with Disabilities, Adopted by the UN General Assembly on December 13, 2006)

Some understandings about disability are generally shared among the disability rights community. Often these have been supported or even strengthened by Supreme Court of Canada decisions. For instance, see: the “Mercier” decision, Québec (*Commission des droits de la personne et des droits de la jeunesse*) v. Montréal (City); Québec (*Commission des droits de la personne et des droits de la jeunesse*) v. Boisbriand (City), [2000] 1 S.C.R. 665, 2000 SCC 27, at paragraph 77 and also Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28 at paragraphs 29-30.





Section 15 of the Canadian Charter of Rights and Freedoms covers “mental disability” and “physical disability” in section 15, but does not define those terms. Diverse legislation defines disability to suit different purposes. Human rights statutes usually define disability broadly, so as to prohibit all forms of discrimination on the basis of disability. (As examples, see: Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 25; Ontario Human Rights Code, R.S.O. 1990, c. H.19, s. 10(1); Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11, s. 2.)

Law clients with disabilities may be surprised to learn that, for some purposes, a government does not consider them to have a disability, under applicable statutes, guidelines and regulations. Legislation and guidelines governing disability income and support programmes may define disability narrowly. They may focus on medical criteria and/or employability and/or a person's functional limitations in performing activities of daily living. For several federal and Ontario illustrations, see note 22 of Providing Legal Services to Persons with Disabilities (ARCH Disability Law Centre) at www.archdisabilitylaw.ca/publications.

Historically, disability was seen in terms of a physical or mental defect or sickness that required medical intervention. This outmoded “medical model” that focused on perceived physical or mental limitations has been rejected in favour of a broader understanding known as the “social model”. Social, economic and environmental obstacles (including the built environment) create barriers to full participation in society. The social model recognizes that society’s failure to accommodate the needs of persons with disabilities gives rise to disadvantages that persons with disabilities encounter in their daily lives. “The medical model tries to adapt the individual to society whereas the social model tries to adapt society to the diversity of individuals that comprise it.” (Human Resources and Social Development Canada, Advancing the Inclusion of People with Disabilities (Ottawa: Social Development Canada, 2006) at page 6.



"Disabilities traditionally were regarded as being divisible into two categories: physical disabilities (e.g., paraplegia, blindness, Deafness) and mental disabilities (e.g., Down Syndrome, schizophrenia, depression). It [is now] understood that many disabilities have both a "physical" and a "mental" component [and] these components are not easily separated or differentiated. Some disabilities involve multiple components, such as physiological, psychological, cognitive, sensory, neurochemical, etc. Learning disabilities, for example, may extend from differences in a person's perceptual as well as cognitive systems. Acquired brain injuries may affect both mobility skills and emotional functioning. Multiple sclerosis may affect memory as well as mobility.

Previously unrecognized disabilities are being identified and distinguished from others. In recent times, for example, learning disabilities, bipolar disorder, chronic fatigue syndrome, chronic pain syndrome, fibromyalgia, environmental sensitivities, and HIV/AIDS have been identified as important types of disabilities." (ARCH, Providing Legal Services ..., pages 2-3)

There are accepted diagnostic tests for some disabilities but not for others. Evidence of some disabilities is quite evident, while others such as learning disabilities, epilepsy and diabetes are "invisible" or "non-evident".

* For instance, see these SCC rulings: the "Mercier" decision, Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665, 2000 SCC 27, at paragraph 77; and Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28, at paragraphs 29-30.

6.2.2 Disability Accommodations

Limitations or symptoms commonly associated with a particular disability may not be present in a particular person. Indeed, the individualized nature of disabilities and the frequent need for individual accommodation tailored to the person are factors given





much weight by the Supreme Court of Canada. See the “Meiorin” and “Grismer” cases summarized below and the “Martin” case (Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur [2003] 2 S.C.R. 504, 2003 SCC 54).

Most law teachers reviewing this Teaching Guide are likely to know already that disability accommodation facilitates the ability of persons with disabilities to do things. When an individual is unable to do something in a certain way, he or she may often be able to do it in another way. Here are some thoughts on barriers, adaptation and disability accommodation, adapted from Providing Legal Services to Persons with Disabilities (www.archdisabilitylaw.ca), pages 1-2:

- Persons who use wheelchairs are able, per se, to enter buildings. But when buildings have steps in front, persons who use wheelchairs become ‘disabled’ from entering. It is the steps that cause a disablement.
- A person who is blind cannot read in the same way as a sighted person but may read using Braille and/or a computer with a screen reader.
- Some persons who are Deaf, deafened or hard of hearing cannot communicate orally, but can speak using sign language. Some individuals can also gain better access to orally transmitted information, through assertive technology such as an FM amplification system.
- A person with a developmental disability may not understand a written training manual but may be able to learn a skill, or grasp a concept, through careful instruction, demonstration, and support.
- Inflexibility regarding hours of work and job descriptions may create barriers for persons with a wide diversity of disabilities. Conversely, greater flexibility may prevent or remove (unintentional) hurdles for many individuals.





- Stereotypical thinking that an individual with a particular functional limitation is unable to perform a task satisfactorily, or that the individual will take excessive time off work, are removable “attitudinal barriers”.

6.3 The Duty to Accommodate

The Supreme Court of Canada has ruled that employers as well as organizations providing services to the public have a "Duty to Accommodate" that takes into account the disabilities of individuals. This view by the Supreme Court has strengthened existing laws saying that employers and others have a responsibility to make reasonable efforts to make adjustments allowing someone with a disability to obtain fairly a particular job or service.

The duty to provide reasonable accommodation is proclaimed in human rights codes that outlaw discrimination in Canada and its provinces and territories. Interpretations by the Supreme Court strengthen those legislated rights. A good source for related extensive discussion is the section on Duty to Accommodate found in the “Disability Policy and Guidelines” of the Ontario Human Rights Commission, available at: <http://ohrc.on.ca/english/publications>.

Accommodation may be defined as the adjustment of a rule, practice, condition, or requirement to take into account the specific needs of an individual or group. To some degree it involves treating individuals differently. Different treatment to adjust for a disability is legally required if the accommodation is needed to ensure that the individual has the opportunity to participate or to benefit fully and equally.

As we observed in Chapter 2, law and bar organizations encourage their lawyer members to find ways to accommodate employees - and increasingly, others such as clients - who have disabilities. Universities and law faculties have been promoting



accommodation, often with more speed and focus than lawyers' groups have, for students and staff with disabilities.

The duty to accommodate in employment, educational, transportation and other fields is balanced by the notion that the employer, educational institution, provider of services and facilities, etc. is not obligated to provide accommodations that cause "undue" hardship. The obligation to accommodate people who have disabilities does not stop, however, when minor inconveniences or "hardships" are encountered. There is a legal obligation to have policies, standards and practices that do not create artificial barriers unrelated to the true essentials under consideration. One basic obligation is to consider all reasonable options for providing accommodation, rather than assuming that it might be too difficult or costly.

In deciding whether alleged hardships are excessive or undue, a court or human rights tribunal might look at factors such as: the financial resources required to provide an accommodation; the kinds of effects that accommodations will have on, for instance, other employees or service providers; the impact of accommodations on the overall firm, department, educational programme or other relevant entity; the degree and kinds of effects that accommodations will have on other clients or consumers - including unusual risks, if any, that accommodations may pose for others (including persons who have a disability).

In many fields, accommodations help to give capable people who may not fit a particular "norm" a fair chance to succeed personally and professionally. Employers, service providers and others need to offer accommodations based on a systematic application of good practices. Yet each person who has a disability usually requires an individualized approach. The severity of a disability varies among individuals and each person responds to and succeeds differently with the "same" disability. Every situation is unique and must be assessed individually.





Reasonable accommodations can ensure that persons with special needs are given a fair opportunity to obtain equitable access or benefits, or to achieve applicable across-the-board standards. Accommodation facilitates flexibility and recognizes that individuals may achieve equally good results in different ways.

Applying “Universal Design” principles to the built environment and to programs and services can help to prevent discriminatory barriers that would require accommodation. Good starting places to learn about these principles are the discussions of “Universal Design of Instruction” and “Accommodations and Universal Design”, on “The Faculty Room” website: www.washington.edu/doit/Faculty/Strategies/Universal/

6.4 Practical Measures for Accommodating Law Clients

This unit provides examples of how persons with a range of disabilities can and should be accommodated so they may receive appropriate legal services. Lawyers ought to be cognizant of the fact that each person with a particular disability experiences it differently. An added need for individuation arises because many people have more than one disability.

As we indicated in Chapter 2, ARCH lawyers (and others) hold the view that solicitors, barristers and law offices have a legal obligation to offer accessible services and to accommodate clients and other persons with disabilities.

The present unit informs law teachers generally on measures that lawyers can take to assure that clients receive the accommodations and competent professional services that they require. By analogy, most of this guidance would apply as well for service and support providers in the public sector (including in the justice system) when they meet and/or assist clients or citizens who have disabilities.



- Disability consumer organizations can provide data and advice about specific disabilities and about frequently associated accommodations.
- The best source of information about a client's own disability and about any related personal accommodation needs is him or her.
- Clients who have accommodation needs will appreciate a question about accommodation needs at the start of an interview. (Issues may include whether the seating arrangements will permit effective communication or when it would be an appropriate time to take a break.)
- Sometimes there are reasons to anticipate a number of accommodation needs. On such occasions, the lawyer could request that arrangements be canvassed and addressed by support staff in advance. (Lawyers could develop a checklist for this purpose.)
- Time considerations are highly important for many clients with disabilities. (For example, consider the infamous delays that arise in arranging accessible transit services. And note that extra time is needed to arrange and conduct sign language interpretation.)
- Some clients with disabilities may require home visits because their disability makes it difficult to leave their homes. Visiting those clients in their homes will facilitate any needed disability accommodations. But many clients, with or without disabilities, prefer the confidential setting of a lawyer's office. Some persons with disabilities live in places that do not afford complete privacy, such as group homes or hospitals.

Most of the guidance listed above was derived from Providing Legal Services to Persons with Disabilities (ARCH Disability Law Centre, updated to 2007). Earlier versions of this document were traditionally made available to bar students in Ontario's Bar Admission Course.



Pages 12-20 of the ARCH advisory deal in detail with accommodations for clients. related to the following: Hearing Disabilities, Vision Disabilities, Communication Disabilities, Disabilities that Affect Mobility, Psychiatric Disabilities, Intellectual Disabilities and Developmental Disabilities, and Learning Disabilities.

To illustrate the kinds of details presented, here are two points of advice that happen to be aimed at ensuring better access to justice for clients who are involved (voluntarily or otherwise) in the justice system:

- "For clients with vision disabilities, lawyers must ensure that written communications are provided in an accessible format... For appearances before courts or tribunals, lawyers should contact the relevant registrar and other parties to ask [for] certain accommodations... For instance, a request can be made for evidence to be converted, in advance of a hearing, into an accessible format so that a client will be able to understand the evidence..."
- "For appearances before courts or tribunals, lawyers should... ensure that accessible rooms are booked for proceedings involving clients with mobility disabilities... [There] are still many court houses with inaccessible rooms."

6.5 Using Appropriate Words and Phrases Related to Disabilities

Law teachers should strive to use and encourage appropriate language when there is conversation about or with persons who have disabilities. In that respect, the federal government produces helpful guidance titled "A Way with Words and Images". Ontario publishes a similarly-aimed guide titled "Word Choices." (A Way with Words and Images: Suggestions for the portrayal of persons with disabilities (Ottawa: Queen's Printer, 2003); Word Choices: A





lexicon of preferred terms for disability issues (Toronto: Accessibility Directorate of Ontario, Ministry of Citizenship, 2002).

Note that you will find outdated terminology in older documents. Even today, not all lawyers, professors, politicians or community leaders are familiar with current and evolving thinking about disability.

Below we present examples of language that may enhance - or affront - the dignity of persons with disabilities. These are adapted from a longer list in one of the excellent resources prepared by ARCH Disability Law Centre. For more advice, see: Providing Legal Services to Persons with Disabilities (Updated January 2007 / www.archdisabilitylaw.ca/publications).

Here are a few illustrations of modern thinking and communication:

- Put the person first by saying, for example, “persons with disabilities” or “women with disabilities”. This is generally considered more appropriate than saying “disabled persons” or (especially) “the disabled”.
- Persons with disabilities are often referred to as “consumers” of disability-related services.
- The term “disability” is considered a more appropriate term in English than the term “handicap”.
- The term “non-disabled” is considered more appropriate than “able-bodied”
- It is not usually appropriate to speak of someone as “suffering” from a disability or as “afflicted” with it, or as a “victim of it,” except in some particular circumstances.

Numerous other illustrations may be found in the sources cited above, in the Reach Canada guide to law for non-lawyer consumers (2007) and in other Reach publications.



6.6 Leading Disability Cases on Equality and the Duty to Accommodate

In a brief Teaching Guide for an educated audience, it is not appropriate to provide a large batch of case notes. For those rare readers of this volume with only general background knowledge on "disability and law", we have summarized a few Supreme Court cases on Equality Rights and on the Duty to Accommodate. One of those rulings was released just as this Guide went to press.

The major judgments summarized below outline broad principles that are applicable to many kinds of disputes involving equality rights, discrimination or failure to accommodate for a disability.

ELDRIDGE DECISION

Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R. 624; [1997] S.C.J. No. 86

Main Issues

The B.C. public health system failed to provide sign language interpretation for Deaf patients during the latter stages of pregnancy and childbirth. The complaining parties asserted that the absence of interpreters impaired their ability to communicate with doctors and other health care providers, thus increasing the risk of misdiagnosis and of ineffective treatment.

The central question was this: Did B.C.'s failure to provide adequate interpreter services for Deaf patients in their dealings with doctors and hospitals violate equality rights under section 15 of the Canadian Charter?

Key Judicial Findings

The Supreme Court of Canada ruled that governments have a positive obligation under the Charter to address the needs of



disadvantaged groups such as persons who have disabilities. B.C.'s failure to pay for sign language interpretation was discriminatory. The appellants suffered discrimination from the failure to ensure that they benefitted equally from medical services offered to everyone. The government had not reasonably accommodated hearing disabilities to the point of undue hardship.

GRISMER DECISION

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) [1999] S.C.J. No. 73; [1999] 3 S.C.R. 868; (1999) 181 D.L.R. (4th) 385

Main Issues

Mr. Grismer was a driver of mining trucks. He had a visual disability called homonymous hemianopia (H.H.). The B.C. Superintendent of Motor Vehicles cancelled Grismer's driver's licence, on the ground that his vision no longer met the minimum standard for peripheral vision. While exceptions to this standard were permitted in other kinds of cases, people with H.H. were not permitted to hold a driver's licence in British Columbia.

The Supreme Court of Canada stated that the key legal issue was whether the Superintendent's absolute prohibition of individuals being allowed to drive with H.H. was a valid standard according to the criteria decided by the Meiorin ruling (see summary below). Those criteria required enhanced accommodation for disabilities. The Supreme Court reasoned that an invalid standard may itself amount to unlawful discrimination.

Key Judicial Findings

The B.C. Superintendent of Motor Vehicles did discriminate by not adequately accommodating Mr. Grismer's disability. The Meiorin case announced that employers and others governed by human rights legislation are now required in all instances to



accommodate the characteristics of affected groups - within the standards set by those employers, public agencies, etc.

It is not good enough to maintain discriminatory standards that are merely supplemented by accommodating those who cannot meet the standards. If a standard seems, on its surface, to be discriminatory, the employer, public agency, etc., must prove that the discriminatory standard has a bona fide and reasonable justification. The defendant must pass the three parts of "the Meiorin test" (see below).

While "the Meiorin test" was developed in the employment context, it applies to all claims for discrimination where reasonable accommodation could be an issue. In the Grismer case, Mr. Grismer demonstrated that there was prima facie discrimination, by showing that he was denied a licence on the basis of his visual disability. The Court found that the Superintendent did not prove that the discriminatory standard had a bona fide reasonable justification.

The B.C. Superintendent's goal was reasonable highway safety, balancing the need for people to be licensed and the need for public safety. The Court said that this goal was legitimate and rationally connected to the issuing of drivers' licences. In addition, the standard of requiring a minimum field of vision of 120 degrees was adopted in good faith. But the standard was not reasonably necessary to accomplish the safety goal. For example, many people with less than full peripheral vision can drive safely. Moreover, Mr. Grismer had been compensating for his disability.

According to the Supreme Court, the Superintendent did not show that the risks or cost associated with providing individual assessment for drivers with H.H. constituted "undue hardship". Mr. Grismer should have been given the opportunity to show, in an "individualized" evaluation, that he could drive without undue risk.



MEIORIN DECISION

British Columbia (Public Service Employee Relations Commission)
v. BCGSEU [1999] 3 S.C.R. 3

Main Issues

For forest fire fighters, the B.C. government had established minimum physical fitness standards. A female firefighter failed to meet one aerobic standard, after four attempts. (She had previously done her work in firefighting satisfactorily.) She was then dismissed. She and her union filed a grievance that included a complaint of discrimination.

Main Issues

The key legal issue was whether the aerobic standard that led to dismissal of the female firefighter unfairly excluded women from forest firefighting jobs and was discriminatory. The general issue was whether the government had improperly dismissed the claimant from her employment situation.

Key Judicial Findings

The Supreme Court of Canada noted that because of physiological differences, most women have a lower aerobic capacity than most men. Moreover, unlike most men, most women could not increase their aerobic capacity enough, even with training, to meet B.C.'s aerobic standard. Evidence was lacking, however, on whether the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest fire fighter safely and efficiently.

The Court ruled that the claimant had suffered unlawful discrimination. She should be restored to her former job position and compensated for lost wages and benefits.



Employers and others governed by human rights legislation are required in all cases to accommodate the traits of affected groups within the standards set by these employers, public agencies, etc. It is not good enough to maintain discriminatory standards and merely mitigate or supplement them through accommodation for those individuals who cannot meet these standards.

Incorporating or integrating the concept of accommodation directly into the developed standard helps to ensure that each person is assessed according to that person's abilities. Individuals should not be judged against presumed group characteristics. Such assumed characteristics are frequently based on bias and historical prejudice and cannot be the foundation for reasonably necessary standards.

The "Meiorin test" has three parts. Once a complainant establishes that a standard is *prima facie* discriminatory, the respondent/defendant has a duty to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement or has a *bona fide* and reasonable justification. The respondent must prove that:

- it adopted the standard for a purpose or goal rationally connected to the relevant function or activity;
- it adopted the standard in good faith, believing that it was necessary for fulfilling the purpose or goal; and
- the standard is reasonably necessary to accomplish the purpose or goal.

The respondent/defendant can show "necessity" as a defence if the respondent or defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship. That hardship could arise, for instance, because of impossibility, serious risk or excessive cost.



Failure to accommodate may be shown by evidence that the standard was set arbitrarily, or that an individual assessment was unreasonably refused (or may be shown in some other way).

The Court held that if the challenged policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship is incorporated into the standard, the fact that the standard excludes some people does not constitute discrimination.

The Supreme Court stated that the "Meiorin test" was a new "unified approach". It was meant to jettison and replace the conventional approach of categorizing discrimination as either "direct" or "adverse effect" discrimination.

VIA RAIL DECISION

Council of Canadians with Disabilities v. Via Rail Canada Inc.
(Judgment released by the Supreme Court of Canada on March 23, 2007)

Main Issues

VIA bought used rail cars that were retired from the English-French "Chunnel" route. Their narrow aisles made them inaccessible to persons with disabilities when they used personal wheelchairs. The Council of Canadians with Disabilities ("CCD") complained to the Canadian Transportation Agency that many features of these "Renaissance" cars constituted barriers to mobility for persons with disabilities. The Agency ordered VIA to modify enough rail cars to maintain one personal wheelchair-accessible car on each daytime train and to provide one sleeper car accessible to personal wheelchairs on each overnight train.

VIA won an appeal at the Federal Court of Appeal. That Court ruled that VIA faced "undue obstacles", taking into account the interests of persons who do not have disabilities and the interests of people with disabilities who do not use personal wheelchairs.



The main law question was this: Do railways and other providers of services and facilities have a Duty to Accommodate up to the point of [proven] undue hardship?

Key Judicial Findings

The Supreme Court of Canada ordered (by a margin of 5 to 4) that the Transportation Agency's decisions should be restored. VIA must provide the needed cars. The Court relied on the Meiorin and Grismer decisions, summarized above.

The Court said that a physical barrier denying access to goods, services, facilities or accommodation customarily available to the public can be justified only if it is "impossible to accommodate" the individual "without imposing undue hardship" on those responsible for the barrier.

Such a discriminatory barrier must be removed unless there is a bona fide justification for its retention, which can be proven by establishing that accommodation imposes undue hardship on the service provider. This onus of proof was not met by VIA Rail. As the Court's majority says, "It will always seem ... cheaper to maintain the status quo and not eliminate a discriminatory barrier." The issue is not just cost, but "whether the cost constitutes undue hardship".

The Court's majority opinion observed that to redress discriminatory exclusions, human rights law favours approaches that encourage independence and access and that seek to minimize the disadvantages created by disabilities. "It is a concept known as reasonable accommodation."

A good source for researching more case law in the disability field is the website of ARCH (www.archdisabilitylaw.ca). You can also review summaries of several judgments dealing with disability-related questions by visiting "LD and the Law", posted on the website of the Learning Disabilities Association of Canada (<http://www.ldandthelaw.ca>)



www.ldac-taac.ca/). Those latter summaries (and much else in that online resource) were written by the author of the current Teaching Guide, Allan McChesney. Articles that review the development of relevant law over the years may be found on the web pages of the Council of Canadians with Disabilities. The CCD was the main consumers' group involved in the VIA Rail case that is summarized *supra*.

6.7 Sources of Outside Expertise for Course Enrichment

As good educators know, one of the surest ways to help an audience learn and retain a lesson is to deliver the lesson in the form of a story. This technique, if exercised well, can also bolster an advocate's efforts to sell a viewpoint to a judge or jury. Law students have always learned by observing experienced counsel and hearing how the justice system works in real life. In the same vein, students (and professors) can learn much about how the legal-justice system works (or doesn't) for persons with disabilities, by reading or hearing about their true life experiences.

Exchanges in a classroom or elsewhere between students and outside experts almost always enrich the proceedings, whatever subject area is being addressed. Reach Canada recommends that law teachers invite to the class or to another venue representatives of "consumer" organizations of people with disabilities. While focusing on relevant legal issues, the class discussions should also raise students' awareness by turning to "access to justice" matters such as the following: legal and attitudinal barriers encountered with government bureaucracies, courthouses and lawyers' offices; difficulties finding truly knowledgeable and competent legal representation for the area of law that a potential client needs addressed; and reminders of simple and relatively inexpensive disability accommodations than can ease or remove hurdles.



While producing this Teaching Guide, Reach Canada has also been developing a guide on law for non-lawyers. That volume includes reference to many disability consumer organizations, which could be prime sources for pertinent knowledge of local resources - and of potential guest experts for your course. You can consult that "consumer guide" to law by going online at www.reach.ca.

Consumers' service and advocacy organizations, run by and for people with disabilities, may have someone on staff who knows the legal/justice issues and is a good communicator. Senior personnel will certainly be aware of appropriate lawyers, community legal workers or public sector staff in the wider community who have expert knowledge that could be shared with your students.

In order to find a guest expert to help enrich a component of the curriculum, a law teacher may not need to search off-campus. This is particularly so with respect to Human Rights courses and Disability and Law courses. Nowadays virtually every university, and many law faculties, host offices, services or other entities tasked with preventing, investigating and dealing with complaints of failure to accommodate, or other forms of discrimination. A personnel member from that Equity or Human Rights facility would naturally decline to discuss current or identifiable cases. But she or he would have expertise on relevant law and could draw upon experiences from past years or from other settings. Moreover, that expert may be qualified as a lawyer, as is, for instance, the Director of the Human Rights Office at Queen's University. In addition, your university's law school has a student-staffed legal aid clinic. Its supervisory personnel include fellow law teachers and probably part-time supervisors from the private or public bar.

For an expert guest on Torts, Criminal Law or other mainstream subjects, it is likely that a law teacher would contact a legal practitioner or judge who works daily in those fields. You could



ensure that the topics covered with your students include matters of particular concern to persons with disabilities. Such considerations could also help to determine what kind of lawyer or other expert to invite to your class. For instance, an area to cover in Torts might be how to achieve litigation outcomes dealing adequately with long-term support and rehabilitation needs, for people whose severe impairment results from someone's negligence.

It is fairly common for teachers of Criminal Law to arrange for students to meet with criminal lawyers or to observe court proceedings as part of the learning curve. To introduce students to less widely-known environments, you could see whether your city has a Mental Health Court. These and other special arrangements are established to deal with individuals who come into conflict with the law largely or partly as a result of a mental illness, intellectual disability or severe addiction. There are Mental Health Courts for example in Toronto, Ottawa and Saint John. For each of these special courts there are designated expert judges, prosecutors, defence lawyers, medical personnel and other contributors. One or more of those individuals might prove to be an excellent resource for a criminal law course.

Personnel of many legal aid agencies and community legal assistance clinics have considerable expertise on disability-related law. In Ontario, virtually all clinics receive support from, and can be located through, the Ontario Legal Aid Plan (www.legalaid.on.ca). Many people with disabilities, when they can acquire legal advice, must turn to the nearest legal aid clinic rather than to private lawyers. In addition, ARCH Disability Law Centre, Advocacy Centre for the Elderly and Injured Workers' Consultants are just three of the specialty law clinics in Ontario whose work has obvious subject-matter resonance.

You will find experts and good publications on "disability and law" issues through major Public Legal Education and Information

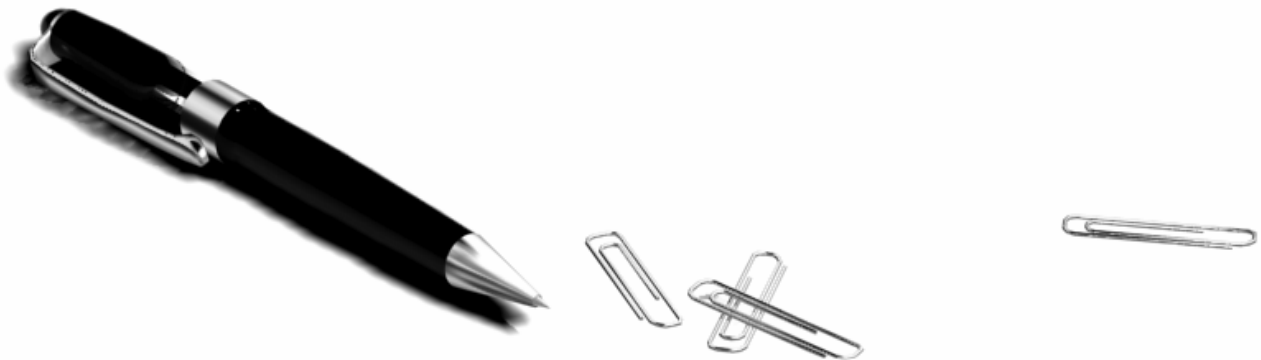


(PLEI) organizations. Community Legal Education, Public Legal Education Association of Saskatchewan and The People's Law School (Vancouver) are a few that come to mind. Web links to these and other central PLEI agencies can be located on the following federal website: www.justice.gc.ca/en/ps/pad/resources/plei.html

A substantial proportion of the caseloads of human rights commissions consist of complaints by people with disabilities, regarding discrimination or failure to accommodate. Many staff members of human rights commissions or tribunals would be good guest speakers.

Many lawyers and other staff working with government departments, such as Justice Canada and your provincial or territorial Ministry of the Attorney General, have expertise on disability issues that they may be willing to share with your students in a class.

Most individuals who are legally trained, and most people who strive to promote equal access to justice for less advantaged groups, have full agendas. You will need to act well in advance if you intend to invite anyone from these categories to be a guest speaker for your class.





6.7.1 Web Addresses for Select Sources of Outside Expertise

Accessibility Ontario

www.gov.on.ca/citizenship/accessibility

Advocacy Centre for the Elderly (ACE)

www.advocacycentreelderly.org

ARCH: A Legal Resource Centre for Persons with Disabilities

www.archdisabilitylaw.ca

Canadian Association for Community Living

www.cacl.ca

Canadian Association of Independent Living Centres (CAILC)

www.cailc.ca

The Canadian Council on Rehabilitation and Work

www.ccrw.org

Canadian Human Rights Commission (CHRC)

www.chrc-ccdp.ca

Canadian Mental Health Association

www.cmha.ca

Canadian Paraplegic Association (CPA)

www.canparaplegic.org/

Community Legal Education Ontario (CLEO)

www.cleo.on.ca

Council of Canadians with Disabilities

www.ccdonline.ca

DAWN Ontario: Disabled Women's Network Ontario

dawn.thot.net



Disabled Peoples' International
www.dpi.org

Enable Link / Canadian Abilities Foundation
www.enablelink.org
www.abilities.ca

Income Security Advocacy Centre (ISAC)
www.incomesecurity.org

Legal Aid Ontario
www.legalaid.on.ca

National Educational Association of Disabled Students
(NEADS)
www.neads.ca

Ontario Human Rights Commission (OHRC)
www.ohrc.on.ca

Persons with Disabilities Online (Government of Canada)
www.pwd-online.ca

Public Legal Education and Information Links
www.justice.gc.ca/en/ps/pad/resources/plei.html

Reach Canada
www.reach.ca





7. *POTENTIAL PRECEDENTS FOR COURSES ON "LAW AND DISABILITY"*

7.1 Introducing the Compilation

In the next section we provide a cluster of optional precedents for designing a course on "Law and Disability". Nuggets from those courses can also be mined to enhance disability and law coverage in other corners of the law curriculum.

"Law and Disability" is a relatively new specialty, yet courses in that domain already traverse a varied landscape. The writer of this teaching resource guide, as well as law teachers who may read (or hear) this guide, owe much gratitude to the educators whose course details are displayed here. Law teachers who are newly motivated to teach about disability-related issues will be getting a head start because of your efforts in developing courses.

The course outlines gathered below demonstrate that some professors concentrate more on making connections among societal contexts, disability and law. Other law teachers take a more "black letter law" approach, although there are obvious limits to doing so in a field linked so closely with society's evolving understandings of disabilities, barriers and accommodations. One law teacher and barrister, David Baker, recently revamped his course, which was among the first in Canada. (You can compare two versions of the syllabus, *infra*.) He strives to cover in a more coherent sequence the steps and considerations that one must undertake when deciding whether and how to pursue disability-related rights through litigation.

The syllabus for a course offered jointly by two faculties at York University makes it apparent that it employs a Critical Studies model. Based on other course descriptions made available to



Reach Canada, it seems that other professors in Canada also base part of their teaching on a Critical Studies approach. (See e.g. the sample course descriptions below that were drawn from the curricula of the Universities of B.C. and Ottawa.)

We took only excerpts from each detailed course description obtained. When editing for length, we removed most instructions for students' on how their performance would be evaluated and how the course would be taught. For the purposes of this Guide, our priorities lie elsewhere: promoting awareness among future lawyers concerning disabilities and access to justice; trying to ensure that issues of direct concern to persons with disabilities are covered well in law teaching; and trying to foster the use of appropriate terminology and background data on disabilities in legal education.

Only representative samples of reading assignments prescribed for students in most courses could realistically be listed in this volume. We did feel we had room in a brief resource guide to cover more examples. (Any law teacher knows how voluminous casebooks and other course materials are.) Moreover, in some instances, lists of reading assignments were unavailable, for practical or professional (e.g. copyright) reasons. In most cases our data came directly from the law teacher responsible for a course. Sometimes we supplemented this with information found on university or law faculty websites.

We want to inform our audience about a few disability-focused courses whose descriptions did not make it into this volume, primarily for reasons of space. If you visit the website of **Community Rehabilitation and Disability Studies at the University of Calgary's Faculty of Education** (www.crd.org/courses) you should find the following courses listed, along with relevant web links:



- CORE 573 Fall / Disability and the Law
- CORE 573 Winter / Disability and the Law
- CORE 603.08 Fall / Advanced Topics - Disability and Law
- CORE 591.26 Fall / Bioethics and People with Disabilities

Looking at just one example from this group, “CORE 573 Winter Disability and the Law” we can report that its syllabus is replete with detail on subject areas and assigned readings that would interest a teacher of law.

7.2 Syllabus Examples from “Law and Disability” Courses

EDITOR’S INTRODUCTION

This section gathers excerpts from eleven syllabi that could (and should) serve as inspirations or precedents for course development. In a few cases we provide detailed extracts, including many of the reading assignments. (For space considerations and other reasons, none of our examples gives the entire list of readings and guest speakers that were organized by the law teacher(s) responsible for the sampled course.) In some instances we are able to provide only a summary description of the course approach and contents. To make it easier for readers to make comparisons among the clustered syllabus samples, we have made a number of small editing changes. These edits often included changing one or two headings used in a law teacher’s syllabus, to make these headings more uniform among the displayed course examples.



"Law and Disability"

ACCESSIBLE JUSTICE: THE CASE OF DISABILITY RIGHTS [UNIVERSITY OF TORONTO, 2007]

David Baker
Faculty of Law, Winter 2007

[Ed. Note: *For many classes, in addition to assigned and background readings, David Baker's complete 2007 syllabus lists "Possible Contacts". These are generally lawyers with expertise in the subject areas covered that week.*]

Course Schedule and Readings

Class ONE: Introduction and Overview

Factors to be covered:

- ✓ Means of the parties, and relative means
- ✓ Amount at stake, proportionality, disproportionate outcomes
- ✓ Membership in disadvantaged group (e.g. Disability), duty to accommodate
- ✓ Public interest factors, and government as representative of the public interest
- ✓ Legal realism – Who actually wins and loses
- ✓ Lawyer compensation and expenses
- ✓ Settlement





Main Readings:

- ✓ Roderick Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions," in ed. Julia Bass et al, Access to Justice for a New Century – The Way Forward Law Society of Upper Canada, Chap.1 - Introduction: What is Access to Justice
- ✓ Allan Gould, "Physician Heal Thyself: The Rights of the Patient," (1985) unpublished

Class TWO: The Rule of Law

- ✓ Reference re: Secession of Quebec, [1998] 2 S.C.R. 217. Access to Courts Re: B.C.G.E.U., [1988] 2 S.C.R. 214. Interpreters
- ✓ Raj Anand, "Intervention: Duong v. Taalman," 17 The Advocates E-Brief, No. 2 Autumn 2005. <www.advocates.ca/publications/pdf/eBrief/e-Brief_fall05.pdf>
- ✓ Tax Court of Canada, Notice to the Profession. August 21, 2000 - Interpretation for the Deaf.
- ✓ Taxation and Legal Fees: Income Tax Act s. 8(1)(b) and 122.5 and Interpretation Bulletin IT – 99R5

Class THREE: The Jungle - Beyond the Rule of Law

- ✓ Carey v. Ontario, [1986] 2 S.C.R. 637
- ✓ A(FC) v. Secretary of State for the Home Office, [2004] H.L.J. No. 45
- ✓ A.L. v. Ontario (Minister of Community and Social Services), [2006] O.J. No. 4673
- ✓ Crown Privilege: Blank v. Canada (Minister of Justice), [2006] S.C.J. No. 39. National Security; Charkaoui v. Canada (Minister of Citizenship and Immigration), 2004 FCA 421
- ✓ Education Malpractice: Gould v. Regina (East) School Division No. 77 [1996] S.J. No. 843





General:

- ✓ David Kennedy, "The International Human Rights Movement: Part of the Problem?" in *The Dark Sides of Virtue*, (Princeton: 2004). pp. 3-35;
- ✓ Harry Arthurs, "More Litigation, More Justice?" in Julia Bass et al, *Access to Justice for a New Century – The Way Forward*, (LSUC). pp. 249-56;
- ✓ Donald Horowitz, "The Courts and Social Policy." (The Brookings Institution; 1977)

Equality Rights:

- ✓ *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85;
- ✓ Gilbert and Majury, "Critical Comparisons: The Supreme Court of Canada Dumps Section 15," 24 Windsor Y.B. Access Just. III (2006);
- ✓ *Clark v. Peterborough Utilities Commission*, (1995), 24 O.R. (ed) 7

Class FOUR: Public Adjudication Process

- ✓ *Psodorov v. Tedesco*, [2006] O.J. No. 865
- ✓ *Tranchmontagne v. Ontario (Director of Disability Support Program)*, 2006 S.C.C. 14
- ✓ Ontario Civil Justice Reform Project 2006, Consultation Paper, <www.civiljusticereform.jus.gov.on.ca/english/consultation.asp>
- ✓ *Charter Jurisdiction of Tribunals: Nova Scotia (Worker's Compensation Bd) v. Martin*, [2003]
- ✓ S.C.J. No. 54, para. 27-65;
- ✓ *Flora v. Ontario (Health Insurance Plan, General Manager)*, [2005] O.J. No. 5482;





- ✓ Multani v. Commission Scolaire Marguerite – Bourgeoys, 2006
- ✓ S.C.C. 6
- ✓ Tribunals (General): Statutory Powers Procedure Act, R.S.O. 1990 C. S22
- ✓ Small Claims Court: McGuire and Macdonald, "Tales of Wows and Woes from the Masters and the Maddened: Navigating Small Claims Court Narratives," (1998), 16 Windsor Yearbook of Access to Justice 19

Class FIVE: Private Adjudicative Process

- ✓ Kanitz et al v. Rogers Cable Inc., [2002] O.J. No. 665
- ✓ Smith v. National Money Mart Co., [2005] O.J. No. 4269 and leave being sought to appeal to the SCC [2005] S.C.C.A. No. 528
- ✓ J. Macfarlane, "Changes in the Legal Profession and the Emergence of the New Lawyer" Chap. 1 in The New Lawyer in, (UBC Press: 2007) forthcoming

Arbitration:

- ✓ Marion Boyd, Dispute Resolution in Family Law: Protecting Choice, Protecting Inclusion, www.attorneygeneral.jus.gov.on.ca/english/;
- ✓ Family Statute Law Amendment Act, S.O. 2006 c.1

Class SIX: Right to Representation

- ✓ New Brunswick (Minister of Health and Community Services)
- ✓ v. G (J.) [J.G.], [1999] S.C.J. No. 47, starting at para. 56
- ✓ E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388



- ✓ Katherine Webster, "States Letting Lawyers Provide A la Carte Menu of Legal Services," (The Associated Press; January 4, 2007)

Legal Aid:

- ✓ National Council of Welfare, Legal Aid and Poor, (1999), www.newscnbes.net/htmldocument/reportlegalaid/

Paralegals and Pro Bono:

- ✓ Access to Justice Act, Ontario Bill 14, Explanatory Schedule C;
- ✓ Pro Bono Law Ontario, www.pblo.org/public/index.cfm

Class SEVEN: Collective Representation

- ✓ Hollick v. Toronto (City), [2001] S.C.J. No. 67, para. 15
- ✓ Rumley v. British Columbia, [2001] S.C.J. No. 39
- ✓ Pearson v. Inco, [2006] O.J. No. 991

Class Actions:

- ✓ Class Proceedings Act, 1992, S.O. 1992 c.6, s.5, 31 and 32-33;
- ✓ Law Society Amendment Act (Class Proceedings Fund), S.O. 1992, c.7, s.59.4;
- ✓ Class Proceedings Regulation under the Law Society Act, O. Reg. 771/92 as amended by 535/95

Trade Unions:

- ✓ McGavin Toastmaster Inc. v. Aincough, [1976] 1S.C.R. 718;
- ✓ Dunmore v. Ontario, [2001] S.C.J. No. 87



Court Challenges Program:

- ✓ Court Challenges Program, www.ccppcj.ca

Standing:

- ✓ Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236

Class EIGHT: Fees and Costs

- ✓ Chris Tollefson, "The Implications of Okanagan Indian Board for Public Interest Litigants: A Strategic Discussion Paper," (Court Challenges Program; 2005), www.Ccppcj.ca/documents/tollefson-e.html
- ✓ Colin P. Stevenson, "Contingency Fees," (LSUC)
- ✓ Incredible Electronics Inc. v. Canada (Attorney General), [2006] O.J. No. 2155

Contingent Fees:

- ✓ Rules of Professional Conduct, LSUC, Rule 2.08(3);
- ✓ Solicitors Act, R.S.O. 1990 as amended c. S. 15, s.15-28;
- ✓ Raphael Partners v. Lam, 61 O.R. (3d) 417

Costs – Proper Considerations:

- ✓ Walker v. Ritchie, [2006] S.C.J. No. 45; Federal Court Rules, Rule 400

Costs – Administrative Tribunals:

- ✓ Statutory Powers Procedure Act, R.S.O. 1990 as amended, c. S 22, s. 17.1; Jeffrey v. Dofacso Inc., [2004] O.H.R.T.D. No. 17



Interim Costs:

- ✓ British Columbia (Min. of Forests) v. Okanagan Indian Board, [2003] S.C.J. No. 76;
- ✓ Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), [2005] B.C.J. No. 29, [2007 SCC 2]

Class NINE: Damages

- ✓ Mary Eberts, "Section 15 Remedies for Systemic Inequality: You Can't Get There From Here," 33 Sup. Ct. L.R. 389 (2006)
- ✓ Keays v. Honda Canada Inc., [2006] O.J. No. 3891, para. 42-66 and 90-117
- ✓ Whiten v. Pilot Insurance Co., [2002] S.C.J. No. 19, para. 78-83 and 112-126

Treble Damages in the United States:

- ✓ Mark Green, "Fraud Busting Begins at Homes," Op-Ed New York Times: Jan 29/06;
- ✓ RICO, 18 U.S.C ss. 1964(c)
- ✓ Taxation of Damages -CRA, IT – 365R2; Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955)

Wrongful Dismissal Damages:

- ✓ Wallace v. United Grain Growers Inc., [1997] S.C.J. No. 94, para. 80-109

Class TEN: Little v. Big

- ✓ Arzem v. Ontario (Minister of Community and Social Services), [2005] O.H.R.T.D. No. 11, para. 110-201
- ✓ Burrows (litigation guardian of) v. Ontario, [2003] O.J.No. 5858





- ✓ Sopinka et al, The Law of Evidence (2nd Ed.) pp. (allocating burdens) 77-80, (facts in knowledge of the parties) 80-86, (failure to call a material witness) 297-98, (Browne v. Dunn) 954-57

Definition of Disability:

- ✓ Quebec (Commission des droits de la personne and de la jeunesse) v. Montreal (City), (Boisbriand) [2000] S.C.J. No.
- ✓ 24; Sutton v. United Airlines Inc., 527 U.S. 471; Toyota Motor Mfg. Inc. v. Williams, 534 U.S. 184

Onus of Proof:

- ✓ Fontaine v. B.C. (Official Administrator), [1998] 1 S.C.R. 425 at para. 17-27

Access to Witness and Information:

- ✓ Rules of Civil Procedure, Rule 31.06(2);
- ✓ Rules of Professional Conduct, LSUC, Rule 4.03;
- ✓ Forcese and Freeman, The Laws of Government, (Irwin:2005) pp. 225-234;
- ✓ Federal Accountability Act, 2006, Bill C-2, s. 194-213

Class ELEVEN: Equality Rights

- ✓ Human Rights Code Amendment Act, Ontario Bill 107
- ✓ Brown v. National Capital Commission, [2006] C.H.R.D. No. 26 at para. 212-223
- ✓ Quesnel v. London Educational Health Centre, (1995), 28 C.H.R.R.D/474



Duty to Accommodate:

- ✓ OHRC, Policy and Guidelines on Disability and the Duty to Accommodate, www.ohrc.on.ca/english/publications/disability-policy.html;
- ✓ British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights (Grismer), [1999] S.C.J. No. 73;
- ✓ Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c.11.

Public Interest:

- ✓ McKenzie Forest Products Inc. v. Ontario (Human Rights Commission), [2000] O.J. No. 1318;
- ✓ British Columbia (Human Rights Commission) v. British Columbia (Human Rights Tribunal), [2001] B.C.J. No. 998.

Investigation:

- ✓ AODA Alliance, Submissions to the Standing Committee on Justice Policy on Bill 107, <www.aodaalliance.org/reform/aoda> pp. 8-10.

Costs:

- ✓ Quereshi v. Ontario (Human Rights Commission) 268 D.L.R. (4th) 281 (2006); Nkwazi v. Correctional Services Canada, (2001) C.H.R.D. No. 29.



Commission as Gatekeeper:

- ✓ Radulesco v. Canada (Canadian Human Rights Commission), [1984] S.C.J. No. 48;
- ✓ Losenno v. Ontario Human Rights Commission, [2005] O.J. No. 4315.

Class TWELVE: Access to Justice Panel

During the final class, there will be a panel consisting of persons involved in reform of the civil and administrative justice system. Each student will pose two questions to the members of the panel, one each concerning civil and administrative procedures. It is anticipated that members of the wider law school community will be invited to observe.



LAW AND DISABILITY

[UNIVERSITY OF TORONTO, 2003]

David Baker
Faculty of Law

[Comprehensively revised in 2007. See previous syllabus notes]

[**Ed. Note:** References to many Casebook readings found in the 2003 syllabus are not included in this edited version of the syllabus.]

Course Schedule and Readings

Class ONE. DEFINING DISABILITY

Recommended Reading:

- ✓ Quebec (Commission des droits de la Personne et des droits de la jeunesse) v Montreal (City) [2000] 1S.C.R 665 Sutton v. United Airlines 119 S.Ct. 2139 (1999)

Class TWO. DISABILITY IN A CRIMINAL CONTEXT

- ✓ Rodriquez v. British Columbia (Attorney General) [1993] 3SCR 519 R. v. Ogg-Moss [1984] 2S.C.R. 173

Class THREE. DISABILITY IN A CIVIL LAW CONTEXT

- ✓ E. (Mrs.) v. Eve [1986] 2 S.C.R. 388

Class FOUR. CAPACITY AND RESPONSIBILITY

- ✓ Clark v. Clark, (1983), 40 O.R. (2d) 283

Class FIVE. CONSTITUTIONAL LAW

Class SIX. EDUCATION LAW





Class SEVEN. HEALTH LAW AND IMMIGRATION

- ✓ Auton v. British Columbia (Attorney General) [2002] B.C.J. No. 2258
- ✓ Olmstead v. L.C. by Zimring 527 U.S. 581

Class EIGHT. INCOME MAINTENANCE LAW

Class NINE. HUMAN RIGHTS LAW (Transportation)

- ✓ McKay Panos v. Air Canada / CTA www.cta-otc.gc.ca / Decision No. 567- AT-A-2002

Class TEN. EMPLOYMENT LAW

Class ELEVEN. THE FUTURE OF DISABILITY



DISABILITY AND THE LAW

[UNIVERSITY OF SASKATCHEWAN]

Doug Surtees
College of Law, Law 498.3 (Section 8)

Short Description: This seminar examines the way in which the law defines who a person with a disability is, and then both facilitates and hinders those individuals in their journey to achieve full participatory citizenship. Some areas we examine, such as disability theory will be primarily applicable to the disabled communities. Other areas including human rights, employment, housing, decision making and so-called 'right to die' issues will be of wider application. These areas will be examined insofar as they have a special application to people with disabilities.

Purpose and Emphasis: The purpose of this seminar is to encourage discussion, research and reflection on the meaning of disability, as well as upon legal topics which have particular importance and impact upon people with disabilities...

The seminar will begin with an overview of the meaning and history of disability. We will examine several models which have been used to try and understand, or at least deal with people with disabilities. We will also briefly examine Saskatchewan, Canadian and international instruments declaring rights which belong to people with disabilities.

...Guest speakers will occasionally be invited to participate...



Objectives:

In addition to objectives shared with other seminars, such as developing the student's analytical and communication skills, the specific objectives of this seminar are to assist students in being able to:

- ✓ understand and explain the significance of a definition of 'disability'
- ✓ describe the range of typical legal issues ... persons with disabilities may face
- ✓ recognize and articulate the way in which legal issues affect persons with disabilities differently than other persons
- ✓ evaluate the impact of legislation and policy on persons with disabilities

Course Schedule [To be revisited after students have an opportunity to make suggestions.]

Class ONE. Introduction 'What is Disability?'

Class TWO. Disability Theory

Class THREE. Disability Theory

Class FOUR. Disability and Human Rights

Class FIVE. Convention on the Rights of
Persons with Disabilities (Vangelis Nikias)

Class SIX. Education Accommodation (Andy Livingston)

Class SEVEN. Right to Die

Class EIGHT. Saskatchewan Abilities Council

Class NINE. Daily Living: Employment, Housing...

Class TEN. Disability and the Justice System





Class ELEVEN. Guardianship, Co-Decision-making, and Powers of Attorney

Class TWELVE. Financial Abuse (Brian Trainor)

Class THIRTEEN. Conclusion: Round Table Discussion

[Ed. Note: There are overlaps, where appropriate, between two courses taught by Doug Surtees, namely the Disability course and the Elder Law course, which is outlined next.]





ELDER LAW

[UNIVERSITY OF SASKATCHEWAN]

Doug Surtees
College of Law, Law 498.3 (Section 10)

Description:

This seminar examines the way in which the law impacts elders in our society. We will examine the concept of ageing, considerations in representing elders, housing, concepts of guardianship and substitute decision making, capacity and consent, health care directives, elder neglect and abuse and the role of the Public Guardian and Trustee.

...In the first class ... I will ask students if there are specific elder law issues ... they would like to address. If there are, the student may volunteer to select the readings and lead the discussion on a particular topic. The syllabus will be adjusted to accommodate this ... I will attempt to arrange for one or two special guests to visit our class.

Objectives:

In addition to objectives shared with other seminars, such as developing the student's analytical and communication skills, the specific objectives of this seminar are to assist students in being able to:

- ✓ describe what the area of Elder Law is concerned with
- ✓ explain the range of typical legal issues which older adults may face



- ✓ recognize and articulate the way in which legal issues affect older adults differently than other adults
- ✓ describe how a legal practice could change in order to more effectively represent older adults
- ✓ evaluate the impact of legislation and policy on older adults

Required Materials: Ann Soden, ed., *Advising the Older Client*, (Markham, Ontario: Lexis Nexis Butterworths, 2005). Other readings will be assigned.

Course Schedule [To be revisited after students have an opportunity to make suggestions.]

Class ONE. Introduction Ageing and Considerations in Representing Elders

Class TWO. Elder Abuse

Class THREE. The Role of the Public Guardian and Trustee

Class FOUR. Guardianship and Co-Decision-making

Class FIVE. Capacity and Consent

Class SIX. Powers of Attorney

Class SEVEN. Guardianship and Co-Decision-Making

Class 8. Discrimination

Class 9. Housing

Class 10. Undue Influence and Accountability

Class 11. Summary





STUDIES IN PUBLIC LAW: DISABILITY RIGHTS [UNIVERSITY OF OTTAWA]

Ravi Malhotra

Faculty of Common Law CML 4104 Winter 2007

Course Overview: In this seminar, we explore how law can be used as a tool to empower people with disabilities and work for social justice on issues relating to disability rights. At the same time, we also consider the extent to which law is used to regulate the lives of people with disabilities. Students will be introduced to a variety of paradigms and conceptions for thinking about disability issues and the differences between impairment, disability and handicap through jurisprudence and other scholarly materials. Some of the topics that are covered include globalization and disability rights, disability accommodation in the workplace and in the educational spheres, reproduction and sexuality and the hotly contested issues related to the “right to die”. I also spend some classes on how disability law is interpreted in foreign jurisdictions and in international human rights jurisprudence. Students will be expected to participate in each class and do the readings in advance.

Course Materials: Dianne Pothier & Richard Devlin, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (University of B.C. Press, 2006)

[Ed. Note: Law teachers may want to review Pothier and Devlin when devising their own courses. Ravi Malhotra’s course syllabus includes frequent references to this volume in the reading assignments. Because legal educators have the convenient option of reviewing the entire book for course development purposes, to conserve space we have omitted the related readings references in our edited excerpts from the syllabus.]



Course Schedule and Readings

Class ONE: Introduction to Disability Law

Class TWO: Theories of Disablement, Part I

- ✓ Patrick Houssais, "Lessons from a Life Worth Living" in Carol Krause, ed., *Between Myself and Them: Stories of Difference and Disability*
- ✓ Allan T. Sutherland, "The Professionals" in *Disabled We Stand*

Class THREE: Theories of Disablement, Part II

- ✓ Gareth Williams, "Theorizing Disability" in Gary L. Albrecht, Katherine D. Seelman & Michael Bury, *Handbook of Disability Studies*
- ✓ Michael Oliver, "The Cultural Production of Impairment and Disability" in *The Politics of Disablement*
- ✓ Baukje Miedema & Janet M. Stoppard, "Asylum, Bedlam or Cure? Explaining Contradictions in Women's Experiences of Psychiatric Hospitalization" in *The More We Get Together...*
- ✓ David Singer, "The Political Economy of Psychotherapy" (2006) 11 *New Politics*, online: <<http://www.wpunj.edu/newpol/issue41/Singer41.htm>>

Class FOUR: Equality Theory and the Meaning of Reasonable Accommodation

- ✓ Sarah Armstrong, "Disability Advocacy in the Charter Era" (2003) 2 *J.L. & Equality* 33
- ✓ Pauline Rosenbaum & Ena Chadha, "Reconstructing Disability: Integrating Disability Theory Into Section 15" (2006) 33 *S.C.L.R.* (2d) 343





- ✓ Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624
- ✓ Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657
- ✓ Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11
- ✓ Ontario Human Rights Code, R.S.O. 1990, c-H.19 Canadian Human Rights Act, R.S. 1985, c.H-6. Ontarians with Disabilities Act, S.O. 2001, c.32
- ✓ Class 5: Educational Barriers and people with disabilities
- ✓ Nancy Hansen, "Spaces of Education: Finding a Place that Fits", Review of Disability Studies 1:3 (2005) 22
- ✓ Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241. Wynberg v. Ontario, [2006] O.J. No. 2732

Class SIX: Transportation barriers and people with disabilities

- ✓ Ena Chadha, "Running on Empty: The 'Not So Special Status' of Paratransit Services in Ontario" (2005) 20 Windsor Rev. Legal & Soc. Issues 1
- ✓ David Baker, "Moving Backwards: Canada's State of Transportation Accessibility in an International Context". Final Report to the Council of Canadians with Disabilities - www.ccdonline.ca/publications/movingback/:
- ✓ "Transportation: A Public Good in Canada" pp.20-42; and "Summary of Recommendations" pp.77-82
- ✓ VIA Rail Canada Inc. v. Canada (Canadian Transportation Agency) (2005), 251 D.L.R. (4th) 418



Class SEVEN: Employment and people with disabilities

- ✓ Michael Lynk, "Disability and the Duty to Accommodate: an Arbitrator's Perspective" Labour Arbitration Yearbook 1 (2001/2002) 51
- ✓ P. Chapman, "Mental Disability and the Arbitration Process: an Emerging Concern: an Arbitrator's Perspective" Labour Arbitration Yearbook 26:2 (1999) 189
- ✓ British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] 3 S.C.R. 3
- ✓ Nova Scotia Workers Compensation Board v. Martin, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54

Class EIGHT: Employment for people with disabilities and the impact of globalization

- ✓ Alan Roulstone, "Disabling Pasts, Enabling Futures: How does the Changing Nature of Capitalism Impact on the Disabled Worker and Jobseeker?" Disability & Society 17:6 (2002) 627
- ✓ Robert D. Wilton, "More Responsibility, Less Control: Psychiatric Survivors and Welfare State Restructuring" Disability & Society 19:4 (2004) 329
- ✓ Ontario Nurses Association v. Mount Sinai, (2005) 75 O.R. (3d) 245



Class NINE: Gender and Disability Rights

- ✓ Nancy Hansen, "Surmounting Perfect Body Syndrome: Women with Disabilities and the Medical Profession" in *The More We Get Together...*
- ✓ Anita Silvers, "Reprising Women's Disability: Feminist Identity Strategy and Disability Rights" (1998) 13 *Berkeley Women's L.J.* 81
- ✓ Fiona Sampson, "Globalization and the Inequality of Women with Disabilities" (2003) 2 *J.L. & Equality* 18

Class TEN: Race and Disability Rights

- ✓ Beth A. Ferri and David J. Connor, "Strange Bedfellows: Race and Disability in U.S. History" in *Reading Resistance: Discourses of Exclusion in Desegregation & Inclusion Debates*
- ✓ David Mitchell and Sharon Snyder, "The Eugenic Atlantic: race, disability, and the making of an international Eugenic Science, 1800-1945" *Disability and Society* 18:7 (December 2003) 843

Class ELEVEN: Sexuality, Reproduction and Genetic Testing

- ✓ Christina Johnson, "Disability and Body Image: 'If only they were disabled, they wouldn't complain about being ugly'" in *Between Myself and Them: Stories of Disability and Difference*
- ✓ Rachel Ariss, "The Form and Substance of Ethics: Prenatal Diagnosis in the Baird Report" (1998) 21 *Dalhousie L.J.* 370
- ✓ *Cameron v. Nova Scotia* (1999), 177 DLR (4th) 611, [1999] N.S.J. No. 297 E.
- ✓ *(Mrs.) v. Eve*, [1986] 2 S.C.R. 388, [1986] S.C.J. No. 60. (19p)
- ✓ *Muir v. Alberta* (1996), 132 D.L.R. (4th) 695, [1996] A.J. No. 37



Class TWELVE: Law and Economics: Its Relevance for Disability Rights

- ✓ Michael Stein, "The Law and Economics of Disability Accommodations" (2003) 53 Duke L.J. 79
- ✓ J.H.Verkerke, "Is the ADA Efficient?" (2003) 50 U.C.L.A. L. Rev. 903
- ✓ Michael Oliver, "Disability and the Rise of Capitalism" in The Politics of Disablement

Class THIRTEEN: Is there a Right to Die? Disability Rights and Assisted Suicide

- ✓ Jocelyn Downie, Chapters 8-10, 12 in Dying Justice: A Case for Decriminalizing Euthanasia and Assisted Suicide in Canada
- ✓ Andrew I. Batavia, "So Far So Good: Observations on the First Year of Oregon's Death With Dignity Act" (2000) 6 Psych. Pub. Pol. and L. 291
- ✓ Carol Gill, "Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia" (2000) 6 Psych. Pub. Pol. and L. 526
- ✓ Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

Class FOURTEEN: The Latimer Case and its Implications

- ✓ Barney Sneiderman, "Latimer in the Supreme Court: Necessity, Compassionate Homicide, and Mandatory Sentencing" (2001) 64 Sask. L. Rev. 511
- ✓ Heather Heavin, "Human Rights Issues in R. v. Latimer and Their Significance for Disabled Canadians" (2001), 64 Sask. L. Rev. 613



- ✓ R. v. Latimer, [2001] 1 S.C.R. 3
- ✓ Krogh, Kari, Mary Ennis, Jon Johnson & Victoria Bowman. A National Snapshot of Home Support from the Consumer Perspective: Enabling People with Disabilities to Participate in Policy Analysis and Community Development (Winnipeg: Council of Canadians with Disabilities, 2005), www.ccdonline.ca/publications: 3.1, 3.2, 3.5, 3.6.4, 5.6, 5.10, 6.1, 6.2, 6.3
- ✓ R. v. Demers, [2004] 2 S.C.R. 489
- ✓ Hutchinson v. BC (Ministry of Health), [2004] B.C. H.R.T.D. No. 55 (B.C. H.T. Trib):
 - I. Introduction (p.1);
 - II. Evidence [selected excerpts];
 - III. Issues (p.11);
 - IV. Analysis of the Prima Facie case [selected excerpts];
 - V. Analysis of Justification (p.45-68);
 - VI. Remedy (p.68) [selected excerpts];

Class SIXTEEN: Disability Rights and Immigration

- ✓ Judith Mosoff, "Excessive Demand on the Canadian Conscience: Disability, Family, and Immigration" (1999) 26 Man. L.J. 149
- ✓ Chesters v. Canada (Minister of Citizenship and Immigration) (2002) 221 F.T.R. 1
- ✓ Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 706



Class SEVENTEEN: The Americans with Disabilities Act

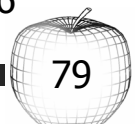
- ✓ Doris Z. Fleisher & Freida Zames, "The Americans with Disabilities Act" in *The Disability Rights Movement: from Charity to Confrontation*
- ✓ Ramona L. Paetzold, "How Courts, Employers, and the ADA Disable Persons with BiPolar Disorder" (2005) 9 *Empl. Rts. & Employ. Pol'y J.* 293
- ✓ *Carolyn Humphrey v. Memorial Hospitals Association*, 293 F. 3d 1128
- ✓ *Peter Lanci v. Arthur Anderson, LLP*, 10 *Am. Disabilities Cas.* (BNA) 1004

Class EIGHTEEN: International Human Rights and Disability Law

- ✓ Arlene S. Kanter, "The Globalization of Disability Rights Law" (2003) 30 *Syracuse J. Int'l L. & Com.* 241
- ✓ Michael Stein, "Disability Human Rights" *Cal. L. Rev.*, forthcoming. Available at SSRN: <http://ssrn.com/abstract=900014>
- ✓ *Price v. the United Kingdom*, no. 33394/96 (Sect. 3) (bil.), ECHR 2001-VII – (10.7.01)
- ✓ *Kathryn Jane Armitage v. Secretary, Department of Social Security*, No. N97/923 AAT No. 12813 (Australia)

Class NINETEEN: Future Directions for Disability Rights Law
in a globalized economy

- ✓ Sunny Taylor, "The Right not to Work: Power and Disability" *Monthly Review* 55:10 (March 2004) 30
- ✓ Samuel R. Bagenstos, "The Future of Disability Law" (2004) 114 *Yale L.J.* 1.
- ✓ *Brown v. National Capital Commission*, [2006] C.H.R.D. No.26





DISABILITY AND THE LAW [OSGOODE HALL LAW SCHOOL AND THE FACULTY OF GRADUATE STUDIES, YORK UNIVERSITY]

Joan Gilmour and Roxanne Mykitiuk
Osgoode Hall (of York University) LW 4905.03

Marcia Rioux
Department of Critical Disability Studies,
Faculty of Graduate Studies,

CDIS 5120 3.0

Course Description and Objectives: This course examines disability as a legal category with implications for the rights of persons with disabilities. Students will be introduced to alternative conceptions and theories of disability and impairment and examine how law both constructs and regulates the lives of individuals with disabilities. Throughout the course we will analyze statutory provisions and jurisprudence in different areas to understand how disability is defined and regulated by law. The course examines and evaluates how law can best achieve the goals of social justice and equality for individuals with disabilities.

[Ed. Note: A York University Graduate Studies calendar available in 2006 gave the following brief description of this seminar: "This course explores disability as a legal category with implications for the human rights of persons with disabilities. Areas for discussion include the history of disability legislation in Canada and internationally; the disability rights movement; the social and legal construction of competence and inequality; social discourse of law and policy; and recent human rights cases."]



The **topic** areas in this jointly offered course include:

- ✓ Historical approaches to the law of disability in Canada
- ✓ The development of conceptions and theories of disability and impairment including: the medical model; the social construction model; the human rights model; feminist and postmodern approaches to disability
- ✓ An examination of disability and impairment in relation to concepts of power, normalcy, health, illness, disease, ageing, dependence, embodiment, competence, human dignity and personhood
- ✓ Legal construction and regulation of disability in a number of contexts including: health services, mental health, employment, economic and social welfare, reproduction, genetics, and death and dying
- ✓ Comparison and evaluation of various legal models (e.g. anti-discrimination, social and economic entitlements) for addressing issues of social justice for people with disabilities

The **objectives** of this course are:

- ✓ To explore the role of law and limits to the role of law in achieving the goals of social justice and equality for individuals with disabilities
- ✓ To provide an overview of existing law relating to the regulation of disability in Canada
- ✓ To develop critical responses to existing law regarding the regulation of disability in Canada.
- ✓ To provide an overview of alternative conceptions and theories of disability and impairment and to evaluate these in the context of the legal regulation of disability.



Required course materials: Joan Gilmour and Roxanne Mykitiuk, *Disability and the Law* (Winter 2007), Volume I available at the Materials Distribution Centre, Osgoode Hall Law School; Volume II to follow.

These materials contain the readings for each class and provide the basis for class presentations and discussions. Discussion questions and problems are handed out in class.

Optional sources: Students are encouraged to monitor the media and other sources of popular culture for recent developments in the area of disability and the law, and to bring these to the attention of the class.

Course Schedule

Class ONE. Disability: Current and Historic Trends [Note that "Class 1 may be preceded by an Introduction class.]

Class TWO. Legal Approaches to Disability

Class THREE. Theorizing Disability

Class FOUR. Perspectives on Reproduction and Disability

Class FIVE. Genetics; Wrongful Life and Wrongful Birth Claims

Class SIX. Consent and Capacity

Class SEVEN. Health Services

Class EIGHT. Death, Dying and Constructions of Disability

Class NINE. Economic and Social Assistance

Class TEN. Reasonable Accommodation



DISABILITY AND THE LAW [RYERSON UNIVERSITY]

Harry Beatty [Original Instructor]
School of Disability Studies

This course will focus on legal issues which arise on a day-to-day basis in providing services to persons with disabilities in Ontario. These issues involve in a fundamental way the independence, dignity and personal and economic security of individuals. Many of the most challenging issues involve balancing these sometimes competing rights and interests.

Each lesson will be based on a particular "fact" situation, illustrative of real-life dilemmas faced by persons with disabilities, their families, advocates and service providers. Discussion of the "fact" situation and possible solutions, will lead to a consideration of how the law may help, or in some cases hinder, the people involved. In each lesson, an aspect of Canadian and Ontario law will be illustrated as well. Emphasis will be placed on how to find legal information, and on how to understand and apply the information once it is accessed. While there will be discussion of ways in which the law might be changed, primarily the focus will be on locating and using current law.



DISABILITIES & LAW

[UNIVERSITY OF BRITISH COLUMBIA]

Judith Mosoff

Faculty of Law 2006-07 (Term 1), LAW 381D.001

In this seminar we examine the increasing body of Canadian law that deals with disability issues, and the social context of this law. From a disability studies perspective we analyse how ideas about disability are incorporated into law and in turn, the ways that the law pertaining to disability influences our cultural conceptions of disability. An important source of course material will be film. As well, we take a social justice perspective to evaluate how law can act both as a repressive and as a remedial force in the lives of people with disabilities. Examples of more specific topics include: guardianship law, reproductive technology and disability, education, mental health law, and access to supports.

Evaluation: Students are expected to complete a major research paper, act as a film critic and participate in class discussions.



Examples of Advanced Specialized Law Courses With a Focus on One Area of Disability

MENTAL DISABILITY LAW [UNIVERSITY OF ALBERTA]

Peter Carver
Faculty of Law Law 599 / Winter 2007

Course Objectives -

Students should leave the course having acquired an understanding of:

- ✓ The major principles of Canadian mental health legislation and case law, based on materials in the Casebook;
- ✓ Theoretical issues concerning the way in which law interacts with, or mediates, the therapeutic and power relationships involved in the mental health system;
- ✓ The perspectives on mental health law of patients, psychiatrists, family members, and lawyers.
- ✓ .Who some of the actors in Alberta's mental health system are, and how they understand their roles.
- ✓ Research materials and sources available in the area of mental health and mental disability law.

Main Course Components:



1. Readings and Classes on Mental Health Law

The Casebook contains the Alberta Mental Health Act, two introductory essays on Canadian mental health law, and edited versions of the most important Canadian cases on mental health law. The goal of this part of the course is to ensure that students acquire an understanding of the basic principles of mental health law in Canada and Alberta. These principles, and the cases covered in the course, will also be important to the research papers in the course...

2. Seminar Discussions...

3. Mental Health Hearings, On-Site Visit(s) and Guest

Presentations

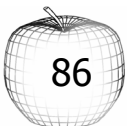
It is intended that each student will attend one hearing of the Review Panels at Alberta Hospital that deal with reviews of civil commitment or treatment orders under section 29 of the Mental Health Act or of the Forensic Psychiatry Review Board dealing with the custodial status of persons held under the mental disorder provisions of the Criminal Code... In addition, there will be at least one site visit (to the Office of the Public Guardian) in the course. Three to four classes will be used for guest presentations by individuals familiar with different aspects of mental health law in Alberta.

4. Research Paper and Presentations...

Course Schedule and Readings

PART ONE: Introduction To Mental Health Law [Classes 1-5]

Perspectives on mental disability, mental health and disorder. The constitutional status of Canadian mental health law. An overview of the history of mental health law in Canada, and key concepts. How does law mediate the relationships of power that exist in a mental health system?





Readings:

- ✓ P. Carver, Mental Health Law, CB pp. 26- 46
- ✓ R. v. Swain

Discussion 1: Alix Spiegel, "The Dictionary of Disorder: How One Man Revolutionized Psychiatry", The New Yorker (January 2005)

PART TWO: Civil Committal - Involuntary Hospitalization [Classes 6-9]

- ✓ Committal criteria in Alberta. Dangerousness as basis for preventive detention. Limits imposed by section 7 of the Canadian
- ✓ Charter of Rights and Freedoms. The Review Panel process.

Readings:

- ✓ McCorkell v. Riverview Hospital;
- ✓ M. v. Alberta; Wurfel v. Alberta Hospital

Discussion 2: S. Stevens, Where is the Asylum? Involuntary

- ✓ Detention and Therapeutic Jurisprudence (2003), pp. 95-112.
Guest: Prof. Gerald Robertson, Review Panels

PART THREE: Consent To Treatment: Should There Be A Right To Refuse Treatment? [Classes 10-14]

- ✓ The fundamental relationship between competence and consent to health care. Meaning and assessment of competence. Section 7 of the Charter, and the power to override competent refusals of treatment. Section 29 of the Alberta Mental Health Act. Readings: Starson v. Swayze Fleming v. Reid Guest: Carol Robertson-Baker, Office of the Mental Patient Advocate



Discussion 3: Community Treatment Orders

- ✓ S. Kisely et al, "CTOs for Psychiatric Patients: The Emperor with No Clothes" (2006) vs. R.L. O'Reilly, "CTOs: An Essential Therapeutic Tool in the Face of Continuing Deinstitutionalization" (2006)

PART FOUR: The Forensic Psychiatric System [Classes 15-17]

- ✓ Part XX.1 of the Criminal Code, dealing with a mental disorder. The statuses of "not criminally responsible on account of mental disorder" (NCRMD), and "unfit for trial".
- ✓ The Forensic Review Board process. The balancing of security and treatment interests in the forensic system.
- ✓ Reading:
- ✓ Winko v. B.C.
- ✓ (Tentative) Observation of Review Board hearings, and visit to Alberta Hospital (Edmonton)

Guest: Miles Cymbaluk, Lawyer Representing Persons with Mental Illness

PART FIVE: The Psychiatrist and the Law [Classes 18-20]

- ✓ The role of the psychiatrist as therapist, and as gatekeeper. Predicting dangerousness as a matter of medicine, and of law. Liability imposed by law on the psychiatrist with respect to dangerousness.

Reading:

- ✓ Smith v. Jones
- ✓ Discussion of hearings observed by students.



Discussion 4: Dr. Will Friend, Clinical Director,

✓ Forensic Psychiatry

PART SIX: Mental Disability: The Case of Sterilization
[Classes 21-25]

Section 15 of the Charter and discrimination on the grounds of mental disability. Concepts of equality. Adult guardianship. The history of eugenics and sterilization laws in Alberta and other jurisdictions. The vulnerability of institutionalized populations.

Readings: N.S. (Minister of Health) v. J.J. Re Eve; Muir v. Alberta

Visit: Office of the Public Guardian [Followed by Discussion 5]

PART SEVEN: Student Seminars and Quiz

Quiz: Class 26

Seminars: Classes 27-32



MENTAL DISABILITY LAW [DALHOUSIE UNIVERSITY]

H. Archibald Kaiser

Dalhousie University Law School, LAWS 2127.02 / 2128.03

This seminar concentrates on issues involving those who are described as having a mental health problem or an intellectual disability. The class surveys many central topics, including the history and conceptualization of mental disorder, substantive and constitutional aspects of involuntary civil commitment, the legal response to alleged incompetence, the right to treatment and to refuse treatment, misuses of power and remedies, advocacy services and the intersection of mental disability and the criminal justice system. Students are encouraged to develop their understanding of the rules and policies of the legal system and to heighten their awareness of this form of inequality and discrimination.



LAW & PSYCHIATRY

[UNIVERSITY OF BRITISH COLUMBIA]

Deborah Connolly

Faculty of Law 2006-07 (Term 2), LAW 384C.001

This course will provide an overview of both criminal and civil aspects of mental health law. The areas of law that directly affect mental health issues will be reviewed, including: fitness to stand trial, criminal responsibility, involuntary commitment, consent to treatment, psychiatric patients' rights, mental competency, as well as civil and criminal remedies.

The course will also help students develop their skills in analyzing laws from a psycho legal perspective. Students will also gain further appreciation of the interface between law and mental health issues.





8. FORWARD THINKING

This is the “First Edition” of the Teaching Resource Guide. The (essential) funding and timetable for developing this resource has allowed Reach Canada to focus on a few facets of law school and university legal education. We plan to do much more in this field, as soon as time and resources permit. In that respect, we invite law teachers who review this “First Edition” to contact Reach Canada, to tell us about their own efforts to enrich teaching and course materials with disability-aware infusions.

We would encourage Canada’s community of legal educators to support teaching of disability issues, not only in specialized “law and disability” courses, but in relevant sections of courses across the law curriculum. For instance, many parts of the law curriculum seek to bolster the practical skills of future legal professionals. Such courses and other endeavours may involve or simulate actual legal work. Law teachers/trainers involved could ensure that disability-related issues are covered in some of the scenarios, case studies or simulations that are used. A “disability and law” option would also seem ideal for the types of intensive learning experiences offered by many law schools during a short “bridge” term (often held in January between semesters).

A long term goal of Reach project planners is to cooperate with law teachers and Law Deans in developing special events and other initiatives that raise the disability awareness and future related professionalism of all law students. A key objective is that everyone studying law will gain greater awareness of elements of law that are particularly relevant for people with disabilities, as well as greater knowledge of associated professional responsibilities and skills.

Law teachers certainly demonstrated interest in the aforementioned concerns at the 2003 annual meeting of the Canadian Association of Law Teachers (CALT). There were several sessions on disability and law. The topics covered at the CALT conference give a partial





indication of the range of law courses in which it would be valuable to integrate more understanding of disability perspectives. Panel session titles included the following: the "Duty to Accommodate Unionized Workers with Disabilities"; critical theory related to "Disability, Human Rights and Public Policy"; "Damage Quantification in Tort and Pre-Existing Disability"; "Disability, Equality and Immigration Law"; "Construction of Disability in Canadian National Survey Data"; and "Post-Secondary Education and Students with Disabilities". (This 2003 data was found at www.acpd-calt.org/english/docs/program_halifax03_e.pdf/.) As was noted earlier, one of the professors contributing to the Reach Equality in Practice project plans to promote consideration of "disability and law" issues during a discussion of Torts teaching at the 2007 CALT conference.

The University of Ottawa's Common Law faculty is conducting a "best practice" initiative that should further foster a supportive climate for raising disability awareness in teaching, along with related enhancements in the law school environment. Law faculties and university departments that teach law elsewhere could choose to borrow from the approach being taken at Ottawa U. In 2006-2007 (and beyond) the Equity Committee of the Faculty of Law's Common Law section is examining five equity-focused areas that can affect students, faculty and staff at the Faculty of Law. Those equity issues are 'disability', 'racism', 'gender', 'sexual identity' and 'socio-economic status/class'. Components of this major project include auditing, reviewing and analyzing data and generating recommendations. The Committee is evaluating how the Faculty of Law is performing on the five equity issues and will develop recommendations for improvements where needed. It will look at these topics in relation to applications, admissions, teaching/curriculum/course content, the student body, support services, admission to the practice of law, etc. Input from all stakeholders (students, faculty, staff) is being sought.

As part of its methodology, the Equity Committee is considering the design, application and actual implementation of existing and contemplated benchmarks or standards. Committee research





extends beyond the University of Ottawa campus, to survey related initiatives undertaken by law societies and by other law schools.

One of the noteworthy features of the Equity project launched at the University of Ottawa is its integration into the curriculum of the Common Law Faculty. Several students are earning course credits doing Directed Research for the project, under faculty supervision. Their required contributions include: participation in group meetings to plan research and to discuss results; devising a research plan; and reporting on their findings. (We were was pleased to be informed spontaneously that those law students whose research tasks and/or interests involved the "disability" equity issue have found Reach Canada publications to be valuable resources.)

We'll give the last word to law students who possess "double expertise". Consistent with the practice in all previous projects conducted for Reach by the author of this Guide, law students, law teachers and lawyers with disabilities are among the researchers and advisers engaged in the Equality in Practice project. The thoughts quoted below are representative of observations offered in 2006-2007 by members of the student community who are studying law and also happen to have disabilities. According to their educated opinions, many law courses could benefit from integrating an elaboration (or a better elaboration) of disability issues. (We should note that even before we had canvassed views from students, individual law teachers who cooperated in the Equality in Practice project had begun addressing some of the later-identified concerns in their own teaching.) Here are a few student thoughts that were shared with the author of the present resource guide:

"I participated in an interviewing, negotiation and counselling course. This course exposed us to the proper method of interviewing a client and the attendant counselling that follows from this important exercise. Something that could be included in such a course might be how to interview a person with a mental disability [or a learning disability] or ... another kind of disability."





"In first year, my criminal law course only touched on an academic article which documented the oppression that people with mental disabilities experienced in prisons in Canada. The criminal law course appropriately emphasized the plight of Aboriginals and women and how the courts and police forces reacted to their issues. But no component focused on problems faced by people with mental disabilities was present."

"Insurance Law ... was a survey course ... focused on tort and contract principles of insurance law. In future, I would suggest including a component on disability insurance issues."

"[My Tax course] ... addressed tax issues for an individual and corporation respectively. [Tax credit] issues such as the Disability Tax Credit [were only] glossed over in one session. This course [was sometimes] taught by a professor who encompasses a social policy perspective of the tax system [facilitating] discussion of advantaged and disadvantaged groups regarding taxation. My Tax professor did not teach with this perspective in mind."

"[I took a] Family Law course [that] surveyed key concepts but did not address issues of disability, especially a spouse with a child who has a severe disability. Consequences of child support could flow from this particular situation."

We applaud the perceptiveness reflected in the above-quoted observations. To demonstrate the objectivity of those who contributed these thoughts, we should note that contributors did also identify several courses in which they had found a fair degree of coverage of disability perspectives. These courses were the following: Human Rights Law; Constitutional Law (e.g. Charter cases regarding disability); Employment Law (e.g. human rights issues pertaining to employees and disability); "Tribunal Practice" (e.g. federal pensions, Old Age Security, and provincial disability income and social assistance programmes).



Students' advisors also extended practical ideas for encouraging examination of disability-related matters in a seminar course on any law topic. For example, students could be encouraged to "present a seminar topic on a disability law or policy issue or write a paper on a topic related to disability and the law". One senior student remarked that advanced seminars addressing social justice issues can help to "fill the void" created by professors who "do not address disability matters beyond a cursory remark". One hurdle that Reach Canada wishes to overcome is the fact that advanced courses with a social justice component are not usually compulsory. Moreover, they may not touch specifically on disability questions. Much remains to be done to assure that all students of law are inculcated with an adequate grounding in law, ethics and professionalism pertaining to disabilities, law and the practice of law.



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