

## LS 101 — Chapter 6: Civil Litigation and Tort Law

### 1 Civil Litigation and the Trial Process

- Most civil cases don't make it to trial.
- Pre-trial procedures:
  - Notice of action — informs the defendant that an action has been started
  - Statement of claim — the plaintiff must make a claim that outlines their allegations and damages and includes supporting documents (process is AKA pleadings).
  - Statement of defence — the defendant prepares a statement of defence to counter-claim.
- Discovery — involves an examination of documents by the lawyers. This may involve the testimony and questioning under oath of both parties by both lawyers. The object is to make all evidence/allegations known and ensure there aren't surprises in court. These are usually transcribed by a court reporter and part of the evidence at trial.
- In-chamber meetings — lawyers may meet up with a judge who is not trying the case to explain why a settlement cannot be reached, and the judge will see if there are merits of the case, weaknesses, and pressure sides to come to an agreement.
- Trial process
  - Both the plaintiff and defendant are testifying under oath and being questioned/cross-examined.
  - Civil cases are heard by only a judge unless it's a personal injury case.
  - Strict rules of evidence followed (ie: the lawyer cannot use leading questions but the one doing cross-examination can).
  - Hearsay evidence is not admissible.
  - The judge then makes a decision a few days/weeks later.
  - The judge may award special damages (specific accountable costs), general damages (cannot be clearly specified), punitive damages (deterrence), lawyer's fees, a cease and desist, or specific obligations.
- Small claims court hears cases that are below \$10 000 (though this is changing to be \$25 000 in Ontario). Lawyers are usually not present since the amounts contested and the legal costs awarded are relatively small. The judge takes a more active role questioning/cross-examining witnesses, and judgements are usually made on the spot.
- Appeals can be made based on questions of law, but not on questions of fact. The costs of appeals are prohibitive since transcripts alone can be thousands of dollars. The appellant launches the appeal and the respondent replies to the action; appeals can be disregarded. If appeals are heard, the appeal court may uphold, order a new trial, or overturn the decision.
- The process of recovery requires that the victor get their money. The cost of bringing an action may not be worth the reward if the defendant avoids payment. The victor can take steps to garnishee money via wages/bank accounts, though only a portion of a debtor's wages can be seized as by law they must have enough to live.

## 2 Tort Law

- Tort — derived from Latin for “crooked” or “wrong”.
- Tort law falls under civil law.
- When one party has caused harm to another party or their property.
- Used in the absence of contracts.
- A tort action is an attempt to seek compensation by using a civil law on a private action (ie: you sue someone for harming you, that lawsuit is a tort).
- Begins when the plaintiff sues the defendant/respondent.
- The difference between crime and torts is that a tort is based on a private incident. A crime is an offence against the public and the state (ie: you see it as like State vs. Defendant).
- Some overlaps between torts and crime — for example, assault is probably both a crime and a tort.
- Tort’s are often not followed up though — for example, you might not bother if the defendant clearly wouldn’t be able to pay anyways.
- Torts require less proof — you just need to show that the defendant’s actions caused harm.
- Vicarious liability is when one is held responsible for the actions of someone else (your own employees, your soldiers, your partners, etc.).
- Joint liability refers to situations where several people are held jointly responsible for some harm committed (ie: business partners).
- If a defendant is found to be responsible for the plaintiff’s injury, the victim can receive damages. Types are special, general, or punitive (these are rare in Canada and are meant to punish/make an example out of).
- An injunction is when the court orders the defendant to cease their wrongful conduct.
- Torts can be classified as intentional and negligence. Most civil court cases deal with negligence.
- For a negligence suit to succeed, 5 elements must be present:
  1. Duty of care — was there a duty of the defendant to be careful at such time?
  2. Did the defendant’s behaviour fall below that standard (fault/breach)? Was the harm reasonably foreseeable?
  3. Loss/damage/injury must be present for liability; there must be some sort of loss of injury.
  4. Is there causation between the damage/injury and the conduct of the defendant?
  5. There must be no prejudicial conduct (contributory negligence) on the part of the victim.
- Premise liability is when one has to require owners of property to ensure that nobody suffers injury/harm on that property within reason. For example, stairs should have guardrails, wet floor signs should be placed if the floors are slippery, operating fire alarms/exits should exist, etc.

## **2.1 Defences to Torts**

- There are numerous possible defences to torts.
- For example, one can claim that it was an accident, and that the defendant had no ability to foresee the danger, had no control, or could not have avoided it even with the greatest of care/skill.
- Necessity refers to the self-preservation or the preservation of others — for example, maybe they had to trespass to avoid a physical threat.
- Police have lawful authority to use force during an arrest.
- Self defence or defence of property can be used for charges of assault.
- Consent is a defence (ie: you can't sue for injury if it happened during a boxing match).
- Truth and fair comment (more for defamation).
- Victims may also be disqualified from seeking damages if they voluntarily assume the risk, though courts are reluctant to use this against a victim unless they also give up any claim to damages.

## **2.2 The Law in Practice**

- Insurance is a variable in lawsuits — now, that might be a source of money that one could take!
- This is a bit of a debated issue; now the punishment kinda goes onto the insurance company.
- No-fault automobile insurance is an alternative to torts — so if you get into an accident, damages to the vehicle are dealt with by your insurance company, no need to get payment from the other party.
- Worker's compensation can also be seen as an alternative to torts, rather than suing the workplace.
- Torts can be a major mechanism for social change and reform.

## **2.3 Increase in Tort Actions**

- There have been more tort actions.
- There may be various factors:
  - Changing values make lawsuits more acceptable; they used to be more stigmatized.
  - The duty of care has expanded.
  - The number of lawyers has increased, and they might think they can win.
  - Contingency fees are a deal between a lawyer or a client where the lawyer doesn't take (much) money directly, but they get a percentage of the winnings. This also means the lawyer will want to convince to sue.
  - Torts may be launched for other motives (spite, moral victory, publicity, discourage people, etc.).
  - An entitlement mentality.
  - Expanding laws.

## **2.4 Frivolous and Abusive Lawsuits**

- Stella awards are based on the lawsuit where someone won for spilling coffee on themselves.
- These are for the most frivolous but successful lawsuits.
- Fly in the water bottle case.
- \$65 million dollar pair of pants being lost.