



# Law and Ethics in Engineering Practice

## Lecture: Introduction to Proof & Privilege

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## 1. Burden and Standard of Proof in Civil Litigation

### Burden of Proof

- Plaintiff initiating a lawsuit (tort or contract) must **prove the case** against defendant.
- Standard used: **Balance of Probabilities**
  - Plaintiff must show their claim is **more likely true than not**.
  - Court must be **reasonably certain** of facts.

### Balance of Probabilities Explained

- Plaintiff's version is more probable than defendant's.
- Courts apply a **sliding scale**: more serious allegations require stronger evidence.
- Lower threshold than criminal law (which requires proof **beyond a reasonable doubt**).

### Key Case: *Continental Insurance v. Dalton Cartage* (Supreme Court of Canada)

- Courts emphasize a **sliding scale** of certainty according to seriousness of allegations.
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## 2. Civil vs. Criminal Proof Standards

Aspect	Civil Standard	Criminal Standard
Proof Required	Balance of probabilities (>50%)	Beyond a reasonable doubt
Consequences of Failure	Liability, damages	Conviction, loss of liberty
Example	O.J. Simpson Civil vs. Criminal cases	Not guilty criminally, liable civilly

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### 3. Proving Negligence

Plaintiff must prove on balance of probabilities that:

1. **Duty of care** existed.
  2. Defendant **breached** that duty.
  3. Plaintiff's **damages** were caused by the breach.
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### 4. Witness Evidence

#### Lay Witnesses

- Testify to **facts** only.
- Generally **not allowed** to give opinions.
- Supreme Court of Canada: witnesses may testify only to facts known or observed.

#### Expert Witnesses

- Provide **opinion evidence** within their expertise.
- Assist court in understanding **technical or specialized issues**.
- Common experts: Engineers, Doctors, Accountants, Scientists.

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## 5. Engineers as Expert Witnesses

- Frequently retained to give evidence on:
  - Structural failures.
  - Soil analysis.
  - Construction delays.
  - Mechanical or design issues.
- Expert duties:
  - Provide **objective, independent opinions**.
  - Limit testimony to **scope of expertise**.
  - Undergo **direct and cross-examination**.
  - Prepare **written expert reports**.

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## 6. Practical Tips for Engineering Experts

- Ensure **qualifications** are clear (degrees, licenses, experience).
  - Retainer letter must **define scope** and limitations.
  - Provide **objective advice**, unbiased despite party retaining you.
  - Review **all evidence**, including opposing party's.
  - Prepare for **cross-examination**; anticipate difficult questions.
  - Be professional and clear; speak plainly to educate court.
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## 7. Court's Assessment of Expert Evidence

Courts evaluate:

Factor	Considerations
Relevance	Is evidence pertinent to trial issues?
Necessity	Is issue beyond judge/jury common knowledge?
Qualification	Is expert properly trained and experienced?
Independence	Is expert neutral, non-partisan?
Credibility	Is demeanor professional, testimony logical?

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## 8. Key Case Examples on Expert Credibility

### ***Cogar Estate v. Central Mountain***

- Expert's report rejected for:
  - Lack of scientific basis.
  - Advocacy disguised as opinion.
  - Not assisting court impartially.

### ***McNamara Construction v. Newfoundland Transhipment***

- Expert evidence dismissed due to:
    - Defensive and argumentative demeanor.
    - Contradictory and confusing testimony.
    - Lack of objectivity.
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## 9. Expert Witness Duty to the Court

- Since **January 1, 2010**, new Ontario rules require:
    - Expert's primary duty is to the **court**, not the retaining party.
    - Expert evidence must be **fair, objective, and impartial**.
    - This safeguards integrity of expert testimony.
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## 10. Privilege in Legal Proceedings

Courts exclude certain evidence for public policy reasons, known as **privileged evidence**.

### Two Main Types of Privilege:

1. **Solicitor-Client Privilege**
  2. **Litigation Privilege**
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## 11. Solicitor-Client Privilege

- Protects confidential communications between client and lawyer seeking legal advice.
- Applies to **oral or written communications** about legal advice.
- Begins at the moment client shares case information.
- **Only client can waive** this privilege.
- Continues **indefinitely**, even after relationship ends.
- Very **limited exceptions**.

### Public Policy Reasons:

- Ensures clients can seek **frank legal advice**.
  - Promotes **equality** in adversarial proceedings.
  - Protects confidentiality.
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## 12. Key Case: *R v. Murray*

- Accused concealed videotapes related to criminal evidence.
  - Privilege only applied to communications, **not physical evidence**.
  - Charges of professional misconduct against lawyer were dropped due to ambiguous rules.
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## 13. Litigation Privilege

- Applies to communications between solicitor and **third parties** (e.g., experts) made **in anticipation or context of litigation**.
  - Ends when litigation ends.
  - Protects preparation of best case, including expert reports.
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## 14. Purpose of Litigation Privilege

- Supports adversarial system by giving parties protected space to prepare.
  - Ensures lawyers and experts can communicate freely without fear of premature disclosure.
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## 15. Case Study: *Moore v. Getahun*

- Dispute over negligent medical treatment.
  - Expert reports submitted by both sides.
  - Issue arose over lawyer's involvement in expert report drafts.
  - Trial judge ordered disclosure of communications between lawyer and expert.
  - Appeal determined:
    - Litigation privilege protects communications for litigation preparation.
    - Applies to draft reports, notes, consultations.
    - Disclosure only required on evidence of improper influence.
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## 16. Summary of Privilege

- Privilege may prevent disclosure of documents during litigation.
  - Privilege is a critical protection for fairness and confidentiality in legal process.
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## 17. Chapter 6 Summary

Topic	Key Points
<b>Burden of Proof</b>	Plaintiff must prove case on balance of probabilities
<b>Witnesses</b>	Lay witnesses testify to facts; expert witnesses provide opinions within expertise
<b>Engineers as Experts</b>	Must be objective, professional, unbiased; provide clear, relevant technical testimony
<b>Privilege</b>	Two main types: Solicitor-client and Litigation privilege protect confidential communications

