



Syllabus

Torts

(Revised May 2017)

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.



Torts

LEARNING OBJECTIVES

A full understanding and the effective practice of any area of the law require not only a thorough knowledge of its substantive rules, but also familiarity with and an ability to think critically about its theoretical underpinnings.

In that area of the law called “torts,” the latter elements are of particular importance. This is so because the Canadian law of torts, as you will see from the readings, is not conceptually whole. No comprehensive or unified theory can be said to inform the various rules and heads of liability that constitute Canadian tort law. While the explanation for this may lie in the historical development of tort law as a residual legal category (many texts “define” tort law by stating what it is *not*), it may also be attributable in part to jurists (judges, lawyers or academics) not always recognizing and addressing fundamental questions of tort law when contributing to its development.

It is the discovery in yourself of this ability—to recognize and address the fundamental questions of tort law—that should be your overarching objective in completing the readings and studying for the examination. Along the way, you should also acquire the following:

1. a thorough knowledge of the substantive rules of the key subject areas of Canadian tort law, including, where applicable, key statutes that impact or interact with the common law;
2. the ability to discover, understand and integrate any changes to those rules;
3. the capacity to spot relevant legal issues in a given fact situation, and to apply the abovementioned knowledge to the same;
4. an appreciation of the theories that have been advanced as bases for the torts that currently comprise our system of loss allocation;
5. familiarity with alternative theories that might ground tortious liability, or some other system of loss allocation, in various circumstances; and
6. the ability and willingness to think critically about all of the above and to articulate your own ideas and opinions that arise from that thinking.

Of course, the above list of objectives could as well serve for an entire career as for an introduction to torts. Nevertheless, by the time you sit for the examination you should have developed a substantial degree of proficiency in all these areas.



EVALUATION:

Evaluation for this course is based solely on a 3-hour, open book examination. A passing grade is 50%.

While exams in the past may have been graded out of 100 marks, you may see exams worth 180 marks (or some other value). This generally works out to be 1 mark per minute on average. However, whatever the raw mark score (100 marks, 180 marks, 270 marks etc.), the exam is always converted to a percentage (%) whereby 50% is considered to be a passing grade.

Example:

In an exam set out of 180 marks a passing grade (50%) will be at least 90 marks.

The exam may consist of short answer questions, and/or short essay questions, and/or problem questions. Not all variations will necessarily appear on a given exam, however, you may expect one or more of these styles to appear. The standard fact-based and essay style questions will still be the major component of these exams however.

- Short answer questions test candidates' ability to succinctly and correctly evaluate statements about material covered in the syllabus. These may include, multiple choice, true/false or fill in the blank styles etc.
- Essay questions test whether candidates have critically engaged with the material listed in the syllabus and have started to form their own opinions about the strengths and weaknesses of the arguments, principles, and doctrines discussed in those materials.
- Problem (fact-based) questions test candidates' ability to identify legal issues, accurately state the applicable legal rules, apply those rules to novel situations, and draw conclusions supported by analysis. In other words, problem questions require the exercise of independent judgment grounded in the application of general rules to specific fact situations. Problem questions may ask you to take a particular perspective, such as that of a lawyer writing a legal memo or opinion letter to a client or a judge writing a decision.



REQUIRED MATERIALS

Robert M Solomon, Mitchell McInnes, Erika Chamberlain and Stephen GA Pitel, *Cases and Materials on the Law of Torts*, 9th ed (Toronto, ON: Carswell, 2015) ISBN 978-0-7798-6670-0

GHL Fridman, *Introduction to the Canadian Law of Torts*, 3rd ed (Lexis-Nexis, 2012)
ISBN 978-0-433-46944-5

SUGGESTED SOURCES FOR FURTHER (OPTIONAL) READING OR STUDY:

Stéphane Beaulac, Stephen GA Pitel & Jennifer L Schulz, eds, *The Joy of Torts* (Markham, ON: LexisNexis Butterworths, 2003)

Peter T Burns & Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, ON: LexisNexis Butterworths, 2009)

Kenneth D Cooper-Stephenson & Elaine Gibson, eds, *Tort Theory* (North York, ON: Captus University Publications, 1993)

Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 6th ed (Scarborough, ON: Carswell, 2012)

GHL Fridman *et al*, *The Law of Torts in Canada*, 3rd ed (Toronto, ON: Carswell, 2010)

Lewis N Klar, *Tort Law*, 5th ed (Toronto, ON: Carswell, 2012)

Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham, ON: Lexis-Nexis Butterworths, 2011)

Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007)

Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011)

Stephen GA Pitel, Jason W Neyers & Erika Chamberlain, eds, *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013)

Sanda Rodgers, Rakhi Ruparelia & Louise Bélanger-Hardy, *Critical Torts* (Markham, ON: Lexis-Nexis Butterworths, 2009)



OUTLINE AND READINGS

Following is a course outline with associated reading assignments. “**SOL**” refers to the required casebook by Solomon, McInnes, Chamberlain and Pitel; “**GHLF**” refers to the Fridman text. Occasionally you are also directly referred to recent decisions of the Canadian courts or to other materials, which are available online (links provided).

A. INTRODUCTION

1. The Concept of Torts

(a) Nature and History of Torts	SOL 1-9
.....	GHLF 3-4, 11, 15-16
(b) Functions of Tort Law	SOL 20-24
.....	GHLF 12-15
(c) Theoretical Approaches	SOL 1151-1178

2. Bases and Scope of Liability	SOL 17-19
.....	GHLF 4-11, 17-23

3. Intention and Related Concepts	SOL 49-61
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4. Remedies	SOL 29-48
.....	GHLF 39-46

(a) Nominal Damages	SOL 31-33
<i>The Mediana</i> ¹	
(b) Compensatory Damages	SOL 33-36
<i>The Mediana</i> ²	
(c) Aggravated Damages	SOL 36-37
(d) Punitive (Exemplary) Damages	SOL 37-44
(e) Disgorgement Damages	SOL 44-48

5. Vicarious Liability	SOL 989-1020
.....	GHLF 25-31

6. Historical Roots: Trespass and Case	SOL 9-17
.....	GHLF 11-12

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1. An embedded hyperlink is provided to the full case on LexisNexis (Quicklaw). It provides more context than the excerpt of Lord Halsbury’s judgment than is reproduced in the SOL casebook.
 2. See the above note.



7. Standard of Proof and Burden of Proof	³	SOL 769-793
(a) <i>F.H. v McDougall</i>	.....	SOL 774, note 8 ⁴
(b) Wikipedia, "O.J. Simpson"	⁵ .....	.....
	https://en.wikipedia.org/wiki/O. J. Simpson	
(c) Legal Burden versus Evidentiary Burden	.....	SOL 769-773
(d) Exceptions to the General Rule on Legal Burden	.....	SOL 774-793

B. TRESPASS TO PERSONS

1. Introduction	.....	GHLF 93-101
2. Battery	.....	SOL 61-67
3. Assault	.....	SOL 67-72
4. Wrongful ("False") Imprisonment	.....	SOL 72-81
5. Wrongful Prosecution		
(a) Malicious Prosecution	.....	SOL 81-87
	.....	GHLF 171-176
	.. <i>Miazga v Kvello Estate</i> , 2009 SCC 51 , [2009] 3 SCR 339	
(b) Wrongful Prosecution Sans Malice	.....	<i>Henry v British Columbia (Attorney General)</i> , 2015 SCC 24 ⁶
6. Intentional Infliction of Nervous Shock	.....	SOL 89-97
7. The Innominate Intentional Tort	.....	SOL 97-98
8. Invasion of Privacy	.....	SOL 99-113
	.....	GHLF 165-169
9. Breach of Confidence	.....	SOL 113-114

3. The chapter for this section in SOL is "Proof of Negligence," but the concepts apply more generally to tort law than that hence their inclusion in the introductory part of this outline.

4. The casebook incorrectly shows the style of cause as "*R.C. v McDougall*," but correctly summarizes the case ratio.

5. Compare the result in Simpson's criminal trial for murder and civil trial for wrongful death.

6. Although not part of the syllabus, interested readers may also want to look at the subsequent trial decision, [2016 BCSC 1038](#), and costs decision, [2016 BCSC 1494](#), where Hinkson CJ of the British Columbia Supreme Court applies the SCC's ruling in this case.

**C. TRESPASS TO PROPERTY****1. Intentional Interference with Personal Property GHLF 81-83**

- (a) Historical Roots SOL 121-127
- (b) Trespass to Chattels SOL 127-131
- (c) Conversion..... SOL 131-154
- (d) Detinue SOL 154-158
- (e) Recaption and Replevin SOL 159-163

2. Intentional Interference with Real Property

- (a) Trespass to Land GHLF 53-58
- (b) Trespass at Common Law SOL 165-177
- (c) Trespass under Statute SOL 176 (note 13); *and*
..... SOL 842-843
- (d) Trespass and Nuisance SOL 177-181
- (e) Trespass to Airspace and Subsoil SOL 181-186

D. NUISANCE AND STRICT LIABILITY**1. Introduction SOL 909-910
..... GHLF 59-69****2. Private Nuisance SOL 910-935****3. Public Nuisance SOL 935-942****4. Remedies SOL 942-956****5. Strict Liability for Escape of Dangerous Substances SOL 961-976****6. Strict Liability for Animals SOL 977-987**



E. DEFENCES

1. Consent

(a) General Principles	SOL 187-188
(b) Implied Consent	SOL 188-190
(c) Exceeding Consent	SOL 190-194
(d) Competency to Consent	SOL 194
(e) Vitiating Consent	SOL 195-205
(f) Consent to Treatment, Counselling and Care	SOL 207-226
(g) Legislative Reform	SOL 226

Note 1 in SOL 226 explains that most provinces have incorporated the concept of consent to treatment into healthcare legislation. The legislation also includes provisions for expressing healthcare wishes in advance and provisions for substitute consent in the event of incapacity. Candidates should be familiar with the noted portions of **one** of the following provincial legislative schemes:

- [Health Care Consent Act, 1996, SO 1996, c 2, Sched A, Parts I and II](#) (Ontario)
- [Health Care \(Consent\) and Care Facility \(Admission\) Act, RSBC 1996, c 181, Parts 1, 2 and 2.1, and Representation Agreement Act, RSBC 1996, c 405, Parts 1–4](#) (British Columbia)
- [The Health Care Directives and Substitute Health Care Decision Makers Act, 2015, SS 2015, c H-0.002](#) (Saskatchewan)

2. Ex Turpi Causa Non Oritur Actio	SOL 205-207
.....	SOL 759-765
.....	GHLF 131-132
3. Defence of Self	SOL 227-232
4. Defence of Third Parties	SOL 232-235
5. Defence of Real Property	SOL 240-245
6. Defence and Recaption of Chattels	SOL 245-246
7. Necessity	
(a) Public Necessity	SOL 247-251
(b) Private Necessity	SOL 251-255



8. Legal Authority

- (a) Introduction SOL 249-261
..... GHLF 102-104
- (b) Authority or Privilege to Arrest Without Warrant SOL 264-272
..... *Citizen's Arrest and Self-defence Act*, [SC 2012, c 9](#)

9. Apportionment of Fault (Liability) in Intentional Torts

- (a) Overview SOL 255-257
- (b) Apportionment of Liability see readings below, under “G”

F. NEGLIGENCE

- 1. Introduction SOL 293-296
..... GHLF 105-106

- 2. Elements of Negligence (Overview) SOL 296-298

3. Duty of Care

- (a) The General Duty of Care Analysis GHLF 106-112
..... SOL 303-325
- (b) Application: Foreseeability
 - (i) Foreseeable Risk SOL 325-331
 - (ii) Foreseeable Plaintiff SOL 331-337
- (c) Special Duties: Affirmative Acts (Introduction) SOL 339-341
 - (i) Rescuing Others SOL 342-354
 - (ii) Controlling Conduct of Others SOL 345-380
 - (iii) Gratuitous Undertakings SOL 380-387
- (d) Special Duties: Miscellaneous (Introduction) SOL 389
 - (i) Rescuers SOL 390-399
..... GHLF 115-116
 - (ii) The Unborn SOL 399-414
..... GHLF 114-115
 - (iii) Bystanders (Victims of Shock) SOL 414-438
..... GHLF 113-114
 - (iv) Patients SOL 438-445
 - (v) Consumer Warnings SOL 445-458
 - (vi) Lawyers' Clients SOL 459-464
..... *Central Trust Co v Rafuse*, [\[1986\] 2 SCR 147](#)

**4. Negligent Misrepresentation and Pure Economic Loss**

(a) Negligent Misrepresentation (Introduction)	SOL 465-472
(i) Causing Pure Economic Loss	SOL 472-490
(ii) Misrepresentation and Contract	SOL 490-503
(b) Negligent Performance of Service	SOL 516-521
(c) Negligent Supply of Goods or Structures	SOL 521-533
(d) Relational Economic Loss	SOL 533-543
(e) New Categories	SOL 505-515

5. Tort Liability of Public Authorities

(a) Introduction	SOL 795-796
(b) Special Rules	SOL 796-806
(c) Negligence of Public Authorities	SOL 806-824
(d) Misfeasance in Public Office ⁷	SOL 824-837
(e) Other Torts	SOL 837-839

6. Standard of Care

(a) Introduction	GHLF 122-126
.....	SOL 545-546
(b) The Reasonable Person	SOL 546-550
(c) Factors Considered	SOL 550-564
(d) Economic Analysis	SOL 564-567
(e) Special Standards	
(i) Persons with Disabilities	SOL 568-574
(ii) Children	SOL 574-578
(iii) Professionals	SOL 578-586
(iv) Role of Custom	SOL 588-593
(f) Role of Legislation in Setting Common-Law Standards	
(i) Role of Non-Compliance with Statutes	SOL 849-858
(ii) Role of Compliance with Statutes	SOL 858-864

7. This is actually an intentional tort, but is placed here for the convenience of considering all torts against public authorities together.



7. Factual Causation

- (a) Introduction GHLF 121-122
..... SOL 595-596
- (b) The But-For Test SOL 596-600
- (c) Established Exceptions to the But-For Test..... SOL 600-602
- (d) Recent Attempts to Modify the But-For Test SOL 602-619
- (e) Proportionate or “Market Share” Causation/Liability⁸
..... [Sindell v. Abbott Laboratories, 26 Cal.3d 588 \(1980\)](#)
..... [Gariepy v Shell Oil, 51 OR \(3d\) 181, 2000 CanLII 22706](#), para 11
..... [Cuillerier v André’s Furnace, 2011 ONSC 5310](#) at para 29
- (f) Multiple Causes GHLF 33-37
..... SOL 619-621
 - (i) Independent Insufficient Causes SOL 621-626
 - (ii) Independent Sufficient Causes SOL 626-628
 - (iii) Successive Causes of Parallel Injury SOL 629-632
 - (iv) Devaluing the Plaintiff’s Loss SOL 632-633

8. Legal Causation (Lack of “Remoteness”)

- (a) Introduction GHLF 118-121
..... SOL 635-636
- (b) Directness versus Foreseeability SOL 636-641
- (c) Foreseeability Modified SOL 641-660
- (d) Intervening Causes SOL 660-672

9. Categories and Assessment of Damages

- (a) Introduction SOL 675-683
- (b) Damages for Personal Injury SOL 683-709
Inflation Calculator⁹
<http://www.bankofcanada.ca/rates/related/inflation-calculator>
- (c) Legislative Reforms SOL 687-688

8. The market share theory of liability developed in *Sindell*, a decision of the California Supreme Court, has been recognized in Canada as creating a potential to establish causation based on the proportion of risk that a defendant causes and to hold such a defendant severally (as opposed to jointly and severally) liable where the case meets the criteria in *Sindell*. Two Canadian cases are cited here—the *Gariepy* case settled after the motion to strike the claim was dismissed.

9. This website can be used, for example, to convert the Andrews cap on non-pecuniary damages for personal injury awards into a value expressed in today’s dollars.



- (d) The Role of Present Value and Discount Rates SOL 703-704,
Khan Academy, “Present Value” online:

https://www.khanacademy.org/search?search_again=1&page_search_query=discount+rates+AND+present+value.

Review the first four (4) short videos related to: (i) “Time value of money”; (ii) “Introduction to present value”; (iii) “Present value 2”; and (iv) “Present value 3”. Present value 4 adds a level of sophistication that is not necessary for the course.

- (e) Survivor and Dependent Claims SOL 710-722
..... GHLF 146-149
- (f) Damages for Property Loss SOL 722-727

G. SPECIAL DEFENCES AND CONSIDERATIONS IN NEGLIGENCE ACTIONS

1. Contributory Negligence and Apportionment of Liability

- (a) Introduction SOL 733
- (b) Development of the Defence SOL 733-735
..... [John C Kleefeld, “The Contributory Negligence Act at Seventy” \(2015\) 78 Saskatchewan Law Review 31](#) at 31-59 [Kleefeld]
- (c) Conduct Constituting Contributory Negligence SOL 735-743
- (d) Contribution Among Tortfeasors; Joint and Several Liability
Kleefeld, supra at 41-46
- (e) Apportionment of Liability SOL 744-752
- (f) Law Reform Agenda *Kleefeld*, supra at 111-126

2. Voluntary Assumption of Risk

- (a) Introduction SOL 752
- (b) Scope of the Defence SOL 753-758

H. REVIEW PROBLEMS

Working on review problems is one of the best ways to learn material.

Review problems from SOL on the material in this outline are at pages 48, 59, 72, 81, 88, 99, 112, 114, 140, 162, 170, 180, 185, 194, 204, 220, 226, 246, 257, 291, 354, 380, 386, 399, 437, 445, 458, 503, 593, 628, 634, 640, 672, 730 (problems 1 and 2 only), 752, 768, 793, 839, 956, 1019 and 1177.



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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (www.canlii.org).

That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts. Your registration fee also includes free access to the Quicklaw resources of Lexis Nexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

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