

Private Law

It is concerned with the regulation of the relationship between individuals, between corporations, and between individuals and corporations.

Private Law

- Contractual
- Torts
- Corporate
- Real estate
- Family
- Labor
- Commercial
- Trusts and estates
- Property
- Intellectual property
- Banking and Securities Law
- Private International

Private Law

Role of the state in Private Law

- Regulator:
 - Compulsory norms, i.e., the general legal framework under which private individuals may act (direct regulator).
 - Non-compulsory norms, i.e., those that apply unless the parties set them aside (indirect regulator).
- Enforcer of regulations (courts).

Roles of individuals

- Regulators (when permitted by the state)
- Enforcer of regulations (when permitted by the state).

Private Law vs. Public Law

	Private Law	Public Law
Goal	Social order	
Object	To regulate conduct, rights, obligations of individuals to each other.	To regulate matters that affect society as a whole.
Initiating party	The individual or company	The state
Substantive rules	Specific	Specific
Procedural rules	Specific	Specific
Sanctions	Compensation	Punishment
Sources	Case-law, parties' regulation, and legislation.	Legislation (mostly)
Canadian Legal tradition	Common law in English provinces and Civil Law in Quebec	Common law across Canada
Charter protections, e.g., defendant's testimony or defendant's right to counsel	NOT APPLICABLE may be compelled No defendant's right to counsel	APPLY, e.g., may not be compelled (privilege against self-incrimination) YES defendant's right to counsel
Primary lawmaker	Court	Legislature
Role of precedent	For substance	Only for interpreting statutes
Availability, prior notice, promulgation of law	unwritten except as cases after the fact	always written; clarity and prior notice important
Retroactivity of law	May be ex post facto	No ex post facto; usually no "common law crimes"
Interpretation always in favour of one party.	N/A	Interpretation that most favours the accused.
Vague and overbroad laws.	Permitted	Laws that are excessively vague or overbroad are not considered constitutional.
Blank laws	Permitted	Not permitted.
Oakes test	N/A	Applies.

Similarities between Private Law and Public Law

- They may apply to the very same act (both kinds of legal action may proceed simultaneously).
- They may use the same legal concepts (battery is both a crime and tort; punitive damages resemble criminal fines; contempt of court can be criminal or civil).
- They must be consistent with the Constitution.
- They are applied and interpreted by courts.
- They have procedural and substantive dimensions.

Private Law

- Unification
 - The substitution of two or more legal systems with one single system.
- Harmonization
 - To co-ordinate different legal systems by “eliminating major differences and creating minimum requirements or standards
- Convergence

When two legal systems or some of their aspects or branches tend to be similar of the same without any specific and intentional governmental action.

Principles

- Equality of parties:
 - Legal subjects are free to enter into legal relations of their choice.
 - Legal subjects have the power to mutually influence the content of their legal relations: rights and obligations.
- Good faith and fair dealing.
- Freedom of contract.
- Party autonomy.

Torts

- A tort is a civil wrong or wrongful act which results in loss or harm (for example, an injury) to another, and can be classified as either unintentional (negligent) or intentional.
- Tort law is a branch of private law that is concerned with civil wrongs and provides compensation to those who have been harmed by the wrongdoing of others.
- Compensation most commonly takes the form of monetary rewards for damages.

Torts. Elements

- Defendant's conduct.
- The nature of the defendant's conduct
 - Intention
 - Narrow in scope.
 - Negligence.
 - Broad in scope.
 - Accident (strict liability)
- Causation.
- Damage.
 - The nature of the plaintiff's loss: not all losses may be compensated.
- The lack of full defence or the existence of a partial defence.

The negligent tort

- Conduct.
- Negligence.
- Causation.
- Damage.
- Lack of a full defence.

Negligence

The negligent act is determined by identifying the appropriate **standard of care** and applying it to the facts of the case. The standard of care is that of a reasonable –careful- person. It is an objective standard focused on the defendant's conduct with reference to that of a reasonable person.

The central element in applying the standard of reasonable care is the concept of a reasonably foreseeable risk.

Two questions:

- **Duty of care:** Does the defendant owe the plaintiff a duty to take reasonable care to avoid causing an unreasonable risk of harm?
- **Breached standard of care:** Did the defendant breach their standard of care? The plaintiff must prove that the defendant did not live up to the standard of care of a reasonable person in preventing the harm the plaintiff suffered.

The duty of care

In Canadian negligent tort law, the plaintiff must demonstrate the defendant owed him or her **a duty of care**—a specific legal obligation to not harm others or their property.

A duty of care requires a relationship of sufficient proximity. That relationship is informed by **the foreseeability of an adverse consequence of one's actions**, subject to policy reasons that a duty of care should not be recognized.

To find a duty, there must be some circumstance or evidence to suggest that a person in the position of the defendant ought to have reasonably foreseen the risk of injury.

The duty of care. Test

(i) reasonable foreseeability; and

- The first question is whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act.

(ii) proximity.

- The second question is whether there is a relationship of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

Types of duty of care

- Specific
 - Apply to one person in particular.
 - Example: A professional gives legal advice to one client.
- General
 - Apply to the public.
 - Example: each motorist owes everyone a duty of care while driving. If the court decides the defendant did not meet his or her duty of care, the defendant can be found in “breach of duty of care”

Breached standard of care

- Once a duty of care has been found, it is necessary to ask whether the defendant has acted in such a way as to have breached that duty of care.
- Standard of care speaks to what is *reasonable* in the circumstances, i.e., what the reasonable prudent person does.
- Level: The **general rule** is that defendants are expected to act with a reasonable level of skill in the activity they are undertaking. **The applicable standard of care is that of a reasonably competent person undertaking the activity in question.**
- The so-called *reasonable person* in the law of negligence is a creation of legal fiction. Such a "person" is really an ideal, focusing on how a typical person, with ordinary prudence, would act in certain circumstances. The test as to whether a person has acted as a reasonable person is an objective one, and so it doesn't take into account the specific abilities of a defendant.
- Proof: The standard of care will always be based on reasonable foreseeability. This means that the courts will not ask the defendant whether they foresaw a certain outcome or not, but rather they will seek to work out what the defendant ought to have foreseen.

Causation

- Causation in fact (the “but-for” test). Did the injury occur because of the defendant’s act, or would it have occurred anyway?
- Proximate cause (legal cause). Was the connection between the act and an injury strong enough to justify imposing liability?

Damage

- No liability can arise in negligence unless the plaintiff suffers damages as a result of defendant's wrongful act, but not all losses may be compensated.
- Remote damages are NOT compensated.
- Defendant is liable only for the REASONABLY FORESEEABLE CONSEQUENCES OF ITS NEGLIGENCE.
- Special remoteness issues: The Thin-Skull rule: as long as some physical injury to the plaintiff was foreseeable, the defendant is liable for all the consequences of the injury arising from the plaintiff's unique physical or psychological make-up whether or not those consequences were foreseeable.

The intentional tort

- Each intentional tort has its own elements. In general, each tort will have the following elements.
- Act
- Intention
 - The defendant desires the consequences of her actions.
 - If the consequences, while not desired, are substantially certain to result from the defendant's conduct, eg. bomb in an airplane.
 - Transferred intent
- Causation
- Damages: no limitation to reasonably foreseeable damages.
- Lack of defences

Intentional interference with the person

- **Battery (bodily security)**
 - A direct, intentional, and physical interference with the person of another that is either harmful or offensive to a reasonable person.
- **Assault (threats of violence)**
 - The threat of an immediate battery
- **False imprisonment (liberty)**
 - There must be a complete restriction of plaintiff's freedom (eg. blockage of bridge is not false imprisonment).
 - Imprisonment can also be psychological (e.g., a person may be intimidated or threatened to go somewhere).

Intentional interference with the person.

Defences

- Consent
- Self-defence
- Defence of a third party
- Defence of property
- Necessity
- Legal authority

Intentional interference with chattel

- Trespass to chattels:
 - The intentional damage to a chattel in the physical control of the plaintiff.
- Detinue
 - Defendant refuses to return the plaintiff's chattel
- Conversion
 - Defendant has taken plaintiff's chattel, eg. theft, shoplifting, etc.
- Protection of owner's reversionary interest
 - Permanent damage to the plaintiff's chattel which occurred in the possession of someone else, eg., unexpired bailment for a fixed term.

Intentional interference with chattel

- Consent
- Public necessity.
 - You take someone else's gun to protect the public.
- Private necessity
 - Only to protect against death or serious bodily harm.
- Privileged invasion to reclaim personal property.
 - Your own personal property which the defendant took or has in his/her possession.

Intentional interference with land

Trespass to land

- It provides a remedy for the direct, intentional (or negligent), and physical interference with land in the possession of the plaintiff. It is actionable without proof of damage.

Three ways to commit it:

- To enter personally onto land without permission
- To place objects on the plaintiff's property (effective possession doctrine for aircrafts)
- When the possessor revokes a visitor's permission or licence to be on the property.

Intentional interference with land

Defences

- Consent
- Necessity
- Legal authority

Intentional interference with economic interests

There are a number of business torts. They may be divided into (i) those that deal with deceptive market practices, such as deceit, injurious falsehoods, and misappropriation of personality, and (ii) a more amorphous group that deals with improper market practices, such as conspiracy, intimidation, inducement to breach a contract, and intentional interference with economic interests by unlawful means.

Strict liability

No need to prove that defendant was guilty of any wrongful (intentional or negligent) conduct. In the absence of defences, proof that the defendant caused the plaintiff's loss is sufficient to impose liability. Strict liability does not play a significant formal role in modern Canadian tort law. But this has been matched by a rise in a de facto strict liability under the guise of strict standards of care within the tort negligence. This is particularly evident in the fields of motor-vehicle accidents, product accidents, and accidents arising from dangerous activities.

Contracts

A contract is a legally enforceable agreement between two or more parties that creates an obligation to do or not do particular things.

- An agreement
- That is legally enforceable

Laws that Govern Contracts

- Provincial

Types of Contracts

- Bilateral contract: a mutual exchange of promises among the parties.
- Unilateral contract: the offer requests performance rather than a promise from the person accepting the offer. A unilateral contract is **formed when the requested act is complete.**

Elements of a contract

- An offer:
- An acceptance: must be unqualified (must match the offer, in all of its terms). Otherwise: counteroffer.
- Consideration: mutual benefit and detriment.

Contracts

- Means and moment of acceptance: The general rule is that an acceptance must be communicated to the offeror according to the terms of the offer or other reasonable terms.
- The offeror cannot impose a contract on the offeree against his/her wishes by deeming that his/her silence should amount to an acceptance.
- Moment: Where an instantaneous method of communication is used, e.g. email, it will take effect when and where it is received.

Exceptions to moment of acceptance rule

- In unilateral contracts, the normal rule for communication of acceptance to the offeror does not apply. Carrying out the stipulated task is enough to constitute acceptance of the offer.
- The Mailbox Rule - Where acceptance by mail has been requested, or where it is an appropriate and reasonable means of communication between the parties, then acceptance is complete as soon as the letter of acceptance is mailed out, even if the letter is delayed, destroyed, or lost in the post so that it never reaches the offeror.

End of offer

- It ends by passage of time:
 - The term of the offer.
 - Reasonable time has passed.
- By Failing to Comply with a Condition Precedent.
- Because of the Death of Either Party.
- By revocation

Revocation of offer

- A revocation is valid at any time until the offeree has made an effective acceptance.
- Unilateral offers may not be revoked if the offeree began performing.
- Mailbox rule: The revocation of the offer may not be done once the offeree has mailed out his/her acceptance.

Defences to contract formation

- **Duress:** when consent is induced by physical force, threats of force, or even wrongful acts.
- **Unconscionability:**
 - Procedural Unconscionability: fault or unfairness in the bargaining process.
 - Substantive Unconscionability: fault or unfairness in the bargaining outcome.
- **Undue Influence:**
 - The promisor must be vulnerable to the influence and the promisee must use excessive pressure (Hidden clauses; Fine print; Adhesion contract; intimidation; take it or leave it). Undue influence may also exist when the promisor dominates the promisee or is in a fiduciary or confidential relationship with him.
- **Misrepresentation of fact:** fraudulent (knowingly or recklessly made with the intent to deceive) or material (likely to induce reliance). In some cases, silence may be equivalent to misrepresentation, such as in case of fiduciary relationships.
- **Illegality:**
- **Incapacity:**
 - Voidable at the minor's option but are enforced against adults. Affirmation occurs upon majority by express or implied terms.
- **Statute of Frauds/Statute of limitations:** marriage, one-year, land, estates, goods over \$ 5000, surety (guarantor).

Interpretation of contracts

- **Plain and ordinary meaning.**
- A “**practical, common-sense approach** not dominated by technical rules of construction”. The ultimate goal is to determine the intent of the parties. A contract must be read as a whole, in light of the surrounding circumstances known to the parties at the time the contract was formed (SCC, Creston Moly Corp. v. Sattva Capital Corp).
- **Intent of the parties** (against the contract’s objective contextual scheme; the analysis should not be framed in terms of the parties’ subjective intention at the time they entered into the contract. In interpreting a contract, the court should consider the contract as a whole, the factual matrix underlying it, and the need to avoid commercial absurdity, among other factors (RBC Dominion Securities Inc. v. Crew Gold Corporation, 2017 ONCA).

Breach

- A party's failure to fulfill any term of the contract.
- Only material breaches give rise to contractual remedies.
- **Remedies for a Breach of Contract**
- **Damages:**
- Compensatory damage: aim to put the non-breaching party in the position that they had been if the breach had not occurred.
- Punitive damages: meant to punish a wrongful party for particularly wrongful acts, and are rarely awarded in the Canadian business contracts

Remedies for breach of contract

Damages

- Compensatory damage: aim to put the non-breaching party in the position that they had been if the breach had not occurred.
- Punitive damages: meant to punish a wrongful party for particularly wrongful acts, and are rarely awarded in the Canadian business contracts setting.
- Nominal damages: when a breach occurred, but no actual money loss to the non-breaching party was proven.
- Liquidated damages: damages identified by the parties in the contract itself. Liquidated damages should be a reasonable estimate of actual damages that might result from a breach.

Remedies for breach of contract

- **Specific Performance.** If damages are inadequate as a legal remedy, the non-breaching party may seek an alternative remedy called *specific performance*. Specific performance is best described as the breaching party's court-ordered performance of duty under the contract.
- **Cancellation and Restitution.** A non-breaching party may *cancel* the contract and sue for *restitution* if the non-breaching party has given a benefit to the breaching party.

Expectation

A court, enforcing a contract, attempts to put the non-breaching party where he or she would have been had the contract been performed (benefit of the bargain).

- Expectation: Lost benefits to plaintiff.
- Reliance: Cost to plaintiff.
- Restitution: Benefit to defendant.

Expectation

- The court calculates damages by taking the value of the contract (actual damages) and subtracting costs avoided, but adding the consequential damages and incidental damages.
- Actual damages: Profits lost, or the additional cost to replace the subject of the contract.
- Costs avoided: Any cost the breach allowed the non-breaching party to avoid.
- Consequential damages: Damages that are not part of the contract, but occur because of the breach.
- Incidental damages: Costs that the non-breaching party incurs while trying to mitigate damages or secure the value of the contract. Often this includes transaction costs (costs of completing the transaction).

Example

Elizabeth agrees to rent a car from Carlye for two days at \$30/day plus \$10 insurance so that Elizabeth can visit clients at \$100/hour. But Carlye cannot deliver a car, so Carlye has breached the contract. After an hour, making one phone call from a pay phone to other rental agencies, Elizabeth rents a car from Emily for \$45/day, but Emily does not require Elizabeth to buy insurance.

- Actual damages = The additional cost to rent the car (\$30 for two days)
- Costs avoided = The insurance premium that Emily did not charge (\$10)
- Consequential damages = The fees Elizabeth could not collect while waiting an hour for another car (\$100)
- Incidental damages = The cost of the phone call (\$0.50)
- $\$30 - \$10 + \$100 + \$0.50 = \$120.50$.