

3

Civil Law & Litigation

offeror

negligence

EXAMINATION

notice of civil claim

STAY OF PROCEEDINGS

TERMINOLOGY

<i>a posteriori</i>	counter-offer	in-house lawyer
<i>a posteriori</i> fact	counter-sues	inadvertence
<i>a priori</i>	Counterclaim	indemnify
<i>a priori</i> fact	court costs	<i>injuria</i>
<i>absque</i>	court docket	intellectual property
acquisition	Court Order	intentional tort
<i>acta</i>	covenant	Interference with chattels
<i>acta non verba</i>	criminal suit(s)	interlocutory application
action	cross-claim	Interrogatories
adjudication	cross-examination	intervener(or)
Affidavit	Crown	J.A.
agreement	<i>custodia</i>	judgment creditor
<i>amicus curiae</i>	damages	judgment debtor
application	<i>damnum</i>	<i>judice</i>
assault	<i>damnum absque injuria</i>	legal capacity
assignee	Default Judgment	legal liability
assignor	defendant	<i>legis</i>
balance of probabilities	<i>demonstrandum</i>	<i>lex</i>
battery	discovery	<i>lex loci</i>
beyond a reasonable doubt	docket	<i>lex non scripta</i>
Bill of Costs	docket number	<i>lex scripta</i>
breach of contract	duress	liability
case law	encumbrance	liable
case number	entity	limitation period
cause of action	<i>erat</i>	List of Documents
Certificate of Judgment	evade service	litigants
chambers	evidence	litigation
charge	<i>ex</i>	litigation guardian
chattels	<i>ex facie</i>	litigious
Civil Procedure Rules	<i>ex parte</i>	<i>loci</i>
civil suit	<i>ex parte</i> application	<i>locus</i>
claim(s)	<i>ex post facto</i>	<i>locus in quo</i>
class-action lawsuit	examination for discovery	<i>locus sigilli</i>
coerce(s)	examination	<i>malfeasance</i>
collateral	in aid of execution	mental suffering
collection	examine(s)	merger
compensation	execution	misrepresentation
consideration	<i>facto</i>	motion
contempt of court	false imprisonment	negligence
contract	frivolous case	nominal damages
contract law	Garnishing Order	<i>non</i>
contributory negligence	general damages	Notice of Action
conveyancing	grounds	Notice of Civil Claim
copyright	<i>in</i>	Notice of Trial
costs	<i>in custodia legis</i>	nuisance

<i>nunc pro tunc</i>	<i>quod</i>	<i>sui juris</i>
Offer to Settle	<i>quod erat demonstrandum</i>	takeover
offeree	real property	taxation of the
offeror	reasonable person	Bill of Costs
opposing counsel	Reasons for Judgment	testimony
Order for Substituted Service	relief	third-party claim
Order for	remedy	Title
Substitutional Service	Response to Civil Claim	tort
<i>pactum</i>	revoked	tort action(s)
party	rule of law	tort law
party of record	Rules of Court	tortfeasor
patent	<i>scripta</i>	trademark
<i>per se</i>	service	trespass
perjury	sign under seal	Trial Certificate
personal property	simple contract	Trial Record
plaintiff	<i>sine die</i>	undue influence
pleadings	solicitor-client costs	<i>verba</i>
<i>post</i>	special damages	<i>verbatim</i>
Practice Memorandums	specialty contract	viable
& Directives	standard of proof	<i>vice versa</i>
<i>prima facie</i>	Statement of Claim	void
<i>prima facie</i> case	Statement of Defence	Without
product liability	stay of proceedings	Prejudice letter
property law	<i>sub</i>	witness
prothonotary	<i>sub judice</i>	Writ of Delivery
punitive damages	Subpoena	Writ of Possession
<i>QED</i>	substantive right	Writ of
questions of fact	substituted service	Seizure and Sale
questions of law	substitutional service	Writ of Summons
<i>quo</i>	sue(d)	Writs of Execution

INTRODUCTION TO CIVIL LAW

In this section you will be introduced to the basic legal terminology associated with the various branches of civil law, lawsuits, going to court, and collection procedures.

Let's start by looking at the three main branches of civil law.

Branches of Civil Law

There are three branches of civil law:

1. Contract law
2. Property law
3. Tort law.

SCENARIO 4

Meetra has finally got her immigration paperwork sorted out thanks to Samantha Chen. She visits Ottawa on her way to Vancouver. The sisters go out to lunch and talk about Meetra's new job. Yalda is not familiar with the employment scene in Canada and Mustafa has made it clear he doesn't want her to work. Nevertheless, Yalda is interested in the Employment Contract that Meetra has negotiated with her new employer.

The following is some contract law terminology Yalda will learn about.

Contract Law

Contract law includes two main categories:

1. Simple contracts
2. Specialty contracts.

Simple contracts are verbal, written, or implied. They have no prescribed wording and are not signed under seal. On the other hand, **specialty contracts** are written and are signed under seal. Examples of specialty contracts are Mortgages, Leases, Licensing Agreements, Separation Agreements, and Service Contracts.

To **sign under seal** means that the parties to a contract sign their names and a red seal is placed at the end of the signature line. Sometimes, instead of a seal, the word *seal* or *L.S.* is placed at the end of the signature line. L.S. is an abbreviation of the Latin term *locus sigilli* meaning *place for the seal*.

The Latin term *pactum* refers to a **contract**, agreement, or **covenant**; all of which basically mean the same thing.

A **party** to a contract is one who holds the obligations and receives the benefits of a legally binding agreement.

For a contract to be valid there must be offer and acceptance. The **offeror** must offer to make a contract and the **offeree** must accept the offer.

An offer must be definite, intended, and communicated to the offeree. If the offeree wants to form a contract, then that intent must be communicated and the offeree must accept the offer within the time frame stated in the contract. The offeree's acceptance must be unconditional.

An offer may be **revoked** – cancelled – by the offeror withdrawing the offer. There are, however, circumstances under which an offer is automatically revoked:

- a counter-offer is made. A **counter-offer** is a response given to an initial offer. It means the original offer was rejected and replaced with another. A counter-offer gives the original offeror three options: accept the counter-offer, reject it, or make another offer.

- the offeror dies before the offeree accepts the offer
- the offeree does not accept the offer within the stated time frame.

When an offer has been accepted, a contract is prepared and signed by all parties. An essential element of a simple contract is a stated **consideration** – value. If no consideration is stipulated, then in the eyes of the law, one party is doing something for the other party free of charge. There is no contract *per se*, merely a gift. Contracts under seal do not need to state a consideration.

The parties to a contract must have legal capacity. **Legal capacity** means that the person is legally able to enter into a contract. There are several things that make a person legally able to enter into a contract, the main ones being age and state of mind.

Minors may make certain contracts with adults but generally they may cancel these contracts without penalty.

A mentally incompetent person cannot make a contract.

If a person makes a contract while intoxicated or under the influence of drugs, the contract may be revoked if three things are proven:

1. the person was actually intoxicated, or under the influence of drugs, to the extent that they did not know that a contract was being made
2. the other parties to the contract were aware that the person was intoxicated or under the influence of drugs
3. the person sought to revoke the contract within a reasonable period of it being made; for example, when the person sobered up or came down from the drugs.

The Latin term *sui juris* – in one's own right – means being legally competent to manage one's own affairs or having full legal capacity to act on one's own behalf. This term is quite often used in the context of civil litigation and in particular in connection with contract law.

Besides the parties to a contract having legal capacity, they must also consent to make the contract. If anyone is forced to sign a contract under duress or undue influence, the contract is invalid. **Duress** refers to one person forcing another to sign a contract. This may include threats to the person's life or well-being. **Undue influence** is when one person **coerces** – persuades by force or threats – another into signing a contract against their will.

A contract is also **void** – has no legal force – if there is a serious mistake or genuine misunderstanding in the terms of the contract or if there has been a **misrepresentation** – false or misleading words or actions.

If two or more people are parties to an agreement or contract and one of the parties does not abide by the terms, then the other party or parties may launch a civil **action** – lawsuit – for **breach of contract**.

Now that you know a little more about contract law, let's move on to look at the second branch of civil law: property law.

SCENARIO 5

Meetra is now living and working in Vancouver. Yalda is quite jealous because she'd really like a job. She volunteers at the immigration association in the food preparation side of things but she yearns to do more; however, Mustafa is adamant that she needs to be at home.

Mustafa is not happy with their current living conditions – the apartment is too small for the four of them. He blames his general unrest on the cramped conditions.

Meetra sees an ad for a partially furnished small house for rent. She goes to see the property and loves it. The leasing agent shows Meetra the property Lease. She recognizes that the document is a contract – something she knows about thanks to Meetra. However, she notices that the Lease has references to various types of property and she's not sure what it all means. She wants to talk with her friend, Kayleigh, who rents a condominium, before showing the Lease to Mustafa.

The following is some property law terminology Yalda will learn about.

Property Law

Property law encompasses personal, real, and intellectual property. Let's look at these now.

PERSONAL PROPERTY

Personal property, often called **chattels**, includes cars, boats, ATVs, artwork, jewellery, electronics, furniture, etc. Damage or removal of personal property is a litigation matter. **Litigation** refers to the process of taking legal action: suing someone. On the other hand, if ownership of personal property is transferred as a result of the death of the owner, then the matter is a wills and estates one.

REAL PROPERTY

Real property includes land and buildings (houses, condominiums, office blocks, shopping malls, factories, warehouses, etc.). As with personal property, if there is damage, or a question of ownership, then the matter is handled by means of litigation. If, however, ownership passes from one party to another, it is a **conveyancing** matter which is handled by the real estate department of a law firm or by a notary public.

Often personal and real property law are intertwined. For example, a client buys a house with chattels such as the stove, fridge, and drapes, and signs a Contract of Purchase and Sale (contract law) listing both the real and personal property. The conveyancing department of a law firm, or a notary public, handles this matter. If anything goes wrong with the conveyance and the contract is broken or not fulfilled, the matter becomes subject to litigation and is handled by the litigation department of a law firm.

If a client sues an insurance company for failure to pay out following a house fire, the litigation claim includes the value of the building (real property) and the contents (personal property).

INTELLECTUAL PROPERTY

Intellectual property refers to the ownership of copyright, patents, and trademarks. With the ever-expanding availability and communication of information over the Internet, questions of intellectual property use and ownership are common.

A **copyright** is the exclusive legal right given to a creator/originator or assignee, to print, publish, perform, film, record, etc. music, art, or literature. An **assignee** is the person to whom a right is legally transferred. The person who transfers that legal right is known as an **assignor**.

A **patent** is a grant of exclusive property rights for a specific length of time to the person – the inventor – who has invented a process, design, or item. This basically means that no-one is allowed to steal the invention from the inventor.

A **trademark** is a graphic, word(s), or name legally registered or established by use as representing a product or company. You are probably familiar with TM on a product. This sign appears next to the trademark graphic, word(s), or name.

Legal matters relating to copyrights, patents, and trademarks are usually handled by lawyers in the corporate department of a law firm; however, large corporations may have their own in-house lawyers. An **in-house lawyer** is a lawyer who is an employee of a company and handles all the legal matters relating to the company. For example, an in-house lawyer might be required to handle product liability litigation and wrongful dismissal cases; work with company executives on potential take-overs and mergers; oversee the company's corporate legal records; and handle intellectual property registrations, litigation, and documentation just to name a few.

There are some legal terms in the previous paragraph that you may want to know more about.

- **Product liability** is the legal liability a company incurs for producing or selling a faulty product. **Liability** or **liable** means being responsible for something, so **legal liability** means being legally responsible for something.
- A **takeover** or **acquisition** is the buying out of one company by another: usually a large company taking over control of a smaller company. In a sense, you could say that it is a combination of "unequals". A **merger**, on the other hand, is the mutual decision of two "equal" companies to combine and form one company.

Now that you know a little more about property law, let's move on to the third branch of civil law: tort law.

SCENARIO 6

The Agami family move into the leased house. One day, Mustafa is walking in the front garden when he notices a rotten limb on his neighbour's tree overhanging his driveway. He speaks with his neighbour, Angelina. He asks her to have the limb removed before it falls and causes damage. Angelina does not seem at all concerned. She just shrugs and says that the tree has been there for years and nothing has ever happened.

Mustafa is very annoyed at Angelina's attitude and mentions it to another neighbour, Ramesh. Ramesh visits Mustafa, looks at the tree, and agrees that the limb is dangerous. He suggests that Mustafa write a letter to Angelina (with a copy to the leasing agent) asking her to remove the rotten limb, adding "then you will have something in writing if ever you have any property damage."

A month later there is a windstorm. The rotten tree limb falls on Mustafa's car in the middle of the night. He hears the crash and goes out to see what has happened. As he walks towards his car another branch falls and knocks him to the ground. He is rushed by ambulance to hospital where he is treated for a broken ankle, elbow, and collar bone. He also suffers a concussion. There is over \$9,000 damage to his car.

On his return home to convalesce, Mustafa asks Angelina to contact her insurance company. Angelina says that she doesn't have insurance and isn't going to pay for the damage or anything else.

Ramesh tells Mustafa to sue Angelina for his personal injuries, loss of wages, etc. Mustafa knows nothing about civil litigation so he asks Asu to go on-line and find out what he can about how to commence a lawsuit.

The following is some civil law and litigation terminology Asu is likely to come across during his Internet searches.

Tort Law

Tort law is a large part of civil law. A **tort** is a wrongdoing, sometimes called a *malfeasance*, for which an injured party may seek **compensation**, typically money, from the wrongdoer commonly referred to as the **tortfeasor**.

Torts fall into two categories:

1. Intentional torts
2. Negligence.

INTENTIONAL TORTS

An **intentional tort** occurs when the tortfeasor is certain of the results of their action, wants to commit the act, and uses voluntary movement to perform the act. Examples of intentional torts are assault, battery, false imprisonment, infliction of mental suffering, interference with land (trespass and nuisance), and interference with chattels. Let's look at these now.

Assault & Battery

Assault and battery are two distinct torts. **Assault** occurs when the victim believes that they are about to be physically harmed against their will, but no physical contact takes place. **Battery**, on the other hand, occurs when the victim is touched; for example, kicked, punched, slapped, or stabbed. The victim, however, does not have to be injured for battery to have occurred. If the battery is offensive to the victim, even if there is no injury, the victim may claim minor damages.

Assault may be both an intentional tort and a criminal offence. As an intentional tort, it may be the basis for a civil action initiated by an individual. As a criminal offence, it may be the basis for a criminal prosecution by the Crown.

False Imprisonment

False imprisonment, as an intentional tort, refers to the victim being prevented from leaving a place; for example, prevented from getting out of a vehicle or leaving a room. False arrest also constitutes false imprisonment. False imprisonment cannot be claimed if the victim has other ways of getting away from their confinement.

Mental Suffering

Infliction of **mental suffering** is an intentional tort if, through extreme conduct, the defendant causes the victim severe emotional distress. There are cases where a witness brings a claim against a defendant for infliction of mental suffering. These witnesses are often close family members of the victim or strangers who are physically and/or mentally injured.

Interference with Land

There are two kinds of interference with land: trespass and nuisance.

Trespass, either intentional or unintentional, is the unauthorized entry onto another person's land or interference with the enjoyment of the land.

Nuisance, on the other hand, refers to the defendant damaging the plaintiff's land or destroying the plaintiff's "quiet enjoyment" of the land. Examples of this private nuisance are: noise, dirt, smells, radio transmissions, etc. There is a category of nuisance that refers to annoying the general public but this is a criminal offence not a civil one.

Interference with Chattels

Interference with chattels relates to moving or interfering with objects belonging to others, without the owner's permission. Examples of chattels are vehicles, boats, RVs, etc. If the chattels are damaged, the defendant must pay for repair or replacement. If the chattels are not damaged, the defendant may be liable for minor damages.

NEGLIGENCE

Negligence means failing to exercise care.

A major difference between an intentional tort and negligence is that the plaintiff in an intentional tort case does not have to prove actual damage. However, in a negligence case, the plaintiff must prove that they suffered damage, that the conduct of the defendant caused the damage, and that the defendant had a duty in law to avoid the particular conduct but breached that duty.

Many negligence cases revolve around the concept of a **reasonable person**. This is the standard that the court uses to determine whether the defendant's conduct is negligent. Few people can live up to the standard of a reasonable person. A reasonable person is always diligent, aware of potential risks, and thinking of the welfare of others. In other words, if you were a reasonable person you would probably never leave home for fear of being negligent!

You know that the most common form of tort is negligence but you may be wondering if there are circumstances where some incidents are both a crime and a tort. Let's look at this now.

Crimes & Torts

Some acts are both a crime and a tort; for example, a motor vehicle accident. If a person drives dangerously and injures someone, the driver may be convicted of the crime of dangerous driving by the state and be subject to punishment in the form of a fine or jail time. Depending on the province and type of vehicle insurance, the driver may also be sued by the injured party in a tort action and be subject to paying **damages** - compensation for injuries suffered - to the injured party. The term **sue** means to start legal proceedings against a person or company.

Criminal suits and **tort actions**, even if they arise from the same incident, are tried separately. Criminal suits are initiated by the **Crown** (prosecutors representing the state) and the accused is prosecuted in criminal court. Tort actions are initiated by the injured party (the **plaintiff**) who sues the wrongdoer (the **defendant**) in civil court. There can be, and often is, more than one plaintiff or defendant in any given action.

Another major difference between a criminal suit and a tort action - **civil suit** - is the required **standard of proof**. Civil suits are those heard in non-criminal courts and in tribunals; for example, landlord-tenant and family law disputes.

The standard of proof for a criminal suit is **beyond a reasonable doubt** while the standard of proof for a civil suit is the **balance of probabilities**. The balance of probabilities means that the judge has to decide who is more believable and what, more likely than not, happened.

Because the balance of probabilities is much easier to prove than beyond a reasonable doubt, many cases are tried as civil rather than criminal.

Now that you know a little more about the three branches of civil law, let's move on to look at starting a lawsuit.

SCENARIO 7

Asu and Mustafa talk over the situation and agree that Mustafa should talk to his automobile insurance company to see if it will sue Angelina and seek compensation.

Mustafa contacts his insurance company and speaks to Pierre Beauchamp. Pierre assures Mustafa that the insurance company will fix or replace Mustafa's vehicle. When Mustafa asks about suing Angelina, Pierre explains that in many instances it costs the insurance company more to sue someone, especially when there is a risk of not being able to collect from the defendant. This is often the case when people do not have insurance. Nevertheless, the insurance company will investigate Angelina's situation and decide, once the facts are in, whether it will commence an action in small claims court and seek a Garnishing Order. When Mustafa mentions his injuries, the likelihood he will be off work for six weeks and will need extensive physiotherapy, Pierre tells Mustafa to contact a litigation lawyer. He also mentions that the insurance company might join in any future lawsuit.

The following is some litigation terminology Mustafa and Asu will learn when speaking with Pierre and a litigation lawyer.

A LAWSUIT

First of all, let's look at what happens before a case ends up in a courtroom, starting with whether a person really does have grounds for commencing a lawsuit.

Establishing Grounds

When a client contacts a lawyer and expresses a desire to sue, the first thing the lawyer will do is to ascertain whether the client has the **grounds** – a basis in law – for a case. The term **cause of action** refers to the set of facts or allegations that make up the grounds for filing a lawsuit.

Many civil litigation situations are ones that have occurred many times before and there is an abundance of case law. **Case law** refers to the written decisions of judges in court cases and tribunals. An experienced civil litigation lawyer is normally very knowledgeable about the case law in specific matters and will be able to advise a client immediately on the likelihood of successfully suing a person or company.

If the client's situation is unusual then the lawyer will research the case law not only in Canada but also in other countries. Very few lawyers will take on frivolous cases. A **frivolous case** is one where the client has no basis in law to sue someone and is just being litigious. Being **litigious** refers to a person constantly wanting to sue others rather than settle disputes without involving the court. Judges do not take kindly to people wasting court time on frivolous cases.

If a lawyer feels that a client has a **viable** – capable of being successful – case, the lawyer will commence an action following the **Rules of Court**. Each province has Rules of Court; for example, in British Columbia there are *Supreme Court Civil Rules*, *Supreme*

Court Criminal Rules, Supreme Court Family Rules, Provincial Court (Family) Rules, etc. These Rules, together with court-issued **Practice Memorandums and Directives**, set out the documents to be prepared; how those documents are to be processed; and, in many cases, provide basic outline document precedents.

Commencing an Action

To commence an action, the plaintiff's lawyer prepares pleadings. **Pleadings** are legal documents that set out the claims and relief sought. The **claims** are the facts of what happened and/or the party's right to demand money, property, or action. The **relief** sought is what the party wants a judge to order.

Both the plaintiff and defendant are referred to as **litigants**.

THE FIRST PLEADING

Document 12 The first pleading that the plaintiff's lawyer prepares is a **Notice of Civil Claim, Notice of Action, Writ of Summons**, or similarly named document (see Document 12).

The Notice or Writ names the parties – plaintiff and defendant – and sets out the plaintiff's claims against the defendant and the relief sought. It also states the **limitation period** – the number of days within which the defendant must reply. The Notice or Writ may incorporate a **Statement of Claim** or this may be a separate document.

When a number of people want to sue, the action is called a **class-action lawsuit**. Class-action lawsuits are common in product liability cases where buyers or users of defective products sue the maker and/or distributor of those products.

The first pleading normally has to be served on the defendant.

SERVICE

Service is the process of giving legal notice to a person either in person or by mail, depending upon the situation. In the case of a legal action, a sheriff, process server, ministry enforcement officer, or similar official serves the Notice or Writ on the defendant.

Document 13 If the defendant discovers that they are about to be served with a Writ or Notice, they may try to **evade service** by means of trickery or cleverness. Most sheriffs or process servers are used to these tactics and are very adept at locating defendants. Occasionally, the defendant cannot be located. When this happens, the court issues an **Order for Substituted Service**, sometimes called an **Order for Substitutional Service** (see Document 13).

Substituted or **substitutional service** means that the defendant is served by other means; for example, serving a close family member or a person believed to have contact with the defendant, posting the Notice or Writ in the court registry, or publishing a copy of the Writ or Notice in a local newspaper where the defendant resides.

Once a defendant has been served with the Notice or Writ, it is decision time: Does the defendant fight the case or not?

Deciding What to Do

Normally a defendant seeks legal advice when served with a Notice or Writ but this is not mandatory. The defendant does, however, have to decide what course of action to take: do nothing or fight.

If the defendant does nothing, the plaintiff wins the case by default and a **Default Judgment** is prepared.

If the defendant decides to fight, then the lawyer prepares a pleading called a **Statement of Defence** or **Response to Civil Claim**.

If the defendant feels that the plaintiff is partially or fully to blame for the wrongdoing, the defendant **counter-sues** the plaintiff by preparing a Counterclaim. A **Counterclaim** is a direct claim back against the entity who initiated the lawsuit. An **entity** is an individual, partnership, or corporation possessing distinct legal rights such as to own property, to sue or be sued, to pay taxes, to make contracts, etc.

Alternatively, the defendant might prepare a **third-party claim**. This happens when the defendant wants another entity who was not named as a party in the action to join the defence and share the risk. Third-party claims by either a plaintiff or a defendant are most commonly seen in motor vehicle accident cases where the third-party is usually an insurance company.

Another type of claim is a cross-claim. A **cross-claim** is against an entity who is a co-defendant or co-plaintiff; in other words, the claim is against an entity who is on the same side.

When the defendant decides to fight a case, there are times when either the plaintiff or the defendant requires a court order/ decision. This process is known as an interlocutory application.

Making Interlocutory Applications

During the course of an action, it is often necessary for either the plaintiff's or defendant's lawyer to ask the court – usually a Judge – for a decision and/or a **Court Order**. The process of applying for a decision or Order is called an **interlocutory application** or simply an **application**. A **motion** is the actual written request to the court; however, the term is often used interchangeably with interlocutory application.

Evidence supporting a motion is normally presented in an **Affidavit** – a sworn written statement.

Interlocutory applications/motions rely heavily on citing cases, rules, and statutes. The cases are precedent-setting ones as you would expect, the rules are those set out in each province's **Civil Procedure Rules**, and the statutes are the provincial and federal laws (acts). Later in this unit, you will have an opportunity to review the details of a decision of a motions judge and see the usage of cases, rules, and statutes in presenting an argument for or against a motion.

Depending upon the situation, it is usual for the plaintiff's or defendant's lawyer to

appear in **chambers** – a non-trial courtroom or a judge's private office – to ask the judge for a decision, Court Order, etc. This happens when, for example, substituted service or extra pleadings are required. If there is no **opposing counsel**; i.e., lawyer for the defendant, as with an Order for Substituted Service, it is known as an *ex parte* **application**.

As a lawsuit progresses, a procedure known as discoveries takes place.

Conducting Discoveries

A **party of record** to an action; i.e., the plaintiff or defendant, may request a case planning conference to organize the discovery of documents, examinations for discovery, expert witnesses, witness lists, and trial (type, estimated length, etc.).

Each side prepares a **List of Documents** in their possession that are relevant to the case. The List may include letters, memoranda, e-mails, telephone messages, accounting records, contracts, etc. Once the List of Documents is prepared and served on, or delivered to, the parties of record, everyone should have the same information. In some provinces, the parties have to demand to see items on each other's List of Documents.

If a case cannot be settled, an **examination for discovery** often called a **discovery** is held. At the discovery, the plaintiff's lawyer **examines** – questions – the defendant in the presence of the defendant's lawyer and a court reporter, and *vice versa* – the defendant's lawyer examines the plaintiff. The court reporter records the proceedings *verbatim* – word for word – and produces a printed transcript for all parties to review.

Another valuable, inexpensive discovery method is interrogatories. **Interrogatories** comprise a list of written questions to be answered by the other party in an Affidavit – no formal examination for discovery takes place.

The purpose of an examination for discovery or interrogatories is to clarify the facts and issues of a case and to obtain admissions from the other party. Often the outcome of an examination for discovery is a settlement.

Settling Out of Court

A party may try to settle out of court by proposing settlement terms in a **Without Prejudice letter**. As you may recall from Unit 2, this letter cannot be used as evidence in court.

Often a Without Prejudice letter forms the basis of a formal **Offer to Settle** which sets out the terms of the proposed settlement but is not an admission of guilt. The fact that an Offer to Settle has been made must not be disclosed to either the court or a jury until all issues, other than costs, have been settled to all parties' satisfaction.

If the parties do not settle out of court, they are then going to court to settle the dispute.

GOING TO COURT

Let's start by looking at some common trial procedures.

Trial Procedures

There is often more than a year between setting a trial date and the actual trial. However, once the trial date is set, the plaintiff's lawyer prepares a **Notice of Trial** detailing the date, time, and place of trial.

A **Trial Record** containing all the relevant documents – pleadings – required by the court for trial is prepared prior to the trial date. Depending upon the province, additional documents may be required. For example, a **Trial Certificate** may have to be filed shortly before the actual trial to confirm that the parties are ready and that all pre-trial procedures are complete.

An integral part of any trial are the witnesses.

WITNESSES

At trial, both sides call witnesses to support their arguments. A **witness** is a person who, under oath, gives evidence sometimes called **testimony**. **Evidence** is important information/facts about the case which hopefully ascertains the truth of the lawsuit allegations under investigation by the court. Lying under oath is called **perjury**.

Generally, a lawyer calls their witnesses to a meeting at the law firm prior to the trial. The objective is to brief the witnesses on court procedure and to give them a "dry run" of their testimony. The lawyer also prepares the witnesses for the questions the opposing counsel is likely to ask. From the lawyer's point of view, the lawyer obtains a good idea of how the witnesses will support the case and, sometimes, how well they will react to cross-examination. **Cross-examination** refers to questioning by the opposing counsel.

Document 14 If a lawyer is dubious as to whether a witness will attend court, the lawyer may prepare and issue a **Subpoena** (see Document 14). In some provinces, such as Nova Scotia, a Subpoena is signed by the **prothonotary** – the chief clerk of the civil court.

At this point, it is a case of waiting for the trial to begin.

AT THE COURTHOUSE

When arriving at the courthouse, the lawyer and the client will need to refer to the court docket. The **court docket** is a list of the cases to be heard on that day. It shows the docket number (the number assigned by the court to a particular case); the case name and topic, and the courtroom number. While this information is on-line, court personnel often have to change courtroom allocations at a moment's notice. No lawyer or client wants to be late for a court appearance, so besides arriving early at the courthouse, the court docket needs to be referred to immediately upon arrival.

Upon entering the courtroom, the trial begins.

AT THE TRIAL

A case may be tried by judge alone or by judge and jury. A **jury** is a group of people randomly selected and summoned by law, to hear a case and render a decision.

If the trial is by judge alone, the judge decides the **questions of fact**: who is at fault, and the **questions of law**: the compensation to be granted.

If the trial is by judge and jury, the jury decides the questions of fact and the judge the questions of law.

Certain situations may arise during the course of a trial. These include contempt of court and stay of proceedings.

Any witnesses who do not appear at court after being served with a Subpoena are in **contempt of court** and are subject to a fine or arrest. Witnesses who refuse to answer questions in court are also in contempt of court. When this happens, a judge may decide to hold the witness in custody for a short while so that the witness can rethink their refusal to answer questions.

Sometimes in the course of a trial there is a stay of proceedings. A **stay of proceedings** is a court ruling halting the legal process in a trial. It usually postpones the trial indefinitely. The Latin term for this situation is *sine die* meaning *without day* or more generally *without naming a specific day*; however, if new and compelling evidence comes to light, a stay of proceedings can be lifted and the trial continue. Sometimes a stay of proceedings has a date stipulated in it, in which case the trial continues on that date.

When all of the evidence has been presented in court, the trial concludes and the judge passes judgment.

JUDGMENT

Document 15 The judge passes judgment either verbally at the end of the trial or in writing, in **Reasons for Judgment**, following the trial (see Document 15).

You may notice the docket number in the style of proceeding in Document 15. Courts across Canada use differing methods to identify cases. Some use the term **docket number** others **case number** or simply **number**. Some courts use coding systems for their case numbers; for example, 25MV1438.

DIGIT	MEANING
25	The year of the case = 2025
MV	The type of case; for example, CI = criminal infraction; CR = criminal case; CV = civil case; FA = family case; MI = motor vehicle infraction; MV = motor vehicle case; and SC = small claims
1438	The sequential number of the case in the current year = 1438th case of 2025

Whatever the circumstances of a lawsuit and/or whatever court the case is heard in, there is always the question of costs and damages.

COSTS & DAMAGES

If a case goes to trial, the loser pays costs as well as the proven damages. The costs normally include a portion of the successful party's legal fees, court filing fees, transcript expenses, etc. Legal fees are known as **solicitor-client costs** and should not be confused with **court costs**, that include filing fees, transcript expenses, etc.

Each province has court rules that include schedules of fees. These schedules are used by the successful lawyer to prepare a **Bill of Costs** that lists the specific costs and their dollar value. The winning party cannot expect that all legal fees will be paid. Generally speaking, the successful party recovers approximately $\frac{1}{2}$ to $\frac{2}{3}$ of their legal fees.

When the successful party's lawyer prepares a Bill of Costs, a copy is sent to the unsuccessful party's lawyer. If the latter disagrees with the Bill of Costs, they can take the matter before the court registrar or taxing officer. This process is known as **taxation of the Bill of Costs**.

The registrar or taxing officer reviews the Bill of Costs and compares the charges to the schedules of fees in the court rules. If necessary, the registrar or taxing officer reduces the amount of the Bill of Costs.

If the defendant loses the case, in addition to costs, they pay damages – compensation for injuries suffered. There are several types of damages. **Special damages** are tangible expenses such as medical costs, loss of wages, and property damage. **General damages** relate to intangibles such as loss of personal happiness due to injury, pain, and suffering. **Nominal damages** are small amounts of money given to the plaintiff to show good faith, even though the plaintiff suffered minimal injury. **Punitive damages** refer to compensation for obnoxious behaviour toward the plaintiff.

Once a lawsuit is settled, either out of court or in court, there are procedures to follow to collect any monies owing. Let's look at some of the collection procedures now.

COLLECTION PROCEDURES

Often a Court Order stipulates that one party must pay the other party a certain sum of money. Sometimes it stipulates that certain goods have to be returned. Whatever the circumstances, the person required to pay the money or return the goods is called the **judgment debtor**. The party trying to obtain the money or goods is called the **judgment creditor**. If the judgment debtor does not pay the money or return the goods within a specified time limit, then the judgment creditor takes other steps to satisfy the terms of the Order. This process is called **collection**.

The first step in the collection process is for the judgment creditor to obtain information on the judgment debtor. This includes details of the judgment debtor's real and personal

property. The information is obtained by the judgment creditor's lawyer conducting searches in various government agencies. Alternatively, the judgment creditor's lawyer obtains information by questioning the judgment debtor in an **examination in aid of execution**. This is similar to an examination for discovery. If the judgment creditor's lawyer wants to question the judgment debtor in court, a Subpoena is prepared and issued.

Once the judgment creditor's lawyer has sufficient information on the judgment debtor's financial situation, the lawyer moves on to the next step in the collection process. This involves forcing the judgment debtor to pay the money or deliver the goods. This is done by a Garnishing Order, a Certificate of Judgment, or one of a series of Writs of Execution.

A **Garnishing Order** is used when the judgment creditor's lawyer discovers that the judgment debtor has income. The following is an example:

Imagine that you are the judgment debtor, that you have a job, and that you owe the judgment creditor \$20,000. The judgment creditor prepares a Garnishing Order that orders your employer to pay a portion of your wages into court each payday. The judgment creditor then applies to the court for payment out of your garnished wages.

If the judgment creditor's lawyer discovers that the judgment debtor has real property, the lawyer places a **Certificate of Judgment** which is a charge or encumbrance against the title to the property. **Title** is the document that lists the legal owner of property and which is registered in a Land Title Office. A **charge** or **encumbrance** is a document registered as a burden against the title and affects the owner's ability to transfer or sell the property. Once payment is made, the Certificate of Judgment is cancelled and removed from the title to the property.

Writs of Execution are used when the judgment creditor's lawyer wants the sheriff to seize property. Examples of Writs of Execution are **Writ of Possession**, **Writ of Delivery**, and **Writ of Seizure and Sale**.

Before we leave this unit, let's have a brief look at the role of medical terminology in civil law and litigation.

MEDICAL TERMINOLOGY & CIVIL LITIGATION

Many civil litigation cases arise from motor vehicle accidents and personal injury incidents. Many of the pleadings in these cases contain medical terms. If you pursue a career in civil litigation, consider taking a medical terminology course.

Now that you have learned more about civil law and litigation, let's look at some additional Latin terms.

MORE LATIN TERMS

Latin terms are used more frequently in civil litigation than in some other areas of law. This is especially true in the courtroom, in a judge's oral or written Reasons for Judgment, and in the law reports relating to cases.

So, let's look at some more Latin terms now.

BUILDING ON YOUR CURRENT KNOWLEDGE

Some Latin terms have more than one meaning or mean different things in different areas of law. Sometimes when linked with another word, the meaning is expanded. Let's look at some of these now.

A priori

In Unit 1, Student Activity 6, you identified the meaning of the term *a priori* as *from the first* or *at first*. In litigation, an *a priori fact* is one that is self-evident and without need of evidence; for example, snow is cold.

A posteriori

In Unit 2, you identified the meaning of the term *a posteriori* as *from the back* or *from the latter*. In litigation, an *a posteriori fact* is one that is based on observed evidence or experience; for example, the snow started to fall at noon.

Ex facie

In Unit 1, Student Activity 6, you identified the meaning of the term *ex facie* as *on the face* or *on the face of it*. In litigation, *ex facie* is often used when referring to an obviously unreliable document and one needing no further examination.

Prima Facie

In Unit 1, Student Activity 6, you identified the meaning of the term *prima facie* as *based on the first impression* or *at first glance*. In litigation, *prima facie* is often used in the context of a case, so a *prima facie case* is *one established by sufficient evidence in a manner apparent to everyone*.

Guessing Questions

1. The Latin word *actus* means *to do* or *to perform*, so what do you think *acta non verba* means? _____
2. The Latin word *lex* means *law*, so what do you think *lex scripta* means?

3. What do you think the Latin term **lex non scripta** means?

4. The Latin word **locus** means *place, spot, or location*, so what do you think **lex loci** means? _____

5. What do you think the Latin term **locus in quo** means in the context of a civil law incident? _____

6. The Latin word **legis** is the genitive case of the Latin word **lex** and means *of law*. You see the usage of **legis** in the English word *legislation*. So what do you think **in custodia legis** means? _____

7. In ancient Latin, **iudicare** meant to *judge*. Some of you may be familiar with the French verb *jugrer* meaning *to judge* which is derived from the ancient Latin word. Based on this, what do you think **sub judice** means? _____

8. The Latin word **erat** means *was*, so what do you think **quod erat demonstrandum (Q.E.D.)** means? _____

9. Based on your knowledge of Latin terms so far, what do you think the term **ex post facto** means? _____

10. The Latin word **damnum** means *damage, loss, or reduction in value*, so what do you think **damnum absque injuria** means? _____

Check your answers on page 211.

Congratulations if you guessed them all correctly! Again, do not worry if you did not manage to figure out the meaning of all these Latin terms, you will always be able to look them up in a dictionary. In many instances, you will meet these terms again as you work through this book.



You have been introduced to quite a lot of civil law and litigation terminology in this unit. Do not be concerned about knowing all the terms straightaway because you will have an opportunity to practise them in the following Student Activities, Discussion Topics, and Unit Comprehension sections.

STUDENT ACTIVITIES

Student Activity 1

Refer to Document 12: Notice of Civil Claim.

1. Locate the terms **negligence, relief, general damages, special damages, costs, plaintiff, defendant, and Counterclaim**. What do these terms mean?
2. On page 2 there is a paragraph relating to the time for response. What is the legal term for this response time?

Student Activity 2

Refer to Document 13: Order for Substitutional Service.

1. What do the terms **in chambers** and **ex parte** mean?
2. Some Nova Scotia Court Orders are signed by a **prothonotary**. What does this term mean?

Student Activity 3

Refer to Document 14: Subpoena.

1. What is a **Subpoena**?
2. What is the legal term for the situation when someone ignores a Subpoena?

Student Activity 4

Refer to Document 15: *Jankus v. Saskatchewan (Attorney General) et al* Reasons for Judgment.

1. What does **et al** in the citation of this case mean? To whom does this relate?
2. What is the meaning of **docket** in the style of proceeding of these Reasons for Judgment?
3. What does **court docket** mean?
4. What is the alternate meaning of the term **docket** that you have learned in a previous unit?
5. What is the role of the Attorney General of a province or territory?
6. What does the term **enacting** in Paragraph [3] mean?
7. What does the term **legislation** in Paragraph [4] mean?
8. What does the term **claim** in Paragraphs [6] and [7] mean?
9. Identify Ms. Jankus' specific claims.

Student Activity 5

You learned the meaning of the term **intervener(or)** in Unit 2.

1. Research the difference between an intervener and *amicus curiae*.

Student Activity 6

From the CanLII (Canadian Legal Information Institute) website, download the decision of the motions judge in the case *Cutcliffe Kymlicka v. Shipley*, 2021 NSSC 70.

1. Read the decision and highlight in green the legal terms that you know. Ensure that you understand the meaning of these terms.
2. Highlight in yellow the legal terms that you do not know and then look up their meaning.

DISCUSSION TOPICS

1. Discuss the main provisions and terminology likely to be found in an Employment Contract such as the one between Meetra and her employer (reference Scenario 4).
2. Discuss the types of property and liability issues and terminology that might be covered under an apartment Lease.
3. Discuss how Mustafa's action in going out that night (reference Scenario 6) might have on the concept of a **reasonable person**.
4. Discuss the concept of **contributory negligence** in the context of Mustafa's personal injury case.
5. If Mustafa's case goes to trial and is successful, discuss the types of costs and damages that might be awarded to him. Discuss also the types of collection procedures that might be followed if Angelina is gainfully employed and owns the property in which she lives.

UNIT COMPREHENSION

Section A

Read the following sentences and then fill in each blank with the appropriate legal term or phrase.

1. _____ is the legal term meaning to fail to use reasonable care.
2. The party offering to make a Contract is called the _____ and the party accepting an offer is called the _____.
3. Tort actions are initiated by the _____ (the injured party).

4. Many negligence cases revolve around the concept of a/an _____ person.
5. The most common form of tort is _____.
6. When a party does not abide by the terms of a contract, a civil action for _____ is launched.
7. _____ contracts are verbal, written, or implied and are not signed under seal.
8. In a motor vehicle accident, a driver may be _____ by an injured party in a tort action.
9. Property law encompasses three main areas: _____ property, _____ property, and _____ property.
10. _____ occurs when the victim believes that they are about to be physically harmed against their will, but no physical contact takes place.
11. The three branches of civil law are _____ law, _____ law, and _____ law.
12. Both the plaintiff and defendant are referred to as _____.
13. A/an _____ is a grant of exclusive property rights for a specific length of time to an inventor.
14. _____ is the Latin term meaning *place for the seal*.
15. Another term for *wrongdoer* is _____.
16. _____ is the unauthorized entry onto another person's land.
17. Some acts, such as a motor vehicle accident, are considered to be both a/an _____ and a/an _____.
18. Contracts under seal do not need to state a/an _____ (value).

Section B

Read the following sentences. Select the correct legal term(s) from those listed in the parentheses.

1. An Order for Substituted Service is an example of a/an (ex parte application, application for motion, discovery, pleading).
2. In most jurisdictions, applications for Court Orders are heard by (court clerks, articling students, judges, lawyers) in chambers.
3. A list of written questions to be answered via Affidavit by the other party is called a/an (examination for discovery, trial, Without Prejudice letter, interrogatory).
4. The purpose of a/an (Writ, examination for discovery, trial, chambers hearing) is to clarify the facts and issues of a case.
5. The documents prepared by both sides that present the facts and issues of the case are called the (interrogatories, discoveries, pleadings, replies).
6. A Without Prejudice letter is the basis from which a formal (Counterclaim, Notice of Civil Action, Offer to Settle, Court Order) is prepared.
7. The term *verbatim* means (examination for discovery, word for word, orally, in person).
8. The process of applying for a Court Order is called a/an (interlocutory application, trial, discovery, pleading application).

Section C

Match the following legal terms to the definitions in the table. Place your answer(s); e.g., h, in the Answer column.

- | | | |
|----------------------|----------------------|---------------------------|
| a. Court Order | g. Trial Certificate | m. Jury |
| b. Special damages | h. Counterclaim | n. Reasons for Judgment |
| c. Cross-claim | i. Notice of Trial | o. Judgment debtor |
| d. Judgment creditor | j. Process server | p. Stay of proceedings |
| e. Court costs | k. Punitive damages | q. Solicitor-client costs |
| f. General damages | l. Assignee | r. Garnishing Order |

DEFINITION	ANSWER
1. Document detailing the date, time, and place of trial	
2. Compensation for loss of wages	
3. Written judgment passed by judge after trial	
4. Document confirming that all pre-trial procedures have been completed	
5. Person who is trying to obtain money under a Court Order	
6. Person to whom a right is legally transferred	
7. Document to divert wages into court	
8. Randomly selected group of people who hear a case	
9. Compensation for loss of personal happiness due to injury	
10. Claim against a co-plaintiff	
11. Person who serves legal documents	
12. Court ruling halting a trial	
13. Person required to pay money under a Court Order	
14. Compensation for obnoxious behaviour toward the plaintiff	
15. Transcript expenses	

