



Piecing the Puzzle Together: Catastrophic Claims, Tort Claims and the New SABS

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Basic Anatomy of Personal Injury Actions

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When insurance is not enough

- Statutory Accident Benefits
- Short Term Disability
- Long Term Disability
- Accidental Death & Dismemberment

Making your client whole again

- Civil law of torts aims to put the injured party in the position she would have been but for the injury
- This is done by an award of money damages
- Payment is for reasonable solace for the victim's pain and suffering and to reimburse/replace economic losses

What is a tort?

- Tort (noun): a civil wrong, other than a breach of contract, for which a remedy can be obtained, usually in the form of damages
- From the Latin *tortus*, meaning twisted, crooked, wrong
- Entirely a creature of the common law (judge-made law)
- Based on a the concept of fault
- Negligence is the most common tort

Who has been injured?

- Children
- Persons under legal disability
- Adults
- A class

Who has been injured? (cont'd)

Children

- Persons under 18 years of age (an unborn child is not a “person”)
- Deemed to be legally disabled
- Cannot sue or be sued without a Litigation Guardian
- Generally, limitation period does not run until age 18
- May be incapable of fault or held to a reduced standard
- Court has *parens patriae* jurisdiction over all children
- Settlements are not binding on children absent court approval

Who has been injured? (cont'd)

Persons Under Legal Disability

- Minors
- Mentally incapable persons (under the *Substitute Decisions Act*)
- Absentees (under the *Absentees Act*)
- Cannot sue or be sued without a Litigation Guardian
- Generally, limitation period does not run while lacking capacity
- May be incapable of fault or held to a reduced standard
- Settlements are not binding on children absent court approval

Who has been injured? (cont'd)

Adults

- Generally, must sue within two years of the *discovery* of the claim
- A claim is discovered when the person with the claim knew:
 - That injury, loss or damage had occurred
 - That it was caused by an act/omission of the person against whom the claim is made
 - That, having regard to the nature of the injury, loss or damage, a court claim would be an appropriate means to seek a remedy
 - **OR**, when a reasonable person ought to have known the above

Who has been injured? (cont'd)

A Class

- Individually “non-viable” claims can be asserted through a class action
- A class action is a civil lawsuit brought by one or more persons on behalf of a larger group
- Seeks to have common or similar claims resolved in a single proceeding
- Result is binding on all class members and opposing parties

Types of personal injury claims

- Workplace accidents
- Car accidents
- Marine accidents
- Slips, trips and falls
- Clinical malpractice
- Products liability
- Battery
- Defamation, discrimination, etc.*

Types of personal injury claims (cont'd)

Workplace Accidents

- Right to sue for damages is curtailed by *Workplace Safety and Insurance Act*
- Injured workers may not sue their own employers or co-workers for injuries suffered in work accident or by occupational disease
- Where right to sue is not extinguished, the worker (or survivor) must elect to sue or claim worker's compensation benefits
- When worker sues but recovers less than provided by the Act, can claim for benefits to make up the shortfall

Types of personal injury claims (cont'd)

Car Accidents

- Every car accident victim has recourse to at least \$200,000 liability insurance from at fault driver, her own insurer, or the Motor Vehicle Accident Claims Fund
- Threshold for recovery of general damages

Types of personal injury claims (cont'd)

Car Accidents (cont'd)

- The victim must have suffered a permanent serious disfigurement or impairment of an important physical, mental or psychological function
- The impairment must substantially interfere with:
 - (i) the person's ability to continue his or her regular or usual employment, despite reasonable accommodation efforts,
 - (ii) the person's ability to continue training for a career in a field in which the person was being trained before the accident, OR
 - (iii) most of the usual activities of daily living, considering the person's age.

Types of personal injury claims (cont'd)

Marine Accidents

- Governed by federal law and international conventions
- *Canada Shipping Act* limits recovery for claims for personal injury sustained in connection with a ship under 300 tonnes to \$1 million

Types of personal injury claims (cont'd)

Slips, Trips and Falls

- *Occupiers' Liability Act* governs tort responsibility of those who possess land or have control over its condition
- Duty on occupiers to “take such care as in all the circumstances of the case is reasonable to see that persons entering onto the premises...are reasonably safe while on the premises.”
- Occupier may not be liable if it “acted reasonably in entrusting the work to the independent contractor” (i.e., snow removal contractor)
- Crown and municipalities may enjoy very short notice and limitation periods and favourable “gross negligence” standard of liability

Types of personal injury claims (cont'd)

Clinical Malpractice

- Generally, clinical malpractice liability may be established if the plaintiff demonstrates, on a balance of probabilities, that the clinician's conduct fell below the applicable standard of care
- The relevant standard is the degree of skill that would be expected of a reasonably competent clinician practicing in Ontario
- Causation is often a hurdle

Types of personal injury claims (cont'd)

Products Liability

- Customers injured by products have two main routes of recovery, depending on the relationship with the supplier
- Contract theory: implied warranty of reasonable fitness for intended use
- Negligence theory: manufacturers of products sold in a form intended to reach the consumer without possibility of intermediate examination are under a duty to take care in manufacturing those products

Types of personal injury claims (cont'd)

Battery, Intentional Infliction of Mental Suffering

- Battery

- A person who intentionally causes a harmful or offensive contact with another is liable in battery
- It is not necessary that harm be intended by the contact

- Intentional infliction of Mental Suffering

- Must prove actual harm
- Intentional acts might void liability insurance coverage
- Victims of criminal acts may be entitled to relatively modest compensation from the Criminal Injuries Compensation Board

Types of personal injury claims (cont'd)

Defamation, Discrimination, Etc.

- Not personal injuries *per se*, but may cause psychological harm
- Defamation: any false statement about a person, whether made in writing (libel) or orally (slander) that tends to lower a person in the estimation of right-thinking members of society generally
- Discrimination: Ontario *Human Rights Code* implicitly forecloses common law remedy for unlawful discrimination on basis of race, sex or disability and modest remedies must be pursued at the Human Rights Tribunal

What the Plaintiff Must Prove

To succeed in negligence, the plaintiff must show:

- She was owed a **duty of care** by the defendant
- The defendant should have met a particular **standard of care** in fulfilling that duty
- There was a **breach of the standard of care**
- The breach caused the **damage** to the plaintiff
- The damage was not too remote a consequence of the breach (i.e., that is was a **proximate cause**)

The Onus of Proof

- Generally, the plaintiff always bears the onus of proving each element of her case on a balance of probabilities
- The question is, “Was it more likely than not?”
- In cases where a motor vehicle strikes a pedestrian, the driver has the obligation to disprove negligence.

What the Defendant May Argue

- Limitation Period
 - Generally two years
- Contributory Negligence
 - Capacity
 - Moral blameworthiness
 - *Violenti non fit injuria*
 - *Ex turpi causa non oritur actio*
- Causation
- Crumbling Skull

What the Defendant May Argue (cont'd)

The Thin Skull Rule

- The defendant must take his victim as he finds her:
“One who is guilty of negligence to another must put up with the idiosyncrasies of his victim that increases the likelihood or extent of damage to him – it is no answer to a claim for a fractured skull that its owner has an unusually fragile one.” *Owens v. Liverpool* (1939)

What the Defendant May Argue (cont'd)

The Crumbling Skull Doctrine

“The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's ‘original position.’ The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.”

Athey v. Leonati (1996)

Damages

Non-Pecuniary Damages

- Compensation for damages that generally cannot be specifically proved or quantified, but which the law presumes follow from the type of wrong committed and which (i.e., pain and suffering, loss of enjoyment of life, etc.)

Special Damages

- Compensation for quantifiable monetary loss (i.e., loss of income or earning capacity, loss of housekeeping capacity, medical and rehabilitation expenses, out-of-pocket expenses, etc.)

Statutory damages

- The *Family Law Act* provides for an award of non-pecuniary and pecuniary damages to certain family members of the injured party; for example, for loss of care, guidance and companionship of the injured party, out-of-pocket expenses incurred to care for the injured party, etc.

Damages (cont'd)

Aggravated damages

- Damages intended to compensate a plaintiff whose injuries have been exacerbated by particularly outrageous conduct by the defendant (i.e., where it has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety)

Punitive (or exemplary) damages

- Damages intended express outrage and to punish the defendant's conduct Awarded only where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence

Steps in a Civil Action

- Investigation
- Pleadings
- Documentary discovery
- Oral discovery
- Interlocutory motions
- Mediation
- Pre-Trial
- Trial
- Appeal
- Enforcement of Judgment

The Role of Experts

- Expert evidence is always used in personal injury cases
- Expert evidence is admissible at trial if it is relevant, necessary is assisting the judge or jury on the issues in the case, and comes from a properly qualified expert
- Generally, expert evidence is necessary where it falls outside the experience and knowledge of a judge or jury

Settlements

- Almost all cases settle without resort to trial
- Settlement of claims of persons under disability requires court approval
- This may require involvement of the Office of the Children's Lawyer or the Office of the Public Guardian and Trustee
- In a full and final settlement the plaintiff typically releases the defendant from all claims that were or could have been advanced in relation to the tort and for damages known or unknown

Conclusion

“The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question [becomes,] ‘Who is my neighbour?’”

Lord Atkin, *Donoghue v. Stevenson* (1932)