CIVIL LAW CONFIDENTIAL, Part One:

Why Does Civil Law Matter?
An Introduction to Civil Justice in Ontario from the Deep End

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Students are familiar with institutions such as the police, the courts, and three levels of government. Criminal offences. Drug use and possession. Driver licensing. Young people are understandably concerned most with the limits imposed on them, their rights and their responsibilities while they explore what it is to be "me."

The difference between the criminal justice system and the civil justice system is easily described in the abstract. The role of criminal justice is to balance the safety and welfare of the public against individual freedom. It is a rights-based process between the state and individuals or companies resulting in a penal sanction. The police, courts and jails are in reality not very different in how they work from the concepts acquired through popular culture, from childhood to adulthood. Cops and Robbers. Trial and Retribution. Get out of Jail Free Cards. The justice vernacular is populated by argot from the criminal law.

Civil justice, on the other hand, is a somehow more forbidding topic. The description of it as a method of resolving private disputes can be opaque to a young person. The traditional method of initiating students, at any level, is to inundate them with the substantive law: torts, contract, and property. What do they mean? In reality, modern jurists will tell you that we are witnessing a

great convergence of these traditional categories. The civil law, in all its subtleties, has to adapt to every aspect of human interaction, not just those aspects which might lead to trouble with the law. We need only look to societies such as the People's Republic of China, whose economic miracle has been fuelled by adoption of a modern civil law, even if other aspects of its legal system continue to draw criticism.

Sometimes it is easier to capture the imagination of the uninitiated by taking them to the reason why these laws exist, and why they must be enforced. Make no mistake: every citizen, young and old, has a right and a duty to learn about these issues. Take, for instance, these common examples where the civil law enters our lives:

- A youth jumping off a dock into a shallow lake, and breaking his or her neck, does not understand the duty owed to oneself to take reasonable care. From that day forward, the resources of our community equivalent to two or more graduates of nursing college could very well be devoted to washing, bathing and feeding a quadriplegic. We take risks with our own lives we would not inflict on others. Had he a better understanding of his or her duty, this accident would not have happened.
- A car driver fails to maintain a vehicle and it stalls in a live lane in high-speed traffic. A car serving around it to avoid the collision, ends up crashing into a median. A family could lose a mother or father, a sibling or a child, or end up, with the community, having to look after one for many, many years.
- So-called law-abiding citizens who would be offended by an accusation of theft from a community trust, see nothing wrong with exaggerating a claim against a mutual insurance

company. They either do not understand they are committing a civil fraud, or feel that a civil wrong is less wrongful than one calling for criminal sanctions.

Each time the civil law is broken, misunderstood, or worst of all, seen as a kind of lesser law of the land, our society has been denied the opportunity to grow, prosper and keep us safe. The glue that holds us together is weakened. If the only law is the minimum standard which keeps our members out of jail, we are reduced to being a people with a police and a jail. The more efficient the law which puts the citizenry in the jails, fewer are the people to construct and develop a society. In theory, a society governed only by the criminal law will reach a state of Utopia when everyone is in jail, and no one outside. If you think that I have omitted the theory of deterrence, and if you think this theory far-fetched, then think of the social cost in the United States of America, of keeping captive a prison population of 2.5 million, or the City of Toronto. This is the law intended to maintain a very minimum standard of behaviour. It is not the law which builds factories, facilitates trade, and creates wealth in a free market. For the development of a vibrant, modern society, the vital ingredient is the civil law. The stronger and more effective the civil law, the more we build bridges, roads, buildings and the good things in life. If the civil law cannot be effectively and efficiently enforced, our very way of life is put in peril.

If the only people in our society who comprehend this law are judges and lawyers, we as a people are in danger of creating an intellectual equivalent of a jail, imprisoned by a law they do not understand, a profession, judiciary and political class that that seem elitist.

One of the reasons why the law is complex, often beyond the immediate comprehension of the average citizen, is that it is either intended to cover unusual situations or is created, through the judge-made common law, from exceptional cases. So often, presenting the issues to the public in terms of technicalities, as judges and lawyers might comprehend them, however, can be like writing a users manual in a foreign language. The adults of tomorrow need to know: who makes these laws? How are they made? How does it allow for exceptional circumstances?

The challenge I present to you is to teach civil law through the judicial process. Teach them about damages. Teach them about injunctions which prohibit unfair or destructive use of land. Let them into the courts and help them understand how disputes between citizens and companies are resolved. The techniques used by lawyers in the courts to present and challenge evidence can be fascinating, once a student learns a thing or two about the basic techniques being used.

Should we teach our adults of tomorrow that a tort is a "wrong in civil law for which damages may be awarded to an injured party"? Or should we teach them, if someone dives into the shallow end of your home pool and breaks his neck, you at risk of paying for not only for his medical bills; but for a nurse to look after him 24-hours a day, a whole host of home alterations and mobility equipment, catheters to facilitate bladder emptying, diapers to prevent leakage of rectal incontinence, loss of employment income until age 65. How does a court decide the value of pain and suffering?

I have included in the CD-Rom a short video of a road accident which resulted in a catastrophic brain injury and civil proceedings which were protracted for 10 years, and filed in court in a

recent civil proceeding. The purpose in including it here is to demonstrate how the irresponsible act of one Ontario citizen, by failing to maintain his car and allowing it to stall in a live lane of highway traffic, can start a chain reaction leading to horrific consequences. The people of Ontario do not need to understand the civil law consequences of human behaviour so that everyone can be a lawyer. Rather, this is essential knowledge to be included in an owner's manual for responsible adulthood.

The cost to a civilization of members unaware of the practical, human and economic consequence of a broken promise, a careless act, or of unfair trade practice, is the breakdown of the invisible glue that holds us together. The purpose of our presentation is to raise awareness of civil justice as a front-line priority for public consciousness in Ontario and Canada. In our materials, I have included:

- "Unconscionable Delay of Civil Justice: Is it also Unconstitutional?" by R. Lee Akazaki, *Advocates Quarterly*, Vol. 32, No. 3, February, 2007; in which I argue that civil justice is as important to Canadian society as health care and the criminal justice system
- "Getting it Right", the report of the Ontario Bar Association's Justice Stakeholder Summit
- Video of catastrophic car accident

CIVIL LAW CONFIDENTIAL, Part Two:

Jeffrey Radnoff

ANALYSIS OF REMEDIES IN CONTRACT/TORT/EQUITY/STATUTORY

When we first study law, one of the first areas discussed is remedies. The law has no meaning to us if we cannot obtain a remedy for a wrong committed against us.

In our civil legal system, there are four ways to obtain a remedy:

BREACH OF CONTRACT

A contract describes an agreement to do something. Offer and acceptance are necessary elements to form a contract along with consideration (money).

Contracts can be proved in documents, or alternatively, can be based on oral communications, or combination oral communications and written documents.

The objective of contract law is to enforce promises made by people. Accordingly, from a remedial perspective, the object of contract law is to put a person in the position that they ought to have been in had the contract been completed. This raises a number of interesting issues, for instance, what if you enter into a contract that, in retrospect, would have lost money (the purchase of a failing business). In the law of contract, even if someone breaches a contract (for instance a landlord wrongfully terminates a lease) you may have no remedy if you are better off by not having to perform your obligations under the contract. Further, you are required to try to mitigate or minimize your damages reasonably.

TORTS

A tort is a general description of a legal wrong. There are many different types of torts, such as misrepresentation, defamation etc.

If someone committed a wrong against you, which wrong is recognized at law (such as a misrepresentation) then you are entitled to damages based on the wrong not having been committed.

For instance, if someone sells you something and misrepresents what that thing is, then you would be entitled to be put in the position had you not made the investment (backward looking). In other words, you get back your investment.

Contrast this to contract law where you would be put in the position had the contract been performed (forward looking).

In some cases, it is arguable that a misrepresentation can be a term of the contract. For instance, someone may say to you if you invest $100.00 you will earn $200.00. If this is a contract (you paid for this advice) then you would be entitled to $200.00 as a contractual remedy. Alternatively, if this is a misrepresentation (a tort) then you would be entitled to the return of the money invested, $100.00

EQUITABLE REMEDIES

Before our current common law system, there were two courts, one of common law and one of equity. Common law was much more rigid. The equitable court replaced rigidly with fairness. There is no distinction any longer, however, certain remedies still exist from the courts of equity.

In equity, it is usual to consider the gain to the wrongdoer. Again this is contrasted to a tort or contract analysis where you look at the loss to the victim.

In equity, you may have no contract. You may have worked for somebody and they obtained the benefit. From an equitable perspective, you have a claim for unjust enrichment which is the enrichment to the party that does not pay you. Other examples of equity include accountings and proprietary remedies, which give you an interest in a piece of property.

STATUTORY REMEDIES

The government also enacts statues (like the *Consumer Protection Act*) which

also provides remedies which are peculiar to the statutes.

CIVIL LAW CONFIDENTIAL, Part Three:

Objection your Honour! – How Canadian Civil Courts Really Work
Jennifer McAleer, Fasken Martineau

Civil trials are not as common as they once were. The size and cost of civil litigation has dramatically increased in recent years. As a result, fewer clients have the resources to take a case to trial. Today, most civil actions settle before reaching a courtroom. Here are some points to keep in mind about those civil actions that actually make it to trial.

The Parties

The parties to a civil trial are known as the plaintiff and the defendant. There can be multiple plaintiffs or defendants in a single action. In addition, sometimes there are third parties, who have been brought into the action by one or more of the defendants. (For example: Plaintiff sues defendant after defendant's car fails to stop at a stop sign and hits plaintiff. Defendant "third parties" the car manufacturer alleging that the brakes on defendant's car were faulty.) Each party is entitled to have their own legal counsel or legal team at trial. As a result, there can often be multiple sets of lawyers in a civil trial. Since a civil action seeks to resolve civil disputes, there is no public prosecutor at trial.

Judge or Jury?

Civil actions may be tried by either a judge or a jury. The Rules of Civil Procedure govern the mechanism by which a party may chose to have a case tried by a jury, rather than judge alone. Generally, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided. Civil juries are composed of six persons selected in accordance with the *Juries Act*. Jury trials are very rare in commercial disputes. They most often take place in personal injury actions or defamation cases.

Motions at the Opening of Trial

At the outset of the trial, one or more of the parties may bring a motion to address outstanding issues or to place some guidelines on the way the trial will proceed. For example; a party might bring a motion to exclude witnesses from the courtroom until such time as that person is called to give evidence. The purpose of the motion is to ensure that witnesses are not influenced in their testimony by hearing the evidence of other witnesses.

Opening Addresses

In a jury trial, the trial will begin by the judge making an opening address to the jury. Plaintiff's counsel will then make an opening address to the jury. The plaintiff is not obliged to make an opening address, but most counsel will do so, because this is an important opportunity to set the stage, by introducing one's client and the key witnesses, and to tell the trier of fact what the case is all about.

In a jury trial, a defendant may, with leave of the court, proceed with his or her own opening address immediately after the plaintiff. In the alternative, the defence will wait until the plaintiff has called all of his or her witnesses and has closed the plaintiff's case. Defendant's counsel will then deliver an opening address before calling his or her first witness. Defendants' counsel will vary in their strategy, as to whether or not to seek leave to "open" immediately following the plaintiff.

In a non-jury civil trial, the judge does not deliver an opening address.

Presentation of Evidence

The parties will present evidence to the court by calling witnesses. The plaintiff will begin by calling each of his or her witnesses in turn, conducting an examination in chief of each witness. The defendant has the opportunity to cross-examine each witness after he or she has finished testifying in chief and before the next witness is called. Once the plaintiff has called all of his or her witnesses, the plaintiff will close his or her case. The defendant will then proceed to call each of his or her witnesses. Plaintiff will now have the opportunity to cross-examine each of the defendant's witnesses.

Exhibits

A document or object cannot be entered into evidence at a trial, unless it is identified by a witness. Identification must be based on first hand knowledge. Once it is identified by a witness, counsel will seek to have it tendered as an exhibit.

Objections

If counsel has an objection to evidence, counsel should stand and inform the judge that there is an objection. Counsel may say something to the effects of, "Your Honour, I have an objection to the question (or evidence)" or simply "Objection, your Honour." Counsel should then wait for the judge to request that counsel state the reason for the objection. The lawyer who initially asked the question will then be provided with an opportunity to respond to the objection. The judge will then rule on whether or not the objection is valid. In a jury trial, the jury will often be excused from the courtroom, while counsel argue over the propriety of the question or the evidence sought to be elicited by the question.

Closing Arguments

Once all of the evidence has been called and both the plaintiff and defendant have closed their case, counsel will have the opportunity to present argument to the court. Argument will usually consist of oral submissions by both parties. In many cases, counsel will also provide written submissions to the court.

Litigation is often called the art of persuasion. Submissions are the final opportunity that a party has to try and persuade the trier of fact that the case should be decided in one's favour. The lawyer must explain why the facts and law support his or her client's position. When delivering

submissions is it important to be accurate, clear and concise. Counsel should avoid exaggeration or melodrama, but still be able to convince the trier of fact that his or her position is the right outcome.

Judgment / Verdict

In a non-jury civil action, the trial judge will deliver the judgment. The judge may deliver his or her judgment from the bench (i.e. in the courtroom) at the conclusion of the trial. More often in lengthy civil trials, the judge will reserve his or her decision and release a written judgment later on. Sometimes, judges will deliver their decision from the bench and indicate that written reasons are to follow.

In jury trials, the jury is given time to deliberate in private to reach a verdict. Once the jury has reached a verdict, the judge and counsel will return to the courtroom to hear the verdict. After some preliminary steps, the registrar will collect the verdict sheet from the jury foreperson and provide it to the judge. Either the judge of the registrar will then read out the jury verdict. The judge will then ask the successful counsel to move for judgment in accordance with the verdict of the jury. The jury is then discharged by the trial judge.