



# Syllabus

# Torts

**(Revised for February 2022)**

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

**Candidates are responsible for obtaining the most current syllabus available.**

V.2



# Torts

## LEARNING OBJECTIVES

A full understanding of tort law requires not only thorough knowledge of its substantive rules, but also an ability to apply those substantive rules to novel factual scenarios, and to think critically about tort law's theoretical underpinnings.

No comprehensive or unified theory can be said to inform the various rules and heads of liability that constitute Canadian tort law. While the explanation for this may lie in the historical development of tort law as a residual legal category (many texts “define” tort law by stating what it is *not*), it may also be attributable in part to jurists (judges, lawyers or academics) not always recognizing and addressing fundamental questions of tort law when contributing to its development.

There are six distinct learning objectives relevant to this subject. Candidates preparing for the NCA Torts exam should develop:

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

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



## EVALUATION:

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

Exams will generally be graded out of 100 marks. Regardless of the total number of marks, 50% is considered to be a passing grade.

### Example:

In an exam set out of 100 marks a passing grade (50%) will be at least 50 marks.

The exam may consist of short answer questions, multiple-choice questions, fact-pattern questions requiring a written legal analysis of a set of facts, and essay questions asking you to explain or comment on aspects of tort law. Not all variations will necessarily appear on a given exam, however, you may expect one or more of these styles to appear. The standard fact-pattern questions will still be the major component of these exams however.

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

### **A WORD OF WARNING Re Fact-Pattern Torts Questions**

For fact-pattern questions, candidates should provide a written legal analysis of each of the relevant legal issues. For instance, most torts include a number of distinct **elements of liability** that must be established by the plaintiff. Each of those elements should generally be addressed in your analysis. In many cases, there are also relevant **defences** that may be raised by the defendant. Depending on the question, you may also be asked to assess potential **remedies**. Your analysis should include each potentially relevant issue even if, for



example, you believe that a claim is likely to fail on one of the elements (such as the duty of care in negligence).

For each issue, you should:

- 1) identify the issue;
- 2) provide a **concise** statement of the relevant law;
- 3) provide an analysis that actually **explains** how the law applies to the facts of the question; and
- 4) briefly state your conclusion on that issue.

The answer should be written in complete sentences and paragraphs, typically with a new paragraph for each issue. It is not sufficient to provide a generic statement of the law that does not link the law to the facts of the question. It is also not sufficient to simply state a conclusion, without explaining how you arrived at that conclusion by the application of the law to the facts.

An example may help. Imagine a question asks you to provide a legal analysis of a claim in negligence brought by a consumer against a manufacturer of goods for injuries resulting from alleged negligence in the manufacturing process. One of the issues you will need to address is whether the manufacturer owed the plaintiff consumer a duty of care. An answer that simply copied out the legal framework for the duty of care, without explaining how that framework applied to the facts of the question, would receive few, if any, marks. The same could be said for an answer that simply asserted, without explanation, that “the defendant owed the plaintiff a duty of care”. Neither of these answers actually explains how the law applies to the facts. A more complete answer would go something like this:

*The first element of liability that must be established by the plaintiff is the duty of care. Where a given relationship falls into an established category of relationships giving rise to a duty of care, a duty of care will be established without the need to engage in a complete duty of care analysis. (Cooper v Hobart; Childs v Desormeaux) There is an established duty of care owed by a manufacturer of goods towards consumers to take reasonable care in manufacturing products (Donoghue v Stevenson). Since the facts of this case involve a claim of negligence by a manufacturer of goods giving rise to injury to a consumer, this claim falls into this established category. It is not necessary to engage in a complete duty of care analysis. The duty of care is accordingly likely to be established.*

The above answer identifies the issue, provides a concise statement of the relevant law, **explains** how the law applies to the facts, and sets out a clear conclusion. This example is not intended as a template to be rigidly applied. It is simply one example of an analysis of an issue that includes each relevant component and actually explains how the law applies to the facts.

**All candidates** should review the following documents:

- [Tips for Writing NCA Torts Exam](#)
- [How to Answer Fact Based Law Exam Questions](#)



## **REQUIRED MATERIALS**

Robert M Solomon, Mitchell McInnes, Erika Chamberlain and Stephen GA Pitel, *Cases and Materials on the Law of Torts*, 10th ed (Toronto, ON: Carswell, 2019) ISBN 978-0-7798-9137-5

Erika Chamberlain & Stephen GA Pitel, eds, *Introduction to the Canadian Law of Torts*, 4th ed (Toronto: LexisNexis, 2020) ISBN 978-0-433-50488-7

## **SUGGESTED SOURCES FOR FURTHER (OPTIONAL) READING OR STUDY:**

Peter T Burns & Joost Blom, *Economic Interests in Canadian Tort Law* 2d ed (Markham, ON: LexisNexis Butterworths, 2016)

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

GHL Fridman *et al*, *The Law of Torts in Canada*, 4th ed (Toronto, ON: Carswell, 2020)

Cameron Jeffires & Lewis N Klar, *Tort Law*, 6th ed (Toronto, ON: Carswell, 2017)

Allen M Linden, et al., *Canadian Tort Law*, 11th ed (Markham, ON: Lexis-Nexis Butterworths, 2018)

Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020)

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



## OUTLINE AND READINGS

Following is a course outline with associated reading assignments.

“**SOL**” refers to Robert M Solomon, Mitchell McInnes, Erika Chamberlain and Stephen GA Pitel, *Cases and Materials on the Law of Torts*, 10th ed (Toronto, ON: Carswell, 2019) ISBN 978-0-7798-9137-5.

“**CHAMB**” refers to Erika Chamberlain & Stephen GA Pitel, eds, *Introduction to the Canadian Law of Torts*, 4th ed (Toronto: LexisNexis, 2020) ISBN 978-0-433-50488-7.

Occasionally you are also directly referred to recent decisions of the Canadian courts or to other materials, which are available online (links provided).

### A. INTRODUCTION

#### 1. The Concept of Torts

(a) Nature and History of Torts .....	SOL 1-9
.....	CHAMB 1-3
(b) Functions of Tort Law .....	SOL 20-25
.....	CHAMB 9-12
(c) Theoretical Approaches .....	SOL 1225-1253

<b>2. Bases and Scope of Liability</b> .....	SOL 18-20
.....	CHAMB 3-9, 13-18

<b>3. Intention and Related Concepts</b> .....	SOL 51-63
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<b>4. Remedies</b> .....	SOL 29-49
.....	CHAMB 41-49

(a) Nominal Damages .....	SOL 32-33
(b) Compensatory Damages .....	SOL 34-36
(c) Aggravated Damages .....	SOL 37-38
(d) Punitive (Exemplary) Damages .....	SOL 38-45
(e) Disgorgement Damages .....	SOL 45-49

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

2. See the above note.



<b>5. Vicarious Liability</b> .....	SOL 1051-1085
.....	CHAMB 19-31
<b>6. Historical Roots: Trespass and Case</b> .....	SOL 9-17
.....	CHAMB 8-9
<b>7. Standard of Proof and Burden of Proof</b> <sup>3</sup> .....	SOL 821-846
(a) <i>F.H. v McDougall</i> .....	SOL 826, note 8 <sup>4</sup>
(b) Wikipedia, “O.J. Simpson” <sup>5</sup> .....	
<a href="https://en.wikipedia.org/wiki/O._J._Simpson">https://en.wikipedia.org/wiki/O._J._Simpson</a>	
(c) Legal Burden versus Evidentiary Burden .....	SOL 821-825
(d) Exceptions to the General Rule on Legal Burden .....	SOL 827-846

## **B. TRESPASS TO PERSONS**

<b>1. Introduction</b> .....	CHAMB 111-126
<b>2. Battery</b> .....	SOL 63-70
<b>3. Assault</b> .....	SOL 70-75
<b>4. Wrongful (“False”) Imprisonment</b> .....	SOL 75-84
<b>5. Wrongful Prosecution</b>	
(a) Malicious Prosecution .....	SOL 85-92
.. <i>Miazga v Kvello Estate</i> , <a href="#">2009 SCC 51</a> , <a href="#">[2009] 3 SCR 339</a>	
(b) Wrongful Prosecution Sans Malice .....	<i>Henry v British Columbia</i> <i>(Attorney General)</i> , <a href="#">2015 SCC 24</a> <sup>6</sup>

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3. The chapter for this section in SOL is “Proof of Negligence,” but the concepts apply more generally to tort law than that hence their inclusion in the introductory part of this outline.
  4. The casebook incorrectly shows the style of cause as “*R.C. v McDougall*,” but correctly summarizes the case ratio.
  5. Compare the result in Simpson’s criminal trial for murder and civil trial for wrongful death.
  6. Although not part of the syllabus, interested readers may also want to look at the subsequent trial decision, [2016 BCSC 1038](#), and costs decision, [2016 BCSC 1494](#), where Hinkson CJ of the British Columbia Supreme Court applies the SCC’s ruling in this case.



<b>6. Intentional Infliction of Nervous Shock .....</b>	<b>SOL 94-103</b>
<b>7. The Innominate Intentional Tort .....</b>	<b>SOL 103-105</b>
<b>8. Invasion of Privacy .....</b>	<b>SOL 105-121</b>
.....	<b>CHAMB 199-203</b>
<b>9. Breach of Confidence .....</b>	<b>SOL 121-123</b>
<b>C. TRESPASS TO PROPERTY</b>	
<b>1. Intentional Interference with Personal Property .....</b>	<b>CHAMB 95-109</b>
(a) Historical Roots .....	SOL 129-135
(b) Trespass to Chattels .....	SOL 135-139
(c) Conversion.....	SOL 139-165
(d) Detinue .....	SOL 165-171
(e) Recaption and Replevin .....	SOL 171-175
<b>2. Intentional Interference with Real Property</b>	
(a) Trespass to Land .....	CHAMB 55-60
(b) Trespass at Common Law .....	SOL 177-189
(c) Trespass under Statute .....	SOL 188 (note 13); <i>and</i>
.....	SOL 892-896
(d) Trespass and Nuisance .....	SOL 189-193
(e) Trespass to Airspace and Subsoil .....	SOL 194-199
<b>D. NUISANCE AND STRICT LIABILITY</b>	
<b>1. Introduction .....</b>	<b>SOL 967-968</b>
.....	<b>CHAMB 61-94</b>
<b>2. Private Nuisance .....</b>	<b>SOL 968-994</b>
<b>3. Public Nuisance .....</b>	<b>SOL 994-1002</b>
<b>4. Remedies .....</b>	<b>SOL 1002-10017</b>
<b>5. Strict Liability for Escape of Dangerous Substances .....</b>	<b>SOL 1021-1037</b>





**6. Strict Liability for Animals ..... SOL 1037-1049**

**E. DEFENCES**

**1. Consent**

- (a) General Principles ..... SOL 201-202
- (b) Implied Consent ..... SOL 202-204
- (c) Exceeding Consent ..... SOL 204-208
- (d) Competency to Consent ..... SOL 208-209
- (e) Vitiating Consent ..... SOL 209-220
- (f) Consent to Treatment, Counselling and Care ..... SOL 222-243
- (g) Legislative Reform ..... SOL 242 (note 1)

Note 1 in SOL 242 explains that most provinces have incorporated the concept of consent to treatment into healthcare legislation. The legislation also includes provisions for expressing healthcare wishes in advance and provisions for substitute consent in the event of incapacity. Candidates should be familiar with the noted portions of **one** of the following provincial legislative schemes:

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

- 2. Ex Turpi Causa Non Oritur Actio ..... SOL 220-222**  
..... SOL 810-817  
..... CHAMB 157-159
- 3. Defence of Self ..... SOL 245-250**
- 4. Defence of Third Parties ..... SOL 251-254**



<b>5. Defence of Real Property</b> .....	SOL 259-264
<b>6. Defence and Recaption of Chattels</b> .....	SOL 264-266
<b>7. Necessity</b>	
(a) Public Necessity .....	SOL 266-270
(b) Private Necessity .....	SOL 270-274
<b>8. Legal Authority</b>	
(a) Introduction .....	SOL 279-280
.....	CHAMB 122-124
(b) Authority or Privilege to Arrest Without Warrant .....	SOL 285-293
..... <i>Citizen's Arrest and Self-defence Act</i> , <a href="#">SC 2012, c 9</a>	
<b>9. Apportionment of Fault (Liability) in Intentional Torts</b>	
(a) Overview .....	SOL 274-276
(b) Apportionment of Liability .....	see readings below, under "G"
<b>F. NEGLIGENCE</b>	
<b>1. Introduction</b> .....	SOL 317-320
.....	CHAMB 127-159
<b>2. Elements of Negligence (Overview)</b> .....	SOL 320-326
<b>3. Duty of Care</b>	
(a) The General Duty of Care Analysis .....	SOL 327-349
(b) Application: Foreseeability	
(i) Foreseeable Risk .....	SOL 349-359
(ii) Foreseeable Plaintiff .....	SOL 359-366
(c) Special Duties: Affirmative Acts (Introduction) .....	SOL 367-370
(i) Rescuing Others .....	SOL 370-383
(ii) Controlling Conduct of Others .....	SOL 383-410
(iii) Gratuitous Undertakings .....	SOL 410-416
(d) Special Duties: Miscellaneous (Introduction) .....	SOL 417
(i) Rescuers .....	SOL 417-427



- (ii) The Unborn ..... SOL 427-448
- (iii) Bystanders (Victims of Shock) ..... SOL 448-469
- (iv) Patients ..... SOL 469-477
- (v) Consumer Warnings ..... SOL 477-490
- (vi) Lawyers' Clients ..... SOL 490-496  
..... *Central Trust Co v Rafuse*, [\[1986\] 2 SCR 147](#)

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

- (a) Negligent Misrepresentation (Introduction) ..... SOL 497-505
  - (i) Causing Pure Economic Loss ..... SOL 505-527
  - (ii) Misrepresentation and Contract ..... SOL 527-542
- (b) Negligent Performance of Service ..... SOL 554-559
- (c) Negligent Supply of Goods or Structures ..... SOL 559-572
- (d) Relational Economic Loss ..... SOL 572-582
- (e) New Categories ..... SOL 543-554

#### **5. Tort Liability of Public Authorities**

- (a) Introduction ..... SOL 847-848
- (b) Special Rules ..... SOL 848-858
- (c) Negligence of Public Authorities ..... SOL 858-877
- (d) Misfeasance in Public Office <sup>7</sup> ..... SOL 877-889
- (e) Other Torts ..... SOL 889-892

#### **6. Standard of Care**

- (a) Introduction ..... SOL 583-585
- (b) The Reasonable Person ..... SOL 585-588
- (c) Factors Considered ..... SOL 588-602
- (d) Economic Analysis ..... SOL 602-606
- (e) Special Standards
  - (i) Persons with Disabilities ..... SOL 606-613
  - (ii) Children ..... SOL 613-617
  - (iii) Professionals ..... SOL 617-625
  - (iv) Role of Custom ..... SOL 627-634
- (f) Role of Legislation in Common-Law Standards .....SOL 901-918

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



## 7. Factual Causation

- (a) Introduction ..... SOL 635-636
- (b) The But-For Test ..... SOL 636-640
- (c) Established Exceptions to the But-For Test..... SOL 640-643
- (d) Recent Attempts to Modify the But-For Test ..... SOL 643-661
- (e) Proportionate or “Market Share” Causation/Liability<sup>8</sup>
  - ..... [Sindell v. Abbott Laboratories, 26 Cal.3d 588 \(1980\)](#)
  - ..... [Gariepy v Shell Oil, 51 OR \(3d\) 181, 2000 CanLII 22706](#),  
para 11
  - ..... [Cuillerier v André’s Furnace, 2011 ONSC 5310](#) at para 29
- (f) Multiple Causes ..... CHAMB 33-39  
..... SOL 661-664
  - (i) Independent Insufficient Causes ..... SOL 664-669
  - (ii) Independent Sufficient Causes ..... SOL 669-671
  - (iii) Successive Causes of Parallel Injury ..... SOL 671-674
  - (iv) Devaluing the Plaintiff’s Loss ..... SOL 674-678

## 8. Legal Causation (Lack of “Remoteness”)

- (a) Introduction ..... SOL 679-680
- (b) Directness versus Foreseeability ..... SOL 680-685
- (c) Foreseeability Modified ..... SOL 685-705
- (d) Intervening Causes ..... SOL 705-717
- (e) Beyond the Scope of the Risk ..... SOL 717-720

## 9. Categories and Assessment of Damages

- (a) Introduction ..... SOL 721-731
- (b) Damages for Personal Injury ..... SOL 731-758  
Inflation Calculator<sup>9</sup>  
<http://www.bankofcanada.ca/rates/related/inflation-calculator>

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

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



(c) The Role of Present Value and Discount Rates ..... SOL 749-751

Khan Academy, “Present Value” online:

[https://www.khanacademy.org/search?search\\_again=1&page\\_search\\_query=discount+rates+AND+present+value](https://www.khanacademy.org/search?search_again=1&page_search_query=discount+rates+AND+present+value).

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

- (d) Survivor and Dependent Claims ..... SOL 758-770  
..... CHAMB 178-182
- (e) Damages for Property Loss ..... SOL 770-775

## **G. SPECIAL DEFENCES AND CONSIDERATIONS IN NEGLIGENCE ACTIONS**

### **1. Contributory Negligence and Apportionment of Liability**

- (a) Introduction ..... SOL 783
- (b) Development of the Defence ..... SOL 783-785  
..... [John C Kleeefeld, “The Contributory Negligence Act at Seventy” \(2015\) 78 Saskatchewan Law Review 31 at 31-59 \[Kleeefeld\]](#)
- (c) Conduct Constituting Contributory Negligence ..... SOL 785-794
- (d) Contribution Among Tortfeasors; Joint and Several Liability .....  
*Kleeefeld, supra* at 41-46
- (e) Apportionment of Liability ..... SOL 794-803
- (f) Law Reform Agenda ..... *Kleeefeld, supra* at 111-126

### **2. Voluntary Assumption of Risk**

- (a) Introduction ..... SOL 803
- (b) Scope of the Defence ..... SOL 804-810

## **H. REVIEW PROBLEMS**

Working on review problems is one of the best ways to learn material. Review problems are located throughout the SOL text at the end of the relevant topics.



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### Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada ([www.canlii.org](http://www.canlii.org)). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your registration fee also includes free access to the Quicklaw resources of Lexis Nexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

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