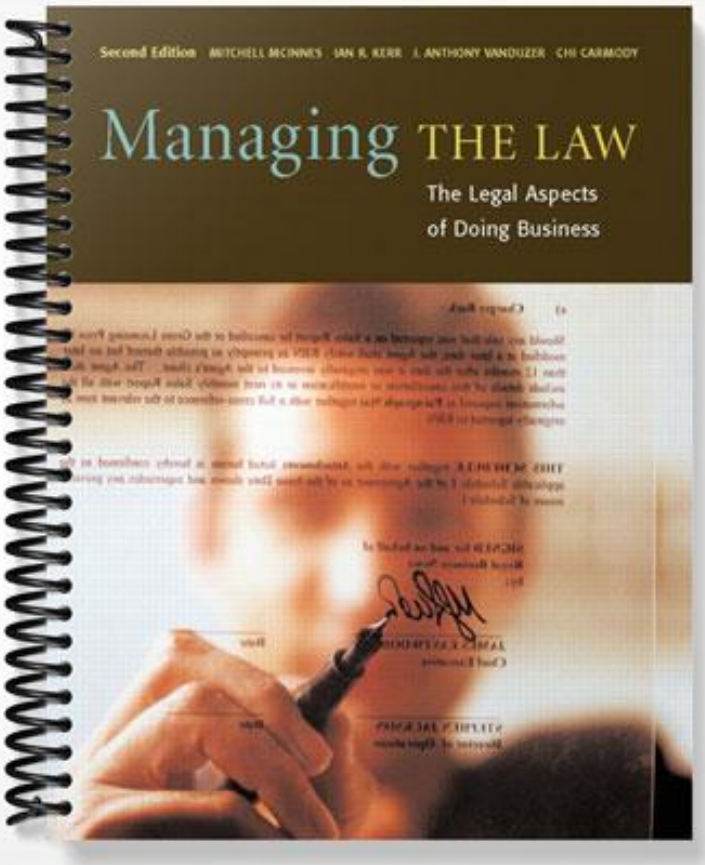
SOLUTIONS MANUAL



CHAPTER 2
LITIGATION AND ALTERNATIVE DISPUTE RESOLUTION

CONTENTS

TEACHING APPROACH

Perhaps more so than any other chapter, Chapter 2 is practical in focus. It provides information that students might well put into practice in a very specific way. That is especially true, for instance, with respect to the discussion of small claims courts.

Students therefore should be encouraged to think about the materials in a practical light. While issues such as pleadings may not be as inherently interesting as some others, they can easily enough be brought to life by asking students to consider the steps that they would need to follow in order to commence or defend a lawsuit.

In that respect, precedents of pleadings are readily available online or in any law library. Students might even be encouraged to try their hand at drafting — not so much with a view to preparing their own pleadings some day, but rather with a view to better understanding the nature of the process.

Likewise, students might be broken into small groups, assigned legal problems, and be required to explore the possibilities for alternative dispute resolution (ADR).

ADDITIONAL TEACHING SUGGESTIONS

Ontario Costs Grid

As noted in the text, Ontario has recently adopted a new system for calculating costs. That system is based on the concepts of *partial indemnity* (in place of party-and-party costs) and *substantial indemnity* (in place of solicitor-and-client costs). A costs grid then determines the amounts that are available for certain services. As the following materials indicate, that amount will reflect a number of factors, including the nature of the proceedings, the experience of the lawyer, and the amount of time devoted to a task. The courts also have a discretion to modify the amounts if, for instance, the lawyer has special expertise in an area. (The following grid was accurate at the time of writing. It may, however, be amended form time to time.)

See <www.ccla.ottawa.on.ca/ccla_images/Cost_Grid.html>

1. Fees other than Counsel Fee
Hourly rates for pleadings, mediation under Rule 24.1, financial statements, discovery of documents, drawing and settling issues on special case, setting down for trial, pre-motion conference, examination, pre-trial conference, settlement conference, notice or offer, preparation for hearing, attendance at assignment court, order, issuing or renewing a writ of execution or notice of garnishment, seizure under writ of execution, seizure and sale under writ of execution, notice of garnishment, or for any other procedure authorized by the *Rules of Civil Procedure* and not provided for elsewhere in the costs grid.

	Partial Indemnity Scale	Substantial Indemnity Scale
Law Clerks	Up to $80.00 per hour	Up to $125.00 per hour
Student-at-law	Up to $60.00 per hour	Up to $90.00 per hour
Lawyer (less than 10 years)	Up to $225.00 per hour	Up to $300.00 per hour
Lawyer (10 or more but less than 20 years)	Up to $300.00 per hour	Up to $400.00 per hour
Lawyer (20 years and over)	Up to $350.00 per hour	Up to $450.00 per hour

2. Counsel Fee — Motion or Application

	Partial Indemnity Scale	Substantial Indemnity Scale
0.25 hour	Up to $400.00	Up to $800.00
1.00 hour	Up to $1,000.00	Up to $1,500.00
2.00 hours (half day)	Up to $1,400.00	Up to $2,400.00
1 day	Up to $2,100.00	Up to $3,500.00

3. Counsel Fee — Trial or Reference

	Partial Indemnity Scale	Substantial Indemnity Scale
Half Day	Up to $1,500.00	Up to $2,500.00
Day	Up to $2,300.00	Up to $4,000.00
Week	Up to $9,500.00	Up to $17,500.00

4. Counsel Fee — Appeal

	Partial Indemnity Scale	Substantial Indemnity Scale
1.00 hour	up to $1,000.00	up to $1,500.00
2.00 hours (half day)	up to $1,250.00	up to $2,000.00
1 day	up to $2,000.00	up to $4,000.00

DISCUSSION BOXES

Business Decision 2.1

Judgment Debts and the Decision to Sue

This question is designed to make students realize that litigation can often end in a hollow victory. In this case, there is little to be gained and much to be lost from suing the hacker. Although the company is legally entitled to $750 000 in compensation as a result of the incident, it apparently has no chance of actually recovering that amount. The boy presumably does not have large assets and the evidence indicates that he probably never will. Consequently, from the company's perspective, the most likely result of litigation would merely be a large fee from its lawyer. (Looking ahead to Chapter 17, the company might consider obtaining hacker insurance as protection from similar incidents in the future.)

Ethical Perspective 2.1

Contingency Fee Agreement

1. The facts illustrate a shortcoming of the litigation system. Even if the defendant is held liable and the court awards costs on a solicitor-and-client basis (or, in Ontario, substantial indemnity basis), the plaintiff will not truly receive *full* compensation. In other words, in a tort action, the plaintiff will not be restored to the pre-tort condition. Between the tort and the legal system, there inevitably will be a shortfall.

That difficulty is simply highlighted by the existence of a contingency fee agreement. The plaintiff's lawyer takes a substantial portion of the damages that the court awarded as compensation for the plaintiff's loss. The plaintiff cannot possibly recover enough to "be whole again."

There is no right answer in this case. The decision to accept or reject the lawyer's offer will be a function of the client's personality and position. The bottom line is that 60

percent of something is better than 100 percent of nothing. The case cannot be won without a lawyer, and that lawyer will want to be paid. The plaintiff might, however, explore a few options. First, negotiations with the lawyer might lead to a lower fee structure. Second, the plaintiff might continue to search for more affordable representation. And third, if the lawyer is hired on the proposed basis, and if the case is won easily, the client might ask the court to review the final bill.

2. Yes indeed — lawyers are human and it is often human nature to take a bird in the hand, rather than try for two in the bush. That may be true even if the lawyer is acting honestly. Decisions are often clouded by subconscious desires.

You Be the Judge 2.1
Court Structure

1. There are four precedents: trial decisions from British Columbia and Quebec, and appeal decisions from Saskatchewan and Ontario. None of those decisions is binding. A decision is binding only if it is given by a court that stands in a higher position in the same court hierarchy. Consequently, in this case, only a decision of the Alberta Court of Appeal or the Supreme Court of Canada would be binding.

Nevertheless, the case must be decided. As the trial judge, the student would therefore be entitled to consider the four precedents. They are not binding, but they may be persuasive. It should be noted, however, that the decision from Quebec would probably be less valuable, all else being equal. Alberta is a common law province, whereas (as explained in Chapter 1) Quebec is governed by the civil law. That difference is especially important in private law matters.

2. It might indeed be desirable to have the same rule consistently applied across the country. For instance, given that mobility rights are entrenched in the *Charter*, it might be desirable if a person could be assured of being subject to the same expectations wherever they were located. Although the various courts of appeal might eventually agree on a common approach, it seems likely that the issue can only be settled by the Supreme Court of Canada. Once that court spoke, every other court in Canada would be required to follow suit.

The present situation involves the rules of tort law, which are a provincial matter. However, students might also recognize that if the issue fell within the federal jurisdiction, consistency could be achieved across the country if the Parliament of Canada enacted a new law.

Business Decision 2.1
Arbitration Clause

The question asks for additional information that could be added to the arbitration clause. The text provides some examples — students would be expected to come up with others. The London Court of International Arbitration provides a useful set of sample clauses < http://www.lcia-arbitration.com/arb/>.

- *Law and Procedure* — The purchaser is a Canadian company, the seller is a German company, and the steel will be delivered to South Korea. If a dispute

arises, a question will arise as to which set of laws applies: Canadian, German, South Korean, or some other. The parties should stipulate one set of substantive law (*eg* the laws of the Province of Ontario). The parties should also decide the procedures to be used during the arbitration.

- *Place of Arbitration* — For the same reason, it is important for the parties to state where the arbitration will take place. Common choices include the London Court of International Arbitration in England, and the International Court of Arbitration which is based in Paris. The parties are, however, free to make their own choice.
- *Language of Arbitration* — Again, because of the multi-national nature of the contract, the parties should decide which language will be used during arbitration.
- *Costs* Although reduced cost is one of the benefits that ADR has over litigation, the process can still be expensive. The parties should decide who will pay for the arbitration.
- *Number of Arbitrators* — The parties should decide on a number of arbitrators (usually one or three). A larger number obviously involves a larger expense.
- *Selection of Arbitrators* — The parties should set up a clear mechanism for selecting the arbitrator(s). They might, for instance, each select one arbitrator and allow that person to select a third. Or they might select from a list of pre-approved nominees. Or they might allow a neutral third party to select the arbitrator(s). The parties might also place restrictions on the nationality of the arbitrator(s) (*eg* the arbitrators cannot all be Canadian).
- *Decision* — The parties should decide whether the arbitrator(s) decision is binding and whether it can be appealed.
- *Confidentiality* — The parties should decide whether or not the matter will remain confidential.

REVIEW QUESTIONS

1. The statement is not entirely true. It is important to distinguish between different types of organizations.

- *Corporations* — Legally speaking, a corporation is a type of person. As a general rule, a corporation can be sued in the same way as a natural person.
- *Clubs and Associations* — In contrast, clubs and associations are *not* regarded as legal persons. As a general rule, they cannot be sued. It is necessary to sue the individual members instead. In some jurisdictions, however, an exception exists for trade unions.
- *The Crown* — The traditional rule said that "the King can do no wrong." As a result, it was impossible to sue the Crown unless the Crown agreed to be sued. That traditional rule has now been changed by legislation. The statutes are, however, complicated and they often introduce unusual restrictions. They need to be read very carefully.

2. Class actions may be available whether or not a jurisdiction has enacted legislation dealing with the issue. In either event, the basic requirements are the same.

- *Common Issues* — There must be *common issues* amongst the various members of the class. The same idea is expressed by the requirement that the class be clearly identifiable. It is not necessary, however, for every claim to be identical.

Even if the court allows a class action to occur, it may set up a process to deal with the special circumstances that affect some claimants.

- *Representative Plaintiff* — The plaintiff must qualify as a *representative plaintiff*. He or she must demonstrate a workable plan for fairly representing the interests of the class members.
- *Notification* — A representative plaintiff must also have a workable plan for *notifying* potential class members. Those notices are very important. In most situations, a class action automatically includes every claimant who has not expressly *opted out* within a certain length of time. And every member of that class will be bound by the decision that the court gives at the end of the trial. People who have not opted out cannot bring separate actions on their own
- *Preferable Procedure* — The court must be convinced that a class action is a *preferable procedure* for dealing with the claims. It will, for instance, consider whether a class action will become too complicated, and whether there are enough similarities between the class members.
- *Certification* — Assuming that those requirements are met, the action will be *certified*. Certification represents the court's decision to allow the various claims to be joined together into a class action. It is usually the most important step in the entire process. Given the seriousness of the situation, defendants are often persuaded to settle out of court after certification

3. That statement is not true. It is certainly *preferable* to have legislation on point. Class action proceedings raise a number of complicated issues, which are best settled by the legislature. However, even in the absence of such legislation, the Supreme Court of Canada has recognized that the courts have the power to allow class action claims.

4. A paralegal is a person, who is *not* a lawyer, who acts on behalf of a client in legal matters.

5. Although there are certain advantages to hiring paralegals (most obviously, they tend to charge considerably less than lawyers), there are also certain disadvantages. In contrast to lawyers, paralegals: (i) do not always have formal legal education (though many have completed training programs), (ii) are not regulated and controlled by anything like a law society, (iii) are not subject to mandatory codes of conduct, (iv) are not required to carry liability insurance, (v) cannot have their bills reviewed by a courthouse official, and (vi) are not covered by a privilege.

6. A limitation period is a period of time within which an action must be started. The details vary depending upon the nature of the claim and the jurisdiction in which the claim is brought. It is, however, possible to offer a few general observations.

- Claims in contract usually have to be started within six years. Tort claims often have to be brought within two years. In some circumstances, however, the period may range from days to decades. It is, for instance, usually necessary to act *very* quickly if you intend to sue a municipality or the Crown. But you may have twenty years to sue someone who has been improperly occupying your land.

- The consequences of missing a deadline may also vary. The general rule in contract is that while the debt still exists, it is unenforceable. The money should still be paid, but the courts are not willing to do anything about it. In other circumstances, however, the plaintiff's rights may die along with the limitation period. That may be true, for instance, if the plaintiff lets the defendant occupy your property for thirty years. After the period closes, the defendant may become the owner of that land.

7. If the defendant does not respond to a statement of claim within the prescribed time period, the plaintiff is entitled to go to court alone and obtain a default judgment. In other words, the judge may hold the defendant liable without even hearing from the defendant.

8. A statement of claim is a document in which the plaintiff outlines the nature of the complaint. The defendant usually responds to a statement of claim with a statement of defence that sets out its version of the facts and indicates how it intends to deny the claim.

9. Examinations for discovery is a process in which the parties ask each other questions in order to obtain information about their case. Although discoveries occur outside of court, they are conducted under *oath* and the answers that they generate may be used as evidence during the trial. While discoveries may be time-consuming, they are cheaper and more flexible than court proceedings. Furthermore, by revealing the strengths and weaknesses of a claim, they may indicate which side is likely to lose if the case goes to trial. If so, thy may lead the parties to agree on an out-of-court settlement.

10. A pre-trial conference is a meeting that occurs between the parties and a judge. After the parties outline their positions, the judge may indicate which of them is likely to lose if the case goes to trial. If so, the likely loser may be persuaded to settle. Depending upon the jurisdiction, a pre-trial conference may be required, or it may initiated by the parties or by the judge. Ontario has gone even further. Since 1999, it has had a Mandatory Mediation Program (MMP). Mediation is a process in which a neutral person C called a *mediator* C helps the parties reach an agreement. That program currently applies to most claims that are brought in Toronto, Ottawa, and Windsor, and it is expected to expand province-wide in the future. Under the MPP, the parties are required to meet with a mediator within 90 days after the defence has been filed. The parties cannot go to trial until they have gone through mediation, and a party who refuses to cooperate may be punished. Even when that process does not produce a settlement, it speeds up the litigation process considerably.

11. Both phrases refer to the standard of proof. They indicate the extent to which the person making a complaint must satisfy the court that a particular version of events is correct. Civil claims require proof on a balance of probabilities. That means that the plaintiff must prove that her version of events is more likely than not (*ie* 51 percent or higher). Criminal proceedings require proof beyond a reasonable doubt. That means that the Crown must show that there is no reasonable chance that the accused is innocent.

12. Those terms are used in civil cases. The *plaintiff* is the person who is making the complaint. The *defendant* is the person about whom the complaint is being made. (In criminal cases, the complaint is made by the *Crown* against the *accused*.) The *appellant* is the person who goes to an appellate court and attacks the decision delivered in a lower court. The *respondent* is the person who defends the decision reached in the lower court.

13. If the appellate court believes that the decision in the court below was correct, it will *affirm*. If it believes that the lower court decision was wrong, it may have a number of options depending upon the circumstances. It may *reverse* the lower court decision (for instance, by saying that the defendant was liable rather than not liable), *vary* some part of it (for instance, by saying that the defendant was liable, but for $15 000 rather than $10 000), or send the case back for a *re-trial* (if it does not have enough information to make the right decision itself). Appellate courts usually sit in panels of three or more. The majority rules. A member of the panel who disagrees is entitled to dissent.

14. A defendant who has been found liable and ordered to pay money to the plaintiff is called a judgment debtor. Unfortunately, even if the court has said that the plaintiff is entitled to remedy, the judgment debtor simply may not have anything to give. For instance, it may be a company that is bankrupt. And even if the judgment debtor does have enough money to pay its debt, it may be reluctant to do so. There are, fortunately, several ways to deal with that second sort of problem. For instance, it may be possible to *garnishee* a judgment debtor's income by forcing his or her employer to pay money to the plaintiff. Or it may be possible to *seize and sell* some of the judgment debtor's assets, such as computers, vehicles, and land. (There are, however, limits to that type of remedy. The judgment debtor cannot be stripped bare or left without any way to earn an income.) Court officials and other types of public authorities, such as the sheriff, are available to help with those enforcement procedures.

15. Costs are the expenses that a party incurred during litigation. As a general rule, they are awarded to whichever side wins the lawsuit. As a result, losing a case usually hurts twice. If the plaintiff loses, then it will be denied the remedy that it wanted *and* it will have to pay the defendant's costs. If the defendant loses, then it will have to pay for both the judgment *and* the plaintiff's costs.

Costs are usually awarded on a party-and-party basis (or, in Ontario, a partial indemnity basis). The losing party is not normally required to pay for *all* of the winner's expenses. Party-and-party costs are calculated instead according to a tariff or grid. The situation may be different, however, if one party has misbehaved (*eg* by bringing a frivolous or vexatious claim) or acted inefficiently (*eg* by refusing a reasonable offer to settle). In those situations, the court may, depending upon the circumstances, award solicitor-and-client costs (or, in Ontario, substantial indemnity) or some multiple of the usual costs. Solicitor-and-client costs (or, in Ontario, substantial indemnity) more accurately reflect the amount that the winning party's lawyer actually charged for the case.

16. The primary attraction to a contingency fee agreement is that the client will not receive a lawyer's bill unless and until the case is won and money is recovered from the other side. (In some cases, however, the client will be liable for the lawyer's disbursements in any event.) Consequently, such agreements may allow a lawsuit to be started by a person who could not otherwise afford to litigate. There are, however, two significant disadvantages to contingency fee agreements. First, the contingency fee rate is usually much higher than a straightforward hourly rate. Since the law firm is taking the chance that it will not be paid in some cases, it needs to be paid extra in other cases. As a result, a large part of the compensation that the plaintiff receives may be used to pay for the lawyers, rather than to make up for the loss that lies at the heart of the claim. A second disadvantage is that a contingency fee agreement may adversely affect a lawyer's incentives and motivations. Since the lawyer will not be paid at all if the case is lost, he or she may be overly-inclined to accept an out-of-court settlement.

17. Small claims courts are often particularly attractive to business people because they are faster, simpler, and less expensive than regular courts. Since the rules and procedures are less complicated than usual, many parties act on their own behalf (though they are entitled to hire lawyers or paralegals). Furthermore, small claims courts are, by their very nature, well-suited to deal with a variety of situations that frequently arise in the business context. The disadvantage to suing in a small claims court is that the court can only hear *small* claims. The dollar limit varies between the jurisdictions. While a claim that is worth more than that limit may be brought in a small claims court, it will not be possible to recover the excess amount. Nor will it be possible to split a single large claim into two smaller ones.

18. The inter-related concepts of a court hierarchy, the doctrine of precedent, and the rule of law lay at the heart of the Canadian legal system.

- To say that the courts are in a hierarchy simply means that they are arranged according to importance. One court is on top, some are in the middle, and several are on the bottom.
- The doctrine of precedent requires a court to follow any other court that is above it in a hierarchy.
- The rule of law states that disputes should be settled on the basis of laws, rather than personal opinions. The concept of a hierarchy and the doctrine of precedent support the rule of law by requiring judges to follow the courts above them.

That system has a number of benefits. One of the most important is consistency. Once an issue has been decided by a court, every court that is lower in the hierarchy must apply it. Consequently, similar cases are decided in similar ways. That sort of consistency also creates another important benefit: respect for the legal system. Even if a litigant disagrees with the trial judge's decision in a particular case, he or she can be confident that the decision was based on law, and not merely on the judge's personal preference.

19. Most lawyers will tell a business client to go to court only as a last resort. There are various reasons for that advice.

- First, litigation is often a bit of a lottery. The results are not entirely predictable. The doctrine of precedent is designed to create consistency, but sometimes there

are not any binding authorities on point. And sometimes, the judge simply gets it wrong. Furthermore, even if the law is clear, the facts may be in dispute. The judge may not believe you or she may think that your witnesses are lying.

- Second, formal litigation is time consuming and expensive. It is not terribly unusual for a case to drag on for more than a decade, as it winds its way through a trial and perhaps two appeals. During that time, important members of an organization will be pulled away from the office in order to give evidence and to advise the lawyers. Lawyers' fees and other costs quickly add up.
- Third, formal litigation tends to be fatal to a relationship. The courts provide an adversarial process that creates winners and losers. Within fairly generous boundaries, each party is allowed, even encouraged, to attack the other side. Not surprisingly, then, the parties may not be willing to do business with each other after that experience.
- Fourth, formal litigation can have a number of indirect costs. For example, since court proceedings are open to the public, they may be reported in the media. Depending upon the circumstances, a corporation may actually be more concerned about bad publicity than about being held liable to the plaintiff.

20. Alternative dispute resolution (or ADR) is a process that allows the parties to settle an argument without a binding court order. There are three important forms of ADR: negotiation, mediation, and arbitration. Each has advantages and disadvantages.

- *Negotiation* A negotiation is a discussion that leads to the settlement of a dispute. Although the parties may use their lawyers, they are not required to do so. Negotiation has many advantages. It tends to be quicker, less complicated, and less expensive than litigation. It often helps the parties to remain on good terms with each other. It allows business people to take advantage of their own bargaining skills. And since it is a private procedure, it can be used to avoid bad publicity. However, the process also has certain limitations and dangers. First, since negotiation requires cooperation, it may not be possible if a dispute has already turned ugly. Second, the parties may not have equal bargaining power, especially if one is inexperienced and unrepresented by a lawyer. As a result of having fewer resources and less information, that person may not be capable of securing a fair settlement. Indeed, it may be exploited. Third, if a dispute concerns a loss that is covered by an insurance policy, the insured must let the insurance company take control of the negotiations. If the party attempts to settle the matter itself, it may lose the benefits of the policy. Finally, there is no guarantee of success. Negotiations may collapse and a dispute may remain unresolved. If so, the effort put into the negotiations will be largely wasted.
- *Mediation* Mediation is a process in which a neutral person, called a mediator, helps the parties reach an agreement. The important point is that mediation is non-binding. The mediator brings the parties together, listens to their arguments, outlines the issues, comments on each side's strengths and weaknesses, and suggests possible solutions. But the mediator does *not* give a decision and the parties are *not* required to obey any orders. In that sense, mediation is unlike formal litigation, but like negotiation. It has many of the same benefits,

limitations, and dangers as negotiations, except that it also provides the parties with a neutral perspective.

- *Arbitration* Arbitrations look more like court proceedings. Arbitration is a process in which a neutral third person, called an arbitrator, imposes a decision on the parties. Accordingly, the fundamental difference between arbitration and mediation is that an arbitrator's decision is almost always *binding*. The parties must obey it. Indeed, it is quite common for the parties to agree beforehand that the arbitrator's decision, unlike a trial judgment, cannot even be appealed. Finality is therefore one of the benefits of arbitration. There are others. Like negotiation and mediation, it tends to be quicker, more private, less expensive, and less adversarial than formal litigation. Furthermore, arbitrators usually have greater expertise than judges. The government selects people to be judges for a variety of reasons. And once those people are *on the bench* (that is, once they have become judges), they generally hear every type of case. Sometimes they have a great deal of experience in an area, but sometimes they have none at all. An arbitrator, in contrast, is selected by the parties to a particular dispute precisely because he or she does have expertise in the area. A professor of contract law may be chosen to decide whether or not an agreement is valid, or a person with an extensive background in employment relations may be asked to resolve a labour dispute.

CASES & PROBLEMS

1. Hupton Motors has based its decision on two problems facing the purchasers: (i) on an individual basis, there may not be sufficient incentive to sue, and (ii) even if there is a desire to sue, the normal litigation process may be unaffordable to purchasers at the "low-end" of the market. Hupton Motors has, however, miscalculated. It has failed to account for two possibilities: (i) class action proceedings, and (ii) contingency fee agreements.

    - *Class Action Proceedings* — The purchasers may be able to avoid the first problem by means of a class action. A class action takes advantage of the "economies of scale." While it may not make sense for 6000 people to individually sue for $500 each, it may make sense for 6000 to bring a single action for $3 000 000. Furthermore, the facts would appear to fit the requirements that must be met (whether or not the action is brought in a jurisdiction that has class action legislation). There are common issues among the claimants. It may well be possible to find a representative plaintiff who can fairly and effectively represent the interests of the class. It may be possible to identify the purchasers or to otherwise provide sufficient notification. And it may well be preferable for the courts to handle the claims as part of a class action, rather than as separate actions. If so, the class action may be certified. At that point, depending upon the evidence, Hupton Motors might be persuaded to settle out of court.
    - *Contingency Fee Agreements* — Contingency fee agreements are particularly well suited to class action proceedings. The individual claimants may not be willing to bear the costs of litigation. Likewise, a lawyer might be reluctant to take on a law suit that promises very little in the way of rewards. Contingency fee agreements, however, allow the claimants to pay only in the event of success, at the same time

that they provide lawyers with sufficient incentive to become involved in a class action. Contingency fee agreements are generally allowed in every jurisdiction except Ontario — and even in Ontario, they are allowed for class action proceedings.

There is one other possibility that Hupton Motors should consider. Under normal circumstances, individual purchasers would not have enough incentive to incur the costs associated with litigation. Some of those claimants might, however, take advantage of the simplified procedures and reduced expenses that are available in the Small Claims Courts. Since the individual claims are worth between $500 and $1500 (almost certainly the lower amount, as we will see in Chapter 12), they fall within the monetary limits that are imposed in those courts. Some of the purchasers might also choose to further cut costs by representing themselves, or by hiring paralegals rather than lawyers.

2. The case presents two potential complications: (i) the passage of time, and (ii) the capacity of the wrongdoer to be sued.

- *Passage of Time* — Like most types of claim, Nomi's claim would be subject to a limitation period. That means that she would have to start her lawsuit within a specific period of time. If she failed to do so, she would lose the right to demand a remedy. The claim in this instance is a tort. Following the general rule, the lawsuit would have to be started within two years from the date of the accident. Nomi therefore may already be out of time.
- *Capacity* — Assuming that Nomi is not barred by the lapse of a limitation period, she will have to consider the issue of capacity. The issue of capacity can be broken into three parts.
    - *Corporation* — As a general rule, it is possible to sue any person. And as a matter of law, a corporation is a type of person (as we will see in Chapter 21). Nomi would therefore be entitled to sue the corporation for the accident. (As we shall see in Chapter 3, Nomi probably has several options. She may sue the actual individual who was acting on behalf of the corporation. Perhaps the employee of a trucking company smashed Nomi's window by driving through it. Nomi may also be able to sue the corporation itself under the doctrine of vicarious liability. That means that the corporation may be held liable for the carelessness of its employee.)
    - *Club* — Although a corporation is a type of legal person, an unincorporated organization is not. Nomi therefore could not sue the chess club itself She could, however, sue the individual members of the club who caused the accident.
    - *Government* — The traditional rule stated that "the King can do no wrong," which actually meant that the King could do all the wrongs he wanted without fear of being sued. It was impossible to sue the Crown unless the Crown agreed to be sued. That rule has now been changed as a result of legislation. The statutes are, however, quite complicated. Moreover, they often contain special restrictions or limitations. Nomi would have to carefully consider the legislation that exists in her jurisdiction.

3. The lawyer commented on three issues: (i) the right to appeal to the Supreme Court of Canada, (ii) the ability of an appellate court to overturn a finding of fact, and (iii) the ability of an appellate court to overturn a finding of law.

- *Appeal to the Supreme Court of Canada* — With a few exceptions (which do not apply here), it is necessary successfully apply for leave to appeal to the Supreme Court of Canada. The court will not grant leave simply because a case involves a great deal of money. Rather, they will grant leave only if a case raises an issue of national importance. It is impossible at this point to say whether that is true in this instance, and if so, whether the court would actually agree to hear an appeal. The lawyer was therefore wrong.
- *Findings of Fact* — An appellate court, including the Supreme Court of Canada, will overturn a finding of fact only if the trial judge made a palpable and overriding error. That is a fairly high standard. If it is not met, the trial judge's findings will stand, even if the appellate court thinks that those findings are wrong. The lawyer was therefore once again wrong.
- *Findings of Law* — An appellate correct will, however, correct an errors of law that were made by the trial judge. It is the trial judge's job to get the facts straight. it is the appellate court's job to get the law straight.

4. Costs are the expenses that a party incurs during litigation. Under normal circumstances, the court will award costs to the winning party. That means that the defendant will have to pay for some of the costs that the plaintiff incurred during the lawsuit. Significantly, however, costs are usually awarded on a party-and-party basis (or, in Ontario, a partial indemnity basis). The court allows the plaintiff to recover an amount that is established by a set of regulations. Those regulations, however, almost always set costs at something less than the plaintiff is actually charged by his or her lawyer. As a result, even if Norris won the case, and even if the NAA was ordered to pay both compensation for the wrongful loss *and* costs, Norris would still not be placed in the financial situation that he expected to enjoy under the contract.

The situation may be different, however, if the defendant acted improperly. Perhaps the NAA unreasonably refused an offer to settle, or perhaps the NAA, despite knowing that it was liable, defended the action simply in an effort to exhaust Norris' resources. In those situations, the court would have the authority to award costs on a solicitor-and-client basis (or, in Ontario, substantial indemnity basis). If so, the award of costs would better reflect the expenses that Norris actually incurred during the case.

5. This problem is based on the *Federal Rules of Court* that govern the award of costs. The relevant provisions are set out below. The aim of those provisions is to encourage parties to accept reasonable offers to settle out of court, and to thereby avoid the costs that are associated with court proceedings. Although the same principles apply under the rules that are in force in each jurisdiction, the rules that apply in the Federal Court are especially hard upon parties who reject reasonable settlement offers.

The plaintiff offered to settle for $400 000. The defendant offered to settle for $200 000. The question presents three different scenarios, depending upon how the court resolved the dispute.

- *Defendant is Liable for $500 000* — The defendant is held liable for *more than* the amount for which the plaintiff offered to settle. Consequently, the court will find that the defendant acted unreasonably in not accepting the settlement offer. According to Rule 420(1), the court may hold the defendant liable for party-and-party costs for the period leading up to the time when the plaintiff made the offer, as well as *double* party-and-party costs from the time that the plaintiff made the offer.
- *Defendant is Liable for $100 000* — The defendant is held liable for *less than* the amount for which the defendant offered to settle. Consequently, the court will find that the plaintiff acted unreasonably in not accepting the settlement offer. According to Rule 420(2)(a), the court may hold the defendant liable for party-and-party costs for the period leading up to the time when the defendant made the offer, but the plaintiff will be liable for *double* party-and-party costs for the period following the defendant's offer.
- *Defendant is Not Liable* — The defendant is held not liable despite the fact that it had offered to pay money in settlement of the claim. Consequently, the court will find that the defendant acted unreasonably in not accepting the settlement offer. According to Rule 420(2)(b), the court may hold the plaintiff liable for party-and-party costs for the period leading up to the time when the plaintiff made the offer, as well as *double* party-and-party costs from the time that the defendant made the offer.

Application to other proceedings

419 Rules 420 and 421 apply, with such modifications as are necessary, to parties bringing and defending counterclaims and third party claims, to applicants and respondents in an application and to appellants and respondents in an appeal.

Consequences of failure to accept plaintiff's offer

420 (1) Unless otherwise ordered by the Court, where a plaintiff makes a written offer to settle that is not revoked, and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and double such costs, excluding disbursements, after that date.

Consequences of failure to accept defendant's offer

(2) Unless otherwise ordered by the Court, where a defendant makes a written offer to settle that is not revoked,

> *(a)* if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to double such costs, excluding disbursements, from that date to the date of judgment; or
> *(b)* if the plaintiff fails to obtain judgment, the defendant shall be entitled to party-and-party costs to the date of the service of the offer and to double such costs, excluding disbursements, from that date to the date of judgment.

Offer to contribute

> 421 Subsection 420(2) applies to a third party, or to one of two or more defendants who are alleged to be jointly and severally liable to the plaintiff in respect of a claim, who makes a written offer to other defendants or third parties to contribute toward a settlement of the claim.

Disclosure of offer to Court

> 422 No communication respecting an offer to settle or offer to contribute shall be made to the Court, other than to a case management judge … or to a judge or … at a pre-trial conference, until all questions of liability and the relief to be granted, other than costs, have been determined.

6. Students would be expected to realize that there is no perfect answer in this case. In fact, from the plaintiff's perspective, there are serious problems with each option.

Litigation offers several potential advantages. If the plaintiff was successful, it would receive full compensation and it would generate adverse publicity for Sentinel. On the other hand, there are significant risks involved in formal litigation. Most obviously, if the claim fails, the plaintiff will not receive any compensation and it will likely be required to pay both its costs and the defendant's costs. Sentinel may also refuse to deal with it again in the future. Finally, it is unlikely, in any event, that the case would even get to trial before June. Given the nature of its business, the plaintiff needs a quick solution. Unfortunately, the court calendar is currently full. Furthermore, Sentinel has incentives to delay the proceedings as much as possible. It wants to avoid bad publicity and it may want to try to squeeze the plaintiff out of business.

The alternative dispute resolution techniques have the advantages of being relatively less expensive and potentially much quicker. They may also better allow the plaintiff to maintain amicable, or at least professional, relations with Sentinel. There are, however, significant risks. There is a possibility, especially with negotiation and mediation, that Sentinel might exploit the plaintiff's relative lack of resources, as well as its need for a timely resolution of the matter. Finally, while there are no guarantees in any event, negotiation and mediation might hold better prospects for generating some compensation,

even if it is incomplete. Arbitration could lead to full compensation, but it could also lead to nothing.

CASE BRIEFS

Garland v Consumers Gas Co (2004) 237 DLR (4th) 385 (SCC) – note 5

The defendant, a natural gas provider, was required to apply periodically to the Ontario Energy Board (OEB), a provincial body, for approval of its pricing scheme. Beginning in the 1970s, that scheme included a late payment penalty (LPP) of 5 percent of unpaid charges. Three important events ten followed. (1) In 1981, the federal government introduced section 347 of the *Criminal Code* to prohibit the receipt of interest at a rate exceeding 60 percent per annum. The effect of that provision was not immediately apparent. (2) In 1994, however, the plaintiff commenced proceedings for the purpose of arguing that the scheme was illegal. And indeed, if a customer paid very soon after the due date, the LPP could be astronomical when expressed as an annual interest charge. (3) In 1998, the Supreme Court of Canada agreed that the LPPs constituted a criminal rate of interest: *Garland v Consumers' Gas Co* (1998) 165 DLR (4th) 385 (*Garland No. 1*). (Remarkably, however, the defendant continued to request, receive and enforce the same pricing scheme for another three years!)

Garland No. 1 set the scene for the restitutionary portion of the proceedings. Since 1981, the defendant had illegally collected as much as $150 000 000 in LPPs. The plaintiff accordingly demanded repayment on behalf of himself and a class comprising as many as 500,000 customers. The claim failed in the lower courts, but the Supreme Court of Canada held that *some* of the LPP payments were recoverable.

Iacobucci J held that restitution for unjust enrichment will be available if three conditions are met.

- The defendant was enriched.
- The plaintiff suffered a corresponding deprivation.
- There was an absence of juristic reason for the enrichment.

On the third issue, Iacobucci J formulated a two-part test.

- The plaintiff must demonstrate that the facts do not fall within one of the "established categories" of juristic reason: contract, disposition of law, donative intent, or "other valid common law, equitable or statutory obligations." If so, restitution *prima facie* is available.
- The burden of proof then shifts to the defendant to show some other reason as to why the enrichment should be retained. Two factors are particularly important at that stage: public policy and the parties' reasonable expectations.

On the basis of that test, the defendant was liable for *some* of the money that it had received.

- It was enriched by the receipt of the LPP payments.
- The plaintiff (and the other customers) suffered a corresponding deprivation because they paid the LPP.
- There was an absence of juristic reason. The facts did not fall within one of the established categories of juristic reason. Although the defendant pointed to the

> fact that the LPP scheme had been approved by the OEB under the *Ontario Energy Board Act*, those orders contravened the Criminal Code and therefore were invalid. Public policy argued in favour of recovery because a wrongdoer should not be entitled to benefit from a crime. However, Iacobucci J also held that the defendant had reasonably assumed that the OEB orders were valid. That assumption became unreasonable only after the plaintiff had made his complaint and started his action.

In the final analysis, the defendant: (i) was not liable at all for payments received before the plaintiff started his action, but (ii) was liable for the LPP payments received after that time — but only to the extent that they exceeded the rate of interest that was allowed by the *Criminal Code*.

R v Romanowicz (1999) 178 DLR (4th) 466 (Ont CA) — note 11
The accused was charged with failing to remain at the scene of an accident. At trial, he chose to be represented by a paralegal, rather than a lawyer. The judge questioned the accused to ensure that he understood the difference between the two. The accused did understand that difference. The trial proceeded and the accused was convicted. On appeal, he argued that he had not been properly represented.

The Court of Appeal noted that sections 800 and 802 permit an accused of certain crimes to be defended by an "agent," rather than a lawyer. It also held that a trial judge should ensure that the accused understands the nature of the choice, but that the trial judge is *not* required to conduct an inquiry into the agent's competence. A judge may, however, disqualify an agent who would bring the administration of justice into disrepute (*eg* on the basis of incompetence, dishonesty, or conflict of interest). In the course of that discussion, the court said, somewhat harshly, that a "person who decides to sell t-shirts on the sidewalk needs a license and is subject to government regulation," but "the same person can … without any form of government regulation, represent a person in a complicated criminal case."

Finally, the court said that once the choice has been made as between a lawyer and a paralegal, the accused must live with the potentially adverse consequences of being represented by someone who is not a lawyer.

Harrison v Carswell (1976) 62 DLR (3d) 68 (SCC) — note 54
The accused was employed by a store that was located in Polo Park Shopping Mall in Winnipeg. The accused became involved in a labour dispute with her employer. She therefore tried to picket within the mall. The owner of the mall objected to the picket and charged her under the *Petty Trespass Act* when she refused to stop. An offence was in fact committed unless the accused had a legal right to picket within the mall. A majority of the Supreme Court of Canada held that she had no such right. The owner of a mall issues an unrestricted invitation for people to visit the premises. Nevertheless, under traditional property rights, it also retains the ability to control activities on its premises and to exclude trespassers. It was irrelevant that the accused was involved in a labour dispute with her employer. Although traditional property rights could be modified so as

to allow picketing in such circumstances, that change had to be introduced by the legislature. A court is not in a position to properly weigh the competing social values.

The court had previously dealt with similar situations in other cases. On the issue of whether those earlier decisions were binding, Laskin J said that "[t]his Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decision. … [W]e are free to depart from previous decisions in order to support the pressing need to examine the present case on its merits."

Dobson v Dobson (1999) 174 DLR (4th) 1 (SCC) — note 56
An action in the tort of negligence was brought on behalf of a boy against his mother. During pregnancy, the mother carelessly became involved in a car accident. That accident damaged the fetus and the boy was subsequently born with disabilities. The mother supported the action, which was really against her insurance company, because she too wanted her son to receive compensation for his injuries.

The Supreme Court of Canada denied the possibility of imposing liability. While accepting that injury to the son was a reasonably foreseeable result of the mother's carelessness, the court held that policy factors negated a duty of care. The majority was concerned that a duty of care would intolerably infringe upon a pregnant woman's freedom of choice for a nine-month period. It was also dissuaded by the task of formulating a standard of care. In contrast to the dissenting judge, it did not believe that the obligation to act carefully, if recognized, could be confined to activities like driving.