

# Table of Contents

Foreword.....	iii
Overview .....	v
Table of Cases .....	xxix
 <b>Advocating with Persuasive Authority: The Art and Science of Persuasion — Chapter VII—Justice Todd Archibald and Mark Friedman</b>	
Introduction .....	1
I. The Authoritative Advocate is a Reliable Narrator .....	2
1. Storytelling Is a Litigation Tool.....	3
2. . . . But a Story Is only as Reliable as the Advocate Telling It.....	7
II. The Authoritative Advocate Is Civil: Civility Is Never a Double-Edged Sword.....	11
1. Civility Is Vital to the Proper Administrative of Justice .....	13
2. Being an Officer of the Court Demarcates How a Lawyer May Zealously Advocate, and It Requires Civility .....	15
3. Civil Advocacy Is Effective Advocacy .....	16
III. The Authoritative Advocate Writes and Speaks with Authority .....	18
1. Oral Advocacy and Written Advocacy Require Many of the Same Techniques .....	18
2. Both Styles of Advocacy Employ Context-First Advocacy .....	19
3. Less Is More and More Is Less for Both Written and Oral Advocacy .....	21
4. Both Forms of Advocacy Use Simple, Comprehensible and Active Language.....	23
Conclusion .....	25
 <b>Failing to Predict the Past: Will Legal Causation Kill Tort Law in Cyberspace?—R. Lee Akazaki, C.S.</b>	
I. Introduction .....	27
II. The Elusive Cyber-Tort .....	30
Paradigm 1: Security Breach .....	31
Paradigm 2: Accidents in a Remote-Controlled World .....	35
Paradigm 3: Economic Torts Come of Age (or Don't) .....	38
III. Expanding Causation from the Tangible to the Intangible .....	43
1. Tort Law's Physicality a Function of 20th-Century Technology, not of Tort Law Itself .....	43
2. Unseen Phenomena: Taxonomy of Non-Physical Objects in Cyberspace .....	46
3. Freeing the “But For” Principle from Ex-Post Exclusivity .....	49

4.	Functional Analogy to Causation in Medical Negligence Cases	53
5.	Overcoming the Legal Fixation with the Ex-Post Forensic Perspective	56
IV.	No Causation? No Cause of Action? No Consequences	67
1.	Making Courts More Sensitive to Causality	67
2.	Just History Repeating: Updating the Formulation of “But For”	69

**The Power of Securities Commissions to Compel Testimony: A Comparative Perspective**—*Sophie Melchers, Josée Beaudoin and Fortunat Nadima Nadima*

I.	Introduction	75
II.	The Canadian Landscape	76
1.	The Principle Against Self-Incrimination in Canada	77
(a)	Use immunity under <i>Charter</i> section 13	77
(b)	Derivative use immunity under <i>Charter</i> section 11(c)	78
(c)	Constitutional exemption from testifying under <i>Charter</i> section 7	78
2.	Testimonial Compulsion in Canadian Securities Inquiries	85
(a)	The British Columbia experience	86
(b)	The Alberta experience	89
(c)	The Ontario experience	95
(d)	The Québec experience	100
III.	The American Landscape	105
1.	The Privilege Against Self-Incrimination in the United States	105
2.	Testimonial Compulsion in U.S. Securities Inquiries	108
IV.	Preventing the Improper Use of Self-Incriminating Evidence	112
1.	Available Mechanisms to Prevent the Improper Use of Self-Incriminating Evidence	112
2.	Practical Tips for Individuals Compelled to Testify	118
V.	Conclusion	120

**Disputes over Parental Care when the Dutiful Child Wants to Be Paid**—*Ruth M. Corbin and Barry S. Corbin*

I.	Policy Importance to Canada	121
II.	Power of Attorney and “Guardian” of the Person Defined	123
III.	Provincial Statutes: Incomplete, Inconsistent or Non-Existent	124
1.	Ontario	125
2.	British Columbia	125
3.	Alberta	127
4.	Saskatchewan	127
5.	Manitoba	129

6.	Quebec .....	131
7.	Nova Scotia.....	132
8.	New Brunswick .....	132
9.	Prince Edward Island.....	133
10.	Newfoundland and Labrador.....	134
11.	Nunavut and Northwest Territories .....	135
12.	Yukon .....	135
IV.	Case Law — Similarities, Differences and no Patterns at All .....	136
V.	Issues and Solutions .....	141
1.	Confronting the Lack of Attention .....	141
2.	Dealing with Commingled Roles.....	142
3.	Addressing Ambiguity Through an “Intangible-Valuation” Model .....	143

**A Canadian Perspective on Insuring the “Next Asbestos”—Heather A. Sanderson**

I.	Introduction .....	145
1.	Insurance Archeology .....	147
2.	Proving the Existence of Old Policies.....	148
3.	The Types of Policies that Are Unearthed Through Insurance Archeology .....	148
(a)	Accident-based policies .....	149
(b)	The evolution of occurrence-based policies.....	150
(c)	Must an occurrence “originate” or “occur” in the policy period? .....	151
(d)	The insurance crisis of the 1980s and claims-made CGL coverage .....	152
II.	Proof of Cover Under Each of the Triggered Policies .....	153
1.	When Do Canadian Courts Have Jurisdiction over the Coverage Dispute? .....	153
2.	The Liability Insurer’s Duty to Defend in Québec .....	154
3.	What Triggers an Insurer’s Duty to Defend in Common-Law Canada? .....	155
4.	Exhaustion of Policy Limits Prior to Tender.....	156
5.	Duty of the Excess Insurer to Defend .....	157
6.	The Problem of Concurrent Primary Coverage .....	157
7.	Proof that an Occurrence Occurred in the Policy Period .....	158
III.	Allocation Issues in Long-Term Progressive Damage Cases .....	165
1.	The Pro Rata Theory of Allocation .....	165
(a)	Pro rata by time on risk .....	165
(b)	Pro rata by limits.....	166
2.	The “All Sums” Theory of Allocation.....	166

3.	Canadian Experience with Allocation .....	167
4.	The Outlier: <i>Lombard Gen. Ins. Co. v. 328354 B.C. Ltd.</i> .....	173
5.	A Return to Pro Rata: <i>Deguisse c. Montminy</i> .....	175
6.	Concluding Thoughts on Allocation .....	175
IV.	Conclusion .....	177

**Separate, Independent and Confounding: Understanding Personal Liability for Corporate Acts** —*Robert Brush and Michael L. Byers*

I.	Historical Evolution of the Law.....	179
1.	The Fundamental Principle of Separate Liability for Individuals and Corporations .....	180
2.	Policy Concerns .....	182
3.	A Restrictive Approach to Individual Liability .....	182
4.	A Trend Towards Concurrent Liability.....	184
5.	Pronouncements from the Supreme Court on Tort Liability ....	185
6.	Proximity, Policy and Duty of Care.....	187
II.	Overview of the Current Legal Framework .....	189
1.	The <i>ScotiaMcLeod/ADGA</i> Framework .....	189
2.	Application of the <i>ScotiaMcLeod/ADGA</i> Framework .....	192
(a)	Cases where no liability was found .....	193
(b)	Cases where individuals have been found liable.....	196
(c)	Claims against supervisory personnel in investor loss cases	197
(i)	Types of claims.....	198
(ii)	Analysis of claims.....	200
III.	Summary and Analysis of the Law .....	202
1.	Significant Factors.....	202
2.	Key Principles to Apply.....	205
(a)	Identity.....	205
(b)	Capacity .....	206
(c)	Nexus .....	207
3.	Policy Concerns.....	207
IV.	Conclusion .....	208

**Misrepresentation in a Contractual Matrix: The Evolving Approach to Exclusion Clauses**—*Diana Edmonds*

I.	Introduction .....	211
II.	Concurrent Liability in Tort and Contract.....	212
1.	The Origins of Concurrent Liability.....	212
2.	Exclusion Clause Ineffective Where an Independent Tort Found ..	215
3.	The Effect of Exclusionary Clauses on Misrepresentation: Entire Agreement Clause Enforced.....	216

4.	<i>BG Checo</i> : Analysis of the Principles of Concurrent Liability and the Impact on Exclusion Clauses .....	218
5.	The Effect of Misrepresentation on Entire Agreement Clauses: Enforcement Declined.....	220
6.	The Effect of Misrepresentation on Entire Agreement Clauses: Clause Enforced .....	222
7.	Overcoming the Barriers to Tort Recovery: The Effect of Misrepresentation on the Provisions of the Exclusionary Clause ... ..	224
8.	Reasonable Reliance on Misrepresentation .....	226
9.	Overcoming Barriers to Tort Recovery: Retrospectivity of Entire Agreement Clauses .....	227
10.	Evolving Interpretation of Exclusionary and Entire Agreement Clauses: The <i>Tercon</i> Analysis.....	228
11.	Application of the <i>Tercon</i> Analysis to Entire Agreement Clauses .. ..	231
III.	Comparative Review of Other Jurisdictions .....	239
1.	Australia.....	239
2.	United States of America .....	240
3.	The United Kingdom.....	242
4.	Summary of Comparative Law .....	243
5.	Summary of Principles.....	243
IV.	Conclusion .....	245

**Civility: A Cornerstone in the Administration of Justice and the Rule of Law**—*Anne L. Kirker, Q.C., Aditya M. Badami, Sarah Ivany and Lindsay Bec*

I.	Introduction .....	247
II.	Summary of Groia Proceedings .....	248
1.	The Felderhof Trial .....	248
2.	LSUC Proceedings Against Mr. Groia.....	250
3.	Groia’s Appeal of the LSUC Appeal Panel Decision to the Divisional Court .....	252
4.	Groia’s Appeal of the LSUC Appeal Panel Decision to the Court of Appeal for Ontario .....	253
5.	Majority Reasons .....	253
6.	Justice Brown’s Dissent .....	254
III.	The Independent Regulation of Lawyers in Canada.....	255
IV.	The Nexus Between the Regulation of Lawyer Conduct and the Rule of Law.....	259
V.	Making the Case for Regulating Professional Standards of Civility... ..	264

**Much Ado About § 1782: Compelling American Discovery for Use in Canadian Class Actions—*Ian C. Matthews and Fahad Siddiqui***

Introduction ..... 269

I. Evidence Gathering by Plaintiffs in Canadian Class Actions ..... 271

    1. The Low-Hanging Fruit: Public Documents and Voluntarily-Given Evidence ..... 271

    2. Tools for Compelling Discovery Evidence in Canadian Civil Litigation..... 274

        (a) *Norwich* orders ..... 274

        (b) Discovery rights provided by the rules of the court ..... 275

        (c) Nuances for discovery in Canadian class actions..... 278

II. Compelling American Discovery Evidence Using § 1782 ..... 279

    1. History of Section 1782 ..... 280

    2. Mechanics of Section 1782..... 281

        (a) Statutory requirements..... 281

        (b) Discretionary factors..... 283

    3. Post-Intel Jurisprudence..... 284

III. How Canadian Courts Have Reacted to Plaintiffs’ Use of § 1782 ..... 286

    1. An Early Signal to Proceed with Caution in Ontario: *Vitapharm* .. 288

    2. A Green Light, for the Moment, in Quebec: *Catucci*..... 291

    3. Hitting the Brakes in Ontario: *Mancinelli*..... 293

IV. Future Use of § 1782 for Class Actions in Canada..... 296

    1. The Framework for Addressing § 1782 Discovery in Canadian Class Proceedings..... 297

    2. The Stage of the Class Action at which the § 1782 Discovery Is Requested ..... 302

    3. The Person from Whom the § 1782 Discovery is Sought ..... 303

    4. The Manner in Which the § 1782 Discovery Request Is Made . 305

Conclusion ..... 307

**Medical Malpractice: Important Developments in the Law—*Maria Damiano***

I. Introduction ..... 309

II. Standard of Care ..... 309

    1. The Locality Rule..... 310

    2. The “Worst First” Approach to Medical Care..... 312

    3. Is it *Res Ipsa Loquitor* by Just Another Name?..... 314

III. Informed Consent..... 317

    1. Disclosure of Material Information..... 318

    2. Reasonable Patient: Subjective and Objective-Objectified Test .. 319

IV.	Causation .....	322
1.	<i>Clements v. Clements</i> .....	322
2.	<i>Benhaim v. St. Germain</i> .....	324
	(a) Trial .....	324
	(b) Court of Appeal .....	325
	(c) Supreme Court .....	325
3.	<i>British Columbia (Workers' Compensation)</i> .....	328
4.	Material Contribution to Risk .....	329
V.	Causation and a Jury.....	330
VI.	Summary .....	333

**The Profitable and Potentially Perilous *Pierringer* Agreement—Theresa M. Hartley and Irina Sfranciog**

I.	History .....	337
II.	Breakthrough in Canada.....	337
III.	Immediate Disclosure .....	338
IV.	Access to the Settling Defendants' Evidence and Experts .....	339
V.	Disclosure of Settlement Amount.....	340
VI.	<i>Pierringer</i> Agreements Benefits .....	342
VII.	<i>Pierringer</i> Agreement Risks .....	343
1.	The Risk of Double Recovery Following a <i>Pierringer</i> Agreement . 343	
	(a) Rule against double recovery .....	343
	(b) Deducting settlements from damage awards.....	344
	(c) Post- <i>Laudon</i> .....	345
	(d) Possible solutions.....	348
	(e) Conclusion .....	349
2.	Joint and Several Liability Amongst the Non-Settling Defendants .....	350
	(a) Joint and several liability .....	350
	(b) Joint and several liability in <i>Pierringer</i> agreements .....	351
	(c) Mixed claims — contract and tort .....	353
VIII.	Conclusion .....	353

**Moving Toward a Standard for Analyzing “A Good Chance of Success on Motions for Security for Costs—Susie Lindsay**

I.	Introduction .....	355
II.	Security for Costs — The Rule .....	356
1.	“As Is Just” — Merits of the Case.....	357
2.	Orders Are Discretionary.....	359
3.	Onus and Threshold .....	361
III.	Evidence Expected in Ontario .....	362

1.	Shifting Standard of Evidence.....	362
2.	Evidence Presented in Motion for Security for Costs .....	363
3.	Sources of Evidence Expected and Relied on to Demonstrate Impecuniosity .....	364
4.	Sources of Evidence Expected and Relied on to Demonstrate “A Good Chance of Success” .....	365
IV.	“A Good Chance of Success” .....	367
1.	What Does “A Good Chance of Success” Mean? .....	367
2.	The Floor .....	369
3.	The Ceiling.....	370
V.	Analysis.....	370
1.	There Is No Ground Between the Floor and the Ceiling .....	370
2.	Options for Clarifying the Court’s Analysis of “A Good Chance of Success” .....	372
3.	Creating an Analytical Framework to Determine if the Plaintiff Has “A Good Chance of Success” .....	374
VI.	Conclusion .....	377

**Through the Scratched Looking Glass: *Sattva*, *Ledcor*, *Teal* and  
Developments in the Law of Contract—Sandra Corbett, Q.C. and Ryan  
P. Krushelnitzky**

I.	Introduction .....	379
II.	<i>Sattva</i> and the Interpretation of Contracts.....	380
1.	Redefining Interpretative Principles .....	380
2.	Shifting the Standard of Review .....	382
III.	Reconciling <i>Sattva</i> with the Interpretation of Standard Form Contracts.....	383
IV.	<i>Ledcor</i> and the Interpretation of Standard Form Agreements.....	387
1.	Summary and Analysis of <i>Ledcor</i> .....	387
2.	<i>Ledcor</i> Clarifying the Surrounding Circumstances for Standard Form Contracts .....	389
3.	The <i>Ledcor</i> Inconsistency: Standard Form Insurance Contracts and Ambiguity .....	393
4.	<i>Ledcor</i> ’s Clarification as to the Standard of Review of Standard Form Contracts .....	396
V.	Entire Agreement Clauses as a Means to Change the Standard of Review.....	397
VI.	Correctness, Surrounding Circumstances and Non-Standard Contracts — <i>Teal</i> .....	398
VII.	Conclusion .....	402



**Waiver of Liability in Recreation Cases—Susan E. Gunter**

Introduction to Liability Waivers in Recreation .....	405
1. Uncertainty of Enforceability of Waivers in Recreation .....	406
2. Public's Perception of Recreational Liability Waivers.....	408
3. Basis of Recreational Liability .....	410
4. Defences to Recreational Liability that Overlap with Waivers..	412
(a) Voluntary assumption of risk.....	413
(b) Inherent risk .....	414
(i) Extreme sports and magnified inherent risk .....	414
5. Standard of Care of Recreation Operators.....	415
6. Canadian Waiver Law .....	416
(a) History .....	416
7. Current Legal Test for Enforceability of Waivers in Recreational Cases .....	417
(a) Application of current test .....	417
8. Challenges to Recreational Liability Waivers .....	418
(a) Consideration — timing of execution: post-contractual waivers .....	418
(b) <i>Non est factum</i> .....	419
(c) Unconscionability .....	419
(i) Limited application of <i>Loychuk</i> in recreation cases .....	423
9. Fundamental Breach of Contract.....	424
10. Privity of Contract and Liability of Co-Participants.....	425
11. Scope of the Waiver .....	428
(a) Listing of the risks to refine the scope of the waiver .....	430
12. Drawing to the Attention of the Participant.....	430
13. No Requirement to Prove Waiver Read.....	434
14. Understanding the Legal Significance .....	434
15. Individual Circumstances of the Plaintiff .....	435
16. Reality of Participants' Signing Waivers .....	436
(a) Marketing.....	436
(b) Target consumers — a broader market .....	437
17. Categories of Plaintiffs.....	437
18. Spectators.....	438
19. Intoxicated Plaintiffs.....	439
20. Minors — Waivers by and on Behalf of Children .....	439
(a) Indemnifying agreements by parents for minors.....	442
(b) Acknowledgement and assumption of risk for minors and their parents .....	442
(c) Education waivers.....	443
21. Canadian Law Reform Commissions .....	443

(a) Manitoba Law Reform Commission 2009.....	444
(b) Law Reform Commission of British Columbia — 1994.....	444
22. Policy Arguments in Favour of Waivers .....	446
23. Policy Arguments Against Waivers .....	448
24. Government Compensation Regimes — Waivers Unenforceable ...	449
.....	449
25. Government-Mandated Duties and Standards.....	451
26. Litigation Procedure for Enforcement of Waivers .....	453
(a) Summary of judgment .....	453
(b) Jury or judge .....	454
Conclusion .....	454

**What Is a New Cause of Action? Post-Limitation Amendments to Pleadings—Sarah W. Corman and Anastasia-Maria Hountalas**

I. Introduction .....	457
II. Historical Common Law Approach .....	457
III. Cross-Jurisdictional Survey .....	459
IV. Permissive Exception Jurisdictions .....	460
1. Alberta .....	460
2. Saskatchewan .....	463
3. New Brunswick .....	464
4. Nova Scotia.....	465
5. Newfoundland and Labrador.....	466
6. British Columbia .....	468
V. No Exception Jurisdictions .....	469
1. Ontario.....	469
2. Manitoba.....	472
3. Prince Edward Island.....	472
4. Northwest Territories, Nunavut and Yukon.....	473
VI. Conclusion: Achieving the “3 Cs” of Clarity, Consistency and Certainty .....	473

**Settlement Privilege and Access to Justice—Alissa Goldberg**

Introduction .....	477
1. Purpose, Definition and Development of Settlement Privilege ..	478
(a) Purpose of settlement privilege.....	478
(b) Test for settlement privilege .....	479
(c) Pre- <i>Sable Offshore</i> understanding of settlement privilege....	480
2. <i>Sable Offshore &amp; Union Carbide</i> .....	480
(a) <i>Sable Offshore Energy Inc. v. Ameron International Corp.</i> ....	480
(i) <i>Nova Scotia Supreme Court</i> .....	481
(ii) <i>Nova Scotia Court of Appeal</i> .....	481

(iii) <i>Supreme Court of Canada</i> .....	482
(b) <i>Union Carbide Canada Inc. v. Bombardier Inc.</i> .....	483
(i) <i>Cour Supérieure du Québec</i> .....	484
(ii) <i>Cour d'appel du Québec</i> .....	484
(iii) <i>Supreme Court of Canada</i> .....	485
(c) What has been clarified by <i>Sable Offshore</i> and <i>Union Carbide</i> .....	486
3. Recent Jurisprudence .....	486
(a) Settlement privilege.....	
4. Exceptions to Settlement Privilege.....	489
(a) Misrepresentation, fraud and undue influence.....	490
(b) Proving the existence of a settlement agreement .....	491
(c) Material change to the litigation landscape .....	493
(d) Limitation issues.....	494
(e) Overcompensation .....	496
(f) Threats and criminal communications.....	498
(g) Miscellaneous .....	500
5. Access to Justice .....	502
(a) Defining access to justice .....	505
(b) Alternative dispute resolution .....	506
6. Key Takeaways .....	508
(a) Without prejudice: Not required, but recommended.....	508
(b) Settlement privilege is a class privilege .....	509
(c) Be careful with your waivers.....	509
(d) Exceptions are on a limited basis .....	509
(e) A push for settling through ADR .....	510
Conclusion .....	510

**Admissible Opinion Evidence at Trial: Rules, Restrictions and Limitations of Expert and Lay Opinions**—*Melanie R. Gaston and Olivia Dixon*

I. Introduction .....	517
II. Rules and Restrictions Regarding Expert Opinion Evidence.....	519
III. Rules and Restrictions Regarding Lay Opinion Evidence.....	522
IV. Recent <i>Case Law on the Lay Opinion Evidence</i> .....	526
1. <i>Dow Chemical Canada ULC v. Nova Chemicals Corp.</i> .....	526
2. <i>Kon Construction Ltd. v. Terranova Developments Ltd.</i> .....	528
3. Analysis.....	531
V. Conclusion .....	537

**The Case for Probate: Not Just a Tax**—*Arieh Abraham Bloom*

I. Introduction .....	539
-----------------------	-----

II.	The Benefits of Probate in the Litigation Context.....	540
III.	Probate in Common Form Verses Probate in Solemn Form.....	546
IV.	Probate and Notice.....	548
V.	Probate and Admissible Evidence .....	549
VI.	Conclusion .....	554

**Offers to Settle—*Itse Ezomo***

I.	General Principles.....	555
II.	Requirements for Attracting Cost Consequences.....	556
1.	Characteristics of a Formal Offer to Settle.....	556
2.	Timing for Making an Offer to Settle .....	558
3.	Timing for Withdrawing an Offer to Settle .....	559
4.	Timing for Accepting an Offer to Settle.....	561
III.	Cost Considerations.....	562
1.	Cost Consequences if Accepted Before Trial .....	562
2.	Cost Consequences of Failure to Accept Before Judgment .....	562
(a)	When is a judgment as favourable as, or more favourable than an offer to settle?.....	563
(b)	Burden of proof of the favourability of an offer to settle ...	563
IV.	Certainty of Terms .....	569
1.	Offer to Settle — Examples .....	570
V.	Conclusion .....	575
<i>Index</i>	.....	577
<i>Consolidated Table of Contents 2001-2016</i>	.....	585