



# Civil Law

## Unit

# 3

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Resolving Civil Disputes 358

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Negligence and Other Torts 388

**“The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.”**

—Beverley McLachlin  
Chief Justice, Supreme Court of Canada



# 11

## Resolving Civil Disputes

### What You Should Know

- What are the differences between criminal and civil law?
- What is a tort?
- What are the procedures involved in bringing a civil action to trial?
- What are the types of damages and other remedies available for resolving civil disputes?
- What is alternative dispute resolution (ADR), and what are the most common forms?

### Chapter at a Glance

- 11.1 Introduction
- 11.2 Crimes and Torts
- 11.3 Civil Courts and Trial Procedures
- 11.4 Judgment and Civil Remedies
- 11.5 Alternative Dispute Resolution (ADR)

### Selected Key Terms

arbitration  
balance of probabilities  
class action  
default judgment  
garnishment  
general damages  
injunction

litigation  
mediation  
punitive damages  
special damages  
statement of claim  
statement of defence  
tort

Avenue East

Small Claims  
Courts

ONTARIO DISABILITY  
SUPPORT PROGRAM  
(ODSP)

Landlord &  
Board

Why is small claims court often called "the people's court"?

## 11.1 Introduction

Civil law is also known as private law. It regulates disputes between individuals. It also regulates disputes between individuals and organizations such as businesses or governments. Society does not have the same interest in regulating civil disputes as it does with criminal matters. Civil disputes only directly concern the parties involved, not all of society. If somebody murders another person, society is concerned. If a neighbour's fence is leaning over onto your property, only you and your neighbour are concerned. If a shopper slips on a wet floor in a store, only the shopper and store are primarily concerned. But, it is likely that the store will change its safety policies after a civil lawsuit. This will make the store safer for the general public.

As you learned in Chapter 4, the main purpose of *criminal law* is to punish the offenders and to protect society from dangerous people. The main purpose of civil law is to compensate for harm. One person may bring an action against the person who committed the civil wrong for damages (in the form of a money award) or some other civil remedy (such as a court order stopping something from being done). Review Chapter 1, page 11, for the various categories of civil law.

damages money awarded to a plaintiff for harm or injury suffered

### Typical Civil Actions

- Tort law—injuries done by one person to another person's body, property, or reputation and claims arising from serious accidents
- Family law—marriage, divorce, child custody, support claims, division of property, and adoption
- Contract law—failure to pay for work done, something bought but not yet delivered, and non-payment of rent
- Labour law—wrongful dismissal from work, unpaid overtime
- Property law—disputes about ownership of property

These are examples of the most common divisions of civil law and the types of legal actions that would be brought to civil courts.



### You Be the Judge

#### Rudman v. Hollander, 2005 BCSC 1342 (CanLII)

For more information, [Go to Nelson Social Studies](#)

On June 16, 2001, the plaintiff, Barret Rudman broke both elbows when he went over the handlebars of his bicycle. He was braking hard in a "panic" stop to avoid colliding with Charles Hollander's car. Evidence was conflicting about how far apart the car and bike were when Rudman applied his brakes and fell.

Rudman was riding behind Hollander's car as they approached a stop sign. As Hollander's car was reducing speed approaching the intersection, Rudman was increasing speed. The plaintiff had bought the bike six weeks earlier and had never

attempted such a stop before. Rudman claimed that Hollander slowed abruptly and moved to the right, blocking him from passing between Hollander's car and the curb. Hollander testified that he did not apply his brakes until after he heard a noise behind him, stopped to investigate, and saw Rudman and his bike on the ground; there was no collision. There was no evidence such as skid marks indicating a rapid slowing of the defendant's vehicle.

• What do you think the judge decided in this case? Explain.



tort a civil wrong or injury

Civil procedure, trials, judgments, and remedies are examined in this chapter. Tort law, a major division of civil law, is the subject of Chapter 12. The word "tort" means a wrong that could be either intentional or unintentional (negligent). Until the nineteenth century, tort law dealt mainly with intentional wrongs such as trespass. What made tort law important was the emergence of negligence, which will be discussed in greater detail in Chapter 12. Important aspects of family law, contract law, and employment law follow in Chapters 13 to 16.

## 11.2 Crimes and Torts

As you know, Canada's justice system involves both criminal and civil law. Both concern wrongs, and in some cases the same wrong; some actions may involve both a crime and a tort. Publicly, the victim calls the police, who may lay charges, which are then prosecuted by the Crown attorney according to the *Criminal Code*. Privately, however, the person can also sue under civil law for damages.

Some actions involve both a crime and a tort.

### Crimes and Torts

If a person ...	It may be a crime of ...	And also the tort of ...
hits another person	assault	battery
breaks into someone's property	break and enter	trespass to land
takes someone's belongings	theft	trespass to goods

Assume that Andrew drives home while under the influence of alcohol after an evening of drinking. He hits Andrea, who is walking home with friends. Society, represented by the Crown, may begin criminal action against Andrew. This could be for careless driving, driving with a blood-alcohol level that is over the legal limit, and impaired driving causing bodily harm. If convicted, Andrew will be punished under the *Criminal Code*.

At the same time, Andrea can begin a civil action. She can sue Andrew for compensation (usually money damages) for her injuries and other losses suffered. It is Andrea's responsibility to bring this civil action. A civil court may award her damages that are "suitable and reasonable" in the court's view for her injuries.

Each action, criminal and civil, proceeds independently of the other. Each case is tried in a different court with a different judge and different lawyers, and there is no set order in which the cases must be tried. But, if Andrew is convicted first in a criminal court, this may help Andrea in her pursuit of damages in a civil action. See the *McIntyre v. Grigg* case on pages 376-377 for a similar case.

People who can prove that they have suffered injury or loss through another person's fault deserve some remedy. Financial payment is the most common and important purpose of tort law from the plaintiff's viewpoint. Some tort actions also contain elements of punishment and deterrence. Interesting tort



cases are often followed closely by the media. The publicity may affect the future actions of many people, including the parties involved and the general public. For example, a customer takes action against a fast-food outlet after finding a dead fly in the bottled water. This might have a negative effect on the company's sales and public image (this case is explored in Chapter 12 on page 397, in *Mustapha v. Culligan of Canada Ltd.*). The company would want to avoid another similar lawsuit. Most likely, the negative publicity would cause other bottled-water companies to review and improve their production facilities and quality-control procedures. If a court awarded Andrea substantial compensation in the car accident caused by Andrew, this could have an effect on other careless drivers.

### Review Your Understanding

1. Define "tort." Give three examples of torts.
2. List the five main branches of civil law, and provide two examples of each.
3. How can an offence be both a crime and a tort? Give an example.
4. Identify the main purpose of tort law.
5. Explain how a judgment in a tort action might also contain an element of deterrence.

## 11.3 Civil Courts and Trial Procedures

Civil actions involving large sums of money or complex issues are tried in your province's supreme court, and they might be appealed to your provincial court of appeal. Some cases might even end up in the Supreme Court of Canada. The role of the courts in civil disputes is to provide a way of resolving conflicts. One court that deals specifically with smaller civil actions is discussed below.

### Small Claims Court

Sometimes called "the people's court," small claims court provides an informal and inexpensive way for settling disputes. Cases are tried informally by a judge without a jury. The judge allows both parties the chance to explain their side of the story. The parties are not expected to know legal procedures. In most cases, the parties represent themselves in simple disputes, although they may use a lawyer for more complex matters. Many businesses use this court to collect unpaid accounts from customers.

All provinces and territories have free, easy-to-read booklets with step-by-step procedures for filing a claim. Also, court staff may sometimes have time to answer questions and explain how to fill out the proper forms. Most forms follow a fill-in-the-blank format. The staff cannot provide you with any legal advice or complete the forms for you. It is important to realize that the case cannot proceed until you have completed and filed the necessary paperwork and paid the corresponding court fee.



In *Liebeck v. McDonald's Restaurants*, 1994, an American civil jury awarded Stella Liebeck \$2.9 million. She suffered third-degree burns when she spilled a cup of hot coffee on her lap. The trial judge reduced the award to \$640 000. The parties settled for a confidential amount before an appeal. Many Canadians regard civil suits like Stella Liebeck's as frivolous (silly or wasteful). What do you think?

small claims court the court to resolve civil claims of \$10 000 or less

### Activity

To learn more about filing a claim,

Go to Nelson  
Social Studies



These are examples of common actions heard in small claims court.

### Typical Small Claims Actions

- breach of contract
- claims for minor accidents
- damage to property
- recovery of property
- unpaid bills
- unpaid loans
- unpaid rent
- unpaid wages

**All About Law DVD**  
 "Small Claims Court" from  
 All About Law DVD

The dollar limit for such claims varies from province to province. It currently ranges from \$5000 to \$25 000. If the amount of your claim is greater than your province's small claims court limit, you may still sue in that court. It is simpler and less expensive. But, you forfeit (give up) the right to recover the amount over the small claims court limit. A person considering a civil action must carefully choose the court to sue in.

### ? Did You Know?

In 2005–2006, 75 041 actions were heard in Ontario's small claims court, compared to 63 251 in the Superior Court of Justice.

The increases in dollar limits reflect the increased value of typical claims. Should all provincial limits be increased to \$25 000? Why or why not?

### Small Claims Court Maximums, 2002 and 2008

Province	2002	2008
Alberta	\$7 500	\$25 000
British Columbia	\$10 000	\$25 000
Manitoba	\$7 500	\$10 000
New Brunswick	\$6 000	\$6 000
Newfoundland and Labrador	\$3 000	\$5 000
Northwest Territories*	\$5 000	\$10 000
Nova Scotia	\$10 000	\$25 000
Ontario†	\$10 000	\$10 000
Prince Edward Island	\$8 000	\$8 000
Québec	\$3 000	\$7 000
Saskatchewan	\$5 000	\$20 000
Yukon	\$5 000	\$25 000

\*Nunavut does not currently have a small claims division in its court structure. Small claims are heard through the Northwest Territories small claims court.

†Ontario will increase its limit to \$25 000 in 2010.

## Balance of Probabilities

**balance of probabilities** the standard of proof in a civil case meaning "more probable than not"

**litigation** legal action to settle a civil dispute

**litigant** one of the parties involved in a civil action; the plaintiff or defendant

A civil lawsuit involves two parties: the plaintiff, who is suing, and the defendant, who is being sued. If more than one person or party has suffered the harm, all injured parties should sue together as plaintiffs in one action (a class action). If more than one person is responsible for causing the loss, they all should be sued as defendants. The process of suing is called litigation. The parties in the action are the litigants (the plaintiff and the defendant). Often, the litigants settle their differences without an actual trial. In the following case, the plaintiff, Ferguson, is suing the defendant, Birchmount Boarding Kennels Ltd., for compensation, claiming that the kennel has caused harm or injury.





## Ferguson v. Birchmount Boarding Kennels Ltd., 2006 CanLII 2049 (ON S.C.D.C.)

For more information,

Go to Nelson Social Studies



In August 2002, Susan Ferguson and Ross Hagans left their dog, Harley, with Birchmount Boarding Kennels while they went on vacation. The couple adopted Harley in 1994. They had regularly boarded



When people leave their pets with a boarding kennel, they assume that their pet will be safe and protected. Do you think the damages awarded in this case were too high?

him with Birchmount since 1996. This time, Harley escaped from the kennel's enclosed play area and was never found. The kennel co-owner testified that he had examined the fence before and after the incident. He did not see any hole or gap in the fence. The evidence also established that the kennel staff conducted daily inspections of the fence. Of thousands of dogs boarded over the years, only two had previously escaped from the yard.

The plaintiffs sued the defendants for damages for pain and suffering related to the loss of their beloved dog. Ferguson was particularly upset about Harley's escape. She was unable to work and had nightmares. They were successful in small claims court and were awarded \$1527.42 in damages plus \$1000 in costs. Birchmount appealed, arguing that the damages were too high because Harley was only a dog, not a person. They lost the appeal.

### For Discussion

1. Why did Ferguson and Hagans bring an action against Birchmount Boarding Kennels?
2. Summarize the plaintiff's arguments for her civil action.
3. Summarize the arguments made by the defendant.
4. Do you agree with the appeal court's decision? Discuss with a partner.

In several provinces, minors may sue on their own for up to \$500. A minor is anyone under the age of 18 or 19, depending on the province. If a minor wants to sue for more than \$500, a parent, guardian, or a litigation guardian, must act for the minor.

In a civil action, the burden of proof is on the plaintiff. The plaintiff is not required to prove the case beyond a reasonable doubt, as is required in a criminal trial. Instead, plaintiffs must try to convince a judge that the events most likely took place in the way they claim. This is known in legal terms as proving the case on the balance of probabilities. Of course, the defendant will then try to show that his or her version is what really happened. The judge will decide whose side is more believable and more likely to have happened.



### You and the Law

If you are a minor and want to sue someone for more than \$500, a responsible adult must act on your behalf. Why is this required? Do you agree with this legal principle? Why or why not?



## You Be the Judge

# Martinig v. Powell River (Corp. of the District of), 2002 BCSC 24 (CanLII)

For more information, Go to Nelson Social Studies



Powell River is a small community on mainland British Columbia that is known for its recreation facilities.

Colleen Martinig was injured playing softball on a field when she caught her foot in a small hole near first base. The field was owned by the town of Powell River, the defendant. The field was inspected by the parks manager and two coaches before the game as part of the regular maintenance system for the park. Martinig was aware of the uneven field. Martinig sued for her injuries.

- Do you think she was successful in her action? Why or why not?

Before discussing the procedures in a civil action, look at the following chart to compare procedures for both criminal and civil actions.

### Criminal and Civil Procedures Compared

Case Factors	Criminal/Public Law	Civil/Private Law
Parties involved	Crown attorney versus accused	Plaintiff versus defendant
Grounds/reason	To determine innocence or guilt of accused	To resolve a dispute
Purpose of action	To punish offender	To compensate for harm
Onus of proof	On Crown attorney	On plaintiff
Burden of proof	Beyond a reasonable doubt	Balance of probabilities
Result of action	Accused is guilty or not guilty	Defendant is liable or not liable for damages
Action taken if defendant is guilty or liable	Accused sentenced	Plaintiff awarded some compensation or remedy

What are the similarities and differences between criminal and civil law procedures?

## Civil Trial Procedures

What actually happens during a civil procedure? Assume that Bjorn runs a red light and hits Kate's car, damaging the car and injuring Kate. As in the earlier example involving Andrew and Andrea, the Crown may lay criminal charges against Bjorn for the accident. Kate, too, must decide if she has a valid reason for suing Bjorn. If Kate thinks she has grounds to sue, she must then decide on the proper court (small claims court or her provincial supreme/superior court) in which to proceed. As you have learned, the court in which a civil action is tried depends on the amount of money involved.



You will learn later in this chapter that going to court is not the only option. However, it is often the only way to settle a dispute when the parties have very different versions of the same event.

## Filing and Serving a Claim

Assume that Kate's action begins in small claims court. Her first step is to file a statement of claim, which must include the following:

- her full name and address
- Bjorn's full name and address
- the amount of money she is claiming
- a brief, clear summary of the reason for the claim

**statement of claim** the legal document in a civil action outlining the plaintiff's case



If more than one defendant is involved, each one must be named and identified correctly.

After completing the claim, Kate mails or hand-delivers it to the court clerk, along with the required filing fee. The fee is the cost of handling the claim. The amount depends on the amount the plaintiff is claiming. Generally, the larger the claim, the larger the fee. The filing fee is added to the claim by the court. Once the claim has been processed by the court, it must be served on the defendant. It may be delivered personally by Kate, by a friend or business associate, or by a private process-serving agency so that the court knows that the defendant, or a responsible adult, has received the claim.

Criminal charges against a person can be brought as long as the accused is alive. Civil action must be brought within a certain period of time following the event. This is called the **limitation period**, which is outlined in each province's *Limitations Act*. These range from two to five years, depending on the reason for the claim. The claim must be served within six months from its date of issue. If it cannot be served within six months, it can be renewed by a judge.

**limitation period** a time period imposed by law

When Bjorn receives the claim, he has between 10 and 30 days to respond, depending on the province. He has three main options:

1. Accept total responsibility and settle the claim.
2. File a defence, explaining his version of the event.
3. Do nothing and ignore the claim.

The Crown may lay criminal charges against Bjorn for running a red light and hitting Kate's car. Kate can proceed in a civil suit against Bjorn if she has a cause of action.



**statement of defence**  
the defendant's response to the plaintiff's complaint

## Defence or Reply

If Bjorn feels that he does not owe Kate anything, he prepares a statement of defence. This is a document that clearly outlines his reasons for disagreeing with her claim. Bjorn may have a number of reasons. He might argue that the light was not red when he went through it and hit Kate's car, or he might say that the brakes on his car failed and he could not stop in time to prevent the accident. If Bjorn enters a defence, a copy of it will be sent to Kate by the court office.

## Payment into Court

If Bjorn feels that Kate is entitled to some, but not all, of her claim, he can pay that amount to the small claims court office. Kate will then be notified. She can either accept the amount and drop the balance of her claim, or pursue the case in the hope of obtaining the full amount.

**counterclaim** the defendant's suit against the plaintiff for damages or other relief

**default judgment** judgment for the plaintiff as a result of the defendant's failure to respond to the plaintiff's claim within the time allowed

## Counterclaim

Bjorn may also make a counterclaim, saying that it was actually Kate who was at fault for the accident. He may attempt to claim damages from her for his own loss or injury. A counterclaim must relate to the problem that caused the plaintiff's claim. When a civil action involves damage to vehicles, the defendant will often counterclaim.

In this example, Bjorn defends against Kate's claim and makes one of his own against her. He argues that she began to move before her traffic light had turned green or that she was driving too quickly to stop (or some other reason for his counterclaim). If the case comes to trial, the judge will examine both the plaintiff's claim and the defendant's counterclaim at the same time. The judge will decide who is at fault, what percentage each is at fault, and who will receive what amount from whom (60/40, 80/20, 100/0).

## Third-Party Claim

Another option available to the defendant is to involve a third party. This is someone who the defendant feels is partly or completely responsible for the dispute. For example, if Bjorn had his brakes repaired just before the accident, and if their failure was responsible for the accident, Bjorn might involve the repair shop and mechanic as a third party to share some of the blame and the cost. Doing this saves time and money. The case can proceed in the presence of all three parties. Otherwise, Bjorn would have to sue the repair shop separately.

## Default Judgment

If Bjorn does not reply to the claim within the required time period, known legally as entering an appearance, a default judgment is automatically made against him. This means that Kate wins and is awarded a judgment against Bjorn by default, since he has not responded to the claim. The court considers that the defendant agrees with the claim, and Kate is entitled to recover the amount she claimed plus any related costs.



If the defendant fails to appear in court, a judgment is automatically made against him or her. The gavel is a symbol of justice, but it is an American symbol. Canadian judges do not use gavels.



## Out-of-Court Settlement

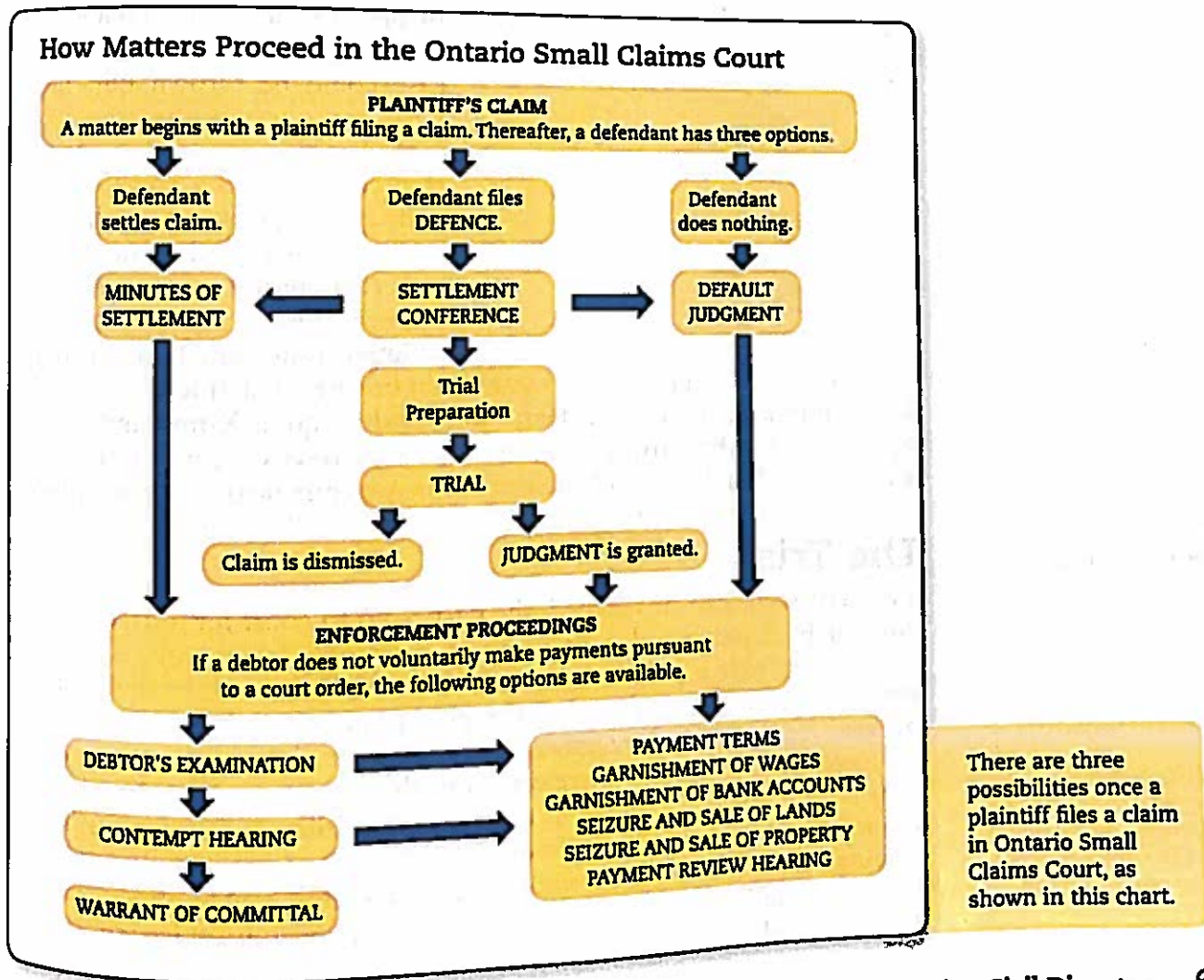
At any point, either party can make a formal or informal offer to settle the dispute instead of proceeding to trial. The litigants should make every effort to negotiate an out-of-court settlement. The plaintiff must balance the proposed offer with the chance of winning the full claim at trial. Kate might prefer to settle for a portion of her claim rather than become involved in a long trial. Settling before a trial saves time and money.

out-of-court settlement when the parties to a lawsuit settle the case before trial



## Pre-Trial Conference

A pre-trial conference, or settlement conference, is the last chance for the parties to resolve the dispute before trial. Both litigants will meet with a judge or a court-appointed referee who encourages the parties to settle the claim. The conference allows each party to hear a basic summary of the other's case so there are no surprises at trial. Based on discussions, the judge may give an opinion of the possible judgment if the case moves to trial. Many cases are settled on the basis of this opinion, without going to trial. The parties can discuss matters openly and honestly. The pre-trial conference judge is not the trial judge. If the parties cannot reach an agreement during the pre-trial conference, a trial date will be set.



## Civil Procedure in Higher Courts

In higher courts, there are more procedures to help the parties settle their dispute to avoid going to trial. The litigants send legal documents back and forth over several months or even years. This attempts to define and narrow the disputed issues and to assist the judge in understanding the dispute details. Because of this, many cases tried in provincial superior courts take several years before reaching trial. This is called the discovery process.

examination for discovery in civil cases, a pre-trial process to learn the other side's evidence

The examination for discovery is a question-and-answer session for the litigants and their lawyers. It can last a few hours or several days. It is typically conducted in a lawyer's office without any court officials present. Its purpose is to limit the possibility of surprises at trial. It provides information about each side's case and allows the parties to reach agreement on certain issues. This reduces court time, saves money, and makes settlement easier.

Both parties must disclose *all* relevant documents, including photos, videotape, and computer files. If material evidence is withheld by one or both of the parties, contempt of court charges could be laid or the case could be thrown out. Either party can question the other under oath. The questions and answers are transcribed by the court reporter and are available at trial. Either party can also ask the court to issue an order permitting inspection of physical objects in the case. In our example, Kate's and Bjorn's cars and



Examination for discovery is a crucial part of most civil actions. In Ontario, discovery hearings will be limited to one day per side, unless the parties involved or the court agree to an extension.

photographs from the accident scene might be inspected. If Kate claimed for serious injuries from the accident, Bjorn could request X-rays and medical reports. Often, the parties settle the case after discovery, when both sides realize it would take a lot of time and money to pursue the case any further.

## The Trial

If no settlement can be reached, the parties go to court for a trial by judge alone or by a judge and a civil jury of six people (except in small claims court, where only a judge hears cases). In some provinces, civil actions are never tried by a jury. Although juries play a key role in criminal trials, they are not often used for civil actions for damages.

Procedures in a civil trial are similar to those used in criminal trials. Each party has a chance to present his or her case by calling witnesses; parties can also testify themselves if they choose. The plaintiff goes first, followed by the defendant. When all the evidence has been presented, each party sums up his or her case and makes a final argument to the judge. The judge will make a decision to allow none, part, or all of the claim.

### ? Did You Know?

In 2005–2006, only 23 percent of civil actions in Ontario were jury trials. Most involved actions for motor vehicle accidents.



In a trial by jury, the judge instructs the jury members on the law applicable to the facts of the case. The jury must consider the evidence, as well as questions such as these:

- Who was at fault, and what caused the injuries or loss?
- Is that person totally at fault, or are both parties somewhat to blame?
- How should damages be determined?
- How much should the damages be?

All these factors must be considered in reaching a judgment. (If there is no jury, the judge does all of the above.)



## You Be the Judge

### Thomas v. Hamilton (City), Board of Education, 1994 CanLII 739 (ON C.A.)

For more information, Go to Nelson Social Studies



Jeffrey Thomas was an athletic 16-year-old student at Scott Park Secondary School. He was one of the best and most experienced players on his school's junior football team. Football skills were taught as part of the regular classroom physical education program. They were also offered as an extracurricular activity in Hamilton high schools. Games were coached by teachers selected by the school principal. Students were eligible to play junior football if they were not older than 15 years at the beginning of the school year. Students had to provide a permission form signed by their parents and a medical certificate indicating that they were fit to play football.

Between 1980 and 1982, Thomas played football and basketball, rode his bike, jogged, and lifted weights four times a week. By the fall of 1982, he was 183 centimetres (6 feet) tall and weighed about 68 kilograms (150 pounds). In October

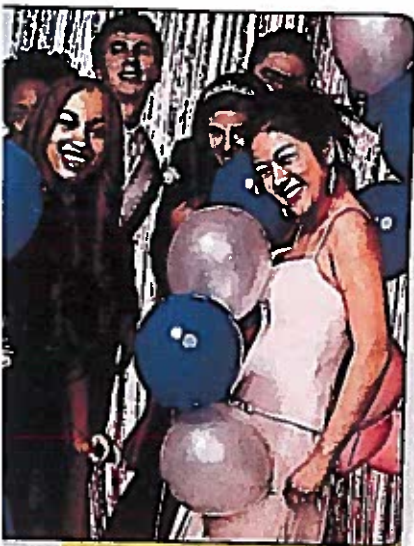
1982, during a football game, Thomas tackled an opposing player headfirst and went crashing into the punt returner's hip. Thomas was running at jogging speed or faster. The punt returner was running at full speed. All witnesses agreed that the contact between the two players was substantial, and that Thomas's body was extended but his head was not up at the point of contact. He and the other players had been taught to tackle with their shoulders, not their heads, and told that contact should be made with a shoulder. Thomas suffered serious injury to his cervical spine, which left him quadriplegic. Thomas and his family sued the school board and the school football coaches.

- Why do you think Thomas and his family brought a suit against the school board and the coaches? What would you have decided if you were the judge in this case?

## Class Action Lawsuits

Class actions are lawsuits that permit groups of people who have suffered similar losses or injuries to come together in one efficient lawsuit. It means that persons who may not have been able to afford to sue on their own can act with others with a common interest against the same defendant. They share the costs of the lawsuit and the outcome. For example, if many consumers are injured because of an allegedly defective product, the key issue is whether the product caused the injuries. In the summer of 2007, a group announced that they planned to launch a class action against OxyContin, made by Purdue

class action a single legal action brought on behalf of all members of a group with a common grievance



A Mississauga, Ontario, banquet hall agreed to pay up to \$1 million to guests who launched a class action lawsuit after becoming ill with E. coli poisoning in June 2003. Guests at several functions, including students at a high school graduation party, became ill from the disease. The settlement was distributed among 150 people. Each person received between \$500 and \$5000, depending on the severity of the symptoms.

Pharma. OxyContin is a painkiller drug that first arrived in pharmacies in the 1990s. It became the number-one pain reliever prescribed by doctors. Since its release, hundreds of fatal overdoses have been reported across Canada. The people in the Atlantic provinces bringing the suit stated that they became concerned when the manufacturer and three of its current and former executives pleaded guilty in a United States court to lying about the drug's risk of addiction. The men must pay U.S. litigants \$634.5 million in fines for claiming the drug was less addictive and less subject to abuse than other pain medications.

In early 2008, former users of Merck's painkiller Vioxx and their families had class action suits approved to go ahead in Saskatchewan and Québec. Vioxx was pulled off the market in 2004 after researchers linked it to increased risks of heart problems. The class action suits claim that the painkiller caused the plaintiffs' medical problems, including heart attacks and strokes. Merck plans to appeal these decisions. The company believes each plaintiff's case should be tried separately. In November 2007, Merck agreed to pay \$4.85 billion to settle similar claims in the United States.

Canada's federal government is settling a major class action suit involving Aboriginal residential schools. For almost three decades from 1930 to 1970, about 80 000 students were forcefully taken from their families and placed in these residential schools. Their native culture was dismissed. Many suffered sexual and physical abuse (see the timeline below and on page 371). Each of the former residents is to receive compensation of about \$10 000, plus \$3000 for each year spent in the once-mandatory schools. This will cost the government approximately \$2 billion.

Multimillion-dollar class action suits are much more common in the United States. Legal observers suggest that they are coming to Canada. More product liability matters and consumer disputes are being filed. Examples of such suits are for the following:

- manufacturing allegedly defective or hazardous products (for example, asbestos, tobacco, silicone gel breast implants, and certain pesticides like Agent Orange—see Chapter 12, page 418)

This timeline provides an overview of events leading up to the historic settlement for victims of residential school abuse. It is the first time in Canadian legal history that so many courts have been involved in the approval of a class action lawsuit.

## Residential Schools

Attendance at residential schools is made compulsory for all Aboriginal children ages 7–15. Children were forcibly removed from families by priests, Indian agents, and police.

There are 80 residential schools in Canada with about 7800 students.

There are 74 residential schools in Canada with about 9300 students.

There are 12 residential schools with 1900 students.

Former students of residential schools begin disclosing sexual and other forms of abuse.

1920

1931

1948

1979

1980s



- mass environmental injury, such as chemical spills and contamination
- mass injury, such as results of airplane crashes
- charging cellphone customers for incoming text messages

Threats of class actions have become a concern for manufacturers. They are time-consuming and expensive to defend. Also, companies run the risk of having to pay substantial settlements or court awards. Class action suits can also be brought against employers. Large companies, including Wal-Mart, Starbucks, and Taco Bell, have had to pay unpaid overtime to employees.

### Benefits of Joining a Class Action

- They avoid the necessity for hundreds, or thousands, of people to file similar individual lawsuits.
- They seek to ensure that people with similar claims are treated similarly.
- They help eliminate common barriers, such as economic barriers, that prevent people from pursuing legal action.

Which of the benefits of joining a class action lawsuit do you think is the most important? Why?

### Review Your Understanding

1. List five examples of cases heard in small claims court.
2. In a civil action, what does the "balance of probabilities" mean? How does it differ from the burden of proof in a criminal trial?
3. What three options are available to a defendant who has just received a plaintiff's statement of claim?
4. What is the purpose of an examination for discovery, and what are its benefits?
5. What is a class action lawsuit, and what are the benefits of joining such an action?

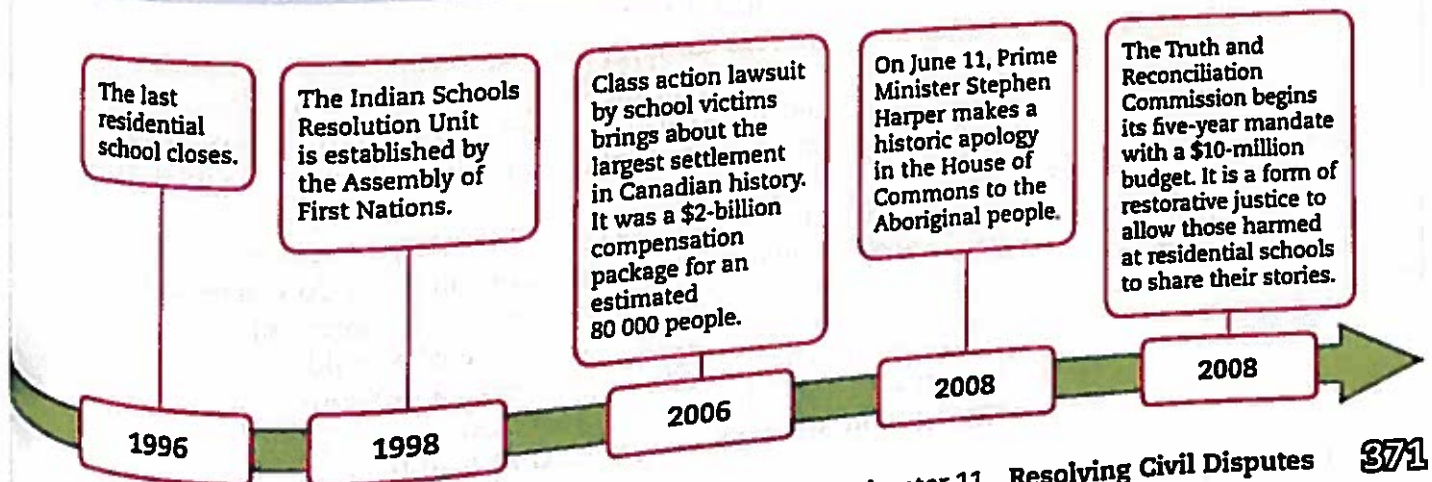


### Did You Know?

In August 2008, separate class action lawsuits were filed in four provinces against Maple Leaf Foods. Up to 20 Canadians died from listeriosis from tainted meat—15 in Ontario. In December 2008, the company agreed to pay up to \$27 million to settle these lawsuits.



In 2007, Dara Fresco, an employee of CIBC, filed a \$600-million claim with the Ontario Superior Court of Justice. She alleged that the bank failed to compensate workers for overtime. This may be the largest unpaid overtime class action in Canadian legal history.





## Activity

To learn more about  
awarding civil remedies,

Go to Nelson  
Social Studies



# 11.4 Judgment and Civil Remedies

At the end of a civil trial, the judge delivers a judgment. In small claims court, the judge often gives an oral judgment while all the parties involved are still present. In higher courts, the judge usually needs some time to review the evidence and the relevant law. A judge is then said to be “reserving judgment.” This means that he or she is delaying a decision to review the evidence and write a judgment.

## Civil Remedies

Damages for the plaintiff’s injury or loss are the most common remedy in tort actions. The intent is to return plaintiffs, as much as possible, to the same position they were in before the loss or injury. In the case of severe injury, such as total paralysis, no amount of money can adequately compensate victims. The major reason for awarding damages in such cases is to help plaintiffs with the cost of future care and to compensate for future loss of income. Judges try to award similar amounts for similar injuries. They review past cases and precedents to determine appropriate awards. Judges are not bound by what other judges have awarded in similar cases. Those awards give them guidance as to the range of damages. There are five types of damages: general, special, punitive, aggravated, and nominal. Plaintiffs may be awarded one or more of these.

**general damages** court ordered compensation for proven losses in a civil action

**pecuniary damages** a form of general damages for losses that can be reasonably calculated

**non-pecuniary damages** a form of general damages for losses that do not involve an actual loss of money and thus are difficult to determine

## General Damages

General damages are those that cannot be easily or precisely calculated. They require a judge’s or jury’s discretion. There are two main categories:

- **Pecuniary damages**—for loss of income and future earnings and the cost of specialized future care
- **Non-pecuniary damages**—for pain and suffering and for loss of enjoyment of life

The word “pecuniary” means related to money. If the plaintiff cannot work because of the defendant’s actions, the judge must consider the loss of income. This includes what the plaintiff was earning at the time of the accident and future earnings. The longer the injured plaintiff is expected to live without being able to work, the greater the compensation. If the victim has a job or had definite plans to enter a specific profession or trade, then the average earnings for that occupation may be used. The settlement must be fair to both the plaintiff and the defendant. Other pecuniary costs include costs for future care such as professional help, special equipment, access to facilities, and medication necessary to assist the plaintiff in daily life.

While pecuniary damages may be difficult to determine, calculating non-pecuniary damages is even more difficult. How do you place a price on pain and suffering? What is the loss of enjoyment of life worth to a person permanently injured in an accident? Should an athlete with a promising career and the thrill of winning an Olympic medal be given more for pain and suffering for injuries than a non-athlete? Money cannot always restore what has been injured or lost. It can provide substitutes



Every year many students  
are injured in physical  
education classes.



for pleasures that are no longer possible. Compensation can make it possible for an injured plaintiff who can no longer skate or ski to enjoy a winter vacation of a different kind.



## Looking Back

### The 1978 Supreme Court of Canada Trilogy

In the United States, there are highly publicized cases in which plaintiffs are awarded millions of dollars. As a result, many Canadians believe cases will be settled the same way. That is not so. Canadian courts take a cautious, or reasonable, and uniquely Canadian approach to cases.

In 1978, three cases (the trilogy) came before the Supreme Court of Canada. They were *Thornton v. Prince George School District No. 57*, *Teno v. Arnold*, and *Andrews v. Grand & Toy Alberta Ltd.* In each, the Supreme Court had to determine appropriate damages for the following, respectively:

- a 17-year-old high school student who fractured his spinal cord in a physical education class resulting in the loss of use of all limbs
- a four-year-old girl who suffered serious brain damage and debilitating physical injuries after crossing the street to buy an ice cream cone
- a 21-year-old man who became a quadriplegic from a traffic accident involving a Grand & Toy driver

The Supreme Court outlined the factors to consider for awards for pain and suffering in very serious cases, those resulting in severe, life-long physical incapacity. The court capped (limited) the maximum award at \$100 000 in most cases. These exclude "exceptional circumstances." As well, it is based on how severe the injury is and the victim's disability. The cap is the key difference between the tort liability systems in Canada and the United States. The policy is to control rising claims. It also promotes fairness in personal injury damage awards across Canada.

Since 1978, judges and courts have maintained the cap. The few exceptions were cases where the plaintiff's injuries were more devastating than those of the victims in the trilogy cases. In *Lindal v. Lindal*, 1981, the Supreme Court stated that the cap should increase over time to reflect inflation. In the three decades since the trilogy, the \$100 000 limit has risen roughly three times.

Most recently, a judgment from the British Columbia Court of Appeal in *Lee v. Dawson*, 2006,

confirms that the cap is still being followed. Ik Sang Lee was seriously injured in a car accident. A trial jury awarded him \$2 million in general damages. The trial judge reduced that award to the cap. At the time of trial, it was \$294 600. Both parties appealed. The plaintiff wanted the \$2-million judgment restored. The defendant sought a further reduction, but both appeals were dismissed. Leave to appeal to the Supreme Court of Canada was also dismissed, thus keeping the cap in place—for now.

The Supreme Court has not set a cap on general damages for loss of reputation. In *Young v. Bella*, 2006 (see the case on page 374), the court indicated that courts can award general damages above the cap for pain and suffering set by the trilogy. The *Young* decision represents an important development in Canadian law. It should make employers take greater care when giving references that could be harmful.

#### For Discussion

1. List two reasons why the Supreme Court of Canada established a cap for damages for pain and suffering.
2. What factors should courts consider when awarding damages for pain and suffering?
3. In the case of permanent disability, a key issue to determine is whether the victim's future care should be in a long-term care facility or a modified home or apartment. Although home care is preferable, it is more expensive. In a chart, research the advantages and disadvantages of a long-term care facility versus a modified home environment.
4. In *Lee v. Dawson*, the British Columbia Court of Appeal refused to "overturn the trilogy." Should this trilogy cap be reviewed and removed? With a partner, discuss the advantages and disadvantages of such an action.

**Young v. Bella, 2006 SCC 3 (CanLII)**For more information, [Go to Nelson Social Studies](#)

In 1994, Wanda Young was a student at Memorial University in Newfoundland. She wanted to become a social worker. She gave her final assignment on the treatment of juvenile sex offenders to her professor, Leslie Bella. In it, she illustrated her point that victims of sexual abuse often become abusers. She included a first-person anecdote of a woman who sexually abused a child while babysitting. Young added the source in her bibliography. She did not footnote it in the body of the assignment.

Professor Bella thought the excerpt was from Young's personal experience. Bella believed it was a cry for help, based on Young's own experience. Bella told her director about it. Young was reported to the Child Protection Services branch of the Newfoundland and Labrador government. Young was listed on the provincial child abuse registry. Her name was red flagged in the RCMP and social work communities. These were where she hoped to work after graduation. The report was investigated two years later.

The misunderstanding was cleared up within 24 hours. Young had to explain that the excerpt was a published quote and not about her.

Young took action against the professor and other defendants. She argued that their actions destroyed her chances of becoming a social worker. In 2003, a trial jury found the defendants at fault and awarded her damages of \$839 000. In 2004, the Newfoundland Court of Appeal overturned the jury award. It believed that the university had acted in good faith. The university complied with child welfare laws that compel people to report suspected child abuse. It should be protected from any legal actions.

Young appealed this decision to the Supreme Court of Canada. Her appeal was heard in October 2005. In a 7-0 judgment in January 2006, the court allowed her appeal and restored the trial judgment.

**For Discussion**

1. Why did Wanda Young sue Memorial University as well as Professor Bella?
2. Newfoundland and Labrador's Child Welfare Act requires there to be "reasonable cause" to make a report to the Child Abuse Registry. There should be a balance between the protection of children, the protection of persons against unfounded allegations, and the protection of informants. Do you think "reasonable cause" to report existed here? Why or why not?
3. Young was awarded \$430 000 for pain and suffering, anxiety, embarrassment, insomnia, and depression, and an additional \$409 000 for lost income and future care. Do you think this was a reasonable judgment? Explain.
4. This case suggests that plaintiffs can receive more than the current cap on general damages as long as claims are based on psychological injury and recognized psychiatric illness, and do not arise from catastrophic physical injuries. Do you agree with this principle? Discuss with a partner.



Wanda Young (left) is shown here with her lawyer after she won her appeal in 2006. Young won \$839 000 in damages for pain and suffering, embarrassment, depression, and lost income and future care.



## Special Damages

Special damages cover out-of-pocket expenses occurring before trial. Receipts are not needed but help to calculate expenses. Such expenses may be ambulance service, hospital costs, therapy, and so on. Lost wages between the accident and the trial are also special damages because they can be calculated precisely.

special damages compensation for out-of-pocket expenses

punitive damages compensation to punish the defendant for malicious behaviour

## Punitive Damages

Punitive damages are also known as exemplary damages. They are additional damages to punish offenders for their oppressive, insensitive, or malicious behaviour. Punitive damages are meant to condemn this conduct and to discourage offenders and the general public from behaving in a similar manner. The damages are usually not awarded if the defendant was punished by the criminal court for the same action. They are usually awarded for intentional torts (discussed in Chapter 12).

In January 1994, a fire totally destroyed the Whiten home. The insurance company denied the claim. It alleged that the Whitens were guilty of arson, but the allegations were untrue. In February 2002, in a 6-1 decision in *Whiten v. Pilot Insurance Co.*, the Supreme Court of Canada ordered Pilot to pay Daphne and Keith Whiten \$1 million in punitive damages. This was the largest amount ever awarded in Canadian history.



This is a good example of a frivolous lawsuit for damages.



## You Be the Judge

### Wolf, Ward, and Luck v. Advance Fur Dressers Ltd. et al., 2005 BCSC 1097 (CanLII)

For more information, [Go to Nelson Social Studies](#)

In August 2001, the three plaintiffs, Peter Wolf, John Ward, and Carson Luck, travelled to Zimbabwe for a hunting safari. Before leaving, they arranged with the defendant, Advance Fur Dressers Ltd., to process their hunting trophies. The defendant would make arrangements with Canada Customs to pick up the trophies. They would take them to their business in Vernon, British Columbia, to work on them. The defendant would deliver the trophies to the plaintiffs.

The plaintiffs had a successful safari, taking 25 animals, some of which were rare and others which were of exceptional size. The plaintiffs shipped their trophies home and contacted the defendant to state that the crates were on the way. Over the next two years, there was a lot of communication between the parties. Each time the defendant assured the plaintiffs that all was well and the trophies were being processed. In December 2003, the defendant wrote that

the trophies were close to completion and would be ready for shipment very shortly. However, this was not true. The company had never claimed the trophies from Canada Customs. They used excuses ranging from a snowstorm, to the death of an employee, to mix-ups in their operations. In fact, the plaintiffs learned that Canada Customs had burned their trophies in 2002 since they had never been claimed.

The hunters sued the defendant for breach of contract, general damages for the destruction of their trophies and mental distress, and punitive damages. They also wanted damages for the full replacement cost each had paid for his trip to Zimbabwe, the hunting safari, and other miscellaneous expenses because each of the trophies had been unique.

- If you were the judge, would you grant this claim? If so, what damages would you award and why? If not, why not?

## ? Did You Know?

In the 1980s, Vince Controni sued *Maclean's* magazine for \$1.25 million. He claimed an article, "The Mafia in Canada," "morally" damaged his reputation. The trial judge awarded him \$1, stating that he did not deserve more because "his reputation had already been stained."

**aggravated damages**  
compensation awarded for humiliation and mental distress

**nominal damages** compensation awarded as a moral victory to a plaintiff who has not sustained any actual losses

## Aggravated Damages

Aggravated damages are similar to punitive damages. They are awarded when the defendant's behaviour harms the plaintiff. For example, the plaintiff may experience serious emotional shock or suffering because of the defendant. Punitive damages are intended to punish or deter defendants. Aggravated damages compensate the plaintiff for the defendant's intolerable conduct.

For example, a drug company makes a morning-sickness pill. It is later revealed that the pill causes birth defects. An investigation might show that the pill was not properly tested. In this case, the court could assess for punitive damages. On the other hand, an investigation might show that the company knew that the pill caused defects. The knowledge did not stop the company from marketing the pill. In this case, the court could award aggravated damages because of the company's appalling behaviour.

## Nominal Damages

Nominal damages are awarded when a judge wants to indicate support for a plaintiff or defendant. The judge awards a small sum, such as \$1 to \$100. Such an award suggests that, although the plaintiff has suffered little or no loss or harm, he or she has won a moral victory. For example, someone trespasses on another person's property but does not damage anything. Nominal damages may be awarded to tell trespassers that they have affected the owner's right of property use.



## Case

### McIntyre v. Grigg, 2006 CanLII 37326 (ON C.A.)

For more information, [Go to Nelson Social Studies](#)



Hamilton Tiger-Cats wide receiver Andrew Grigg (left) was charged with several serious criminal offences and was sued after hitting a pedestrian, Andrea McIntyre, with his car while driving under the influence in 1996.

On September 13, 1996, Andrea McIntyre was a first-year McMaster University student and an outstanding athlete. She was walking home with friends from the university pub. Andrew Grigg, then a wide receiver with the Hamilton Tiger-Cats, drove through a stop sign. He made a reckless turn, hit a lamppost, and seriously injured McIntyre. She suffered several injuries, including mild brain trauma, a fractured femur, and recurring depression. She would never recover her athletic form.

After Grigg's arrest, a Breathalyzer test showed that his blood-alcohol content was two to three times over the legal limit. Grigg had been drinking at a student pub run by the McMaster Student Union that evening. He was charged with several serious criminal offences. However, Grigg had not been informed of his Charter right to legal counsel before being given a Breathalyzer test. The Crown attorney

*continues...*





## McIntyre v. Grigg, 2006 CanLII 37326 (ON C.A.)

dropped all charges except for careless driving. Grigg pleaded guilty to that charge. He received a \$500 fine and a licence suspension.

Six years later, Andrea was still in serious pain and required medication for the rest of her life. She also suffered severe depression and had made two unsuccessful suicide attempts. Her lifetime earning potential was reduced as a result of the accident. She launched a civil action against Grigg and the McMaster Student Union. The Union staff had failed to monitor Grigg's alcohol consumption. In March 2004, the jury awarded McIntyre \$250 000 in general damages for pain and suffering. Grigg and his father, who owned the vehicle involved in the accident, were ordered to pay 70 percent of the damages. The McMaster Student Union was found 30 percent liable. The Griggs were also ordered to pay \$100 000 in aggravated damages and \$100 000 in punitive damages.

The Ontario Court of Appeal heard the defendants' appeal in May 2006. On November 6, in a 2-1 judgment, the appellate court cut the punitive damages award from \$100 000 to \$20 000. It also

struck down the jury's \$100 000 aggravated damages award. McMaster's appeal was also dismissed. The *McIntyre v. Grigg* case was the first time in Canada that punitive damages were awarded in an impaired driving case. It broke new ground in Canadian law.

### For Discussion

1. What do you think of the trial judgment, the damages awarded, and the division of liability between the Griggs and McMaster Student Union? Discuss with a partner.
2. What are aggravated and punitive damages, and why was each awarded by the trial jury?
3. Why do you think the Ontario Court of Appeal struck down the aggravated damages award, but reduced the punitive damages award?
4. The dissenting justice stated: "All automobile-owning members of society will effectively be 'punished' for the conduct of Mr. Grigg and comparable drivers." What does he mean, and what are the possible implications?

## Injunctions

Sometimes a plaintiff is not interested in cash compensation. Suppose that Kasey, Leo, and Ravinder are members of a rock band that rehearses that late each evening at their home. Their neighbours, the Lafrattas, feel that they are being unfairly disturbed by the loud music. They ask the band to keep the noise down and they talk to the boys' parents. The Lafrattas then might ask the courts for an injunction. This is an order for a person to do or not do something. In this case, a court order to the band members to do or not do something. Similarly, a factory that might limit the rehearsals to reasonable hours. Another common use of injunction requiring the owners to stop this activity. Another common use of injunctions is to require striking workers to return to work.

Failure to comply with an injunction might result in a contempt of court charge. This could be followed by a fine or jail sentence. Finally, injunctions are increasingly used when a relationship has broken down and one party is harassing the other party. Issuing an injunction might prevent one spouse from selling the matrimonial home, for example. It could order the removal of the problem party from the home.

**Injunction** a court order directing a person to do or not to do something for a specific time period



During the Olympic Games, injunctions are often issued to prevent unlawful use of the Olympic symbols and trademarks, such as this 2010 Olympic mascot.

**contingency fee** an arrangement between a plaintiff and a lawyer where the lawyer will be paid an agreed-upon percentage of the damages at the end of the case



### Did You Know?

Contingency fees are not allowed for criminal and family law cases.

## Contingency Fees

Civil court actions are very expensive. Many people cannot afford to pay lawyer fees and court costs. The concept of contingency fees in civil law is common in American television and films. The idea is that a lawyer will take a case and not demand the usual retainer fee in advance. In fact, lawyers sometimes waive those fees altogether and instead agree to deduct a percentage from the judgment. This fee must be determined in advance in a written agreement between the client and the lawyer. If you lose the case, your lawyer receives nothing. Of course, because of the added risk, your lawyer will ask for a corresponding higher fee if he or she wins the case.

Some provinces have guidelines that limit the size of contingency fees. These can be between 20 and 40 percent of the amount of money awarded. The amount is based on the complexity and length of cases. All provincial rules state that a lawyer's fee must not exceed a fair and reasonable limit. The chart below outlines the advantages and disadvantages of contingency fees.

### Advantages and Disadvantages of Contingency Fees

#### Advantages

- They are practical when the plaintiff has a strong case.
- They allow greater access to justice for persons who cannot afford a lawyer and who do not qualify for legal aid.
- They are beneficial for class actions and complex personal injury cases.

#### Disadvantages

- They might encourage frivolous lawsuits since clients may have nothing at the start.
- Lawyers might take only those cases they are reasonably certain to win.
- They could encourage multimillion-dollar lawsuits, as has happened in the United States.

After viewing this chart, do you support the concept of contingency fees? Why or why not?



### You and the Law

If you were seriously injured in an accident, do you have any plans about your future—education, employment, and lifestyle—that would help the court determine what types of damages you might receive? Explain.

### Review Your Understanding

1. What are the two main categories of general damages?
2. Why is it difficult to determine what damages to award a young child?
3. How do special and nominal damages differ?
4. What is the difference between punitive and aggravated damages?
5. What is a contingency fee? List two advantages and two disadvantages of this system.

## Enforcing a Judgment

In a civil case, it is up to the plaintiff to collect any damages awarded. This is known as enforcing the judgment. Getting the defendant to pay damages is not the court's responsibility. For a successful plaintiff to collect damages, the defendant must have one of the following:



- money
- assets that can be seized and sold
- a debt owed to them by someone else or wages that can be seized and paid to the plaintiff

Being awarded a judgment is one thing; collecting on it is quite another. The losing defendant may have little money or may be reluctant to pay. There is an old saying: "You cannot get blood from a stone." This means that you cannot collect money from someone who has none. There are various options available to help plaintiffs receive payment, including examination of the debtor, seizing assets, or garnishment. These are discussed below.

## Examination of the Debtor

If the defendant refuses to pay, the plaintiff can request an examination of the debtor. The defendant is ordered to appear in court to satisfy the judge as to whether he or she can settle the claim. The debtor is examined under oath about such things as income and assets. An agreement is usually reached as to how much the debtor can afford to pay. If necessary, instalment payments can be arranged.

## Seizing Assets

Another option is to apply to the courts to take legal possession of the defendant's property and sell it to settle the judgment. A court official seizes the assets and notifies the defendant. There is a set period to settle the judgment and redeem (get back) the goods. If this is not done, the goods are sold at public auction. The court deducts all of its costs from the sale and then pays the plaintiff as much of the judgment as possible. Any money left over is returned to the defendant. Certain goods, such as clothing, furniture, utensils, and workers' tools, cannot be seized. The goods must be determined to belong to the defendant before they can be seized.



This is one method of seizing assets. However, it is not what is intended when the court orders taking possession of a person's property to settle a judgment.

## Garnishment

A wage garnishment is a court order that instructs an employer to deduct a specific percentage of a debtor's wages and pay that to the court. Some people call it having your wages "garnished," but the correct term is "garnisheed." Courts will decide not only whether a portion of your wages should be garnisheed, but also the amount within provincial law guidelines. In turn, the court will give the money to the plaintiff as a payment on the judgment. Provincial labour laws do not allow an employer to fire an employee because of a garnishment order.

**garnishment** a court order that money owed by a defendant to a plaintiff be paid out of the defendant's bank account or wages

Bank accounts, unpaid rent, and money owing on contracts can also be the subject of a garnishment order. If the defendant cannot afford to have the percentage of wages taken, he or she can apply to the court to have the amount altered. In most provinces, a garnishment order remains in effect for six months, but can be renewed if the entire amount is not paid within that time. There are three ways to stop a wage garnishment (see the chart below).

These are the three ways to stop a wage garnishment.

### Three Ways to Stop a Wage Garnishment

- pay the judgment owing to the plaintiff
- file a proposal with the court about your payment plans
- file for personal bankruptcy



### Costs

In any civil case, the judge must decide whether to allow court costs or not. Usually, the losing party is required to pay the legal fees and other expenses of the successful party. These costs are based on a fee schedule published by the courts and vary by province. The winning party prepares a bill of costs and gives it to the losing party for payment. However, the amount the judge awards may cover only part of the costs. These can be substantial for long, complex trials in higher courts. The rest of the cost might have to come out of the damage award, and sometimes there is little left over for the plaintiff.

### Review Your Understanding

1. List three of the things that a defendant must have before a successful plaintiff can collect damages.
2. How are court costs determined, and who usually pays them?
3. What is the purpose of an examination of the debtor?
4. What procedures are followed when a defendant's assets are seized to pay a judgment award to a plaintiff?
5. Outline the three ways for a defendant to stop a wage garnishment.

## 11.5 Alternative Dispute Resolution

As you have seen, civil litigation often takes a great deal of time and money. Like criminal courts, civil courts across Canada are backlogged, and it may take several years and thousands of dollars before a case reaches trial. Because of the increasing expense and time-consuming nature of litigation, there is a trend in Canada toward alternative dispute resolution (ADR). As you saw in Chapter 1, on pages 32 to 33, negotiation, mediation, and arbitration are methods used in ADR. This section examines ADR in more detail.

**alternative dispute resolution (ADR)** a process designed to resolve conflicts without formal trials



## Five Advantages of Alternative Dispute Resolution

- It is less expensive than traditional litigation.
- It is much faster than traditional litigation.
- It is less distressing than traditional litigation.
- It may produce a better or fairer result than traditional litigation.
- It often results in a win-win situation that benefits both parties.

Of these five advantages of ADR, which do you think is the most important and why?

## Negotiation

Resolving disputes happens all the time. You may have to negotiate with a family member for the use of the family car. Part of the discussion may involve when you will be home with the car. You may try to negotiate a new deadline with your teacher for handing in a major project. Negotiation is an informal and voluntary dispute resolution process between the parties involved. A third party is not involved. The two parties determine the process, communicate with each other, and reach mutually acceptable decisions. Discussions may relate to proof, witnesses, and evidence, and problem solving may be used to consider available options. Any agreement reached can be written into a contract. If negotiation does not work, mediation is often the next step.

### ADR Communication Models

#### Negotiation

Parties communicate with each other and make their own decisions.

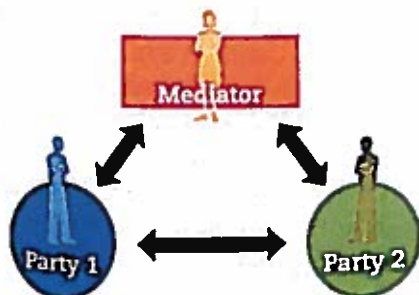
The outcome can be written into a contract that is final and binding.



#### Mediation

A selected neutral third party facilitates parties making their own decision.

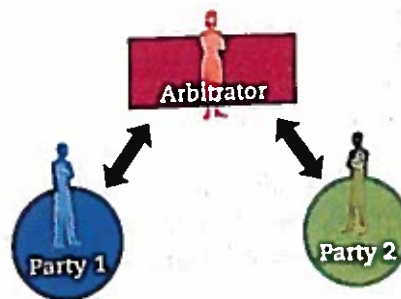
The outcome is an agreement to which both parties are committed; the outcome can be written into a contract that is final and binding.



#### Arbitration

A selected third party receives statements and arguments from both parties and acts as the decision maker.

The arbitrator's decision is final and binding.



negotiation a process whereby the parties to a civil dispute try to resolve the issues out of court, with or without their lawyers

mediation a process whereby a neutral third person tries to help the parties settle the dispute out of court

arbitration a process whereby a neutral third party hears from the parties and makes a final and binding decision

If you were resolving a dispute with friends, which model would you choose? Why?

## ? Did You Know?

Mediation has a success rate of 80 to 85 percent.

## Mediation

Mediation is a non-binding process in which the parties appoint a neutral third party—a mediator—to help them reach a mutually acceptable solution to their dispute. It is the most rapidly growing form of ADR. In 1999, Ontario introduced mandatory mediation for certain types of civil actions. The parties involved are required to participate in mediation before a trial is scheduled. Other provinces have adopted this procedure as well. It is

becoming a major factor in family relationship disputes, such as child custody, visitation, support payments, and division of property (these issues will be discussed in Unit 4).

The mediator does not impose a solution on the parties. He or she establishes a process to involve the parties in a co-operative decision-making process to settle their dispute. The mediator provides a relaxed, informal, comfortable, and private environment for discussion. The goal is a win-win situation, rather than having a winner and a loser, which is often the case in a trial. Mediators often ask the parties to prepare written statements outlining their versions of the dispute. The mediator reviews these statements and gives the parties a chance to tell their story. At the mediation, the parties can discuss their conflict honestly and openly, and arrive at possible solutions. After learning about the dispute, the mediator tries to get the parties to adjust or settle their dispute based upon his or her assessment of the merits of the claims. The cost of mediation is usually shared equally between the parties. Once an agreement is reached, it can be included in a written contract. If the parties cannot agree, they can walk away and continue with the litigation process.



This seems to be a relaxed, informal, but unusual, mediation conference.

## Arbitration

Arbitration is a formal process in which the parties involved select a neutral third party or a panel of people with specific technical knowledge. The arbitrator performs a role similar to that of a judge. Arbitration is more formal than negotiation or mediation, but it costs less than litigation. It is the last chance to settle a dispute before thousands of dollars are spent in litigation. Unlike mediation, there may be a winner and a loser.

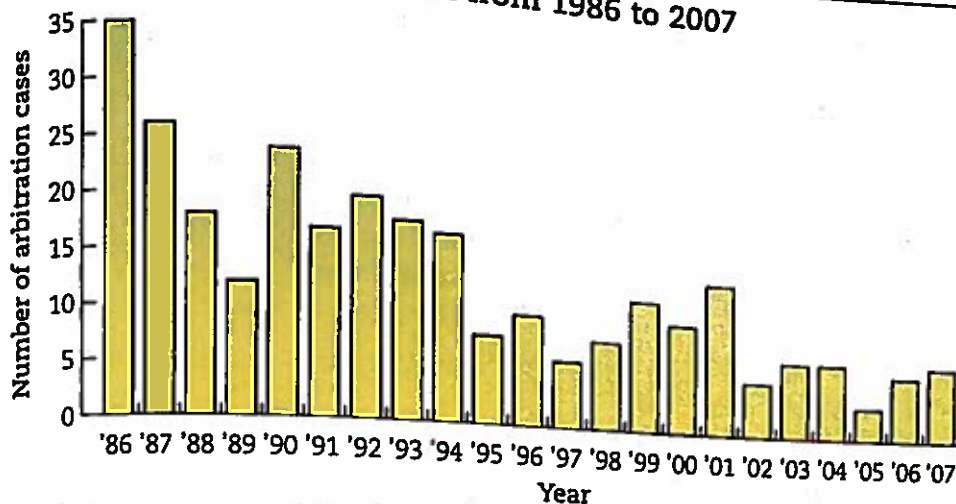
With arbitration, the parties do not have control over decisions. The arbitrator receives statements about key issues and hears arguments. Both parties can present evidence as well as examine and cross-examine witnesses. Communication flows between the parties through the arbitrator. With his or her specific knowledge, the arbitrator will consider the two positions. She or he usually makes a final, binding decision on both parties. Binding arbitration is often used between professional athletes and their teams when resolving salary disputes. Striking workers and their employers sometimes turn to binding arbitration to resolve contract disputes.

## ? Did You Know?

Choosing the best ADR option depends on the interests of both parties. Mediation helps when a neutral third party can bring a fresh view to stalled negotiations. Arbitration is effective if negotiation and mediation have failed and neither party is ready to sue in court.



**Arbitration Cases in Baseball from 1986 to 2007**



The number of baseball salary disputes making it to arbitration has fallen considerably since the peak of 1986. Today, about 90 percent of baseball arbitration cases are settled before the final stage.

### Arbitration and Litigation Compared

Factor	Arbitration	Litigation
Speed	Takes days to weeks	Takes months to years
Expertise	Involves an expert	Involves a judge and a jury with limited experience
Procedures	More businesslike but less formal than litigation	Follows formal, complex rules and procedures
Costs	Significantly less expensive than a trial	Can be costly, depending on the length of the trial
Privacy and confidentiality	Conducted in private; not publicly disclosed	Proceedings conducted in public and may be reported by media
Finality	Resolution may permanently satisfy both parties	Resolution may result in divided feelings; there is a winner and a loser

For a serious civil action, would you choose arbitration or litigation?



### Did You Know?

The Canadian Motor Vehicle Arbitration Plan (CAMVAP) helps settle disputes between vehicle owners and manufacturers. It is the largest consumer product arbitration plan in Canada. Although funded by car manufacturers, CAMVAP is an independent body. CAMVAP has about 100 independent arbitrators across the country, most of whom are lawyers.

### Review Your Understanding

1. What is ADR? What are the three options available?
2. List two reasons why ADR is being used more often to resolve civil disputes.
3. What is the difference between negotiation and mediation?
4. Distinguish between mediation and arbitration.
5. When is the use of arbitration most effective?

## Should the Criminal or Civil Justice System Regulate Violence in Sports?

Canadians have become increasingly vocal about violence in team sports like hockey. On March 8, 2004, many Canadians were shocked when Vancouver Canucks star Todd Bertuzzi sucker-punched Colorado Avalanche rookie Steve Moore. Bertuzzi then jumped him from behind. Moore was hospitalized with three broken vertebrae in his neck and a concussion. He has not played hockey since. Bertuzzi was suspended for 17 months throughout the 310-day NHL lockout. He was banned from competing in the 2004 World Cup of Hockey and in European pro leagues. He also lost just over \$500 000 in salary and hundreds of thousands of dollars in product endorsements.

Bertuzzi was criminally charged with assault causing bodily harm. He pleaded guilty and was sentenced to one year's probation and 80 hours of community service. Steve Moore is suing Bertuzzi for almost \$38 million. This case went to mediation in December 2008.

Violence in sports is not confined to players. Fans have also been guilty of outbursts of violence. In Europe, incidents of spectator violence have been relatively common at soccer matches. Many fans expect violence, and players and coaches try not to disappoint them. Sometimes outbreaks of violence between teams spark fights between their respective supporters in the audience. Such incidents have caused Canadians to consider how to deal with these outbursts of violence when they happen and how to prevent them.

### On One Side

Some fans and players state that some violence is natural and expected in contact sports like hockey, and many players are willing to do anything for victory. They say that risking injury during a hockey

game is as much a part of the game as winning and losing. Those who criticize the bodychecking and fights do not really understand the game. Aggression is a basic human condition. It is natural for athletes to let off steam. Players may be upset by questionable calls, heckling fans, pressures of the game, or all three. NHL scouts and general managers constantly search for players who will do battle and come out the winner. Hockey can be mean and ugly. Games are often won in the corner when two big, strong players battle for control of the puck. If violence were eliminated, fan support would decrease and the game would suffer. There are enough rules, penalties, and disciplinary committees to punish those who use too much force. There is no need for criminal or civil action.

### On the Other Side

People who oppose violence in sports say that violent behaviour is learned and can be unlearned. At an early age, children who play hockey are taught how to bodycheck to get control of the puck. They see their heroes and role models involved in violent acts and want to copy them. Phrases like "taking him out" and "playing the man" are common. Players are expected to engage in fighting, resist backing down, and support team members who are involved in a fight. There is a fear that this learned violence will become part of the daily lives of children watching and playing the sport.

Fans who oppose violence in sports believe it overshadows the skills of the game. Fighting ruins the game and should be banned. They want criminal and civil action taken against those who use intentional violence. They point out that this type of violence taking place outside the game would be subject to criminal or civil action.





Steve Moore is taken off the ice on a stretcher after Todd Bertuzzi sucker-punched and seriously injured him during an NHL game in 2004. Is this "a natural part" of the game? Explain.

They propose large fines and lengthy—or even permanent—suspensions to deter athletes from engaging in violence.

## The Bottom Line

Efforts are being made to understand the nature of violence and deal with it effectively. Violence in sports is no exception. Sports clubs are being pressured to make and enforce tougher rules and penalties for violent behaviour in sports. The media are

moving away from sensational coverage of violence in sports. Failure to address the problem at the grassroots level could lead to government action to deal with it.

Some Canadians approve of violence in sports and consider it part of the game. Others feel that violence takes away from the game. In hockey, some violence falls within the rules, and the rest is penalized within the game. Society needs to consider which acts are outside the game rules and require legal action.

## What Do You Think?

1. List the differences between the criminal and civil remedies in the *Moore v. Bertuzzi* case.
2. How has the traditional attitude toward violence in sports changed?
3. Assume you are participating in a contact sport. Prepare an argument in favour of using violence in contact sports. Prepare a counterargument that supports criminal or civil action for acts of intentional violence during the game.
4. Should Todd Bertuzzi have been banned from playing hockey until Steve Moore is able to play again? Debate with a partner.
5. In your opinion, is violence in sports a reflection of violence in society? Explain.
6. Conduct an Internet search to find out the results of the mediation in this case or if it ultimately went to trial.

# Chapter Review

## Chapter Highlights

- Civil (private) law involves disputes between individuals or between individuals and organizations such as businesses or governments.
- Tort law, family law, contract law, labour law, and property law are examples of civil law.
- The main purpose of civil law is to compensate victims for harm or loss suffered.
- Small claims court provides a simple, inexpensive way to settle many civil disputes with a judge and no jury.
- The litigants (parties involved in a lawsuit) in a civil action are the plaintiff (the person suing) and the defendant (the person being sued).
- In civil actions, plaintiffs must prove their case on the balance of probabilities.
- Defendants who receive a claim may file a defence, make a payment into court, or make a counterclaim or a third-party claim.
- A pre-trial or settlement conference is a chance for the litigants to reach a settlement without a formal trial, and many cases are now settled this way.
- Class action lawsuits are brought on behalf of all members of a group with a common interest or grievance. They are becoming more common in Canada.
- There are five types of damages that may be awarded to a successful plaintiff: general, special, nominal, punitive, and aggravated damages.
- An injunction is a court order requiring a defendant to do or not to do something.
- Contingency fees allow greater access to justice for persons who cannot afford a lawyer, but they may be a gamble for the lawyer.

- Alternative dispute resolution (ADR) has become a practical and popular alternative to civil litigation.
- The three ADR models are negotiation, mediation, and arbitration.

## Check Your Knowledge

1. Outline the main differences between a civil and a criminal action.
2. Summarize the procedures used in a small claims action.
3. Explain the types of damages available for resolving civil disputes, and provide an example of each.
4. Summarize the remedies available to enforce a judgment against a defendant, and provide an example of each.
5. Outline the three types of ADR and when each might be used.

## Apply Your Learning

6. With a partner, discuss the meaning of the following quotation from former American Supreme Court Justice Sandra Day O'Connor:  
"The courts [of this country] should not be the places where resolution of disputes begin. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."
7. Create a detailed original civil action that involves a plaintiff suing a defendant. Your scenario must provide information that supports a claim for some of the types of damages discussed in this chapter. Share your scenario with a classmate. Have him or her identify the evidence that could support each particular damage claim.



8. As you have learned, juries in criminal trials must reach unanimous decisions, while juries in civil actions have to reach majority decisions. Provincial courts of appeal and the Supreme Court of Canada also reach split decisions. Should Canadian law be changed so that criminal trials with juries can reach majority decisions, too? Discuss with a partner, and be prepared to defend your position in class.

## Communicate Your Understanding

9. Collect at least five newspaper or Internet articles over a two-week period that discuss or describe civil actions, civil courts, damage awards, and any other issues studied in this chapter. For each article do the following:
- Summarize the article in your own words.
  - Highlight the issue(s) involved.
  - State and justify your opinion on the issue(s) discussed in the article.
10. Conduct an Internet search for background details on *Liebeck v. McDonald's Restaurants*, 1994 (see page 361 for more information about this case), and discuss both sides of the case. If you had been on the jury, how would you have decided the case? What amount of damages would you have awarded Stella Liebeck, if any? Could McDonald's avoid liability by increasing the size of its warning about the coffee's temperature? Discuss in groups, and be prepared to defend your position.
11. Conduct an Internet search to determine the status or what happened in any of the class action suits mentioned on pages 369–371. Prepare a short summary of the class action, highlighting the key arguments on both sides of the claim. Share your findings with your classmates, and compare the results of these actions. Were they successful and to what extent? If not, why not?

## Develop Your Thinking

12. Although the primary function of tort law is to compensate victims, some people feel that it also acts as a deterrent or a penalty. Using original examples from cases you have found in the news, describe two situations in which tort law serves both of these functions.
13. In small groups, conduct an Internet search, and examine the background of Aboriginal residential schools. Why did they exist? Who attended them? What happened to the thousands of students who attended them? (See also the timeline on pages 370–371.) Then examine the background of the class action lawsuit against the schools and the federal government. What was involved? What was the government's final resolution? Share your group's findings with other groups. Discuss how this happened and what can be done to prevent a recurrence of a similar tragedy.
14. Punitive damages function like fines in criminal law. How are they similar? How are they different?
15. Assume that you are involved in an accident that leaves you permanently disabled.
- What evidence would you bring forward to justify your claim for loss of future income?
  - How would such evidence differ for the following people: (i) a six-year-old child; (ii) a 45-year-old chief executive officer of a leading corporation; (iii) a single parent with an eight-year-old child.