

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – DECEMBER 2020

LAW 469.001
Civil Procedure

Adjunct Professors Greenberg and Mitretodis

EXAM PASSWORD: d2MuH5
RESUME CODE: ABB497

TOTAL MARKS: 95

(8:50 AM PST) **PREPARATION TIME ALLOWED: 10 MINUTES**

(9:00 AM PST) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 3 HOURS**

8:50-9:00 AM Preparation Time (Exam writing not permitted) – This time is given to students to download/print your exam questions once the exam has been made available online on Canvas, to read the Exam Password on this exam coversheet, to enter the Exam Password for the exam in Exemplify, and to progress in Exemplify until you see the **STOP SIGN**, where you will **WAIT until 9:00 AM. DO NOT proceed past the STOP SIGN. DO NOT begin typing your exam answers in Exemplify until 9:00 AM!**

9:00 AM Exam Writing Time – At 9:00 AM, you may proceed past the **STOP SIGN** in Exemplify and begin typing your exam answers. Students are required to calculate and monitor their own time for writing exams. All exam answer uploads will be monitored to ensure that typing of answers only occurred during the allotted Exam Writing Time.

This is an open book examination. You may have any class materials including *British Columbia Annual Practice*.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question. Do not email your professor or anyone else about this while the exam is in progress.

ACADEMIC INTEGRITY

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software. Students typing exam answers before or after the allocated exam writing time may receive a grade penalty.

CONFIDENTIALITY REGULATIONS – READ CAREFULLY

As this exam is being written off-campus and is unsupervised, any communication whatsoever (including, but not limited to in person, telephone, e-mail, text, social media, etc.) concerning the contents of this examination with anyone (other than the Student Services staff of the Allard School of Law) is strictly prohibited.

In the event any information comes to your attention regarding a breach of these regulations (by others, or inadvertently by you), please immediately contact Student Academic Services (studentservices@allard.ubc.ca) and make full disclosure.

A breach of these regulations may constitute student misconduct, and you may be subject to penalty or discipline under UBC's Academic Misconduct policies.

What Do I Do If:

- **I cannot access the exam questions on Canvas**

If you experience technical difficulties accessing the exam questions on Canvas, email studentservices@allard.ubc.ca and the exam questions will be emailed to you. Please provide your phone number when emailing Student Services.

- **I'm experiencing technical difficulties DURING THE WRITING of the exam**

If you experience technical difficulties with Exemplify at the very beginning or during an exam, you may attempt to solve your problem/reboot your computer **BY YOURSELF**. You are **STRONGLY** encouraged to spend **NO MORE THAN 5 minutes** attempting to do so. You will **NOT BE GIVEN ANY EXTRA TIME** to complete the exam. **If your attempt to solve the problem is unsuccessful**, or if you choose not to make such an attempt, you **MUST** immediately **begin hand-writing** your exam answers with pen on lined paper. **You may NOT type your exam answer in word-processing software.**

When you have finished writing the exam, you must upload the exam answers that you completed in Exemplify (if you are prompted for a Resume Code, it is on the coversheet of the exam questions). Email Bernie Flinn, flinn@allard.ubc.ca, for help with this. Please provide your phone number in the email. Bernie or another IT Support staff person will then help you to upload any answers that you typed in Exemplify.

You must also upload to Canvas your hand-written exam answers into the "Exam Answer File Upload (Word Processor or Hand-written ONLY)" folder. Scan or take a picture of each page (.jpg) of your exam and put them into one folder to upload.

Your answer file should be named, and the coversheet of your answers should be titled with:

Your Exam Code, Course Number, Name of Course, and Instructor Name

i.e., **9999 LAW 100.001 Law of Exam Taking – Galileo**

- **I'm experiencing technical difficulties EXITING and UPLOADING the exam**

If you experience any difficulty exiting and uploading your Exemplify exam answers, you must wait until the allocated time period specified on the coversheet of the exam has ended, then email Bernie Flinn, flinn@allard.ubc.ca, and he or another IT Support staff person will help you to upload your Exemplify exam file. Please provide your phone number in the email.

If you have approved accommodations to type your answers using Word Processing Software, and experience difficulties uploading your exam answer file to Canvas, email your exam answer file to studentservices@ubc.ca.

- **I fall ill in the middle of an exam, or am otherwise interrupted such that I'm unable to continue writing my exam**

Please stop writing, note the time that you stopped, and email studentservices@allard.ubc.ca immediately to notify them and discuss options. Please provide your phone number when emailing Student Services.

END OF COVER PAGES

After completing law school and articles you are now an associate in a small law firm in Vancouver.

Your firm specializes in representing local, life-sciences start-up companies. One of the firm's existing clients is Good Life Pharma Co. ("**Good Life**"). Good Life is a British Columbia company incorporated pursuant to the *BC Business Corporations Act*.

In January 2020, Good Life's President and Chief Executive Officer, Dr. Alia Gupta, ("**Gupta**"), shifted all of its research resources into developing a vaccine to combat the novel corona virus (the "**Virus**") that resulted in the COVID-19 pandemic (the "**Pandemic**").

Since then, Good Life has been part of a world-wide race with other research companies to develop, obtain approval for, produce, and market an effective vaccine against the Virus. In May 2020, Good Life began testing a potential vaccine it referred to as Corona Vaccine Gamma ("**Gamma**"). The initial results for Gamma were promising. In August 2020, Good Life began large scale testing of Gamma on a group of 40,000 subjects. Half the group were injected with Gamma, and the other half acted as a control group receiving a placebo of water.

In October 2020, the results of the testing for Gamma showed that it was 94.9% effective and had no significant negative side effects.

On October 15, 2020, Good Life publicly announced these results for Gamma and held a press conference. In the press conference, Gupta revealed that Gamma required only one dose to be effective, could be stored and transported at room temperature, and was expected to be available by injection or as a nasal spray. Gupta stated that Gamma was, "the most effective and convenient vaccine candidate developed so far". Gupta expressed her hope that Gamma would receive regulatory approval in 2020.

On October 16, 2020 Phazer Pharmaceuticals Ltd. ("**Phazer**"), a company incorporated in New York State, held a press conference to announce the results of testing on its vaccine named Warp Speed ("**Warp Speed**"). Phazer's President and Chief Executive Officer Dr. Will Berrow ("**Berrow**") publicly pronounced that tests showed Warp Speed was 95.1% effective, with side effects limited to occasional fever and fatigue. Berrow advised that Warp Speed must be stored at negative 70 degrees Celsius. During the press conference, Berrow stated, "Unlike the false claims that have been made by other companies about their vaccine candidates, Phazer's test results are genuine and reliable. As a result, Warp Speed is the only effective vaccine with any chance of being approved in 2020."

The same day, Gupta asked to meet with Myrna Elias ("**Elias**"), a partner in your law firm, to discuss the statements made by Berrow. Elias asks you to join the meeting which will be held online via Zoom.

Answer all of the questions below.

****NOTE: In each of your answers, make specific reference to any applicable legislation, *Supreme Court Civil Rules* (the “Rules”), case law, ethical obligations and rules of conduct. ****

- 7 Marks** 1. In your Zoom meeting, Gupta tells you and Elias that it is critical to Gamma’s success that there be public confidence in its testing process. As a result, she wants to move as quickly as possible to bring a claim on behalf of Good Life against Phazer, Berrow and anyone else who has repeated Berrow’s comments from the press conference. Elias suggests bringing claims in the torts of injurious falsehood and defamation.

Gupta instructs you and Elias to file a Notice of Civil Claim claiming injurious falsehood and defamation as soon as possible. During the meeting:

- (a) Gupta asks you what you would have to do to serve each of Phazer and Berrow, and how you recommend they be served? Phazer is incorporated and has offices in New York state, Berrow resides in London, England. Elias asks you to answer Gupta’s question assuming that the rules for service in New York and England are the same as British Columbia’s.
- (b) Gupta asks you how long Phazer and Berrow will have to file a response?
- (c) Gupta says that hundreds of people repeated Berrow’s false claims about Gamma on Twitter. She wants to know if it is possible to include claims against these Twitter users without knowing their identities, and if so, how would you do so?
- (d) She also asks, if you were able to include claims against the Twitter users and later discovered their identities, how might you bring these people into the action, and what would be the best way of doing so?

How do you respond to Gupta’s questions?

- 7 Marks** 2. You successfully serve both Phazer and Berrow with a Notice of Civil Claim. Within the required period for response you receive from counsel for Phazer, Rudy Jewelly (“**Jewelly**”) a Response to Civil Claim and a Counterclaim filed on behalf of Phazer. You also receive from counsel for Berrow, Jenna Mellis (“**Mellis**”) a Response to Civil Claim filed on behalf of

Berrow, as well as a filed Third Party Notice claiming against TheraLabs Ltd. (“TheraLabs”) the company that performed the testing on Gamma.

The Phazer Counterclaim is brought against both Good Life and Gupta personally. It alleges that Good Life and Gupta conspired together to make defamatory statements and injurious falsehoods against Phazer in their October 15, 2020 press conference.

The Third Party Notice from Berrow alleges that if TheraLabs had performed and reported the testing of Gamma properly, Berrow would not have called the results false and Good Life would have avoided the negative effects of those statements.

Elias asks you:

- (a) Whether Berrow’s Third Party Notice is proper, and if not, what if anything can you do about it?
- (b) If Berrow’s Third Party Notice is proper, what steps must Berrow take to make it effective?
- (c) Can Phazer bring Gupta into the action through a Counterclaim, and if so what steps must Phazer take to make the Counterclaim effective against Gupta?
- (d) If the Counterclaim is made effective against Gupta, what steps should she take and when must she take them?

How do you respond to Elias?

8 Marks 3. Pleadings have now closed and Phazer, Berrow, Good Life and Gupta are all parties to the action. Each has pleaded that the statements made in their respective press conferences were true. For a number of reasons, TheraLabs has not been made a party to the action despite Berrow’s Third Party Notice.

Elias asks you to work with Gupta to prepare a list of documents for both Good Life and Gupta. You have another Zoom meeting with Gupta to discuss document disclosure. Gupta poses the following questions to you:

- (a) Gupta tells you that following the Phazer press conference she sent emails to the research team members at TheraLabs to ask about the allegations that the test results were false. She received emails back from TheraLabs verifying the test results, with the caveat that the test results might contain undiscovered errors in the data. Gupta tells you that when the litigation started she “double deleted” her emails and the TheraLabs responses, and they are no longer retrievable by her.

She asks what, if anything, you will do in regard to these deleted emails?

- (b) Gupta asks whether there is any way for Phazer or Berrow to obtain these emails from TheraLabs if they have not deleted them, and if so, what are the chances that they could obtain the emails from TheraLabs?
- (c) Gupta tells you that she has an email dated October 14, 2020, from in-house counsel for Good Life that provided “talking points” for her October 15th press conference. The email suggested phrases for Gupta’s description of the advantages of Gamma so that they would have as much positive effect on Good Life’s share price as possible, while being as accurate as they could be. Gupta asks if this email must be disclosed and provided to Phazer and Berrow?
- (d) Gupta has a spreadsheet tracking Good Life’s average daily share price after the Phazer press conference that was prepared by Good Life’s chief financial officer in November 2020 to help Good Life assess the damages caused by Phazer’s statements. Gupta acknowledges that the share price is publicly available, but asks if the spreadsheet must be disclosed and provided to Phazer and Berrow?
- (e) Gupta has the full research report from TheraLabs which was the basis for the statements she made in her October 15th press conference. She tells you that the report includes trade secrets about how Gamma was produced. She advises she will not agree to provide that part of the report to Phazer as a competitor, as she is concerned that they will just provide the information to their own scientists to replicate Gamma. She asks whether she can provide the report with the business sensitive parts excluded?

How do you respond to Gupta’s questions?

10
Marks

- 4. Following completion of document disclosure, Elias writes to all parties to schedule examinations for discovery and to ask Phazer to identify a representative to be examined. Jewelly responds stating that Phazer nominates Berrow to be examined. Elias asks you whether you can obtain Phazer’s VP of Vaccine Research and Development, Danny Beema (“**Beema**”), as the representative for Phazer instead, given that you will already examine Berrow as a personal defendant to the action.
 - (a) Can you examine Beema instead of Berrow as the corporate representative for Phazer?

- (b) If you cannot examine Beema as the corporate representative for Phazer, can you conduct two 7-hour examinations for discovery of Berrow (one examination of him as CEO of Phazer and one examination of him as a personal defendant)?
- (c) Assume you are unsuccessful in obtaining Jewelly's agreement to examine Beema as the corporate representative of Phazer and Elias decides to proceed with the examination of Berrow as representative for Phazer. At the examination for discovery, it turns out that he is unable to answer a significant number of questions because he is not knowledgeable about the efficacy and side effects of the vaccine Warp Speed. What options are available to you to obtain the evidence you need?
- (d) Further, during the course of your examination for discovery of Berrow as the representative of Phazer, Jewelly repeatedly objects to your questions and interrupts the flow of your discovery. What recourse is available to you?
- (e) This action aside, in your view is it always desirable, proportional and helpful to conduct an examination for discovery in every case?

8 Marks 5. Elias asks you to consider sending Phazer interrogatories.

- (a) What must you do to obtain interrogatories?
- (b) What use can you make of interrogatories here and what benefit would there be in obtaining interrogatories in this case?
- (c) Should you seek to obtain interrogatories in this case prior to conducting examinations for discovery or afterwards, and why?
- (d) What is the permissible scope of interrogatories?

8 Marks 6. Gupta wants you to pursue a deposition of the Chief Medical Officer for Phazer, Rachelle Schetty ("**Schetty**"), who is located in New York state and refuses to testify at trial. Phazer will not consent to a deposition. Elias asks you to bring an application for the deposition of Schetty.

- (a) How can you get Schetty's evidence admitted at trial?
- (b) In support of your application, you plan to provide an affidavit by Elise Kooney ("**Kooney**"), the Chief Medical Officer of Good Life. Is Kooney permitted to include hearsay evidence in her affidavit?

- (c) Kooney and you work together on preparing her affidavit. Kooney wants to include the following statements in her affidavit:
 - (i) Kooney's opinion on whether the legal elements to establish defamation have been satisfied; and
 - (ii) communications with Good Life's in-house counsel.

Do you include these statements? Why or why not?

- (d) You file and deliver the affidavit of Kooney. Jewelly then brings an application to cross-examine Kooney. Does Jewelly have a right to cross-examine Kooney? If not, what test will the court consider in determining whether to grant the cross-examination?

6 Marks 7. Gupta tells you and Elias that she wants to force Twitter to take down the posts about Berrow's false claims about Gamma.

- (a) Can you bring an application against Twitter to remove the posts?
- (b) Is this type of application within the jurisdiction of a master or a judge?
- (c) What type of undertaking is your client required to make in bringing this type of application?

6 Marks 8. Elias asks you to retain an expert to prepare a report on the efficacy and side effects of Gamma.

- (a) Generally speaking, what are two potential grounds of attack from opposing counsel that you need to be aware of when working with an expert to prepare their report?
- (b) When does the report need to be served on the other parties?
- (c) Under what circumstances can the expert testify at trial?

8 Marks 9. Elias has delivered an opinion to Gupta assessing Good Life's chances at trial. Elias has concluded that Good Life will likely succeed in a claim for the tort of injurious falsehood against Phazer and Berrow, with them being characterized as concurrent, not true joint tortfeasors. Elias has valued the

likely damage award at \$10,000,000 in total, and concluded that Good Life and Berrow will likely each be allocated 50% of the liability.

Elias has received an informal offer to settle from Berrow (not made pursuant to Rule 9-1). The offer states that Berrow has substantial personal debts, and currently has assets of only \$100,000. The offer is for Berrow to pay Good Life the full \$100,000 in exchange for a “*BC Ferries*” type settlement agreement. The offer goes on to state that if a settlement is not reached on these terms, Berrow’s funds will likely be used up in defending the claim leaving Berrow unable to pay any damages.

Elias tells you that separate and apart from the written offer to settle, Mellis telephoned her to say that she had secretly recorded on her iPhone the legal strategy discussions she had with Jewelly over the past few weeks. Mellis told Elias she would provide these recordings which would give insight into Phazer’s defence strategy if the settlement offer is accepted.

Elias asks you:

- (a) What is a “*BC Ferries*” settlement agreement, and what specifically would it require Good Life to do to implement it?
- (b) Should Good Life accept this offer, and why or why not?
- (c) What should she do about the offer to provide the recorded discussions?

How do you respond to Elias’s questions?

- 7 Marks** 10. Fast-forward to the year 2025. The Gamma vaccine was widely distributed to Canadians in 2021 and 2022. By the year 2024, some Canadians attributed chronic headaches as a side effect of Gamma. A proposed class action is filed against Good Life on behalf of all Canadians who developed chronic headaches after taking Gamma
- (a) What are the criteria the plaintiff needs to meet to certify the action as a class action?
 - (b) What considerations could come into play in determining whether a class proceeding is the preferable procedural vehicle for this action?
 - (c) In your view, are class actions an effective means of obtaining justice against large corporations?

**20
Marks**

11. Discuss:
- (a) the meaning and importance of Rule 1-3 on the conduct of civil litigation in British Columbia;
 - (b) whether the Rules do or do not achieve the objectives set out in Rule 1-3(1), and why or why not;
 - (c) any revisions, additions or deletions you would recommend be made to any of the Rules to better achieve the objectives set out in Rule 1-3(1), or if you would not recommend any changes to the Rules, explain why not; and
 - (d) do the Rules need to be made more inclusive, particularly in respect of Indigenous people, and if so, how?

Include in your discussion reference to specific examples, cases and Rules where appropriate.

END OF EXAMINATION