

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

FINAL EXAMINATION – APRIL 2021

LAW 435C.001
Personal Injury Advocacy

Professors Marc A. Kazimirski / Sandra L. Kovacs

EXAM PASSWORD: cXy837
RESUME CODE: B133A2

TOTAL MARKS: 100

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

(9:00 AM PDT) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 3 HOURS 20 MINUTES**

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, meaning that you can and should refer to class notes, cases, statutes, and other class readings.

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@allard.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.

SECTION 1 - HYPOTHETICAL 80 Marks

QUESTIONS IN SECTION 1 RELATE TO THE FOLLOWING HYPOTHETICAL FACT PATTERN.

Bill Gambini, a second year UBC Law student, is the proud owner of a metallic, mint-green 1964 Buick Skylark convertible.

Stan Rothenstein is over-educated and unemployed. Stan completed a Bachelor of Psychology degree at UBC. Stan was feeling burned out in the last few years of his studies and his grades deteriorated in his third and fourth years. By his last year of undergrad, Stan was feeling anxious and moderately depressed. After completing his degree, Stan decided to take a break from his university studies to teach yoga. Having benefited from two years of yoga and meditation, Stan was feeling ready to go back to school. He was considering a graduate degree in psychology or possibly applying to medical school. Stan is the son of Dr. David Rothenstein, a renowned neurosurgeon.

On April 1, 2020, Bill and Stan are on a road trip in the sunny Okanagan, cruising along in Bill's Skylark. Bill's car insurance on the Skylark expired on March 30, 2021 - he was so excited about their planned road trip that he forgot to renew his policy. They decide to stop at a convenience store to buy a can of tuna. They share a deep love for this healthy road trip snack.

Bill and Stan leave the convenience store parking lot and enter the highway. They are headed westbound and there are two lanes in their direction of travel. The speed limit is 90 km/h. It is evening. The sun is bright on the horizon. Bill lowers his visor to shield his eyes against the glare of the sun. Bill comments that he wished he had brought his Ray-Ban wayfarer sunglasses. Neither Bill nor Stan are wearing seatbelts since the Skylark is not equipped with them.

As they travel westbound on the highway in the fast (left) lane, at 110 km/h, they come upon a metallic pink 1963 convertible Pontiac Tempest, traveling at approximately 100 km/h in the slow (right) lane. Bill slows (by 10 km/h) to have a better look at the Tempest. He admires the taillights and is approximately one car-length behind the Tempest in its blind spot. Bill pulls out his iPhone camera and takes a photo of the Tempest.

Elle Woods is the proud owner and driver of the Tempest. Firmly believing she could never do any wrong, she purchased only the minimum liability insurance available from ICBC, \$200,000. She is also enjoying a road trip in the sunny Okanagan. She has her faithful companion, Bruiser, a Chihuahua, sitting beside her in the passenger seat. Both she and Bruiser are properly restrained with custom fuzzy-pink seatbelts.

Elle has been a lawyer for eight years and established herself as one of the top sole-practitioner criminal defence lawyers in BC. Early in her career, Elle worked at one of the biggest law firms in the country (BIG Law) but left after she was sexually assaulted by one of the senior partners. She complained to the managing partner who disregarded the allegations and told her to "toughen up". Elle struggled after leaving the firm and developed posttraumatic stress disorder symptoms arising from that terrible experience. By participating in a rigorous trauma counselling program, Elle learned to manage her symptoms. She is now thriving in her legal practice. Elle has plans to grow her solo defence practice to build an all-female criminal defence powerhouse law firm, called "Pink Law". She has already planned the décor for the office: it will be all different shades of pink with lots of faux fur accents.

Approximately 300 meters ahead of Elle's Tempest in the slow (right) lane is a "Super B Train" combination commercial vehicle, operated by Arnold Schwarzenegger. Arnold works for Terminator Trucking Inc. He is carrying a heavy load of fuel. He is traveling at only 50 km/h, well below the speed limit, but his hazard lights are not activated.

Bill and Elle are quickly catching up to Arnold near the top of a hill, after which there is a steep downgrade of 8%. The road is dusty from the sand on the side of the highway. When Arnold drives over the crest of the hill, he suddenly sees what he thinks is a deer on the right side of the highway. Arnold is concerned the deer will run out into the highway so he slams on his brakes. As Arnold's truck skids down the dusty road, Arnold realizes it was not a deer he saw, but rather a large sign advertising the release of the upcoming animated movie, "Bambi II: Thumper's Revenge". Arnold sighs, laughs at himself for misperceiving the sign and continues to drive to his destination.

When Elle drives over the crest of the hill, she sees Arnold's truck with its brake lights illuminated and slowing rapidly. Elle makes a split second decision that she will not be able to stop in time before she rear-ends Arnold's truck. Elle briefly checks her side view mirror, sees nothing, turns on her left signal, and starts to make a lane change into the left lane.

As Bill is taking a photo of the Tempest, he notices its left turn signal illuminate and that it starts veering to the left. Bill drops his iPhone, slams on his brakes and yanks his vehicle to the left to avoid what he believes will be an imminent collision with the Tempest. He loses control, and the passenger side of the Skylark – exactly where Stan is sitting – collides with the rear of the Tempest. Bill's Skylark is sent flying after the impact with Elle's vehicle. The Skylark flips and comes to rest upside-down, in the middle of the highway. Unrestrained, both Bill and Stan are thrown from the Skylark.

Elle maintains control of the Tempest and is able to pull over to the side of the road. Elle has a panic attack at the scene. She calls 9-1-1; she is frantic when speaking to the dispatcher.

Jerry Maguire is driving westbound on the highway in his 1965 red convertible Chevrolet Corvette. He did not see what happened in the moments before the collision because he had not yet crested the hill. He pulls over behind Elle's Tempest and runs to Stan's aid. He too calls 9-1-1. He tries to talk to Stan but Stan drifts in and out of consciousness. He stays at the scene and he submits to a recorded RCMP interview. Jerry also speaks with Elle at the scene. Jerry asks if she is doing ok and offers to watch Bruiser while Elle is being assessed by the paramedics. Elle is grateful for Jerry's help. They have a brief chat at the scene and discover that they are both lawyers. Jerry gives Elle his business card, which states "Jerry Maguire, Super Agent."

Arnold does not even know a collision has occurred behind him and he continues driving westbound on the highway. A witness to the collision manages to jot down Arnold's personalized license plate number, "IL B BAK."

The RCMP attend at the scene to take photographs, gather components from the debris field, and take measurements. First responders' vehicles have driven all over the sand at the scene; there are tire marks everywhere.

Bill suffers from severe neck pain after the collision and has numbness and tingling radiating down his arms. An MRI reveals pre-existing degenerative disease in his cervical spine and a disc bulge at C4-5. Fortunately, Stan is able to arrange an expedited appointment for Bill to see his super-surgeon dad, Dr. Rothenstein, who tells Bill that surgery is required. Dr. Rothenstein performs the

surgery and, after a couple of weeks in hospital, Bill's pain improves dramatically. Unbeknownst to Bill, Dr. Rothenstein only removed the disc and did not fully fuse the vertebrae. Bill stoically returns to school in the fall to complete his third year of law school, but his neck pain symptoms return, and his now chronic and constant neck pain limits his ability to sit in class and study. His prognosis is poor; his pain is permanent and expected to only worsen with time. Despite his pain, he still manages to land his dream job at BIG Law (the same national firm where Elle was assaulted), but he struggles to keep up with the billable hour demands.

Stan fares worse than Bill. He is unconscious at the scene for several minutes. He is later diagnosed with a moderate-to-severe traumatic brain injury. He spends months in hospital followed by a prolonged stay at GF Strong for rehabilitation. He continues to experience profoundly disabling symptoms including blurred vision, light and noise sensitivity, word finding difficulties, ringing in his ears, constant headaches, low mood, irritability, and sleep problems. Stan moves back in with his dad. He stops teaching yoga and abandons his plans to go back to school. He sleeps all day with the curtains drawn. He falls into a deep depression, he starts to self-medicate with alcohol, and he has suicidal thinking. He refuses to get psychiatric help despite his dad recommending he do so.

Elle has nightmares and recurring, intrusive thoughts about the collision. Sometimes her dreams and intrusive thoughts also involve the senior lawyer who harassed her at BIG Law. She has frequent panic attacks at her desk. Elle's sleep suffers and her productivity at work declines.

Bill's cousin "Vinny" Gambini is a personal injury lawyer. Vinny has had some problems with the Law Society because he has a history of taking as many clients as possible and there have been a number of instances where the Law Society found that Vinny was in a conflict of interest by acting for the driver and passenger in the same vehicle in contentious liability cases. Vinny has learned from this and he quickly realizes he would be in a conflict to act for Bill and Stan. Vinny decides to refer Stan out to KazLaw for legal representation, but he takes on Bill's case, both as plaintiff's counsel and as defendants' counsel, since Bill is uninsured by ICBC.

KazLaw files a Notice of Civil Claim to commence the legal action for Stan. The Notice of Civil Claim names Elle Woods, Arnold Schwarzenegger, and Terminator Trucking Inc. as defendants. KazLaw advises Stan that Bill should also be included as a defendant but Stan does not want to "sue" his friend (because he knows that Bill does not have insurance) but he will think about it. Vinny files a Notice of Civil Claim for Bill and names the same defendants listed above.

Elle Woods notifies ICBC of the actions against her and ICBC appoints defence counsel for her. Elle is also thinking about consulting a separate plaintiff's counsel to consider bringing her own action for her psychological injuries and losses arising from the crash.

You should assume all court actions are filed in British Columbia and that the actions are subject to the BCSC Civil Rules of Court and BC legislation. If you need to make any additional factual assumptions in answering a question, clearly state what those assumptions are.

Value/Time

2 Marks

QUESTION 1

(3.5 minutes)

Why is Vinny in a conflict to take on Stan's case?

4 Marks

QUESTION 2

(11 minutes)

Why does Stan's notice of civil claim name Arnold Schwarzenegger and Terminator Trucking Inc. as defendants? Why is it important to name these defendants?

2 Marks

QUESTION 3

(3.5 minutes)

Can Bill argue the defence of 'agony of the collision'? Why / why not?

8 Marks

QUESTION 4

(14.5 minutes)

Stan agrees to add Bill as a defendant. What particulars of negligence would you allege against Bill? Please cite the relevant sections of the *Motor Vehicle Act* that apply to the claim against Bill.

If Stan decides to settle with Bill and only Bill before trial for \$1, but continue his action against the other defendants, how can that settlement be achieved, and how will that settlement impact the trial judgment, if at all?

6 Marks

QUESTION 5

(11 minutes)

You are a lawyer at KazLaw and you are the lead counsel taking Stan's case to trial on damages only. What evidence do you plan to lead at trial to prove Stan's injuries and damages? Explain the value of each piece of evidence you identify.

8 Marks

QUESTION 6

(14.5 minutes)

You are a top-notch personal injury lawyer in downtown Vancouver. Elle Woods comes to see you for advice about bringing a claim for her psychological injuries arising from the collision. What advice do you give her about potential causation issues in her case and/or her damages claim generally?

6 Marks

QUESTION 7

(11 minutes)

Elle decides to file an action for her own injuries and damages arising from the collision. The defence lawyer in her action is applying to court for production of pre-accident counselling records following Elle's earlier sexual assault. Elle does not want the counselling records to be disclosed and she has instructed you to oppose the application.

What rule is the application brought under?

What arguments do you make in opposing the application in chambers?

2 Marks

QUESTION 8

(3.5 Minutes)

You are Elle's plaintiff's lawyer. Do you have a basis to claim punitive damages against Bill Gambini and, if so, on what grounds?

10 Marks

QUESTION 9

(18 minutes)

Mona Lisa Vito is an expert hired by ICBC on behalf of Elle Woods as defendant. Ms. Vito is frequently hired by ICBC; she is never retained by plaintiff's counsel. She writes the following report served by ICBC at the 84-day mark before trial:

Qualifications

*While I am not a qualified professional mechanical engineer, I have **LOADS** of experience with cars because both my dad and my brother are auto mechanics. I worked on cars with them throughout my teen years. I am an encyclopedia of knowledge when it comes to classic cars and their performance characteristics.*

Factual Assumptions

I am instructed to assume the following facts are true:

- 1. Elle Woods was driving the Tempest in the slow lane westbound on the highway, at 90 km/h.*
- 2. Bill Gambini was driving the Skylark westbound in the fast lane at 100 km/h.*
- 3. The speed limit on the highway is 90 km/h.*
- 4. Ms. Woods was slowing her vehicle due to an obstruction ahead, namely a slower-moving unidentified Super B tractor-trailer combination vehicle with its hazard lights deployed.*
- 5. A collision occurred between the Tempest and the Skylark at approximately 7:30 p.m. on the evening of April 1, 2021.*
- 6. The cops' photographs and analysis of the tire marks at the scene are 100% correct.*
- 7. I believe Elle (because she is VERY credible) that she did not cut off the Skylark or encroach on the Skylark's lane, and the Skylark simply collided with the rear of her vehicle, without any provocation by her.*

Opinion

I have reviewed the photographs of the accident scene taken by the cops.

The '64 Skylark and the '63 Tempest were both manufactured by GM and would leave similar tire marks. But, the Tempest had positraction and the Skylark doesn't.

Positraction is a limited slip differential which distributes power equally to both the right and left tires. The '64 Skylark had a regular differential, which, anyone who's been stuck in the mud knows, you step on the gas, one tire spins, the other tire does nothing. There's more! When the left tire mark goes up in the photograph, the right tire should tilt out and ride along on its edge. But that didn't happen here. The tire mark stayed flat and

even. The car that left this tire mark had an independent rear suspension. Now, in the '60s, there were only two other cars made in North America that had positraction, and independent rear suspension, and enough power to make these marks. One was the Corvette, and to my knowledge, there was no Corvette on scene. The other involved vehicle had the same body length, height, width, weight, wheelbase, and wheel track as the '64 Skylark, and that was the 1963 Pontiac Tempest.

The tire marks left in the sand at the scene therefore allow me to conclude, irrefutably, that the Tempest travelled straight and stayed within its own lane, the curb lane, in the moments before the collision.

You are Vinny Gambini and you represent Bill Gambini.

What should you do when you are served with Ms. Vito's expert report before trial, and how do you challenge the admissibility and the weight of her opinion at trial?

8 Marks

QUESTION 10

(14 minutes)

Vinny Gambini makes the following brief opening statement at a liability-only trial, after Elle Woods' plaintiff's lawyer makes his opening statement: "Yeah, everything that guy just said is bullshit... Thank you."

Elle's lawyer stands up and objects to Mr. Gambini's opening on grounds it is pure argument. The objection is sustained and Mr. Gambini is chastised by the trial judge.

If you had an opportunity to mentor Vinny Gambini, how would you help him to redraft his opening statement on behalf of Bill?

5 Marks

QUESTION 11

(9 Minutes)

You are the trial judge in Bill's damages-only trial for his claim arising from the collision. What award will you make for his non-pecuniary damages and why?

4 Marks

QUESTION 12

(7 minutes)

You are Stan's lawyer at KazLaw. Is he contributory negligent and why is it important to avoid having him be found contributory negligent?

3 Marks

QUESTION 13

(5 minutes)

Does Elle Woods have a viable tort action against BIG Law for the senior partner's sexual assault? Would she be entitled to any punitive damages as against BIG Law?

8 Marks

QUESTION 14

(14.5 minutes)

You are Stan's lead trial lawyer at KazLaw. Draft your closing argument for only his claim for lost future earning capacity.

4 Marks

QUESTION 15

(7 minutes)

Bill is suing Elle for damages arising from the collision. Elle's evidence at her examination for discovery was that she was travelling at 110 km/h. At trial she says it was 90 km/h, and that she is 100% confident in her recollection because she looked at her speedometer in the moments before the collision.

At trial, Elle's defence lawyer calls Jerry Maguire as a witness. Elle and Jerry stayed in touch after the collision and became good friends. Jerry feels like Elle's friendship "completes him". At trial, Jerry testifies that he witnessed the collision in its entirety. He says Bill was travelling at an outrageously high speed before the collision. He says that Elle was traveling at a safe speed and that she took all necessary precautions before changing lanes, including engaging her left turn signal and checking her blind spot.

Advise Vinny on how he should cross-examine Elle and Jerry about the collision?

SECTION 2 – ESSAYS 20 Marks

10 Marks Each (18 minutes each)

Answer only TWO of the three following policy questions:

- A. Should defendants' insurers be permitted to surveil plaintiffs in personal injury actions?
- B. Is tort reform, specifically in the form of a 'no fault' system for motor vehicle collision injuries, necessary, fair and just for British Columbians?
- C. Should juries and judges be privy to all evidence, even if it is emotionally sensitive or inflammatory?

END OF EXAM