

THIS EXAMINATION CONSISTS OF **5 PAGES**

PLEASE ENSURE THAT YOU HAVE A COMPLETE EXAMINATION

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

FINAL EXAMINATION – APRIL 2022

LAW 241.004
TORTS

Professor Gordon Christie

TOTAL MARKS: 100

TIME ALLOWED: 2 HOURS AND 45 MINUTES
PLUS 15 MINUTES READING TIME
[3 HOURS TOTAL]

- NOTE:
1. This is an open book examination. Students are allowed to bring in all materials, except for library books. Communication devices (mobile phones, etc.) are not permitted, and should be turned off and out of sight.
 2. This exam has two sections. You must answer fully the fact-pattern question, but are expected to answer only 2 out of the 4 questions provided in the short-essay section.
 3. You have 15 minutes at the beginning of the exam to read the questions and write notes in an exam booklet that is NOT to be marked. (Please write “Notes” on the front of this exam booklet.) You are not allowed to type in Exemplify or write your answers in an exam booklet during the 15 minutes reading time.

THIS EXAMINATION CONSISTS OF TWO SECTIONS

Section One: One question, 70 points total

In the early morning hours of March 11th, Harriet and Franko were both seriously injured in an accident just east of Chilliwack, as the 2010 Toyota Tercel they were in, as they headed west toward their home in Surrey, veered into the other lane of traffic and struck a van heading east. About 4 hours earlier – at about 3AM – the two had left Kelowna, at that point with Franko behind the wheel. Partway back, at Merritt, they had pulled into a gas station, picked up some heavily caffeinated drinks, and switched roles. At the time of the accident, then, Harriet had been driving, and she admits that she fell asleep at the wheel. Franko had also been asleep, with his passenger seat reclined as far as it would go (though he was buckled in).

The evening before the two of them had been parked in a laneway close to downtown Kelowna when RCMP officers had investigated their goings-on, and had found in their vehicle a small quantity of drugs and an envelope filled with cash. For the next 4 hours the two had been detained at the local RCMP detachment, charged with possession of drugs for the purpose of trafficking. While detained, the officers on duty did not run a check on the driver's licence status of either Harriet or Franko – had they done so they would have found that Harriet had had her licence suspended 2 months ago due to her driving without auto insurance.

At just before 3 in the morning the two had been released from the Kelowna detachment on a promise to return, with conditions. The keys to the Tercel had been handed to Franko and the two had been warned not to stay any longer than necessary in the downtown Kelowna area.

The officers had seized Harriet's phone when searching the car, and though Harriet had asked for it back the officers on duty had kept it as evidence. On the phone was a number for a friend in Kelowna that Harriet and Franko knew they could stay with. Harriet claims that she asked the officers if she could just look at her phone to retrieve this number, but that that request was also denied. The officers dispute this point, saying that she never mentioned needing to find a number on the phone. In addition to the phone, most of the money Harriet and Franko had had with them – about \$1000 – had also been seized, money which Harriet says she told the police she had with her to deliver to her mother living in an assisted-living home in Vernon, what Harriet had said had been the final intended destination for their trip (they claimed they had stopped in Kelowna just to rest up before the final drive to Vernon, about 45-minutes north). The police also dispute having been told about the purported purpose behind having this much cash in-hand (which they say they would not, regardless, have accepted at face-value).

Without the phone and not knowing the number for the friend (and with most of their money seized as well), the two decided they had no option but to try to make the 4 hour+ drive back to Surrey.

The van they hit was being driven by Archie, on his way to pick up some workers for a blueberry farm operation that he worked for doing odd jobs (including transporting field-workers). Archie was the most seriously injured of the three involved in the accident – he suffered breaks to both his femur bones, a broken collarbone, and one collapsed lung. About a week after the accident, recovering in Chilliwack Regional Hospital, Archie was visited by Mariya, a long-time friend and a constable in the Chilliwack division of the RCMP. Mariya

told Archie about 'water cooler chat' in the detachment about the accident, talk about how Harriet and Franko were two drug-addicts, on the road almost certainly "high as kites" after having bought and sold drugs in the interior.

Besides his day-work for the blueberry farm, Archie is also an aspiring politician. With a local municipal election coming up in just a few weeks he took this opportunity to post some statements about the incident to his online 'election-platform' page (which at this point is a Facebook page, open to the public). Under the heading "Scum of the Earth", he posted about an accident that had taken place a week earlier, caused by people "blasted out of their minds". These people, he argued, had no right to any sort of free health care or support to deal with their injuries – hospitals, he argued, "should turn such trash away if they show up at an Emergency Room after maliciously injuring innocent, hardworking taxpayers." Only people who paid into the health care system and who were upstanding citizens should be able to access free care – all others, he argued, should either be turned away or required to pay upfront the full costs of whatever care they were to receive.

Franko worked at a federal penitentiary in Abbotsford, and had called into work the day after the accident to ask for medical leave, noting that he had been involved in a serious car accident. His supervisor, Abigail, lives in Chilliwack and had been avidly following the upcoming municipal election. She came across Archie's Facebook page post and put things together, realizing that Franko had been one of the people in the vehicle that had struck Archie. While Franko was still in the hospital waiting discharge Abigail spoke with him about the accident and confirmed that he had been in the Tercel that had struck Archie. The next day she had Human Resources at the penitentiary prepare a notice of termination for Franko – "we can't have any drug addicts or drug peddlers working in this environment!" she had said to the Human Resources supervisor.

Chapter 19.3 of the *RCMP Operations Manual* addresses guarding prisoners and personal effects. Section 1.3 provides as follows with respect to release of prisoners:

1.3 The RCMP is responsible for the well-being and protection of persons in its custody. Where appropriate, prisoners will be released to a responsible individual and not into an adverse environment.

You are a junior lawyer at a law firm in Chilliwack. A senior lawyer in your firm has asked that you take the account provided as if it makes up a set of facts and write a memo exploring all the ways all the various parties involved in this unfolding story might be able to use actions within areas of the law of torts to seek compensation for harms they may have suffered. You have been asked to limit your analysis to possible actions under negligence and defamation, and to disregard criminal law and employment law issues that might arise. You have also been asked to indicate where more information is essential for a complete legal analysis to be carried out. Please write the memo.

Section Two: 30 points total (15 points for each answer)

Answer **2 (two)** of the following 4 (four) questions. If you answer more than two and do not indicate which you wish to have graded, I will grade the first two that you answered – so, be careful to answer only two, or clearly indicate which two answers you wish to have graded!

1. In *Hollis v Dow Corning Corp.*, (1995) 4 S.C.R. 634, the Supreme Court of Canada decided that in the context of cases involving alleged negligence of the manufacturer of a dangerous product in not adequately warning of material risks, the matter of causation (whether the plaintiff was injured as a result of this negligence) should be addressed through the application of a subjective test. The Court quoted with approval a passage from *Buchan v Ortho Pharmaceutical (Canada) Ltd.* (1986), 12 O.A.C. 361 (ONCA):

The manufacturer has put a product on the market without proper warning. The likelihood that the consumer will take the drug without knowledge of its potential risks is a foreseeable consequence of the breach of the duty to warn. Whether the particular consumer would have taken the drug even with a proper warning is a matter to be decided by the trier of fact on all of the relevant evidence. . . . In my opinion, it was open to the trial judge, viewing the evidence as he did, to credit the plaintiff's testimony that she would not have taken the pill had she been told of the danger of stroke, and to determine the causation issue accordingly. Whether a so-called reasonable woman in the plaintiff's position would have done likewise is beside the point.

Do you think it is proper to assess causation in this sort of case through a subjective test? What sorts of concerns might someone have about taking such an approach? Do you think that given how the Court constructed the approach in *Hollis* these sorts of concerns are adequately addressed? Be sure to explain and defend your answers to these questions.

2. In *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, the Supreme Court of Canada, as it considered whether a duty of care might be found that would impose a legal obligation on Maple Leaf Foods in relation to the franchisees of Mr. Sub, ultimately put great weight on the availability of alternate means of allocating risks:

In sum, under the *Anns/Cooper* framework and its rigorous proximity analysis, the determination of whether a claim of negligent supply of shoddy goods or structures is supported by a duty of care between the plaintiff and the defendant requires consideration of “expectations, representations, reliance, and the property or other interests involved”, as well as any other considerations going to whether it would be “just and fair”, having regard to the relationship between the parties, to impose a duty of care. *In particular, where the parties are linked by way of contracts with a middle party that, taken together, reflect a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent that allocation by way of tort claims. Courts must ask: is a party using tort law so as to circumvent the strictures of a contractual arrangement? Could the parties have addressed risk through a contractual term? And, did they?*

Why does the Court think that an investigation into the availability of contracts should arise the midst of determining whether a duty of care in the law of torts exists? What do you think are the 'policy' reasons behind this approach (that is, what do you think animates the reasoning here – what are the extra-legal concerns that the Court has in mind as it goes about making it less likely that parties can use the law of torts in these sorts of business contexts)? Do you agree with these sorts of reasons? Why or why not? Be sure to explain and defend your answer.

3. Imagine that three companies all produce a product P that requires the use of chemical X in its production. Imagine that this chemical is so toxic that exposure to just one molecule of it is sufficient to lead to serious neurological damage, a kind of neurological damage that only comes from exposure to chemical X (which is only present in the environment during the manufacturing of product P – once product P is manufactured chemical X is embedded in the product and is rendered harmless). Imagine that Sarah has worked in all three of the factories run by these three companies, each time for a period of exactly one year. In all three factories there were lax safety measures, and Sarah has evidence that indicates that in all three periods during which she was working at the three factories there were an equal number of opportunities for her to be exposed to chemical X. It is physically impossible to determine at which time she was exposed to chemical X – it could have happened in any of the three periods she was working for the three companies (or during two of the periods, or even possibly during all three periods – but recall that exposure to only one molecule is required in order to come down with the neurological problem).

Do you think the 'robust and pragmatic' approach advocated in *Snell v. Farrell*, (1990) 2 S.C.R. 311, would lead to a just and fair determination of causation in this situation? Do you think the alternate approach laid out in *Clements v. Clements*, (2012) 2 S.C.R. 181, would lead to a just and fair determination? Do you think it might be necessary to come up with a third alternative (if so, explain what this would be)? Whatever your response, be sure to explain and defend your answer.

4. In *Fiala v MacDonald*, 2001 ABCA 169, the Alberta Court of Appeal held that "[i]n order to be relieved of tort liability when a defendant is afflicted suddenly and without warning with a mental illness, that defendant must show either of the following on a balance of probabilities: (1) As a result of his or her mental illness, the defendant had no capacity to understand or appreciate the duty of care owed at the relevant time; or (2) As a result of mental illness, the defendant was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care".

Does it seem *right* and *fair* that the mentally ill are provided this variance within the analysis of the standard that applies to them? Be sure to explain and defend your answer.

END OF EXAMINATION