



Federation of Law Societies of Canada

National Committee on Accreditation

SAMPLE

Examination for

Torts

Candidate No.: _____

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Examination for Torts

General conditions of NCA online exams:

To help NCA applicants transition to online long form examinations, the NCA now allows an extra hour, or **four (4) hours in total**, for completion of each exam.

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The examination will be graded on a **pass/fail** basis (50% is a pass).

The contents of the examination, including the exam questions, **must not be disclosed** or discussed with others

If you finish early, you must stay in place, with your computer still locked down, for the full 4 hours. **Failure to follow the proctor's instructions regarding sequestering is a violation of the Candidate Agreement and will result in your exam being disqualified.**

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Each exam may have its own special instructions, therefore, it is important for you to read these carefully before starting.

Instructions specific to this exam:

1. This examination contains **XYZ questions for a total of 100 marks.**
2. Please write legibly, in complete sentences rather than in point form. You may abbreviate names etc. provided you indicate that you have done so at the beginning of each question (e.g. Carole = C; plaintiff = π).
3. In answering all questions, cite appropriate legal authorities. If you believe you need to make any assumptions, make these explicit. Acknowledge relevant legal and factual ambiguities where appropriate.
4. If asked to analyze liability, make sure to consider all elements, even if the claim seems to fail on one of the elements.
5. Students should have enough time to produce well-organized and reasonably well-written answers. In grading these answers, weight will be given to relevance, conciseness, and organization.

This sample exam provides an indication of the style/type of questions that may be asked in each exam. It does not reflect the content or actual format/structure of questions nor their value. Actual exams for a specific subject vary from exam session to exam session.



PART ONE (15 marks; 30 answer blanks)

Fill in the blanks in the following paragraphs with a word or phrase. In some of the blanks, there are synonymous words or similar phrases that could be used; what's important is to show that you understand the concept even if you might use different words. Where a case name is required, provide the full case name but not the citation, as no marks are allocated for that.

Please write your answers on the writing pad provided with the exam using the letters associated with each blank.

1. In Canada, the Crown is generally _____(a) from civil liability for malicious prosecution. However, as explained by the Supreme Court of Canada in _____(b), that is not so for the _____(c) and his or her agents, known as _____(d). In this regard, they are just like others who may be held liable for this tort.

To succeed in a malicious prosecution action for a prior proceeding, the plaintiff must first show that the proceeding was _____(e) by the defendant and, second, that it _____(f) in the plaintiff's _____(g). These are low thresholds to meet. For example, in _____(h), the Supreme Court held that when the defendant attended before a magistrate to swear _____(i) against the plaintiff, that sufficed to satisfy the first element; the Court also held that the second element was met when the defendant later _____(j).

The third element that the plaintiff must prove is that the defendant lacked _____(k) for commencing, or perhaps continuing, the prior proceeding. In the general case, the test has both a subjective component, meaning that the defendant _____(l), and an objective component, meaning that _____(m) was reasonable in the circumstances. In the specific case of a Crown prosecutor, the Supreme Court changed the test so that only the objective component is relevant. The rationale given was that Crown prosecutors must act solely as professionals in the public interest when deciding whether to initiate or continue prosecutions: see _____(n).

The fourth element that the plaintiff must prove is _____(o), which in legal terms, means an _____(p). See, e.g., _____(q), where the defendant initiated false charges of _____(r) against an employee to set an example



for other employees. At this fourth stage, the subjective component mentioned above can also become relevant. For example, if a Crown prosecutor didn't believe that there was reasonable cause to commence a prosecution, that could be evidence of malice. However, malice should not be inferred solely from a lack of belief in reasonable and probable grounds, as the latter is equally consistent with prosecutorial conduct that is not _____(s), such as negligence. The fifth element that the plaintiff must prove is _____(t). For example, the plaintiff may have had to incur substantial _____(u) costs in defending the prior proceeding, or the proceeding may have harmed the plaintiff's _____(v) in the community, or his or her ability to be gainfully _____(w).

Finally, while the name of this tort is malicious prosecution, there is an argument to be made that what we are seeing in Canadian law is the development of a cause of action for what might be better called _____(x), which has both a malicious and a non-_____ (y) branch. The first branch is the traditional tort and applies to both _____(z) parties and Crown prosecutors; the second branch applies only to Crown prosecutors and does not require proof of the fourth element. Instead, what the plaintiff must show is that the Crown prosecutor has, in breach of his or her _____(aa), harmed the plaintiff. In _____(bb), the one case to develop this new branch of the cause of action, the harm was caused by Crown prosecutors intentionally _____(cc) that was material to the plaintiff and impinged on his ability to _____(dd) in the prior proceeding.



PART TWO (21 marks total; Answer all 7 questions; 3 marks each)

Questions 2–8 are based on the following scenario. Each question has a best answer worth 3 marks, a second-best answer worth 2 marks, and two answers worth 0 marks. **Circle the letter for each answer (a, b, c, or d) on this exam so that it's clear which question you're answering. If you make a mistake, cross out and circle the correct answer. If you pick more than one answer, no marks will be assigned.** In the scenario, the drivers' names begin with "D" and others' names begin with "P."

FACTS

Dale was driving 40 kilometres per hour (kph) in a 40 kph zone down the right-hand lane of a four-lane Ontario street where children were playing. Nine-year-old Patrick ran into the street chasing a soccer ball. Dale, without glancing over his left shoulder or looking in his rear-view mirror as prescribed by traffic regulations, swerved into the other lane to avoid Patrick. In so doing, he hit a car driven by Danika and going in the same direction as Dale in the left-hand lane at 50 kph. Danika lost control of the car, hit a utility pole, and was seriously injured. The pole, owned by Powerco, snapped in two and the wires were about to fall on Patrick, still in the street. Paula, standing nearby, saw this and ran to push Patrick out of harm's way. She succeeded, but in saving Patrick was hit by the wires herself. Paula died of electrocution and burns from the wires. Patrick survived with some bruises and scraped knees.

Questions

2. In a personal injury claim by Patrick or Paula (that is, Paula's estate) against Dale:
 - a. Paula and Patrick have the legal burden of proving any negligence on Dale's part.
 - b. Dale has the legal burden of proving the absence of any negligence on his part.
 - c. Paula and Patrick have the evidentiary burden of proving any negligence on Dale's part.
 - d. Dale has the evidentiary burden of proving the absence of any negligence on his part.

3. In claims between Danika and Dale for damage to each of their vehicles:
 - a. Danika's speed would be evidence of breach of the standard of care on her part and Dale's speed would be evidence of compliance with the standard of care on his part.
 - b. Danika's speed would be a *prima facie* breach of the standard of care and Dale's speed would be *prima facie* proof of compliance with the standard of care for driving speed.



- c. The parties will be liable to each other based on the tort of breach of statutory duty—Danika for speeding; Dale for failing to look over his left shoulder and check his mirror.
 - d. The parties' respective speeds will be irrelevant because it was Dale who caused the accident by swerving without looking over his left shoulder and checking his mirror.
4. Paula (that is, Paula's estate) has potential tort claims against:
 - a. Powerco only.
 - b. Powerco and Danika only.
 - c. Powerco, Danika and Dale only.
 - d. Powerco, Danika, Dale and Patrick.
5. Of the following case sets, pick the best set for advancing Paula's potential claims:
 - a. *The Ogotogo, Bolton v Stone, Wagon Mound No. 1.*
 - b. *Wagner v International Railway Co., US v Carroll Towing, Wagon Mound No. 2.*
 - c. *Cooper v Hobart, Vaughan v Menlove, Re Polemis.*
 - d. *Just v British Columbia, ter Neuzen v Korn, Wagon Mound No. 1.*
6. If Patrick sues Paula's estate for battery, the estate will plead that:
 - a. Paula had a benign motive of pushing Patrick out of harm's way to save his life.
 - b. Paula had Patrick's implied consent to push him out of harm's way to save his life.
 - c. Paula acted out of necessity to push Patrick out of harm's way to save his life.
 - d. Paula's pushing Patrick out of harm's way was neither harmful nor offensive.
7. You happen to be walking by the courtroom near the end of Paula's case while Dale's lawyer is making arguments to the judge or jury. The Latin phrase that you're most likely to hear coming from the courtroom is:
 - a. *trespass vi et armis*
 - b. *volenti non fit injuria*
 - c. *ex turpi causa non oritur actio*
 - d. *novus actus interveniens*



8. Assume now that: (i) Dale is uninjured; (ii) a jury assessed Danika's damages at \$100,000 and Paula's at \$500,000; and (iv) the jury found Dale and Danika 40% and 60% at fault for the accident, respectively. If Paula recovers all her damages from Danika and if Danika also sues Dale for her own damages, how much is Danika entitled to recover in total?
- \$360,000. (Based on each driver's degree of fault, Danika is entitled to recover \$60,000 for her own damages and \$300,000 for contribution towards what she paid to Paula.)
 - \$300,000. (The trial judge re-assesses liability at 50% each for both drivers, as it is not possible to determine each driver's degree of fault. Danika is entitled to recover \$50,000 for her own damages and \$250,000 for contribution towards what she paid to Paula.)
 - \$240,000. (Based on each driver's degree of fault, Danika is entitled to recover \$40,000 for her own damages and \$200,000 for contribution towards what she paid to Paula.)
 - \$200,000. (Danika is not entitled to recover any of her own damages from Dale because her negligence exceeds Dale's, but she is entitled to recover \$200,000 for contribution towards what she paid to Paula.)



PART THREE (72 marks total; Answer 2 of 3 questions; 36 marks each)

Answer **ANY TWO** of questions 9, 10 or 11, each of which is worth 36 marks. Each question is a simplified version of a real case. Don't let the length of question 11 dissuade you from choosing it. Although it takes longer to set out the facts of that case, the question itself is no more complex than the others.

9. Saskatchewan is the leading North American producer of lake-grown wild rice—a premium product owing to its large kernel size, dark colour, nutty flavour and organic growing conditions. Harvesting this rice other than on private lands and waterways may be done only by permits granted to Northern Saskatchewan residents. Kaiya unlawfully—that is, without a permit—harvests rice on public lands jointly owned by Saskatchewan and Canada. Assume such an ownership arrangement is possible and that each government has an undivided half-interest in the lands.

Using a valid search warrant, Saskatchewan officials seize the rice. Concerned it might perish, they sell it at auction for proceeds of \$50,000 after seizure and storage costs. Kaiya is charged with an offence relating to harvesting the rice but the charges are stayed due to evidentiary problems. Kaiya thinks she is entitled to the \$50,000 proceeds or a portion of them, but Saskatchewan officials refuse to pay her anything on the basis that the rice was harvested unlawfully. Canada has issued a letter saying that it “refuses to release its interest [in the rice] to anyone other than Saskatchewan.”

Kaiya wants to know if she can sue Saskatchewan for the proceeds. If so, she also wants to know the likely outcome and how much she can recover. Advise Kaiya, after carefully considering the relevant case law and arguments. **(36 MARKS)**

10. The Canadian Food Inspection Agency (“CFIA”) has received a statement of claim from the Buena Vista Salad Company (“BVSC”), the essential parts of which are outlined below.
- i. The plaintiff, **Buena Vista Salad Company (“BVSC”)**, exported carrots to Canada from the USA. BVSC sold the carrots to Costco, and Costco sold them to the public.
 - ii. The defendant, **Canada Food Inspection Agency (“CFIA”)**, has duties under the *Canadian Food Inspection Agency Act* and *Canada Agricultural Products Act* that include inspecting and grading food products in import, export, and interprovincial trade.
 - iii. After four consumers of the carrots reported illness, CFIA, assisted by the Public Health Agency of Canada, inspected the carrots, but the inspection was done negligently.



- iv. CFIA stated to BVSC, Costco, the US Food and Drug Administration, and the public, that the carrots might be contaminated with *Shigella* bacteria, which could cause illness, and advised the public not to consume them.
- v. Relying on these statements, Costco recalled the carrots from its stores in Canada, BVSC recalled its carrots from stores in the USA, and the recalled carrots were destroyed, along with BVSC's carrots in inventory and "in the ground."
- vi. The carrots were not contaminated with *Shigella* and did not cause the alleged Shigellosis outbreak.
- vii. BVSC suffered economic loss as a result of CFIA's negligent inspection and misstatements, for which CFIA is liable.

CFIA has moved to strike the statement of claim. As discussed in class, this type of motion is the source of many of the leading cases that we studied in tort law. The test for such a motion is whether "it is plain and obvious that on the facts as pleaded or as they could be amended, the defendant owes no duty of care to the plaintiff." In other words, the case proceeds on a question of law, assuming the facts to be as pleaded.

You are the motion judge. Write your decision. **(36 MARKS)**

11. A lawyer from Cascadia (a fictional jurisdiction) has contacted you for your help on a case. The lawyer's client, Pia Liber ("Pia") gave birth to her son Jason at Cascadia Women's Hospital ("CWH"). Jason was born with serious disabilities due to complications during delivery. Dr. Susan Hopp ("Susan") delivered Jason and was responsible for Pia's care before birth. The facts are set out in more detail below, followed by some questions that the lawyer has asked.

Pia is a molecular biologist, formerly employed by a pharmaceutical company. She is of small stature—1.55 metres (just over 5 feet). She also suffers from diabetes. Babies born to women with diabetes tend to be larger than average, and their mothers are at greater risk of having problems when giving birth, particularly through shoulder dystocia, in which the baby's shoulders become lodged above the pelvis. Thus Pia's pregnancy—her first—was high-risk. Accordingly, she attended a special prenatal clinic at CWH throughout her pregnancy. She was under the care of Susan, an obstetrician and gynaecologist.

For diabetic mothers, the risk of shoulder dystocia is 9–10%. Shoulder dystocia presents increased risks to the mother in a few cases, including postpartum haemorrhage and perineal tears. It also presents risks to the baby. The physical manoeuvres required to free the baby can cause it to suffer a broken shoulder or an avulsion (tearing away) of the brachial plexus—the nerve roots that connect the baby's arm to the spinal cord. Such an injury can result in permanent disability, leaving the child with a useless arm. The risk of a brachial plexus injury, in cases of shoulder dystocia involving diabetic mothers, is about



0.2% (1 in 500). In an even smaller percentage of cases of shoulder dystocia, the umbilical cord becomes trapped against the mother's pelvis. It can then become occluded (closed up), causing the baby to suffer from oxygen deprivation, resulting in cerebral palsy or death. The risk of this happening is less than 0.1% (1 in 1000).

Susan accepted that the 9–10% chance of shoulder dystocia in diabetic mothers was a high one but didn't tell Pia about it. Her practice was not to discuss it. This was because the risk of a grave problem for the baby resulting from shoulder dystocia was so small. She believed that if she mentioned the condition, most women would say, "I'd rather have a caesarean section." In her judgment, that was not generally in the interest of mother or baby.

Furthermore, about 70% of cases of shoulder dystocia can be resolved by various physical manoeuvres, such as trying to move the baby down by external pressure or even pushing the baby's head back into the birth canal so as to be able to perform an emergency caesarean section.

At her 36-week appointment, Pia told Susan that she was worried that her baby might be too big to be delivered vaginally. However, Pia did not ask about specific risks. Had she done so, Susan would have told her about the risk of shoulder dystocia. Rather, she told Pia that she would be able to deliver vaginally, and that if there were difficulties in labour, she could have a caesarean section. Pia accepted that advice. But if she had requested an elective caesarean section, she would have received one.

Susan induced Pia's labour with hormones, as she had planned. After several hours, labour stopped. The strength of the contractions was then augmented by administering more hormones over a further period of several hours, so as to overcome whatever was delaying progress towards vaginal delivery. When the baby's head still failed to descend, Susan used forceps. The baby's shoulder then became impacted (stuck) before his head fully emerged.

Susan had never dealt with that situation before. It was very stressful. An anaesthetist gave Pia a general anaesthetic so as to enable Susan to try one of the manoeuvres to free the baby's shoulder. This did not work. Susan decided that she had no other option but to try to complete the delivery. She pulled the baby's head with "significant traction" to complete the delivery of the head. Eventually, "with a huge adrenalin surge," Susan was able to pull the baby free.

During the 12 minutes between the baby's head appearing and the delivery, the umbilical cord was occluded, depriving him of oxygen. After his birth, he was diagnosed as suffering from cerebral palsy, caused by the deprivation of oxygen. He also suffered a brachial plexus injury causing paralysis of the arm. All four of his limbs are affected by the cerebral palsy. If Pia had had an elective caesarean section, Jason would have been born uninjured.

Expert witnesses have been retained for both sides. The gist of the evidence for the plaintiff will be that if a mother expresses concerns about the size of her baby, then it is proper practice to discuss the potential problems that could arise, including the risk of shoulder dystocia and the option of an elective caesarean section. The gist of the evidence for the



defendant will be that it is reasonable not to discuss shoulder dystocia in such circumstances, as the risks of a serious outcome for the baby are so small. Like Susan, the defence expert thinks that, if doctors were to warn women at risk of shoulder dystocia, “you would actually make most women simply request caesarean section.” However, the expert accepts that if a patient asked about specific risks, the doctor must respond.

Pia’s lawyer has outlined the relevant Cascadian law on whether a doctor’s omission to warn a patient of inherent risks of proposed treatment is a breach of the standard of care. The case law generally holds that if the omission is accepted as proper by a responsible body of medical opinion, no breach will be found. The defence experts would constitute “a responsible body of medical opinion.” There are some exceptions to this general rule, but they likely won’t apply here because in the vast majority of cases, shoulder dystocia is addressed by simple procedures and the chance of a severe injury to the baby is tiny. So this law goes against Pia. Pia’s lawyer has also told you that in Cascadia, “decision causation” is addressed by asking what a reasonable patient would have decided to do had the relevant risk information been provided. Interestingly, if the defence expert is right—i.e., that “you would actually make most women simply request caesarean section”—this causation test would work in Pia’s favour.

Pia’s lawyer recognizes that this case is likely to go all the way to Cascadia’s Supreme Court, and is preparing extensively for it, including soliciting opinions on how the case would be handled in other jurisdictions so that the courts will have the benefit of a comparative law. The lawyer specifically wants to know how Canadian courts would approach this case, and how that approach would be similar to, or different from, the Cascadian approach. Provide the lawyer with your opinion.



PART FOUR (42 marks; Answer 3 of 8 questions; 14 marks each)

12. Answer **ANY THREE** of the following questions. Where the question asks you to “comment,” you can decide whether to agree, disagree, agree in part, and or disagree in part. The label you use is less important than the reasons you provide.
- a. Dave, Dana and Dale shoot in Paula’s direction, with one of them—we don’t know who—injuring her. In Paula’s action against them, the three hunters are presumptively liable for Paula’s loss, and any one of them—Dale, for example—could have to pay the whole judgment.
 - b. The duty-of-care concept has proven highly flexible, and has been adapted to situations far beyond manufacturers’ liability for consumer products. It is well equipped to keep up with changes in technology and social norms.
 - c. The distinction between private and public nuisance should be abolished.
 - d. It has been said that “possession is nine-tenths of the law.” Comment, based on how tort law is used to protect interests in personal property or chattels (you may use either of those terms). Your answer should mention relevant cases.
 - e. To better address the contingencies associated with future medical care and lost earning capacity in personal injury cases, Canadian courts can order defendants to pay structured (periodic) payments to plaintiffs.
 - f. Explain and characterize the debate between Justice Dickson and Chief Justice Laskin in *Harrison v Carswell*. Whose opinion (decision) do you prefer—and why?
 - g. Courts create torts. Comment, with reference to any law that you think is relevant.
 - h. Having regard to its purposes and perspectives, tort law has a promising future in Canada.



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