

**FACULTY OF LAW  
MIDTERM EXAMINATION – DECEMBER, 2008**

**LAW 430 THE LAW OF TORTS (BROWN)**

Time allotted: **ONE (1) hour and TEN (10) minutes.**

Code Number: DO NOT ENTER YOUR NAME ON ANY PART OF YOUR EXAMINATION. To ensure anonymity during marking, a list will be circulated in the course of the examination and you are to enter your name opposite a number on that sheet. That number will be your code number FOR THIS EXAMINATION ONLY. Please enter it at the top of the front page of your examination paper.

Special instructions:

1. This examination paper contains one (1) question on 2 pages (*not* including this page). Please check now to ensure that you have received a complete examination. Raise your hand immediately if you do not have a complete examination.
2. This examination is an **OPEN BOOK** examination. Subject to the stipulations in paragraph 6 (below), you may consult any materials you find helpful.
3. This examination is failsafe. It will only count towards your final grade if you achieve a lower grade on the final examination in April, 2009, in which event this examination will count for 25% towards your final grade.
4. **THINK CAREFULLY ABOUT YOUR WORK, ORGANIZING YOUR ANSWER BEFORE YOU START WRITING.** Credit will be given for *quality, not quantity*. You must offer concise, clear and well-organized answers that are directed to the question asked, and, where appropriate, supported by reference to, and argument derived from, the relevant cases and statutes.
5. Please **WRITE IN COMPLETE SENTENCES**. Credit will not be awarded for point-form answers. And, please **WRITE LEGIBLY**. If this means you must write on every other line, then please do so.
6. Cell phones, pagers, beepers and related devices are strictly forbidden. Please turn off and stow away such devices immediately. The use of computers is also not permitted in this examination.
7. Adhere strictly to the time limitation imposed on this examination. Failure to stop writing at the end of the examination may lead to a deduction of grades or failure to accept the examination paper.
8. As a courtesy to your classmates, if you finish your examination during the last 15 minutes of the examination period, please refrain from leaving the room.

**PLEASE DO NOT TURN THE PAGE TO BEGIN READING THE EXAMINATION UNTIL YOU ARE DIRECTED TO DO SO.**

Marjorie Brown and her husband, Ed Brown, seek your advice. They are semi-retired residents of Viking, Alberta. Marjorie has served her community in a variety of capacities, culminating in her election in 2004, and re-election in 2007, as Viking's mayor. Ed is a retired hardware merchant, and devotes his spare time to tending the grounds of their home, volunteering for their church, and to the Rotary Club. Until recently, Ed and Marjorie have enjoyed the friendship and esteem of their fellow residents of Viking. That, however, is no longer the case. To say the least, things have changed.

While the home which Ed and Marjorie own near Viking's residential center is a modest one, it is situated on a 15 acre lot. Since they purchased it as a young couple in 1966, the lot has been covered with an assortment of birch, spruce, and poplar trees, as well as the sorts of shrubs, bushes and willows that one typically sees dotting undeveloped parts of central Alberta. Despite the extent of vegetation, this was no untamed wilderness. Ed and Marjorie fastidiously maintained their lot. It was described a June 2002 editorial in Viking's newspaper, *The Weekly Review*, as "an adornment" to the town and as "Viking's vernal wonderland". For miles around, Ed and Marjorie's lot was spoken of in hushed tones and with quiet reverence. During late-September's autumn foliage, people drove from places as far-flung as Kinsella and Ranfurly to gaze through their passing car's windows at the resplendence that was unfolding along the roadside at Ed and Marjorie's home. It did not escape general notice that these visitors added to Viking's economy by purchasing gasoline, restaurant meals and supplies in Viking before returning home to tell their friends and neighbours about the wondrous sight they had witnessed that day.

One Sunday in April 2008, Ed was just finishing his annual "Spring clean-up". This is a long process entailing for him nearly a month of work, consisting mostly of cutting down and bucking up some of the older sick trees, pruning the healthy ones, cutting back the shrubs and raking the old, dead groundcover. This year, he used a Bobcat to gather up all the debris into ten piles, ready for burning. With over fifteen acres of land to clear, the piles obviously became quite large – "each one was about the size of my garage", Ed says.

After pouring a small jerry can of gasoline onto one of the piles, Ed ignited it with a blowtorch. His intention was to let it burn slowly for several days, then repeat the lengthy process with each of the subsequent piles. He estimated that the burning would take about three to four weeks. Within minutes of ignition, vast wafts of smoke ranging in colour from white to dark gray and brown began to rise from the pile and drift eastwards, carried by Viking's prevailing winds through the towering forest of Ed and Marjorie's lot, and towards the neighbouring property, which was – and still is – owned and occupied by Ed and Marjorie's longtime friend, John Larssen. John, an octogenarian widower, lives alone and has spent most of the past five years gruffly dismissing suggestions from family members that he should move into a seniors' home. He likes his independence. He also likes fresh air, and so he keeps his windows slightly ajar on all but the very coldest winter days.

By Day 2 of Ed's burning, the smoke created a steady haze over and in John's home. John had watery eyes, was coughing, and had developed a constant headache. None of this, of course, was known to Ed and Marjorie. They would have been mortified to know the level of discomfort they were causing to their friend. "Still", wonders Ed aloud to you, "would it have killed the old fart just to keep his windows closed for a few weeks?"

On the fifth day of burning (Ed was now just starting on his third pile), the winds shifted southwards, over the residential street bordering the frontage of Ed and Marjorie's lot. Ed noticed this, but "thought nothing of it." He had second thoughts, however, as he saw a sedan drive by. The sedan, a 1966 Chevrolet Beaumont, was being driven by Ellis Dudley, a local schoolteacher. The smoke completely obliterated Ellis's vision. He continued to drive, trying to keep the car going straight. After about five seconds, he suddenly saw the figure of John Larssen come into his line of vision. John had just stepped out from his driveway onto the shoulder for his daily afternoon stroll. Realizing that he had driven off the road and onto the wide shoulder (there is no sidewalk along that road), Ellis tried to stop. It was too late. Ellis attempted to swerve further off the road to avoid hitting John, but instead struck him. John was taken to hospital, suffering from broken ribs, a broken right arm and right leg, and multiple abrasions and bruises. Ellis was uninjured.

Two days later, Ed and Marjorie received a letter from the Town of Viking's bylaw enforcement officer, advising them that Ed's burning was contrary to Bylaw 3942, Section 2 of which provides that "no burning" shall occur except on designated "burning days", of which there are only two each month. Marjorie is obviously embarrassed by this development. She is, after all, the mayor. The subject of Ed's burning, and John's injury, is now the stuff of public debate in *The Weekly Review*. In response to all the horrible publicity, Ed has written a letter to the editor, pointing out that some of his neighbours also burn their yard waste in contravention of Bylaw 3942, and also pointing out that his lot is something of a tourist attraction. "Stop me from burning", he ominously warns, "and within three years Viking's vernal wonderland will become Viking's tangled mess".

**Please write a letter to Ed and Marjorie addressing ALL tort law issues that may arise in the facts that have been set out above.**

**Please indicate in the letter if you need more information on any issue, and why such information is significant. If your advice to Ed and Marjorie depends on what such additional information might reveal, please canvass the various possible outcomes.**

**END OF EXAMINATION**