

**FACULTY OF LAW  
FINAL EXAMINATION – APRIL 2008  
LAW 452 CIVIL PROCEDURE (BILLINGSLEY/BROWN)**

Time allotted: TWO (2) hours

---

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 WRITE YOUR CODE NUMBER HERE:** \_\_\_\_\_

Special instructions:

1. This examination paper contains twenty-one (21) questions (some of which have sub-parts), for fifty-six (56) marks on twenty (20) pages (*not* including this page). **Please check NOW to ensure that you have received a complete examination. Raise your hand immediately if your paper is incomplete.**
2. This examination is an open book examination. Consult any materials you find helpful.
3. The examination questions pertain to the facts described on pages 1 to 3 of the examination paper. **Except as stated otherwise, where any additional facts are given in a specific question, such additional facts are to be assumed and considered for the purpose of that specific question *only*.** In other words, unless stated otherwise, each question is independent of all other questions.
4. **Assume that the governing Rules of Court at all material times are as set out in *Test Draft 3 of the New Rules Project* (to which we have been referring throughout the course). This also applies to questions where you are asked to assume that we are now at some future date (i.e. “Assume that it is now June 8, 2009”).**
5. Where the question asks for “appropriate and specific authority” for your answer, a portion of your mark depends upon your correctly referring to the precise statutory provision(s), case authorit(y/ies) or other assigned readings or authorities discussed in class). You are not required to refer by number to a specific Rule of Court.
6. Answer ALL questions. Wherever possible, please try to confine your answer to the space provided on the examination paper, although extra paper will be provided if requested. Questions are NOT of equal value. Apportion your time intelligently.
7. Computers, cell phones, pagers, beepers and related devices are strictly forbidden. Please turn off and stow away such devices immediately.
8. 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.
9. *“30 days hath September, April, June and November. All the rest have 31, except February alone, which has 28 days clear and 29 in each leap year.”*

**PLEASE DO NOT TURN THE PAGE TO BEGIN READING THE EXAMINATION UNTIL YOU ARE INVITED TO DO SO BY THE ENVIGILATOR**

## FACTS

Elizabeth Windsor and her husband Philip Windsor have lived in Edmonton since February, 1952 when they immigrated from the United Kingdom. They are also charter members of the Sons & Daughters of the Society of St. George in Edmonton, which was established in the same year.

March 6, 2007 was intended to be a special day in their lives. They were to be guests of honour at the Society's banquet at the Derrick Club, in Edmonton, marking the 55<sup>th</sup> anniversary of the Society's establishment in Edmonton. It was also, coincidentally, Elizabeth and Philip's 60<sup>th</sup> wedding anniversary. Elizabeth and Philip were also to be honoured with a medal marking their long service to the Society. Due to their advanced age (Elizabeth is 82 and Philip is 88), they were escorted by their 17 year old great-granddaughter Eugenie Windsor. She arrived that day at Elizabeth and Philip's south Edmonton home ("Sandringham") shortly before 7:00 pm and called Topsy Driver Taxis ("Topsy Driver") to request a taxicab. Topsy Driver Taxis is a chain of taxicabs based in Cleveland, Ohio, and is owned and operated by an Ohio Corporation, Mkele Mbembi Enterprises Ltd.

At 7:15 pm, the taxicab, driven by Wallis Simpson, arrived at Sandringham. Eugenie patiently helped Elizabeth and Philip down their front steps and into the back seat of the taxicab. She then sat in the front passenger's seat. By 7:20 pm, they were on their way.

The driving conditions were wretched. Heavy snow had fallen that day, and most of the roads were still unploughed. Eugenie noticed that Wallis had a strong odour of marijuana about her, but Eugenie said nothing about it. At 7:30 pm, while they were proceeding westbound on 23 Avenue and just approaching 111 Street, Wallis slowed as she approached several cars which were stopped, waiting for the light to change. The taxicab skidded on ice. Wallis veered to the right, giving Eugenie just a second or two to brace herself before the taxicab struck a lamppost.

After the impact, Eugenie immediately looked behind to her great-grandparents. They were both conscious but in pain. Eugenie looked in the rear-view mirror and saw that she had some scrapes and bruises. Wallis seemed to Eugenie to be fine, and in fact Wallis happily handed over her cell phone to Eugenie so that Eugenie could phone the police and an ambulance. The police arrived five minutes later (followed quickly thereafter by two ambulances).

While the ambulance attendants seemed more concerned about Elizabeth and Philip, they also suggested that Eugenie go to hospital to be “checked over”. She accompanied Philip in one ambulance while Elizabeth, who the ambulance attendants seemed to be most concerned about, had already departed for hospital in the other ambulance. The last Eugenie saw of Wallis, she (Wallis) was being questioned by police. As the doors to Eugenie’s ambulance were closing, she used her cell phone to phone her mother, Sarah Windsor, to advise what had happened and to ask her to meet everyone at University Hospital.

After making that call but before arriving at University Hospital, the ambulance in which Eugenie and Philip were travelling was struck at the corner of 34 Avenue and 111 Street by a 1990 Ford Tempo driven negligently by Earl Spencer, a professor of political science at the University of Alberta. Earl was uninjured. After approximately ten minutes, another ambulance arrived to finish the job of transporting Eugenie and Philip to University Hospital. By the time they reached the hospital, Sarah had arrived and was speaking to a doctor about Elizabeth, who had arrived five minutes earlier.

Eugenie was treated for minor scrapes and bruises and released later that day. The next day, she awoke with severe low back pain which has improved only slightly and very gradually. She is, moreover, traumatized by having seen her great-grandparents injured and has not returned to her part-time job, which paid her \$12/hour on a 10 hour/week work schedule. Philip suffered a fractured left wrist and lower back pain and was hospitalized for five weeks. Elizabeth suffered a serious closed head injury and numerous broken bones, and was hospitalized for nearly three months. She suffers no lingering effects of her head injury, but is still undergoing intensive rehabilitation for her other injuries. It is unclear which of Eugenie’s and Philip’s injuries were sustained in the incident involving the taxicab as opposed to the incident involving the ambulance and Earl’s car.

It is now April 25, 2008. Eugenie, Philip and Elizabeth have retained you to commence two actions:

1. An action by Eugenie, Philip and Elizabeth against Topsy Driver for breach of contract and negligence, and against Wallis for negligence (the “First Action”), seeking:
  - a. Damages of \$100 for breach of contract;
  - b. general damages of \$120,000 for Elizabeth;
  - c. general damages of \$75,000 for Philip;
  - d. general damages of \$30,000 for Eugenie;
  - e. past income loss of \$6,240 for Eugenie;
  - f. future income loss of \$12,000 for Eugenie; and
  - g. costs and interest.
  
2. An action by Eugenie and Philip against Earl Spencer for negligence (the “Second Action”), seeking:
  - a. general damages of \$75,000 for Philip;
  - b. general damages of \$30,000 for Eugenie;
  - c. past income loss of \$6,240 for Eugenie;
  - d. future income loss of \$12,000 for Eugenie; and
  - e. costs and interest.

**QUESTIONS BEGIN ON PAGE 4 (NEXT PAGE).**

**VALUE**

**QUESTION 1**

1 mark

In which jurisdiction (that is, in *which court*) should the First Action and the Second Action be commenced, and what document(s) should be used to commence each action?

---

---

**VALUE**

**QUESTION 2**

1 mark

Draft the portion of the Style of Cause listing the defendants in the First Action.

---

---

---

---



**VALUE**

**QUESTION 4**

2 marks

Assume that, two days after receiving Statements of Defence in both actions, you realize that you neglected, in both Actions, to include in the commencement pleading a claim for court ordered interest. Do you need to take any steps to protect your clients' interests? If so, what do you need to do? *Please cite appropriate and specific authority for your answer.*

---

---

---

---

---

---

---

**VALUE**

**QUESTION 5**

3 marks

Assume that it is now May 15, 2009. You filed the Statement of Claim in the First Action on April 30, 2008 but you have not served it on Topsy Driver. Instead, on May 7, 2008, you contacted a representative of Topsy Driver's insurer, who said over the telephone "wow, it looks like a slam-dunk for your clients. I'm just taking off for two weeks' vacation. When I get back, let's talk about damages and see if we can't work out a settlement for your people." You left several messages in June and July 2008, but never heard back. What course of action do the Rules of Court provide in this circumstances? What are your chances of success in pursuing this course of action? *Please cite appropriate and specific authority for your answer.*

---

---

---

---

---

---

---

---

**VALUE QUESTION 6**

2 marks

You don't know Earl Spencer's residential address, although Eugenie tells you that she heard at the scene of the accident that Earl was on his way to the Sugar Bowl Coffee & Juice Bar (the "Sugar Bowl") on 88 Avenue, just west of 109 Street in Edmonton, where he often eats dinner and chats with the staff, many of whom are his students. Assume that, in order to serve him with the commencement document(s), you have sent a process server on one occasion to the Sugar Bowl. On that occasion, the bartender said "Earl? Oh yeah, he's a regular. He swings by for dinner four, maybe five nights a week." Assuming you decide to try to serve him substitutionally, will you be successful in obtaining an order allowing you to do so by leaving a copy of the Statement of Claim for him at the Sugar Bowl? Please provide reasons for your answer.

---

---

---

---

---

---

---

---

---

---

**VALUE QUESTION 7**

4 marks

Assume that all defendants in both Actions have been validly served with the commencement document(s) and that all parties except Wallis have retained counsel. Earl's lawyer, a Lethbridge lawyer named Fiona Tackleton, has written you saying that you should not have commenced the First Action and the Second Action as separate actions. She writes that she is going to apply to the court to "get the appropriate order, in the circumstances."

(a) What type of order will Fiona seek from the court?

---

---

(b) With reference to the facts, what arguments will Fiona have to make?

---

---

---

---

---

---

---

---

---

---

(c) Do you think Fiona will succeed in obtaining such an order? Please explain your answer.

---

---

---

---

(d) Can Fiona serve the Notice of Application seeking such an order *before* she files and delivers a defence?

---

---

---

---

**VALUE**

**QUESTION 8**

4 marks

Assume that it is now June 28, 2008. You effected valid service of the commencement document(s) in the First Action upon both Topsy Driver and Wallis on April 28, 2008. Neither of them have yet filed a defence.

**(a)** What procedural step should you consider taking?

---

---

---

---

**(b)** Assume that, on May 30, 2008, you received a letter from a lawyer, Lawrence Doerksen, advising that he has just been retained to act for Topsy Driver, and that he needs a month to review the file at which point he will file a Statement of Defence on Topsy Driver's behalf. Does this change the answer you gave to question (a) above? Please explain your answer.

---

---

---

---

**(c)** Assume that, once you take the procedural step you described in answer to question (a) above, you receive a letter from Wallis's lawyer, Mary O'Sullivan. She tells you that Wallis has just retained her and that she is seeking instructions to "do what we have to do to proceed with a defence." What is it that Mary now "has to do"?

---

---

---

---

(d) What arguments will Mary have to make in order to succeed?

---

---

---

---

**VALUE**

**QUESTION 9**

2 marks

What would be the best pleading(s) or document(s) for Earl to file in the Second Action in the following circumstances?

(a) He wants to claim contribution or indemnity from Wallis and Topsy Driver?

---

(b) He wants to admit liability to Eugenie and Philip, but also wants to reserve the right to challenge the *quantum* of their claims for damages.

---

**VALUE**

**QUESTION 10**

4 marks

What would be the best next step(s) for Wallis to take in the First Action in the following circumstances:

(a) The Statement of Claim alleges that she was “negligent” but does not say what she negligently did or negligently failed to do.

---

(b) Wallis wants to deny liability to Eugenie, Philip and Elizabeth and to claim contribution and indemnity from Topsy Driver.

---

(c) It is now June 8, 2009. On December 1, 2008, Wallis obtained an order requiring Philip to furnish a copy of his diary for the dates of March 6, 2007 to September 6, 2007. He has failed to do so.

---

(d) The commencing document(s) you file on behalf of Eugenie, Philip and Elizabeth fail(s) to allege negligence, breach of contract or any cause of action against Wallis.

---

**VALUE**

**QUESTION 11**

2 Marks

Wallis has, since the accident involving your clients, left employment with Topsy Driver and now operates a taxicab business in competition with Topsy Driver. In the course of examining Topsy Driver's producible records, Wallis sees that they include a list of Topsy Driver's corporate accounts, including customers' addresses and the rates which Topsy Driver charges them. Wallis wants to use this information to contact Topsy Driver's customers to offer them cheaper rates if they use her taxi service.

a) Please explain why Wallis can or cannot do this.

---

---

---

---

(b) Assume that Lawrence Doerkson, who is Topsy Driver's counsel, learns that Wallis is in competition with Topsy Driver and is concerned that Wallis not see the record. What position(s) should Lawrence take with respect to Wallis's inspection of Topsy Driver's records?

---

---

---

---

**VALUE**

**QUESTION 12**

2 Marks

You have served a Notice to Admit in the First Action on Topsy Driver, asking it to admit the authenticity of the clinical records of Elizabeth's and Philip's family physician, Dr. Victoria Regina, from March 2006 to April 2007. While you expected this to be uncontentious, Topsy Driver's counsel, Lawrence Doerkson, has refused to make that admission. Because Lawrence knows that Dr. Regina now lives in Australia, you think this is an unreasonable position for him (or his client) to take. Please discuss your option(s).

---

---

---

---

---

---

---

---

**VALUE**

**QUESTION 13**

2 Marks

Assume that Earl alleges that his collision with the ambulance was caused by the negligence of Christie-Mae Reibnitz, a pedestrian who dashed out in front of Earl’s car, forcing him to swerve into the ambulance. Earl’s lawyer, Fiona Tackleton, has filed a Third Party Notice on his behalf in the Second Action against Christie-Mae and served it upon her. She has filed a Statement of Defence to that Third Party Notice. What additional fact do you need to know in order to determine whether Christie-Mae can require Philip to submit to examination for discovery, and why is that additional fact significant?

---

---

---

---

**VALUE**

**QUESTION 14**

4 Marks

Assume that it is now April 1, 2010. Philip died of causes unrelated to the accident on December 19, 2007. Elizabeth died of causes unrelated to the accident on January 31, 2008. Wallis died of causes unrelated to the accident on June 5, 2008. On October 5, 2008, counsel for Topsy Driver delivered to you a formal Offer to Settle the First Action in the following terms:

“The defendant Topsy Driver will pay the plaintiff Eugenie Windsor \$65,000, inclusive of costs and interest.”

You have received no instructions to reply to the Offer and accordingly did not do so. A five day trial of Eugenie’s claim in the First Action against Topsy Driver was heard by a Court of Queen’s Bench judge without jury in March, 2010. At the conclusion of the trial the court awarded Eugenie \$52,240 plus costs and interest.





**VALUE**

**QUESTION 16**

2 Marks

Assume it is now Wednesday, December 24, 2008 at 9:30 am. You have just been served by counsel for Wallis with a Notice of Application seeking an order requiring Elizabeth to produce records that she has listed as “privileged” in her Affidavit of Records. The Notice of Application states that the application is to be heard on Monday, December 29, 2008 (which you should assume is a day on which Chambers applications will be heard). Has Wallis’s counsel given sufficient notice? Please explain your answer.

---

---

---

---

---

---

---

**VALUE**

**QUESTION 17**

6 Marks

Assume that it is now June 8, 2010. Philip died of causes unrelated to the accident on December 19, 2007. Elizabeth died of causes unrelated to the accident on January 31, 2008. Nothing has happened in the First Action since an examination for discovery you conducted of Wallis on June 4, 2008. Until two weeks ago, you had been unable to obtain instructions from Eugenie since Philip’s death. She says she has been too upset at the death of her beloved great-grandfather to instruct you. Now 20 years old, she continues to live with her parents, does not work and has stopped attending school. Then, two weeks ago, Eugenie instructed you to send a letter to Topsy Driver’s and Wallis’s counsel, inviting an offer to settle her claim in the First Action. You did so on May 28, 2010, but the response from defence counsel consisted of a Notice of Application by Topsy Driver and Wallis to dismiss Eugenie’s claim in the First Action for want of prosecution. The application is set to be heard today. What arguments do you anticipate defence counsel will raise? What arguments will you raise? Do you think you will successfully resist this application? Why or why not? *Please cite appropriate and specific authority for your answer.*



**VALUE****QUESTION 18**

2 Marks

Assume that, in support of an application for judgment on a Summary Trial in the Second Action, Philip provides an affidavit. Please circle which *one* of the following four statements is most likely to be ruled inadmissible:

- When I looked out of the ambulance in the aftermath of the accident, I heard Ms. Simpson yelling. To me, she looked and sounded drunk.
- My head was spinning after the accident, but I am absolutely certain that I heard one of the ambulance drivers say that Ms. Simpson had a bag of marijuana in her jacket pocket.
- The roads were terrible that day, just awful, the worst I'd seen since moving to Edmonton many years ago. Were I driving that day, I would have been driving at a slower rate of speed than Ms. Simpson was.
- Since my accident, I haven't engaged in my usual activities. I feel hopeless and depressed, and I just want my life back.

**VALUE****QUESTION 19**

2 Marks

Once you have served the Affidavit of Records of the Plaintiffs in the First Action, you receive a phone call from Wallis's counsel, Mary O'Sullivan. Mary says that the method employed in your clients' Affidavit of Records to list the records is 'improper.' Her specific complaint is that you had listed medical documentation in the following terms:

A folder containing medical records relating to the Plaintiff Elizabeth Windsor between March 6, 2007 and July 31, 2007, indelibly numbered from 1 to 3,982.



(b) In support of his application, Earl has decided to obtain affidavits from colleagues and friends to rebut the suggestion that he is sadistic or perverse. *Questions of relevance aside*, can the court consider such an affidavit?

---

---

---

---

**VALUE**

**QUESTION 21**

2 Marks

You are inspecting Topsy Driver's records at the office of Lawrence Doerkson, Topsy Driver's counsel. In the course of your review, you come across a memorandum from Topsy Driver's President to Lawrence, describing her concerns about the lawsuit and about Wallis's reliability as a witness. Has Topsy Driver waived privilege over this memorandum? Please explain your answer, *citing appropriate and specific authority for your answer*.

---

---

---

---

---

---

---

---

**END OF EXAMINATION**