

**FACULTY OF LAW
FINAL EXAMINATION – APRIL 2006**

LAW 452 CIVIL PROCEDURE (BROWN)

Time allotted: **THREE (3) hours**

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 twenty-five (25) questions (in addition to sub-questions within a question), for seventy (70) marks on twenty-eight (28) 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. Questions 1 to 23 of this examination pertain to the facts described on pages 1 to 3 of the examination paper. **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 such cases, therefore, each question is independent of all other questions. (Questions 24 and 25 do not pertain to the fact pattern).
4. 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 authority or authorities (rule(s), including subrule(s), statutory provision(s), case authority(ies) or other assigned readings or authorities discussed in class).
5. 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.
6. Computers, cell phones, pagers, beepers and related devices are strictly forbidden. Please turn off and stow away such devices immediately.
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 INVITED TO DO SO.

FACTS

On Saturday, May 15, 2004, Thomas Stall was supervising operations at his corporation's factory in Edmonton, Alberta (the "Factory"). He and his wife Edith Stall owned the business through a corporation. He and Edith were the only shareholders. The corporation, a registered Alberta corporation, was called "North Saskatchewan Petroleum Accessories Ltd." ("North Saskatchewan"). With him at the Factory on that day was their daughter, Sarah. She had just graduated that June from the University of Western Ontario's Ivey School of Business at the tender age of 19, and was now starting to assist her father in North Saskatchewan's business of manufacturing and distributing propane and propane accessories. Part of her salary was withheld as rent, as she continued to live at home with her parents.

Shortly after the lunch break, Sarah heard one of North Saskatchewan's employees, Alan Macleod, shout that he could smell a propane leak. Just as she turned to ask Thomas if he had heard what Alan had shouted, there was a large explosion. Sarah immediately used her cell phone to call 911 and summon the Edmonton Fire Service. Seconds later, Sarah saw that the far wall near her father's office and almost the entire ceiling of the Factory was aflame. She then saw Thomas running into his office and emerging with a fire extinguisher. Sarah immediately ran to him, urging that he leave the Factory immediately. He agreed, but before they could make their way out, a portion of the Factory ceiling fell on them. Alan and several other employees saw this and after a minute or so of debris removal, they were able to recover Thomas and Sarah and remove them from the Factory.

Fortunately, Edith was not at the Factory that day. She had decided to take the day off, in order to drive their other two children, sons named Jack and Robert, to their various weekend activities. At the time of the fire, Edith had just retrieved Robert from his hockey practice at the University of Alberta. She was now starting eastbound on Whyte Avenue in order to retrieve Jack, who was attending French immersion lessons at Collège St-Jean. Her plan was then to drive both boys to the family's south Edmonton home for a late lunch before taking them to the Factory for a quick visit with their father and sister. It involved a lot of driving, but she didn't mind, as she truly enjoyed operating her new SUV, a 2004 Limona "Canyonero", which she had specially ordered through a British Columbia corporation, Limona Fabrikat Inc. ("Limona"), through which the Latvian-based manufacturer operates in Canada. Limona is headquartered in Dawson Creek, British Columbia.

Heading eastbound on Whyte Avenue, Edith approached the intersection with 109 St. She applied the brakes, but the vehicle did not slow down. Edith, panicking, reapplied the brakes several times, but it was no use. The Canyonero entered the intersection against a red light, and was struck on the driver's side by a 5 tonne delivery truck. The truck was operated by Margaret Podgorenko, an Edmonton resident who was employed by the truck's owner, Not Fragile Movers Ltd. ("Not Fragile"), which is a registered Alberta corporation.

Thomas, Sarah, Edith and Robert were all taken to hospital. Sarah and Robert were both discharged later in the day, Sarah with multiple minor scrapes and a fractured nose, and Robert with a broken arm. Thomas was discharged after two weeks, having received skin grafts to repair several areas where he had been burnt by falling debris. He also suffered a broken collar-bone and a concussion. Edith suffered very serious injuries, including a broken left leg, a fractured skull, a shattered left eye orbit, a broken left collar-bone, jaw, nose and extensive internal bleeding. She remained in hospital for three months. The Canyonero was destroyed in the accident.

Fire investigators determined that the explosion and fire at the Factory were caused by an improperly installed valve on a propane tank. The valve was installed by an Edmonton contractor named Arthur Anderson, who operated as a sole proprietorship under the name “Whitemuddy Services” (“Whitemuddy”).

When Edith left the hospital, she wrote Limona, demanding that it replace the Canyonero under the full bumper-to-bumper warranty she had purchased along with the Canyonero. Limona acknowledged a “problem” with the brake system in its 2004 model, but stated that it was not covered by the warranty and refused to replace the Canyonero.

At the time of these incidents, both Thomas and Edith were 44 years old. Robert was 13 years old, and Jack was 12 years old. Arthur was 28 years old. Margaret was 41 years old.

It is now April 19, 2006. Thomas, Edith, Sarah and Robert have retained you to commence two actions:

1. An action by Thomas and Sarah against Whitemuddy for negligence (the “Fire Action”), seeking:
 - a. general damages of \$150,000 for Thomas;
 - b. past income loss of \$80,000 for Thomas;
 - c. future income loss of \$150,000 for Thomas;
 - d. general damages of \$40,000 for Sarah; and
 - e. costs and interest.

2. An action by Edith and Robert against Limona for breach of contract or alternatively negligence, and against Not Fragile for negligence (the “Motor Vehicle Action”), seeking:
 - a. general damages of \$300,000 (in respect of Edith);
 - b. general damages of \$40,000 (in respect of Robert);
 - c. damages for breach of contract or alternatively negligence of \$50,923.53 (being the purchase price of the Canyonero); and
 - d. 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 Fire Action and the Motor Vehicle Action be commenced, and what document(s) should be used to commence each action?

VALUE

QUESTION 2

2 marks

Draft the Style of Cause which should appear on the commencing document(s) in the Fire Action.

VALUE

QUESTION 3

5 marks

Assume that, on May 28, 2004, Edith died of her injuries. She had a valid will, which named Thomas as her executor.

(a) Should this result in your joining any additional person(s) as a plaintiff to either action? If so, whom, and to what action, and (where relevant) in what capacity?

(b) Would this change your selection of the document(s) that should be used to commence the Motor Vehicle action? If so, how?

(c) Draft the Style of Cause which would, as a result of Edith's death, now appear in the Motor Vehicle action. *(If you need additional information in order to complete the Style of Cause, please draft the Style of Cause as far as you are able with the information you have, then indicate what additional information you require.)*

VALUE

QUESTION 4

1 mark

Assume that, on March 28, 2006, Thomas drowned during a fishing trip to Great Slave Lake, in the Northwest Territories. He had a valid will, naming Edith as the executor of his estate. Should this result in your joining any additional person(s) as a plaintiff to either action? If so, whom, and to what action?

VALUE

QUESTION 5

2 marks

In the Motor Vehicle Action, what steps must you take in order to effect valid service of the commencement document(s) on Limona, and what must you demonstrate in order to take that step? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 6

2 marks

Assume that Edith attends at Not Fragile's office in Edmonton and leaves the commencement document(s) in the Motor Vehicle Action with Not Fragile's cashier at the front counter. Has she effected valid service on Not Fragile? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 7

2 marks

You don't know Arthur Anderson's residential address. Assume that, in order to serve him with the commencement document(s), you have sent a process server on five occasions to the offices of Whitemuddy. On each occasion, the receptionist has told the process server that "Artie just stepped out – you just missed him, and I don't know when he'll be back." On one of those occasions, someone who appears to be another employee shouted out "but I just saw him dash into the bathroom not two minutes ago", only to receive a glare from the receptionist. Given this information from the process server, what steps should you take to effect service on Arthur of the commencement document(s)? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 8

5 marks

Assume that all defendants in both actions have been validly served with the commencement document(s) and that all parties except Arthur Anderson have retained counsel. Limona's Calgary-based lawyer, Ursula Janisch, has written you saying that you should not have included the breach of contract claim against Limona in the Motor Vehicle Action. She explains that just last year Edith sued Limona in Small Claims with respect to the very same defect that you are now alleging caused her motor vehicle accident. In that case, she adds, the court determined that the warranty did not extend to the brakes and therefore Limona was not required to replace the Canyonero. Ursula also said that she is going to apply to court to "get the appropriate order, in the circumstances."

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

(b) With reference to the facts and any *appropriate and specific authority*, what arguments will Ursula have to make?

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

(d) Can Ursula serve the Notice of Motion seeking such an order *before* she files and delivers a defence? *Please cite appropriate and specific authority for your answer.*

(e) Assume that the Motor Vehicle Action and the Fire Action have been consolidated under Rule 229. Assume also that that Arthur Anderson filed his own Statement of Defence (without the assistance of counsel) showing, as an address for delivery, Arthur’s residential address in Edmonton, and his personal fax (also known as “telecopier”) number in Edmonton. Does Ursula effect valid service of Arthur by faxing the Notice of Motion to that fax number, or does Arthur have to retain counsel for Ursula to effect valid service by fax of the Notice of Motion? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 9

3 marks

Assume that it is now September 15, 2006, and that you effected valid service of the commencement document(s) in the Motor Vehicle Action upon both Limona and Not Fragile on July 5, 2006. Neither of them have yet filed a defence.

(a) What procedural step should you consider taking? *Please cite appropriate and specific authority for your answer.*

(b) Assume that, once you take that procedural step, you receive a letter from Limona’s lawyer, Ursula Janisch. She tells you that Limona has instructed her to apply to “undo what you just did.” What arguments will Ursula have to make to succeed?

(c) Assume that, just prior to taking that procedural step, you receive a letter from Catherine Wedgewood, an Edmonton lawyer, indicating that she has just been retained to represent Not Fragile. She says she will need a further three weeks to review the file, at which point she will file a Statement of Defence on Not Fragile’s behalf. Should you proceed to take that procedural step? Why, or why not? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 10

5 marks

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

(a) Arthur wants to admit liability to Thomas and Sarah, but also wants to reserve the right to challenge the *quantum* of their claims for damages.

(b) Arthur wants to claim contribution or indemnity from Dumkopf Propane Repairs Ltd. (“Dumkopf”), an Alberta corporation which operates a propane equipment business and which had last serviced the valve which Arthur had installed on the grounds that Dumkopf damaged the valve, resulting in the fire.

(c) Arthur had entered into a contract with Thomas personally as well as with North Saskatchewan for his work on the valve, and neither Thomas nor North Saskatchewan have paid him for his work.

(d) Arthur wants to apply for an order requiring Sarah to furnish security for costs. (*Please cite appropriate and specific authority for your answer*).

(e) Arthur wants to deny liability to Thomas and Sarah, and in the alternative to plead contributory negligence on Thomas’s part for not leaving the Factory immediately when the explosion occurred.

VALUE

QUESTION 11

2 marks

What would be the best next step for Limona to take in the Motor Vehicle Action in the following circumstances:

(a) Limona wants to claim contribution and indemnity from Not Fragile.

(b) The commencement document refers to a letter, which Limona’s lawyer has never seen, and which the commencement document states was written to Edith by Limona’s Latvian-based President, Andris Teikmanis, admitting that the brakes on the 2004 Canyonero were “dangerous” and that Limona would accept responsibility for “all the consequences.”

VALUE

QUESTION 12

3 Marks

Assume that Arthur’s lawyer, John Evaniuk, has issued a Third Party Notice on Arthur’s behalf seeking contribution and indemnity from one of his former employees, Darryl Young.

(a) Assume that Darryl lives and works in Cardston, Alberta, but is currently working on a major pipe-fitting operation in Fort St. John, British Columbia, and does not intend to return to Alberta until August 1, 2006. Must John wait until Darryl’s return to Alberta before serving him with the Third Party Notice? *Please cite appropriate and specific authority for your answer.*

(b) Assume that John hires a process server to serve Darryl with the Third Party Notice. The process server spies Darryl getting a pedicure in a beauty salon in Cardston, Alberta. The process server walks into the beauty salon and gives Darryl the Third Party Notice, which Darryl takes in his hand. The process server says nothing, and leaves immediately. Darryl immediately begins receiving a manicure, resulting in his being unable to inspect the document until more than 30 minutes later, when his manicure is completed. Has Darryl been validly served with the Third Party Notice?

(c) Assume that the basis for Arthur's Third Party Notice against Darryl is that, when Darryl left Arthur's employment in March 2006, Darryl took with him approximately \$35,000 worth of Arthur's tools. Is this an appropriate basis for Arthur's Third Party Notice? Please explain your answer.

VALUE

QUESTION 13

1 Mark

Arthur's Affidavit of Records includes a written record, consisting of a two-page document, which you have discussed with him on examination for discovery. At trial, you attempt to introduce the record into evidence, when Arthur's lawyer objects to its admissibility and its relevance. Is Arthur's lawyer precluded from making that objection by virtue of having listed that record in the Affidavit of Records? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 14

1 Mark

Arthur's lawyer, John Evaniuk, has written to you, demanding disclosure and production on Thomas's hospital records documenting his treatment there. Is John entitled to demand this of you? Why or why not? *Please cite appropriate and specific authority for your answer.*

VALUE QUESTION 15

2 Marks

Assume that Arthur has successfully served Darryl Young with a Third Party Notice in the Fire Action and that Darryl has filed a Statement of Defence to the Third Party Notice. What additional fact do you need to know in order to determine whether Darryl can require Thomas and Sarah to submit to examination for discovery, and why is that additional fact significant? *Please cite appropriate and specific authority for your answer.*

VALUE QUESTION 16

2 Marks

Assume that, in order to buttress your case as to the negligent manufacture of the Canyonero, you have requested that Limona produce a representative for Examination for Discovery. Limona produces its President, Jane Dempsey, who as it turns out has no personal knowledge whatsoever of the manufacturing process. You are aware that Limona's Director of Maintenance Services, Jasbir Oppal, who resides in Edmonton, is able to provide all the information you would require from a representative of Limona. Please discuss, *citing appropriate and specific authority*, whether you can require Limona to make Jasbir available for Examination for Discovery.

VALUE

QUESTION 17

2 Marks

Assume that Limona's lawyer, Ursula Janisch, has successfully served Not Fragile with a Third Party Notice, and that Not Fragile has filed a Statement of Defence to the Third Party Notice. Ursula has learned that, at the time of Edith's accident, Not Fragile maintained a vehicle maintenance staff of six employees. Ursula believes that failure of Not Fragile's delivery truck's brakes may have caused or contributed to Edith's accident, which is significant because the Third Party Notice alleges improper maintenance of the delivery truck. Ursula serves appointments to examine all six of these employees.

(a) Does Ursula need to provide anything else in order to be entitled to examine these employees for discovery? *Please cite appropriate and specific authority for your answer.*

(b) Assume that, after Ursula serves the appointments, she learns that two of the employees are no longer working for Not Fragile, but instead are working on a farm 5 km south of Lethbridge, Alberta. Does this affect Limona's entitlement to examine those two persons? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 18

2 Marks

Assume the facts set out in Question 17(b). Regardless of your answer to Question 17(b), assume that Ursula is able to examine all six employees for discovery. In the course of her first examination, she asks the employee questions about his knowledge of, and training in, vehicle maintenance. Not Fragile’s lawyer objects. What arguments would you expect Ursula to make in support of her entitlement to ask such questions? *Please cite appropriate and specific authority for your answer.*

(a) To what two bodies might you want to report John's conduct, and upon *what specific authority* would you rely in each case?

(b) Assume that, early in the discovery of Arthur, and prior to John's objectionable conduct, Arthur testified that he kept a written record of the work he did at the Factory, including who worked on the installation of the valves on each propane tank. He said that this record would have been stored with his other business records at the home of his mother, Florence Anderson. How can you obtain access to this record, and what must you show in order to obtain access? *Please cite appropriate and specific authority for your answer.*

VALUE**QUESTION 21**

4 Marks

Assume that, on May 17, 2004, Thomas died of his injuries from the fire at the Factory. Assume also that, on Edith's behalf, you serve the other parties to the Motor Vehicle Action with her Affidavit of Records in that action.

(a) Please circle which *one* of the following records ought to be included in Edith's Affidavit of Records:

- A copy of documentation of her shareholding interest in North Saskatchewan and personal property she lost in the fire at the Factory.
- A copy of the professional certification setting out the credentials of the emergency physician who treated her for her injuries.
- A copy of a receipt for \$25, which Edith paid for a monthly gym pass, where she underwent the physical rehabilitation program recommended by her physician.
- A copy of Thomas's death certificate.

VALUE

QUESTION 22

2 marks

Assume that Arthur has successfully served Dumkopf with a Third Party Notice and that Dumkopf has filed a Statement of Defence to the Third Party Notice, in which Dumkopf alleges the following:

In answer to the Third Party Notice, the Third Party Dumkopf says that the Defendant Arthur Anderson is an immoral individual who is likely involved in the child pornography industry.

Arthur is livid that such an allegation could be included in a public document such as a pleading.

(a) What type of application should Arthur bring?

(b) In support of his application, Arthur has decided to prepare an affidavit describing the distress and public vilification he has experienced because of Dumkopf's allegation. *Questions of relevance aside*, can the court consider such an affidavit? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 23

4 Marks

Assume that a friend of Robert has informed Not Fragile that, seconds before the accident, Edith had allowed Robert to take the steering wheel of the Canyonero. When he did so, he caused the Canyonero to veer towards Not Fragile's delivery truck. With this information in hand, Not Fragile files a Statement of Defence in the Motor Vehicle Action denying liability and damages, and counterclaiming against Edith for \$7,533 in damages (representing the cost of repair of Not Fragile's truck), and against Robert for negligent operation of Edith's Canyonero. You file a Statement of Defence to the Counterclaim on behalf of both Edith and Robert.

- (a) Not Fragile files an application for Summary Judgment against Edith and Robert on the Counterclaim. Is this procedurally permissible?
Please cite appropriate and specific authority for your answer.

(b) Instead of seeking Summary Judgment against both Edith and Robert on the Counterclaim, Not Fragile instead seeks Summary Judgment against Edith *only*. Is this procedurally permissible? *Please cite appropriate and specific authority for your answer.*

VALUE

QUESTION 24

6 Marks

“Our Rules of Court are a product of balancing the interests of the parties. Where an advantage is given to one party, it is extended to all parties.”

Give *three* examples from the procedures set out in the Rules of Court which support this statement (and be sure to explain how your example relates to the statement). *Please cite appropriate and specific authority for your answer.*

(a)

(b)

(c)
