

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
FIRST YEAR SUPPLEMENTARY EXAMINATIONS, 2018

LEGAL DRAFTING AND INTERPRETATION

(AUGUST , 2018)

Instructions to Students

- (a) Time: **3½ hours**
- (b) Answer **FIVE** questions.
- (c) In answering any question, a candidate may reply by reference to the law of any Commonwealth Caribbean territory, **but must state at the beginning of the answer the name of the relevant territory.**
- (d) It is unnecessary to transcribe the questions you attempt.
- (e) Answers should be written in black or dark blue ink. Erasable pens are not allowed.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

QUESTION 1

Jose and Paco are from a South American country torn by civil and political conflict. They arrived in your jurisdiction as refugees seeking asylum. Their applications for asylum are being considered, but owing to delays on their part, no further housing or other benefits are available to them under the applicable refugee legislation. They are therefore facing the prospect of poverty while they await the government's ruling on the applications, as they now have no shelter or means of survival in your country.

Both refugees have learnt, however, that there may be a window of opportunity under the National Assistance (Homeless Persons) Act ("the NAHPA"). Section 55 of the NAHPA provides that the local authority/municipal corporation ("the Corporation") may provide temporary residential accommodation and accompanying benefits to persons who, "by reason of age, illness, disability or other circumstances", are in need of care and attention.

Jose and Paco applied for assistance under section 55 of the NAHPA. The Corporation, while sympathetic to their plight, rejected their applications on the basis that neither of them qualified for assistance under the section. In the Corporation's opinion, on a proper interpretation of section 55, Jose and Paco failed to show that:

- (i) they came within any of the specific criteria set out in the section; or
- (ii) there were "other circumstances" justifying the need for assistance, since this phrase was restricted by the context to some physical or personal characteristic from which they suffered.

Desperate, Jose and Paco approach you for advice on the validity of the Corporation's decision. Your research uncovers the following:

The NAHPA was introduced on a wave of public sympathy, following the discovery of the corpses of three homeless young girls who had been denied basic humanitarian assistance from a series of government agencies. Several provisions of the legislation accordingly reflect the desire of the policy-makers that no one genuinely in need of support be denied assistance.

The Long Title to the NAHPA states:

“AN ACT to ensure that, as far as possible, residential accommodation and other benefits are made available to all persons whose particular circumstances demonstrate that they are genuinely homeless and in danger of becoming destitute if assistance is not provided by the state, and for connected matters.”

In light of all the facts, give your reasoned opinion on the likelihood of success of any challenge to the Corporation’s decision.

QUESTION 2

Splash Events Management Limited (“SEML”) is a company involved in the management of concerts and other functions in your jurisdiction. SEML was appointed to manage the National Art Festival, a three-day event scheduled for July 2018.

In preparation for the event, SEML entered into a contract with caterers, Food Unlimited (“FU”), for the provision of catering services over the period of the festival. Extracts from the contract are set out below:

“...

1. **INTERPRETATION**

...

“Hospitality Area” means the tented structure set up on the eastern side of the Festival grounds;

...

2. **SERVICES**

(1) FU shall provide catering services in the Hospitality Area, as well as at such additional areas as may be agreed between SEML and FU in advance of the Festival.

(2) FU agrees to perform its obligations under this contract with all due skill and care and to adhere to best industry standards.

...

7. OBLIGATIONS OF SEML

SEML shall:

- 1. ensure that FU is provided with access to the Hospitality Area from 10:00 am until 7:00 pm on each day of the Festival;*
- 2. make adequate preparatory arrangements for the provision of such serving and storage areas as are necessary to enable FU to carry out the catering services agreed between the parties;*
- 3. take reasonable steps to ensure the security of FU's equipment and supplies, and staff and their personal belongings;*

..."

Representatives of FU and SEML met at the festival site in June 2018 to discuss the logistics of providing the catering services, and the relevant arrangements were confirmed in writing.

The following developments unfolded at the festival:

- (a) On the first day, FU staff were not able to enter the Hospitality Area until 12 noon, as SEML's agents arrived late to install the tent. Patrons complained about the lengthy delay in the availability of food.
- (b) On the second day, while FU staff were serving meals in the Hospitality Area, they were surprised to be asked by an SEML agent to also serve at a smaller tent, which SEML had hastily set up that day elsewhere on the festival site. The resulting disruption in FU's catering services became obvious to patrons.

(c) At the end of the second day, FU discovered that some of its serving dishes, cutlery and wine glasses were missing from the Hospitality Area, as staff had been unable to properly monitor these assets when serving at the two locations.

FU is unhappy at the turn of events at the festival, and is considering its options. FU asks you to advise whether SEML has breached its contract with FU, and if so, in what respect(s).

Prepare an opinion.

QUESTION 3

Carla Lyn is an informal trader in children's accessories. For some time, she had been searching for a stable, cheap location to rent in order to display her goods, but without success. Some months ago, she observed a few persons selling their products under tarpaulins in an open-air setting, on land situated on the outskirts of the capital city. Business seemed to be bustling, and she made arrangements with the landowner to set up a booth there to sell her goods.

Lyn has recently learnt that the government had passed legislation last year offering certain special financial incentives to assist small businesses in achieving economic viability. After further investigation, she made an application to the Ministry of Industry for financial assistance under this incentives scheme. However, her application was refused on the ground that she did not qualify for aid.

Disgruntled, she sought legal advice and was encouraged to appeal to the Trade Tribunal against the Ministry of Industry's decision.

You have been assigned to appear for the Attorney General, who represents the Ministry of Industry in the proceedings before the Trade Tribunal. Your research reveals the following:

1. The incentives scheme was introduced by the Commerce (Special Incentives) Act (“the CSIA”), sections 20 to 25 of which provide for special concessions to be made to an “owner or operator of any shop” within a certain revenue band (that is, a small business).
2. There is no specific definition of the term “shop” under the CSIA.
3. The CSIA also offers incentives for the operations of a number of facilities other than shops, but these facilities are all formally established, enclosed structures.
4. The language used in the CSIA is typically careful and precise.

Counsel for Lyn contended at the Tribunal that in the absence of an express definition of “shop”, a generous interpretation should be given to that word so as to secure the widest possible benefits to vulnerable businesses. Counsel further noted that this position would be consistent with the modern shift from a strict, constructionist approach to interpretation to a more liberal, purposive one.

Finally, counsel for Lyn drew the Tribunal’s attention to two articles by experts in a legal journal, urging courts to adopt a wide interpretation of commercial expressions, where the objective of the legislation was to favour fragile businesses over established operators.

Counsel therefore urged the Tribunal to recognise Lyn’s outdoor facility as a “shop”, since trading in goods, the essence of shopping, routinely took place at that location.

The Tribunal now calls on you to respond to the submissions on behalf of Lyn.

Prepare your response.

QUESTION 4

On July 27, 2018, Jim Farr positioned himself outside a hotel in the tourist area, circling the building periodically. He then approached several female guests walking alone outside the hotel, offering sexual intercourse in exchange for money. Constable Sharp observed this behaviour for

some time and then arrested him. Farr has been charged with loitering and soliciting in a public place for purposes of prostitution, contrary to section 32 of the Public Order Act (“the POA”).

Section 32 reads:

“It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.”

There is no definition of the term “common prostitute” in the POA, nor any indication in that Act as to the scope of the phrase.

At the trial, counsel for Farr argued that while the reference to “common prostitute” in section 32 was on its face unclear, the expression had always been associated with females only, and that males were therefore not contemplated by the provision. The prosecution countered that the term was clearly wide enough to capture both males and females, and preservation of public order would be undermined if a narrow interpretation were adopted.

The judge accepted the defence’s submissions and Farr was acquitted.

You are attached to the office of the Director of Public Prosecutions/Attorney General. Your supervisor directs you to review the judge’s decision and report on whether any grounds exist for appealing against the judgment (a procedure permitted in your jurisdiction).

In your research, you discover that the POA was overwhelmingly inspired by the report of the Task Force on the Preservation of Law and Order (“the Taylor Report”), which was tabled in Parliament and made recommendations for the reform of the law governing several street offences. In addressing the subject of prostitution, the Taylor Report consistently referred to female perpetrators, whether expressly or by implication.

Prepare the memorandum requested by your supervisor.

QUESTION 5

The local authority/municipal corporation (“the Corporation”) in your jurisdiction owns a market area comprising several structures (“the Arcade”), which has just been renovated. The Corporation intends to lease the Arcade to Fuller Brothers Limited (“FBL”), which will then partition the space and issue licences for individual vendors to market their products.

The Corporation has standard form leases for these purposes, and the property department has prepared a draft lease for the Arcade. The draft imposes several obligations on FBL, among them the covenants set out below:

“ INSURANCE

15. *The Lessee hereby covenants with the Lessor to:*
- (a) insure and keep insured against loss or damage by fire and storm the said Arcade and all erections and buildings belonging or appertaining thereto, with all additions and improvements to the same premises, with the Risk Free Insurance Company, or some other high office or underwriters of lofty repute to be approved of by the lessor, in a competent sum to cover the full value thereof;*
 - (b) make all payments necessary for the above purposes and to produce the policy of such insurance;*
 - (c) and produce the receipt for such payments to the lessor or to its agent on demand, and to cause all monies which shall be received in respect of an insurance claim to be laid out in rebuilding, reconstructing, restoring or reinstating such part or parts or section or sections of the said Arcade and premises as shall have been burnt down or damaged by fire or water;*
 - (d) and if the same monies shall be insufficient for rebuilding, reconstructing, restoring or reinstating the parts or sections burnt down or damaged by fire*

or water as aforesaid, to provide out of its own monies such further monies as may be required and forthwith to expend the same for that purpose;

(e) keep the said Arcade at all times properly and sufficiently lighted and cleansed, free from nuisances and in a fit and proper condition.”

You have just joined the Corporation as its junior legal officer. In a meeting with your supervisor, she observes that while the draft lease is legally sound, she prefers a more “*up-to-date, 21st century version*”.

Comment on clause 15 above in light of your supervisor’s remarks, paying particular attention to structure, language and modern drafting practices.

Do not redraft the provision, nor alter the policy indicated.

QUESTION 6

Phil Lore is HIV-positive and was at all material times aware of his HIV status. In August 2017, he engaged in sexual intercourse with Meg Task without disclosing his HIV status to her. Recently, it was confirmed to Task that she had contracted HIV, and there is cogent evidence that this was as a result of the sexual encounter with Lore.

Lore has been charged under section 22 of the Criminal Offences Act, 1907 (“the COA”) with “maliciously inflicting grievous bodily harm” on Task. At his trial, counsel for Lore contended that Lore’s actions disclosed no offence under section 22 of the COA, since the transmission of the virus could not be said to have “inflicted” any harm on Task.

Lore’s counsel supported his submission by citing early 20th century cases on the meaning of the word “inflict” under the COA, which indicated that there had to be an act of immediate physical violence. Counsel observed that neither the violence nor the immediacy required was present in

Lore's case, and urged the court not to adopt an interpretation of "inflict" which legislators in 1907 could not have contemplated.

In contrast, the prosecution argued that the word "inflict" had to be viewed more broadly in the current era, having regard to the change of meaning since the early 20th century to take account of new methods of assault.

The trial judge rejected the Crown's argument and acquitted Lore.

You are one of the prosecutors contemplating the merits of appealing against the trial judge's decision (a procedure permitted in your jurisdiction), and have been asked to send your opinion to the lead prosecutor in the case.

Prepare the required opinion.

QUESTION 7

Animal Park Limited ("APL") operates a zoo in your jurisdiction. As part of plans to expand its operations, APL applied for a permit to import a range of animals, including amphibians such as frogs, toads and salamanders. The permit was granted.

On arrival of the animals in the jurisdiction, the Ministry of Immigration and Customs ("the MIC") imposed a substantially higher rate of duty on the importation of the amphibians, than on other animals which were exclusively land-based. The MIC based this approach on section 50 of the Import Duties Act ("the IDA"), which creates two different classes of animals for duty purposes, namely, "aquatic animals", calculated at the higher rate, and "other animals", attracting the lower rate.

The IDA provides no express definition of the phrase "aquatic animals".

APL challenged the validity of the MIC's decision in court. However, the judge accepted the arguments on behalf of the MIC that there was no legal basis on which to set aside its decision, since the imported amphibians spent at least part of their lives in water, even if they spent some time on land as well. Accordingly, the judge ruled that these animals properly fell within the classification of "aquatic animals".

Dissatisfied with this ruling, APL approached the firm, in which you are an associate, for advice. The managing partner sends you a note, part of which reads:

"I am not convinced by the judge's decision. I think this may be a case to which the expressio unius rule applies so as to favour our client, APL.

Please examine this issue and let me have your response."

In your examination of the IDA, you observe that in other provisions of the statute where the expression "aquatic animals" appears, the context strongly suggests a reference to animals which either live exclusively in water, or which spend some part of their lives in water.

Prepare the note to the managing partner.

QUESTION 8

Ava Sert, 25, enjoys an active social life. While returning home late one night, after a visit to a nightclub, Sert had the sense that she was being followed. She quickened her pace and arrived home safely. The following week, after a similar club visit, she returned home to find a note on her door, which read:

"I KNOW WHAT YOU DID LAST WEEK."

Frightened, Sert ran into the house and locked all windows and doors securely. The next day, she changed all the locks on the doors.

Two days later, while at home, Sert answered a telephone call, but only heard heavy breathing coming from the other end of the line. Alarmed, Sert promptly replaced the telephone receiver. This experience was repeated over the next few days, causing Sert great distress. Eventually, she was forced to consult a psychiatrist, who diagnosed severe anxiety disorder, and prescribed medication.

Will Bann was recently taken into custody for stalking a number of women, using techniques similar to those experienced by Sert. All the victims have suffered psychiatric injury, similar to Sert's, as a result of the harassment.

Bann has now been charged on multiple counts of assault under section 48 of the Crimes (Punishment) Act ("the CPA"), which makes it an offence for anyone to commit an assault "occasioning actual bodily harm".

There is no definition of the expression "bodily harm" in the CPA, nor any other guidance in that statute as to its meaning.

You are part of the defence team representing Bann in the case. Senior defence counsel sends you the following note:

"I don't think the Crown have a case here. All the complainants have sustained psychiatric injury only – no evidence of physical harm has been produced. I believe that in the absence of a specific definition of 'bodily harm', the ordinary meaning should prevail.

In fact, I have extracts of the Minister's speech in the Parliamentary debate on the Crimes (Punishment) Bill, where he gave two examples of assaults that the new Act would deter: both examples dealt with physical, not psychiatric harm.

I therefore believe we can submit the record of his speech to the court to undermine the prosecution's case."

Prepare a reasoned response to senior counsel's note, indicating whether you agree or disagree with his assessment.

END OF PAPER