

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
FIRST YEAR SUPPLEMENTARY EXAMINATIONS, 2010

REMEDIES

(FRIDAY, AUGUST 20, 2010)

Instructions to Students

- (a) Time: **3 ½ 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 ink.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

QUESTION 1

Jack Broman and his wife, Priscilla, decided to build a small guest house with 10 self-contained rooms on a lot of land they had acquired in Mountain Ridge. They entered into a contract with Dean Porter, an experienced contractor and builder, to construct the guest house at a cost of \$14.5M. It was a term of the contract that construction would be completed within a period of eight months and the guest house delivered to the owners by February 27, 2009.

Mr. Broman told the contractor that he desired to have the place “guest-readied” for the summer tourist season. He further informed him that they had entered into a number of contracts with furnishers, suppliers of goods and workers and that failure to observe the time stipulated would involve Mr. Broman and his wife in obligations to these persons.

The contract provided that if the building was not finished by the agreed date, the contractor would “pay to Mr. and Mrs. Broman the sum of \$10,000 per day as penalty for every day the breach continued”. It was also agreed that “should there be any defect in the construction whether from bad workmanship, defective materials or failure to comply with design specifications, or from any other cause, the sum of \$2.5M was to be paid by the contractor as liquidated damages”.

The contractor completed the building on May 15, 2009, with one less bathroom than was specified.

Advise Mr. and Mrs. Broman on their rights against the contractor.

QUESTION 2

Alistair, a Land Surveyor who was 30 years old at the time, suffered a serious injury when a motor vehicle in which he was a passenger, and which was owned and driven by Alton, was involved in a collision with another vehicle. It is likely that both drivers were at fault.

Following the collision, Alistair was admitted to the Accident and Emergency Section of the Public Hospital. There he was examined by a doctor. The examination revealed he was suffering from a 1¾ inch laceration of the right cheek, two irregular lacerations of the nose, a fracture of the right seventh rib and dislocation of the right shoulder joint and the right hip joint. He was fully conscious and there was no evidence of any damage to the central or peripheral nervous system. The injuries were attended to and, on the following day, the dislocated shoulder and hip joints were reduced under anaesthetic. He was confined to bed and the right leg was put in traction.

He was discharged from the hospital one month later by which time the facial wounds were healed and the pain from the fractured rib had subsided.

After being discharged, Alistair was required to attend the Public Hospital weekly as an outpatient. He complained bitterly of pain in the right hip joint and the fact that he walked with a limp. He refused to attend for physiotherapy and for counseling sessions. The attendants at the outpatient department said he was the most offensive patient they had encountered.

On the advice of two surgeons Alistair proceeded to Canada for treatment. They realized that Alistair had “such a deep distrust in the local caregivers that he complained that every examining physician and physiotherapist was causing him increased pain and that those who counseled him were a nuisance and were trying to brainwash him”.

Furthermore, Alistair was particularly annoyed that one consultant had prescribed physiotherapy instead of painkillers and insisted that he should have “absolutely no alcohol or other drugs”.

Alistair’s trip to Canada was financed by a salary advance from his employers and a loan on which he had to pay interest at 20% per annum. Also, he took out travel insurance for the trip. His wife accompanied him. She was on no-pay leave from her job for the two months that she spent in Canada.

Alistair is disappointed with the treatment “in foreign because it was no better than local”. He is still feeling intense pain and is still walking with a limp. He cannot jog as he used to. He is disgruntled and angry because he is also of the view that the scar on his cheek might have affected his relationships. He furnishes a plastic surgeon’s report which indicates that the scar was reducible at a cost of US\$10,000. However, there would be a residual mark with which Alistair has to live for the rest of his life.

Alistair also tells you that a friend of his in Canada had told him that he should be a wealthy man when his case was finished. He also is of the view that he should be able to recover not only his wife’s fare and accommodation cost but the salary she lost.

Advise on the measure of damages and the bases on which the quantum will be computed.

QUESTION 3

Enliteners Ltd. and its editor, Rick McRain, published material in two of their newspapers which a judge sitting with a jury found to be defamatory of the claimant,

Alayne Waker, a well respected auditor. When the second publication appeared, he was given a month's pay in lieu of notice and dismissed.

Mr. Waker, in his claim form, claims damages for defamation on the footing of aggravated and exemplary damages. Assessment of damages is set for next week.

Your senior in the matter has asked you to prepare a memorandum in respect of the measure of damages and to indicate the likely method of computation to be employed by the tribunal in arriving at the quantum of damages.

Additional matters for your consideration include the following –

- the defendants are reputable publishers with a high level of credibility;
- the first of the libellous publications was obtained from a reputable wire service;
- the second publication took place after the wire service had indicated to the defendants the possibility that the matter was defamatory and asked that “the story be killed” (i.e. not published);
- hard copies of the publications were in wide circulation within the jurisdiction and amongst the diaspora;
- the publications were also online and are advertised as such;
- the publishers encourage online readers to email their stories to other persons;
- evidence was given by two persons who had received the publications by email;
- the defendants' attorney-at-law informed the judge that they were unable to prove their defence of truth because their “witnesses have refused to appear as a result of fear of reprisal”;
- the same libel was published by another newspaper of some respectability and the publisher has agreed to settle the claim and paid compensation to Mr Waker.

Prepare the memorandum as required.

QUESTION 4

Mr. Archibald, the Managing Director of A-Z Co. consults you. He describes the situation facing his company as “Trouble in quintuplicate”. The following is the summary of his statement:

“A transporter owned by A-Z Co. was carrying a damaged SUV to a garage for repairs. The driver, Elninja, while negotiating a sharp bend in the road lost control of the transporter which crashed into a house owned and occupied by Mr. Vince who, fortunately, was not on his verandah as usual.

As a result, Mr. Vince’s house was damaged; the transporter was damaged; the SUV was damaged beyond recognition and Elninja suffered injuries. One of the bystanders who saw the incident shouted, ‘What a stress?’ before collapsing. She was taken to the Public Hospital where she was admitted for treatment.”

Mr. Archibald says that his company expects to be contacted by lawyers.

Advise Mr. Archibald on any liability to pay damages and what his company requires in order to process claims from the injured parties.

QUESTION 5

Gensengh had agreed with his former employers, a non-governmental organization (NGO) Rights For All, not to disclose to any third party any information gathered in the

course of his employment. He decided two years after retirement to write and publish a work entitled “The Wrong Path to Rights”. When the publishers announced the launch of Gensengh’s book, his former employers brought an action against Gensengh and his publishers for breach of confidence. They claimed a declaration, damages and an injunction.

An interim injunction was granted for a period of 21 days. As a result, all the arrangements for the launch had to be cancelled, resulting in wasted expenditure. The interim injunction was subsequently discharged prior to the trial for, *inter alia*, the fact that the information that formed the basis of two chapters in Gensengh’s ten chapter book is accessible on the NGO’s parent company’s website.

Prepare a memorandum for Gensengh’s attorney-at-law advising him –

- (i) whether the defendant will succeed and the reliefs that will be awarded;
- (ii) what measure of damages should he anticipate that the NGO would seek to obtain and whether he would be able to resist this measure; and
- (iii) how he should proceed in respect of the loss caused by the interim injunction.

QUESTION 6

Gino da Sinto, a chartered accountant, who was employed to Ace Auditors, was killed instantly when scaffolding from a building under construction by BMA Contractors suddenly fell on him while he was lawfully walking on Main Street on January 31, 2010.

Gino, who was 40 years old at the time, is survived by his widow Marcia, 35 years old and their two children: Karlos 15 years old and Lollita 12 years old as well as his mother Anna-Belle, all of whom were dependent on him for financial support. His mother, Anna-Belle, who is a widow, lives with the family in the matrimonial home is registered in the names of Gino and Marcia. Gino paid all bills for the household – utilities, groceries and housekeeping services. He did odd jobs around the home and helped with the garden and lawn. He paid for family entertainment and for the monthly family dinner at a restaurant where the children had to observe formal social skills.

Expenses in respect of the children

Karlos and Lollita attended the same school. Expenses in respect of clothing, school fees, books, uniforms, transportation, health care and enrichment involvements, such as music lessons, were met by the deceased. The children received small allowances which all expected to increase in the future.

Expenses in respect of mother

Anna-Belle, 68, received a small pension on retirement from the university bookshop where she had worked. She receives health care from the University Health Centre. Gino provided food and shelter and was available to chat with her and give her encouragement.

Expenses in respect of wife

Gino furnished Marcia with about \$10,000 monthly which he called a “love gift”. There was an understanding, initiated by Marcia, that when Karlos and Lollita entered university she would return to her practice as a realtor.

Expenses exclusively on himself

Gino was a dapper dresser and spent money on clothing and jewellery for himself. He subscribed to accounting journals and was interested in the latest IT applications. He was a member of the Chartered Accountant Society for which he paid a fee.

Deceased's earnings

Gino earned a monthly salary from his employers who permitted him to work as consultant to a number of NGOs which they approved. He had enjoyed a substantial annuity for his lifetime from a fund established by his Aunt Ishbelle. With his death his brother succeeds to the annuity. He was insured in respect of death by accident and his wife is the named beneficiary.

Death Testate

He died leaving a will of which Marcia is the sole executrix. Marcia and the children and his brother's daughter, Nella, are the beneficiaries under the will.

Non pecuniary loss

Marcia and her mother-in-law are experiencing great grief. The children have not yet come to grips with their loss. They are crying day and night.

Marcia consults you for advice on the above. Advise her on the legal principles applicable in this matter.

QUESTION 7

Answer **both** (a) and (b).

- (a) “The distinction between exemplary damages, vindictory damages and additional damages could be said to involve a distinction without a difference.” Discuss briefly.
- (b) Police entered Ras Maxel’s home very early on the morning of September 25, 2008. He was dragged out of bed, down the stairs and flung bodily into a police car. When he enquired as to the reason for this outrageous treatment, he was told that he was experiencing only the introduction to a course to teach him to show manners to the police. In the course of transit to the police station, one officer, Cpl. Reese, kept beating him in the head and cursing expletives. At the police station Cpl. Reese shouted, “Supe, we bring the great store detective who arrest your wife saying she shoplifting.” The Superintendent said, “Put him in the cell with Jango. Jango will beat the life out of him.” Jango was reputed to be a petty thief who had the tendency to assault any prisoner who occupied a cell with him.

When Jango saw Ras Maxel he said, “Maxie is you they mistreat like this? Supe, come carry the man to hospital! Is me you want to frame say is me beat him?” Jango was loud and boisterous and refused to calm down until Maxel was removed from the cell and taken bleeding to the hospital where he was admitted and placed under police guard. Later, Cpl. Reese, on the instructions of the Superintendent, put Jango in handcuffs and charged him with disorderly conduct and obstructing police in the course of their duties. Ras Maxel spent 10 days in hospital.

Ras Maxel is a store detective who, some weeks before, had arrested the Superintendent's wife for shoplifting. She was not prosecuted. The same week he had caught Jango shoplifting but had given him a kind warning to cease his bad ways and keep out of trouble. It turned out that Jango was arrested and put in the cell with instructions "to beat a man to a pulp". Neither Jango nor Ras Maxel was offered bail. They were held in custody for 10 days and were charged jointly with disorderly conduct and assaulting police in the course of their duties. Only Ras Maxel was charged with resisting arrest.

On the day of the trial they each pleaded not guilty. The Senior Magistrate was curious as to why Ras Maxel, a well known store detective of honest repute, was involved in a joint criminal enterprise with Jango, a known petty thief.

After the accused men gave their testimony, she acquitted them and personally apologised for having had to try the case. She recommended that disciplinary action be taken against the Superintendent.

Ras Maxel and Jango, whose true name, is Rudolph Riley, seek your advice as to what reliefs are open to them and the basis on which any remedy will be awarded.

Advise them.

QUESTION 8

Answer **both** (a) and (b).

- (a) Distinguish the tort of harassment (declared by the Supreme Court of Jamaica per Sykes J) from the tort of intimidation (declared by the House of Lords UK).
- (b) Ganesha Garnet, 45 years, has been widowed for five years. She has two adult children, Lestorene and Nelton. She is a data processor employed to a leading firm. Ganesha is considered to be an outstanding and well respected person. For the past three years, a man by the name of Abner has been asserting that he is her first born son whom she had abandoned in the hospital where she had given birth to him. He writes letters to her, inviting her to meet with him for a “truth and reconciliation session”.

He attends at her workplace to assert the claim to all who will listen. He also attends regularly at her church to do the same. He telephoned her constantly during last year until she had the number changed and de-listed from the telephone directory. He sends her greeting cards regularly. He signs all his correspondence to her as “Abner, your firstborn and heir”.

To avoid him, Ganesha was forced to transfer her church membership to a sister congregation. She recently sold her house and moved to a new location and she is considering giving up her job. She has suffered embarrassment and humiliation and has observed that a number of persons are giving her the “cold shoulder” and are merely “grunting their greeting” to her when she greets them. Ganesha is depressed and at her wits end. She believes that she has been slandered, defamed and harassed.

Advise her on any cause of action open to her and the possible reliefs.